

XXXX XXXX,  
STUDENT

v.

BALTIMORE COUNTY  
PUBLIC SCHOOLS

\* BEFORE LOUIS N. HURWITZ,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No: MSDE-BCNY-OT-12-43752

\* \* \* \* \*

**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On November 8, 2012, XXXX XXXX (Parent), on behalf of her child, XXXX (the Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Baltimore County Public Schools (BCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

On November 19, 2012, the Parties advised me in writing that they had waived the resolution session. The Parent had not requested mediation in this case. On November 29, 2012, I conducted a telephone prehearing conference and issued a Prehearing Order on December 4, 2012. The parties were able to agree on dates for the hearing which would allow me to issue a decision within the 45-day timeframe provided in Section 300.515, Volume 34, Code of Federal Regulations (C.F.R.).

I conducted a hearing in this matter on December 17, 2012. The Parent appeared on her own behalf and was assisted by XXXX XXXX, the Student's guardian. J. Stephen Cowles, Esquire, represented BCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUE**

Whether BCPS improperly failed to include transportation in the Student's Individualized Education Program (IEP) at public expense from [School 1] ([School 1]) to [School 2] ([School 2]) to attend the late morning and afternoon component of the Student's educational program?<sup>1</sup>

### **SUMMARY OF THE EVIDENCE**

#### **A. Exhibits:**

The Parent offered the following pre-marked exhibits, which were admitted into evidence:

- P 1 Receipt from XXXX Cab Service, dated November 19, 2012
- P 2 Letter from BCPS to the Parent, dated March 4, 2011
- P 3 Letter from BCPS to the Parent, dated February 24, 2012
- P 4 BCPS Magnet Transportation Zones

---

<sup>1</sup> The Student's guardian, Mr. XXXX, transports him to [School 1] in the morning, where he takes a BCPS bus to [School 3] ([School 3]) to attend a carpentry program. The Student is then transported at BCPS expense back to [School 1]. Transportation from [School 1] to [School 2] for the late morning and afternoon program is currently the responsibility of the Parent. BCPS transports the Student from [School 2] to home in the afternoon.

- P 5 High School Assessment (HSA) test scores from 2012
- P 6 Woodcock-Johnson III Normative Update Tests of Achievement, Form A, Parent Report, date of testing: April 24, 2012
- P 7 BCPS Educational Assessment, dated March 26, 2009
- P 8 Psychoeducational Report of XXXX XXXX, Ph.D, dated August 29, 2007
- P 9 Emails addressing concerns about the Student, dated January 14, 2009 and June 16, 2009
- P 10 Parent Survey-Special Education, dated July 20, 2010
- P 11 Writing sample from the Student, undated
- P 12 General letter to Parents from [School 4], dated Fall 2006
- P 13 IEP Summary, dated June 16, 2003, with the following attachments: letter from Dr. XXXX XXXX, dated May 12, 2003; letter from Dr. XXXX XXXX, dated May 28, 2003; Harford County Public Schools Special Education Medical Report, dated May 27, 2003; Classroom Teacher's Checklist of Student's Behavior, dated May 12, 2003; BCPS Interim Report, dated May 14, 2003; Letter from XXXX XXXX, dated May 13, 2003, with attached IDEA Procedures Manual and Section 504 information; and letter from XXXX XXXX, dated June 6, 2003, with attached list of Suggested Classroom Accommodations for Specific Behaviors and materials on Attention Deficit Disorder (ADD) and Attention Deficit Hyperactivity Disorder (ADHD)
- P 14 Pupil Services Team referral Notification, dated December 10, 2002, with parent and teacher ADHD Rating Scale Summaries
- P 15 ADHD Screening Evaluation by Dr. XXXX XXXX, dated October 2, 2002
- P 16 Blue Cross/Blue Shield Explanation of Benefits statement from 2002 and 2007 and XXXX Learning Center proof of payment letter, dated January 19, 2008

I admitted the following pre-marked exhibits on behalf of BCPS:

- BCPS 1 Individualized Education Program (IEP) Team Summary, dated October 1, 2012
- BCPS 2 IEP Team Summary, dated September 4, 2012
- BCPS 3 IEP Team Summary, dated May 17, 2012
- BCPS 4 IEP Team Summary, dated February 3, 2012
- BCPS 8 IEP, dated September 4, 2012
- BCPS 9 IEP, dated May 17, 2012

- BCPS 10 IEP, dated February 3, 2012
- BCPS 18 BCPS High School Magnet Program Brochure, with application and decision information for the 2011-2012 school year
- BCPS 19 BCPS High School Magnet Program Brochure, with application and decision information for the 2012-2013 school year
- BCPS 20 Résumés for BCPS's expert witnesses

B. Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, the Student's guardian; and
- XXXX XXXX, Special Educator/Math Teacher at [School 2].

BCPS presented the following witnesses:

- XXXX XXXX, Carpentry Instructor at [School 2], who was accepted as an expert in Special Education and teaching carpentry;
- XXXX XXXX, Special Educator/Math Teacher at [School 2], who was accepted as an expert in Special Education; and
- XXXX XXXX, IEP Chairperson at [School 2], who was accepted as an expert in Special Education.

**FINDINGS OF FACT**

The Parties stipulated to the following facts, which I find by a preponderance of the evidence:

1. The Student is sixteen years old. His date of birth is XXXX, 1996.
2. The Student is identified by BCPS as a student with a disability under the IDEA under the category of Other Health Impaired (OHI) as a result of ADHD.
3. The Student was initially determined eligible for services under the IDEA in 2000 through the XXXX Program.

4. The Student has received special education services beginning in 2000 and continuing every school year thereafter.
5. Outside assessments which have been reviewed by the IEP Team identify the Student as having severe ADHD, dysgraphia, and dyslexia.
6. On October 8, 2010, the IEP Team at [School 7] convened to review the Student's program and progress. The team agreed that the Student was making good progress and that his IEP remained appropriate. The Student's IEP provided for him to receive special education services in a separate class setting through the [Program] ([PROGRAM]).
7. On or about October 14, 2012, the Student applied to [School 5] ([School 5]) by submitting an application to participate in the school's Construction Management Program for the 2011-2012 school year.
8. On January 25, 2011, the Student completed the Magnet Admissions Assessment as part of the application process to [School 5].
9. On February 18, 2011, the IEP Team at [School 7] convened to review the IEP and the Student's progress. The Team agreed that the Student would receive special education services in the adapted setting for science, social studies, language arts, and math. The Student was in the inclusive setting for reading (language) as it utilizes a modified curriculum.
10. On March 4, 2011, BCPS provided the Parent the Student's test results and admission decision regarding his application to [School 5]. The Student did not meet the criteria for admission to [School 5].
11. On or about November 11, 2011, the Student applied to [School 3] ([School 3]) by submitting an application for the 2012-2013 school year to participate in the Carpentry Careers Program (the [School 3] program).

12. On November 11, 2011, the IEP Team at [School 2] conducted an IEP Team meeting for reevaluation planning. The Parent gave permission for the recommended educational assessment to be conducted.
13. On January 11, 2012, the Student completed the Construction Management Practical Assessment and Interview as part of the [School 3] program application process.
14. On February 3, 2012, the IEP Team met to review the results of the educational assessment, conduct an annual review, and determine the need for Extended School Year (ESY) services. The Team also developed a transition plan. The IEP Team, including the Parent, approved the IEP. The Team determined that the Student continued to be eligible for special education services under the disability category of OHI. The Team also determined that the Student would continue in the [PROGRAM] setting and that extended school services were not needed. The Parent stated her disagreement with the decision regarding special transportation and a document of disagreement was completed.
15. On February 24, 2012, BCPS mailed to the Parent the Student's assessment results and admission status regarding his application to the [School 3] program. The Student met the criteria and was admitted to [School 3] starting in the 2012-2013 school year.
16. On May 17, 2012, the IEP Team met to review and revise the IEP. The Team determined that the Student will have two periods of Carpentry and one period of Biology at [School 3], based on parental choice. The remaining academic courses would be provided at [School 2]. The IEP was amended to reflect the services that will be provided at [School 3] and [School 2] for the 2012-2013 school year.
17. The Student is currently enrolled in the tenth grade in the [PROGRAM] at [School 2].
18. The Student is currently participating part-time in the Carpentry Program at [School 3], which is a magnet school within BCPS.

19. On September 4, 2012, the IEP Team conducted an annual review and discussed the need for ESY services. At the Parent's request, the Team discussed special transportation services. The IEP Team determined that the Student's needs do not require the use and support of special education transportation services.
20. In accordance with BCPS magnet school transportation procedures, the Student is provided transportation from [School 1], one of the available bus stop locations for students, to [School 3] in the morning. The Parent provides transportation to [School 1] in the morning in order for the Student to access transportation to [School 3].
21. Following the Student's morning classes at [School 3], he receives bus transportation services to [School 1] in accordance with the magnet transportation procedures.
22. The Parent has been providing transportation from [School 1] to [School 2], where the Student attends the remaining academic classes and then he is provided regular BCPS bus transportation home from [School 2].

I find the following additional facts by a preponderance of the evidence:

1. The Student does not have any emotional, medical or physical needs that warrant special education transportation services. He rides the regular education bus, as provided by BCPS.
2. Although standardized test scores for testing (of math, reading and written language) done in 2009 and 2012 without accommodations puts the Student in the range of very limited total achievement, he is considered an excellent student who performs well on tests and quizzes, with accommodations.
3. BCPS provides transportation to and from magnet programs in secondary schools for students who reside within the established transportation zone of the magnet program.
4. The [School 3] program transportation zone does not include [School 2].

5. As part of the application process to the [School 3] program, the Parent was made aware of the fact that transportation is not provided by BCPS to students who reside outside of the established transportation zone of a magnet program.
6. [School 2], the Student's home school, has a similar carpentry program to which students can apply. Although not part of magnet program, the [School 2] Carpentry Program is a two-year, four-credit program, beginning in the tenth or eleventh grade, to which students may apply.
7. The [School 3] program has fewer students in the class as opposed to the [School 2] Carpentry Program. The [School 3] program requires that the students wear uniforms.
8. At an IEP Team meeting on October 1, 2012, the Team again considered the Parent's request for special transportation and determined that, although the Student has a disability, he does not require the use of specially designed transportation services.
9. Both the [School 3] and [School 2] Carpentry Programs are accredited through the National Center for Construction Education and Research.
10. Both the [School 3] and the [School 2] Carpentry Programs provide all of the supports listed as needed by the Student in his IEP. The Student would have the opportunity to obtain a diploma in either program.
11. BCPS also provides a Carpentry Program at the [School 6] ([School 6]), a magnet school in XXXX. BCPS provides transportation to and from [School 6] from all areas of BCPS.
12. The IEP Team did not place the Student in the Carpentry Program at [School 3]. He applied to the [School 3] Magnet Program and, upon acceptance, chose to attend [School 3] for their morning program.<sup>2</sup>

---

<sup>2</sup> The Student also attends a Biology class while at [School 3] because it is convenient for scheduling purposes. Should he attend [School 2], that Biology class would be available to him there.



13. Attending the Carpentry Program at [School 3] has helped the Student with his self-esteem and provides him with technical skills that will assist him in pursuing a career path.

## DISCUSSION

### **I. Burden of Proof/Persuasion.**

In administrative hearings addressing the validity of a child's IEP, the burden of proof/persuasion is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the Supreme Court defined in the *Weast* case, the burden of proof in this case is thus on the Parent to establish the merits of her allegations.

### **II. The Parent's Case**

At the heart of the Parent's Due Process complaint is BCPS's refusal to amend the Student's 2012-2013 IEP to include transportation for the Student from [School 1] at about 10:40 a.m. to [School 2], where he attends school in the late morning and early afternoon. Currently, the Student's guardian drives him to [School 1] early in the morning, where the Student takes a regular education BCPS bus to the morning program he chose at [School 3]. After the Student's morning program at [School 3], BCPS transports him to [School 1]. The Parent is responsible for the Student's transportation from [School 1] to [School 2], incurring a \$20.00 taxicab fare each school day. BCPS transports the Student home from [School 1].

The Parent is neither alleging any procedural errors in this case nor is she challenging the Student's program and placement at [School 2]. As historical background to this case, the Parent discussed BCPS's failure, several years ago, to heed her request for a classroom aide for the Student or to fund a non-public program for him at [School 4],<sup>3</sup> pursuant to a doctor's recommendation. The Parent attributes the extent of the Student's current deficits, in part, to

---

<sup>3</sup> The Parent testified that she first made this request of BCPS in 2002.

BCPS's past failures to address his needs. The Parent pointed to the Student's January 2012 Woodcock-Johnson III standardized test results, which placed him at a second to fourth grade level, and what she called his significant life skills deficits.

The Parent maintains that the [School 3] program is not merely a voluntary choice, but a necessity that greatly benefits the Student, as he nears the time when he will be forced to transition into the "real world" and seek a career that will allow him to support himself. The Parent testified that she is aware that BCPS does not provide its students transportation to [School 3], a magnet school, from [School 2]. She suggested that the BCPS limitations in that regard are discriminatory in that other BCPS students who attend other BCPS high schools are given more choices in their selection of magnet schools that provide transportation to those school zones.

The Parent discussed the Student's ADHD, dyslexia, and dysphagia diagnoses. She explained that her son's life skills deficits are so significant that sending him to the [School 3] Program is a necessity. The Parents contended that the [School 3] program has better job training than the [School 2] Carpentry Program, which she said students refer to as "just another class," unlike [School 3] program students, who want to be there for what the program offers. She stated that [School 3] definitely provides the better carpentry program. In support of her position that it is "necessary" for the Student to attend the [School 3] program, the Parent referenced information she has read about magnet programs and the significant ways in which students benefit from them.

The Parent acknowledged that the Student's grades "are good," but she stated that they are misleading, noting that he has difficulty writing basic sentences. The Parent did not offer other examples explaining her perception of the Student's life skills shortcomings.

The Parent acknowledged signing the Magnet School Programs application where she accepted responsibility for transporting her child to and from the magnet program if the Parent “accept[ed] a placement for which BCPS transportation is not provided.” The Parent, when asked about this at the hearing, stated that she never thought the Student would be accepted into the [School 3] program.

The Parent offered her opinion that BCPS’s reluctance to accede to her transportation request is “a money issue.” She referenced the expenditures she has made over the years in addressing the Student’s deficits and BCPS’s shortcomings in addressing those needs. She remarked that she “spent a fortune in testing” before finding out that BCPS could have paid for testing. The Parent also discussed the nearly \$8,000.00 she spent at the XXXX Learning Center during the 2007-2008 school year for tutoring the Student and her current, ongoing transportation costs. The Parent stated that she is willing to compromise on the transportation costs associated with transporting the Student and, therefore, is only requesting transportation between [School 1] and [School 2], which represents a \$20.00 cost for a taxicab each school day.

XXXX XXXX, the Student’s guardian, testified about the Student’s struggles with his homework. Mr. XXXX offered his concern about the disparity between the Student’s low standardized test scores and his grades.

The Parent presented the testimony of XXXX XXXX, the Student’s math teacher, who discussed the Student’s low standardized test scores, which are the product of testing without any accommodations.

The Parent summarized her position by stating that BCPS has failed the Student over the years and, as a result, she is seeking to help him transition to “the real world.” The Parent is requesting that an exception be carved out, based on her son’s severe disability and limited life

skills, to cover the additional costs she is incurring in paying for the Student to be transported from [School 1] to [School 2] for the late morning and early afternoon portion of his program.

### **III. BCPS's Response**

BCPS responded to the Parent's case by stating that no special education issue has been raised, rather it is a dispute with the BCPS's magnet school transportation policy. BCPS notes that [School 2], the Student's home school, provides the necessary services to implement the Student's IEP. It further contended that the Parent's choice to have the Student attend a voluntary magnet program at [School 3] does not render him eligible, as a regular or special education student, for BCPS-provided transportation services because he does not live in the magnet school's attendance zone. BCPS emphasized that the Parent was well aware when she completed the [School 3] Magnet School Application that transportation was not included. Nevertheless, the Parent elected to send the Student to the [School 3] program. BCPS also noted that the Student's IEP does not include any special education transportation needs. The Student rides the regular education bus where it is available to him.

BCPS presented the testimony of XXXX XXXX, carpentry teacher at [School 2], to discuss the two-year carpentry program available to [School 2] students, some of whom have IEPs. Next, BCPS had XXXX XXXX, the Student's math/special education teacher, explain the Student's academic performance in her class and her assessment of his life skills, such as reading signs, counting and doing basic math operations, reading and interacting socially with his peers. Ms. XXXX testified that the Student has done well in her class, with accommodations, supports and special services. Ms. XXXX participated in at least one of the IEP Team meetings attended by the Parent where the Parent's request for transportation, as noted above, was discussed. The teacher recalls the Team informing the Parent that transportation services cannot be provided because the Student does not have needs that require special education transportation for him.

Finally, Ms. XXXX noted that the IEP Team did not recommend placing the Student at [School 3] because the carpentry program at [School 2] can address all of the supports and accommodations he requires.

BCPS's last witness, XXXX XXXX, the IEP Chairperson at [School 2], further shed light on the IEP Team's consideration, at two separate Team meetings, of the Parent's request for transportation services. Ms. XXXX explained that the IEP Team determined that the Student's IEP can be implemented in the [PROGRAM] classroom at [School 2]. Additionally, despite the Parent's advocacy before the IEP Team of the Student's need to attend the Carpentry Program at [School 3], the Team decided that his IEP can be implemented while he pursues his carpentry interests at the [School 2] program. Ms. XXXX noted that on at least two occasions, with the most recent being on October 1, 2012, the IEP Team discussed the Parent's request for special education transportation from [School 3] to [School 2]. Ms. XXXX explained that the IEP was not amended to include the requested transportation because the [School 3] program is not a special education placement and the services the Student receives at [School 3] are available to him at [School 2]. Lastly, the witness noted that special education transportation would be appropriate in an IEP only if a student's emotional, physical or medical needs warranted it. For example, special education transportation may be warranted if a child's safety is an issue on the bus, if his behavior has to be closely monitored, if his anxiety level needs to be monitored or he otherwise needs close supervision. Ms. XXXX indicated that the Team did not offer that level of support because the Student does not need it; he rides the regular education bus, without supervision, where BCPS provides transportation.

The BCPS position in this case is that there were no procedural or substantive errors in the IEP process. Due to the Parent choosing a placement not provided for in the Student's IEP, BCPS is therefore not obligated to provide transportation, as requested. BCPS maintained that

the Parent waived special education transportation to the pre-existing program unless it is available through the magnet office, which it is not. BCPS also asserted that even if special education transportation was on the Student's IEP, BCPS would not be responsible for it due to the Parent's selection of the [School 3] Program over the [School 2] carpentry option.

#### IV. Legal Framework

##### A. Statutory Framework under IDEA.

Congress identified four purposes for its enactment (and revision) of IDEA, with the following being primary:

- (1) (A) to ensure that all children with disabilities have available to them a **free appropriate public education** that emphasizes special education and **related services** designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

20 U.S.C. § 1400(d) (2010) (emphasis added). The following pertinent terms for implementing this purpose are defined in section 1401:

- (9) **Free Appropriate Public Education.** The term "free appropriate public education" means special education and related services that –
  - (A) have been provided at public expense, under public supervision and direction, and without charge;
  - (B) meet the standards of the State educational agency;
  - (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (D) are provided in conformity with the individualized education program required under Section 1414(d) of this title.

...

- (14) **Individualized Education Program; IEP.** The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with Section 1414(d) of this title.

...

- (26) **Related Services.**

(A) In General. The term “related service” means **transportation**, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services **designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child**, counseling services including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(emphasis added). Clearly implicit in these definitions, and as specifically set out in section 1414(d), is Congress’ goal that a child’s “individualized education program” would be reflected in a comprehensive “written statement . . . that is developed, reviewed, and revised,” in accordance with a specific schedule and with specific standards set out in IDEA in an IEP. 20 U.S.C. § 1414(d)(1)(A)(i) (2010). Among other things, the IEP is required to contain “a statement of the child’s present levels of academic achievement and functional performance . . . , a statement of measurable annual goals, including academic and functional goals . . . , a description of how the child’s progress toward meeting the annual goals . . . will be measured . . . , [and] a statement of the special education and related services and supplementary aids and services . . . to be provided to the child . . . .” 20 U.S.C. §1414(d)(1)(A)(i).

B. Supreme Court interpretation of IDEA.

In *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court affirmed that the congressional purpose in enacting the IDEA was the provision of a free appropriate public education (FAPE) to children with disabilities. The Court stated that implicit in this purpose was a requirement that the education to which access is provided is sufficient to “confer some educational benefit upon the handicapped child.” 458 U.S. at 200. The Court noted that a child’s grades and his or her advancement through the school program were important factors in determining whether educational benefit was conferred. 458 U.S. at

203. The Court identified the basic inquiry as twofold: first, has the education agency complied with procedures set forth in the IDEA; and second, was the child's IEP, developed through IDEA procedures, "reasonably calculated to enable the child to receive educational benefits?" If these two requirements are met, the requirements of IDEA have been satisfied. 458 U.S. at 206-07.

## V. Analysis

The *Rowley* Court explained that it is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of participation at every stage of the administrative process [] as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06.

In response to my inquiries and, as clarified in both the prehearing conference as well as the hearing, the Parent has acknowledged that she is not alleging any procedural or substantive shortcomings in the Student's IEP. The Parent testified that she chose for her son a carpentry program at [School 3] that she considers to be better than the one available to him at [School 2]. In response to one of my questions, she explained that she was not so much disparaging the carpentry program at [School 2] as she was pointing out that the [School 3] program at the magnet school was "more beneficial" to the Student.

The IDEA provides that all children with disabilities between the ages of three and twenty-one, inclusive, have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). In *Rowley*, the United States Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Rowley*, 458 U.S. at 200-01 (emphasis added). See also *In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).



The IDEA contains the following similar definition of FAPE:

[S]pecial education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge...[and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012); COMAR 13A.05.01.03B(27).

I also note that the Parent had also said at one point during the hearing that the [School 3] program was “a necessity” for the Student. Since the above statements seem inconsistent with the Parent’s position that she is not challenging the IEP’s program and placement choices and the fact that she is only pursuing the transportation issue, I feel compelled to address the matter briefly.

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or nonpublic, that money can buy” or “all services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983). Instead, a FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207. A finding that a child is not progressing at the same speed as his other peers does not shed any light on whether a child has failed to gain educational benefit. As discussed in *Rowley*, what constitutes educational benefit for two different children may differ dramatically, depending on the disabilities that are present. *Id.* at 202.

Therefore, “educational benefit” requires that “the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200. *See also MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d at 526, *citing Rowley*, 458 U.S. at 207; *see also A.B. v. Lawson*, 354 F.3d 315 (4<sup>th</sup> Cir. 2004). Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and

related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Cent. Susquehanna*, 853 F.2d 171, 182-3 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6<sup>th</sup> Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick County v. Summers*, 325 F.Supp.2d 565, 576 (D.Md. 2004).

The fact that the [School 3] Carpentry Program may be “a better” program or “more beneficial” to the Student does not mean that the Student is entitled to be placed in such a program to be provided FAPE. The Parent clearly is not asking BCPS to place the Student at [School 3] for the Carpentry Program. She has elected to enroll her son in what she believes to be the better program to provide him with work skills as he transitions from high school to the working world. As noted above, the law does not require a school district to provide the “better” of two programs in order to maximize educational benefits to the child.

Furthermore, the transportation request is made with the knowledge that the IEP Team did not deem it appropriate to include special education transportation services in the child’s IEP. The IEP Team did not include special education transportation, as related services, in the IEP because the Student has no medical, emotional or physical needs that would qualify him for such services. I find that the Parent has not shown that BCPS was incorrect in not including special education transportation services in the Student’s IEP. If they had included special education transportation in the IEP, BCPS still would not be obligated to accede to the parental preference for a program other than the one identified in the IEP.

The facts of this case are very similar to those found in *Timothy H. and Brenda H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999), 30 IDELR 535. In that case, the Court held that the school district had no obligation to provide transportation to a special

education student who attends a school that is located within the school district, but which is not the student's regularly assigned school. In that case, the parents did not dispute that the regularly assigned school offered a FAPE for their daughter, but simply preferred the special education program offered at the school she was attending. In the present case, the Parent is not disputing the fact that FAPE is available at [School 2]. However, she believes that the [School 3] Program is more beneficial for the Student. As I noted, that is not the issue before me. The IEP has the Student assigned to [School 2], where they have a similar carpentry program; he is attending [School 3] solely because the Parent prefers the latter program. Because *Timothy H.* is an Eighth Circuit case, it is not binding here. However, I find it very persuasive.

The Parents argue that the Student should be provided with transportation as a related service, even though he is attending [School 2] at the Parent's election. Given the Student's lack of need for special education transportation and the above analysis, neither case law nor any IDEA authority supports the concept that the requested transportation should be provided.

## **VI. Summary**

As described above, under the legislative scheme set out in IDEA, a school system is obligated to provide students with disabilities a FAPE; a FAPE includes the provision of appropriate related services; and the FAPE is to be described in detail on an annual basis in an IEP established for that student by the school system. *See* 20 U.S.C. §§1400 (2010 and Supp. 2012), 1414 (2010).

In this case, there is no dispute about the program and placement set forth in the Student's IEP. The Parent has failed to establish that BCPS, by failing to provide transportation at public expense to a Student who is not eligible for special education transportation services and has chosen to attend a morning program at a school other than the one provided in his IEP, has not satisfied the IDEA requirements referenced above. Although I commend the Parent on

her efforts on behalf of the Student, I find that she has not established that BCPS's refusal to transport the Student from the [School 3] program, where he attends a morning program, to his home school, [School 2], where he attends the late morning and afternoon program listed in his IEP, amounts to a denial of FAPE.

### **CONCLUSIONS OF LAW**

I conclude as a matter of law that the Parent did not carry her burden to prove that BCPS improperly failed to include in the Student's Individualized Education Program (IEP) transportation at public expense from [School 1] to [School 2] to attend the late morning and afternoon component of the Student's educational program. 20 U.S.C.A. § 1415(f)(1)(A) (2010); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

### **ORDER**

I **ORDER** that the Parent's due process complaint is dismissed.

December 21, 2012  
Date Order Mailed

---

Louis N. Hurwitz  
Administrative Law Judge

LNH/tc

### **REVIEW RIGHTS**

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.