

XXXX XXXX,
STUDENT

v.

MONTGOMERY COUNTY PUBLIC
SCHOOLS

* BEFORE DAVID HOFSTETTER
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-MONT-OT-12-32713

* * * * *

DECISION

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

STATEMENT OF THE CASE

On August 16, 2012, XXXX XXXX, M.D. (Parent), on behalf of his daughter, XXXX XXXX (Student), filed a Due Process Complaint along with a mediation and hearing request with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). MCPS declined to mediate and, on August 27, 2012, the parties notified the OAH that they had mutually waived a resolution session.

I held a telephone prehearing conference (TPHC) on September 5, 2012. The Parent represented himself and the Student. Also participating by telephone was the Student's mother,

XXX XXXX (Mother).¹ Zvi Greismann, Esquire, represented MCPS. By agreement of the parties, the hearing was scheduled for September 28 and October 11, 2012.

I held the hearing on September 28, 2012, at MCPS headquarters in Rockville, Maryland. The Parent represented the Student and himself. Mr. Greismann again represented MCPS. Because the hearing concluded on September 28, 2012, a second hearing day was not required.

In accordance with the regulations governing the time frames for the issuance of special education decisions, the decision in this case would normally be due on or before October 11, 2012, which is forty-five days after August 27, 2012, the date both parties executed the Notice of Outcome of Resolution Meeting. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2011). At the close of the hearing on September 28, 2012, the parties requested an extension of time until October 29, 2012 for me to issue the decision, and I granted the request. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

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) (2011); 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; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A .05.01.15C; COMAR 28.02.01.

¹ The Parent and the Mother are separated and in the process of divorcing. The Student lives with the Mother. At the TPHC, the Mother expressed uncertainty as to whether she wished to be a party to the case. Regardless of her status, however, she stated that she wished to receive all notices from the OAH and that she wished to attend the hearing on the merits, although she stated that she did not expect to testify. I informed the parties that if the Mother wished to be considered a party, she must make a motion to that effect and that I would then rule on the motion. I also informed the parties that I would add the Mother to the distribution list for all mailings from the OAH. The Mother did not file such a motion and, therefore, is not a party to this matter. The Mother was not present at the hearing on the merits and did not seek to testify.

ISSUES

1. Whether MCPS has failed to offer and provide a free appropriate public education (FAPE) to the Student based on the number of hours of speech therapy offered;
2. Whether MCPS has failed to offer and provide a free appropriate public education to the Student based on its alleged failure to conduct certain evaluations and assessments of the Student;
3. Whether, under the facts of this case, MCPS has complied with applicable stay-put requirements.²

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent, except where noted:

- Parent's #1 Curriculum Vitae of the Parent, undated
- Parent's #2 Excerpt from Individualized Education Program (IEP), dated September 8, 2011
- Parent's #3 Email thread between Parent and XXXX XXXX, May 22 –May 24, 2012
- Parent's #4 Change of School Assignment (COSA) Information Booklet, 2011-2012, not dated further
- Parent's #5 Letter from Parent to "School Principal [School 1]" and "Equity Assurance Office, MCPS," undated
- Parent's #6 [School 1] ([School 1]) enrollment forms, signed by Parent, August 23, 2012
- Parent's #7 MCPS publication titled, "Goal 1: Ensure Success for Every Student"
- Parent's #8 Pleadings regarding discovery in XXXX v. XXXX, Circuit Court for Montgomery County, Case No. XXXX

I admitted the following exhibits on behalf of MCPS:

- MCPS #1 Pre-Kindergarten Teacher Questionnaire, dated May 19, 2011
- MCPS #2 Report of Speech-Language Assessment, dated August 18, 2011
- MCPS #3 Letter from XXXX XXXX to the Parents, dated September 8, 2011
- MCPS #4 IEP, dated September 8, 2011
- MCPS #5 Letter from XXXX XXXX to Parents, dated May 17, 2012
- MCPS #6 [School 2] Progress Report, dated November 15, 2011
- MCPS #7 Individualized Education Program, dated June 4, 2012
- MCPS #8 Curriculum Vitae, XXXX XXXX, undated

Testimony

The Parent testified on behalf of the Student and was accepted as an expert in the field of medicine.

XXXX XXXX, speech-language pathologist at MCPS, testified on behalf of MCPS and was accepted as an expert in the field of speech pathology.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Student is five years old, born on XXXX, 2007.
2. The Student is currently enrolled in kindergarten at [School 3] ([School 3]).
3. During the 2011-2012 school year, the Student attended the [School 2], a private pre-school.

² The Mother stated at the TPHC that she did not share the Parent's position regarding any stay-put issue.

4. While at the [School 2], the Student exhibited no signs of behavioral problems, cognitive deficits, autism, or developmental delays. While at the [School 2], the Student exhibited some problems with articulation, sometimes making it difficult for her to be understood and requiring a teacher to ask her to repeat a statement.
5. In or around July 2007, the Student's parents contacted the Child Find program due to concerns about the intelligibility of the Student's speech.
6. The Student was evaluated by professionals at the Child Find clinic on July 20, 2011 regarding development in various areas, including math, reading, written language, and motor skills.
7. Among the tools used in evaluating the student at the Child Find clinic was the Developmental Indicators for the Assessment of Learning – 3 (DIAL-3). The Student met age expectations regarding the hearing, tympanometric, and vision screenings. She also met age expectations regarding the "Concepts" portion of the exam which tests for knowledge of, among other things, body parts and colors. She knew five to six position words, 11-12 comparative concepts, and was able to sort items by shape. The Student met age expectations for math, reading, and written language skills. In the "Motor" portion of the exam, the Student scored at or above grade level in all areas. The Student's grasp was determined to be "acceptable but not proficient" and she was observed to have slightly low muscle tone. Various exercises were recommended to the Student's parents to improve hand grasp. Testing and observation of the Student revealed no concerns regarding cognitive or social skills.
8. Despite the slightly low muscle tone observed at the Child Find evaluation, the Student was at that time able to copy with pencil and paper at a six-year-old level.

9. On the “Speech-Language” portion of the Child Find clinic evaluation of July 20, 2011, the Student was observed to produce sound errors with certain blended sounds, which affected her intelligibility. Notwithstanding her intelligibility problems, the Student had strong vocabulary skills and was able to rhyme and identify words when given their initial sounds.
10. As a result of the testing at the Child Find clinic on July 20, 2011, Child Find staff recommended speech-language services for the Student to address problems with articulation. No other services were recommended.
11. Following her evaluation by Child Find, MCPS found the Student eligible for “itinerant” speech and language services.
12. MCPS identifies “itinerant” services as speech and language services provided to pre-schoolers.
13. On August 18, 2011, the Student was given a speech-language assessment by XXXX XXXX, a speech-language pathologist employed by MCPS. Also on August 18, 2011, Ms. XXXX completed a Report of Speech-Language Assessment concerning the Student.
14. In evaluating the Student, Ms. XXXX used both formal and informal assessments. Informal assessments included her observations of the Student; formal assessments included assessment tools such as the Preschool Language Scale, Fourth Edition.
15. At the time of her assessment by Ms. XXXX, the Student’s test results were above expectations for a child her age in both receptive and expressive language. The Student’s test results, however, were well below average for articulation. Ms. XXXX determined that approximately 68% of the Student’s conversational speech was intelligible when the listener was unaware of the context of the speech, and that approximately 76% of the

Student's conversational speech was intelligible when the listener knew the context of the speech.

16. On September 8, 2011, an IEP meeting was held concerning the Student. At the time of the IEP meeting, the Student was living with the Parent and the Mother and the home school for their address was [School 1] ([School 1]). The meeting was attended by the Parent, XXXX XXXX, Speech-Language Pathologist, XXXX XXXX, Principal at [School 1], and XXXX XXXX, General Educator at [School 1].
17. The purpose of the meeting was two-fold: First to determine if the Student was eligible for special education services and, if so, to produce an initial IEP.
18. As of the date of the IEP meeting, September 8, 2011, the Student was meeting age expectations, for reading, written language, and math. The Student was above age expectations for receptive and expressive language. The Student was at or above age expectations for motor skills. For oral language, the Student was below age expectations based on her articulation problems.
19. The IEP team identified the specific articulation deficits affecting the Student, including a statement of the particular sound and sound combinations with which the Student had trouble.
20. The IEP team determined that as a result of her articulation problems, the Student was eligible for special education services.
21. The IEP set forth goals and objectives for the Student, primarily that she would produce target sounds in words, phrases and sentences, and spontaneous connected speech, with 80% accuracy. The IEP also provided that achievement of the goals and objectives

specified would be evaluated by a speech-language pathologist employing both informal procedures and an observation record.

22. The IEP provided that the Student would receive one 45-minute speech-language therapy session per week.
23. At the September 8, 2011 IEP meeting, the portion of the IEP concerning behavioral interventions was intentionally left blank as no participant, including the Parent, raised any issues concerning the Student's behavior.
24. The Parent signed the proposed IEP on September 8, 2011.
25. Beginning in late August or early September 2011, the Student began speech-language therapy sessions with Ms. XXXX once per week for 45 minutes, as provided for in the IEP. These sessions continued throughout the 2011-2012 school year and took place at [School 1].
26. During their sessions, the Student and Ms. XXXX worked primarily on articulation issues.
27. Ms. XXXX used a data sheet in each session to calculate the number and percentage of times that the Student was able to correctly say a target sound.
28. During the first two sessions with Ms. XXXX in September 2011, the Student would occasionally become frustrated and would cry or crawl under the table and put her head down. As a result of this conduct, Ms. XXXX and the Student's Mother instituted a system of rewards and positive reinforcements and the behavior did not recur.
29. The Student made substantial gains in articulation during the 2011-2012 year. By the end of the 2011-2012 school year, the Student was able to produce between 85% and 100% of the target sounds at the beginning, middle, and end of words.

30. During the 2011-2012 school year, the Student's capabilities in receptive and expressive language were above age expectations.
31. The Parent did not attend any speech-language therapy sessions offered to the Student by Ms. XXXX.
32. In her regular meetings with the Student, Ms. XXXX did not observe any signs of autism, cognitive problems, motor problems, or serious behavioral problems.
33. On or before May 22, 2012, a copy of a draft IEP was sent to the Parent and the Mother in anticipation of an IEP meeting to be held on June 4, 2012.
34. On May 22, 2012, the Parent sent an email to Ms. XXXX and the IEP team stating that, in addition to the Student's speech-language needs, he was concerned about "neurological/developmental problems" regarding the Student. He noted that, in his view, the Student was not sufficiently computer literate, that she could not understand simple age-appropriate math and logic problems and that she sometimes "shuts down" cognitively. He requested that MCPS conduct "a comprehensive psychological and cognitive evaluation, to include language, IQ, motor development." Parent Ex. 3.
35. On June 4, 2012, the IEP team met for the purpose of determining whether the Student was eligible for special education services for the 2012-2013 school year, when the Student would be entering kindergarten and, if so, to develop an IEP. The meeting was attended by XXXX XXXX, Assistant Principal at [School 1], General Educator XXXX XXXX, and Ms. XXXX.
36. At the June 2012 IEP meeting, Ms. XXXX and MCPS staff again proposed speech-language services for the Student consisting of three, 30-minute speech-language therapy sessions per month. The Parent objected to the amount of time offered for speech-

language services and argued that the Student should receive significantly more time. As a result of discussions on this issue and in light of the Parent's position, the MCPS members of the IEP team agreed to revise the proposed IEP so as to provide the Student with six, 30-minute sessions per month. The six, 30-minute sessions are intended to include some portion of that time with the speech-language pathologist in the classroom with the Student, assisting her and observing her ability to integrate her developing skills into regular classroom activity.

37. The MCPS members of the IEP team declined to further increase the amount of speech-language services offered to the Student, stating on the IEP, "[The Student] is a preschooler entering kindergarten for the 2012-2013 year. She [is] making academic progress and does not require instructional/testing." MCPS Ex. 7.
38. The June 2012 IEP set forth goals and objectives for the Student, primarily that, with 80% accuracy she would produce target sounds in all word positions (initial, medial, final), in phrases, in sentences, and in spontaneous connected speech. The IEP identified the specific articulation deficits affecting the Student, including a statement of the particular sound and sound combinations with which the Student had trouble. The IEP also provided that achievement of the goals and objectives specified would be evaluated by a speech-language pathologist employing both informal procedures and an observation record.
39. As of the date of the IEP meeting on June 4, 2012, the Student was meeting age expectations, for reading, written language, and math. The Student was above age expectations for receptive and expressive language. The Student was at or above age

expectations for motor skills. For oral language, the Student was below age expectations based on her articulation problems.

40. At the June 2012 IEP meeting, the Parent was given an opportunity to present his view that the Student required comprehensive testing beyond her articulation issues but he declined to present a detailed statement of the basis for his request for additional testing.
41. Based on the information from the [School 2], the Child Find evaluation, the speech-language assessment performed by Ms. XXXX, and the school year of speech-language therapy with Ms. XXXX, the MCPS members of the IEP team determined that the Student had no other deficits or disabilities requiring further testing or assessments.
42. No professional who has evaluated or worked with the Student has ever believed that the Student is autistic.
43. The goals, objectives, and services identified in the June 2012 IEP were appropriate and reasonably calculated to provide the Student with a FAPE.
44. The Student currently receives speech and language services consisting of six, 30-minute sessions per month, as provided in the June 2012 IEP.
45. The Parent declined to sign the June 2012 IEP because he believed it did not offer sufficient speech-language services and because it did not provide for the testing and assessments he requested.
46. The Parent and the Mother separated in January 2012.
47. After the Parent and the Mother separated, the Mother lived in an apartment near the former marital home and the Student continued to live with the Parent in the marital home. The MCPS home school for both the marital home and the Mother's apartment at that time was [School 1].

48. Beginning in approximately the end of June or the beginning of July 2012, the Student began living primarily with the Mother.
49. In or around August 2012, the Mother moved to an apartment in Montgomery County some distance from the Parent. The home school for the Mother's residence is [School 3].
50. The Mother enrolled the Student at [School 3] at the beginning of the 2012-2013 school year and she currently attends that school.
51. The Student receives special education services at [School 3] pursuant to the June 2012 IEP.
52. The special education services that the Student receives at [School 3] are materially identical to the special education services she would receive if she was attending [School 1].
53. A divorce action concerning the Parent and the Mother is pending in Montgomery County Circuit Court. The Court has not entered any order concerning custody or specifying the school the Student should attend.

DISCUSSION

Motion for Judgment by MCPS

Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.12E:

E. Motion for Judgment

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:

- (a) Proceed to determine the facts and to render judgment against an opposing party; or
- (b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.12E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Md. Rule 2-519 “allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact.” *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). In deciding a motion for judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

In this instance, MCPS moved for judgment at the close of the Parents’ case, on the ground that the Parent had failed to meet his burden of proof. The burden of proof lies with the Parent because he is challenging MCPS’s determination regarding special education services. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

As permitted by COMAR 28.02.01.12E(2)(b), I denied MCPS’ motion. MCPS proceeded to present its evidence, thereby withdrawing the motion. COMAR 28.02.01.12E(3). I am deciding the case on its merits after considering all the evidence.

Substantive Law

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2010); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012) and COMAR 13A.05.01. The IDEA requires “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.” 20 U.S.C.A. § 1400(d)(1)(A) (2010); *see also* Md. Code Ann., Educ. § 8-403 (2008).

An evaluation is defined as procedures used to determine whether a student has a disability under IDEA and the nature and extent of the special education and related services that the student needs. A public agency must obtain parental consent before conducting an evaluation. 34 CFR §§ 300.15 and 300 (2012).

A FAPE is defined in COMAR 13A.05.01.03B(27) as follows:

“Free appropriate public education (FAPE)” means special education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 C.F.R. §§ 300.7, 300.121, and 300.122, and this chapter;
- (c) Include preschool, elementary school, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is similarly defined in the IDEA and in the applicable federal regulations. 20 U.S.C. § 1401(9) (2010); 34 C.F.R. § 300.17 (2012).

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181-82 (1982). COMAR 13A.05.01.09A outlines the required content of an IEP as a written description of the educational needs of the student related to a disability and the special education and related services to be provided to meet those needs. *See also* 34 C.F.R. § 300.320 (2012). Special education must be designed to meet the “unique needs” of the child. 20 U.S.C.

§ 1401 (29) (2010). A student’s IEP must be reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 189, 201, and 207. However, the IDEA does not require local school districts to maximize the potential of each disabled child commensurate with the opportunity provided to non-disabled children. *Rowley*, 458 U.S. at 197, n.21, and 198-99. Instead, school districts must provide an “appropriate” education; that is, one designed to confer “some educational benefit.” *Rowley*, 458 U.S. at 201; *see also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004); *J.L. v. Mercer Island School District*, 575 F.3d 1025, 1036-38 (9th Cir. 2009) (*Rowley* standard not changed by 1997 amendments to the IDEA). The statute provides a “basic floor of opportunity” to disabled children so that they may receive educational benefit. *Rowley*, 458 U.S. at 201; *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Issues Regarding Speech-Language Services

As relevant to this case, speech or language impairment is defined in COMAR 13A.05.01.03B(74) as follows:

“Speech or language impairment” means a communication disorder such as . . . impaired articulation . . . that adversely affects a student’s educational performance.

See also 34 C.F.R. § 300.8(c)(11) (2012).

In this case, both the Parent and MCPS agree that the Student is in need of speech-language services due to an articulation problem.³ The articulation problem sometimes makes it difficult for teachers or peers to understand her and thus may affect her “educational performance.” The parties also agree with the goals and objectives set forth in the 2012-2013

³ The Parent does not claim that the Student has any speech-language problem other than the identified articulation problem.

school year regarding speech-language services. T. 83.⁴ The parties disagree as to the number of hours of speech-language services the Student should receive.

During the 2011-2012 school year, while still a pre-schooler, the Student received speech therapy from MCPS after the articulation issue was identified during the Child Find process. Specifically, the Student received speech therapy with a licensed speech-language pathologist (Ms. XXXX), once per week for 45 minutes. By the end of the school year, the Student had made what Ms. XXXX described as “just tremendous, fabulous progress.” T. 154. Specifically, by the end of the school year, the Student was able to produce between 85% and 100% of the target sounds at the beginning, middle, and end of words. *Id.*

Although recognizing the Student’s excellent progress, the MCPS members of the June 2012 IEP team agreed that the Student still needed to make greater improvement in her articulation. As a result, the team recommended that the Student receive three, 30-minute speech-language therapy sessions per month for the 2012-2013 school year. At the June IEP meeting, the Parent objected and argued that additional time was required, given what he considered to be the severity of the Student’s articulation problem. A discussion ensued at the IEP meeting and ultimately MCPS proposed that the Student receive six, 30-minute speech language therapy sessions per month, twice the total hours of service originally proposed by MCPS. The proposed amount of service monthly is equal to the number of monthly minutes of services that the Student received as a pre-schooler during the 2011-2012 (i.e. 180 minutes total, per month.) MCPS Ex. 7.

⁴ References to pages of the transcript are cited as “T. [page number].”

MCPS' expert witness, Ms. XXXX, testified persuasively that the speech-language services offered by the 2012-2013 IEP, including the stated goals and objectives and the amount of time in therapy, were clearly sufficient to provide the Student with a FAPE. She emphasized the great progress that the Student had made the previous year, explained how the goals, objectives, and methodologies of the current IEP were specifically geared to the Student's needs, and opined that the Student was likely to continue to make significant progress in the 2012-2013 school year. T. 156-168. Based on her education, training, and experience, as well as her clear and consistent testimony, I find Ms. XXXX to be a credible witness and give substantial weight to her testimony.

The Parent did not offer any expert testimony on the issue of speech-language services for the Student. He merely argued that his opinion was that the Student was not making progress fast enough and that more hours were required. He testified repeatedly that in the area of articulation (as in other areas) he believed that the Student's development compared poorly to that of her older brothers when they were her age. T. 42. On cross-examination, the Parent was asked if he would agree that at the June IEP meeting, MCPS staff was "somewhat responsive" to his concerns regarding speech therapy. He testified:

Well, somewhat. If you need to buy something that is \$100 and you only have \$1, are you somewhat able to buy it? I don't think so. You try to offer \$1 for a TV and they won't. I wanted many hours, she offers me one and a half.

It's more. You could say one and a half is more than one. It's more responsive. I don't think it's adequate. Whether it's substantially more or more, it is more. I'm not disputing that part. So in the strict sense, it's more responsive.

In the bigger picture, does it make a substantial change in my request? In the bigger issue, I don't agree. Because it doesn't make as much substantial change as I want. An extra half-hour, which means maybe 20 minutes per day, for somebody who has been going through developmental delays for three years, two or three years, is not enough to me. As a parent, I want things to happen faster, and improvement to happen faster.

T. 112-113.

The issue for my determination, of course, is not whether the Parent received everything he wanted from the IEP meeting or whether he considers the services offered to be sufficient to allow “improvement to happen faster.” Rather, the issue is whether the Student’s IEP is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 189, 201, and 207. The Parent’s reliance solely on his own anecdotal experience with the Student and his own “sense” of what appropriate services would consist of, is, in the light of the expert testimony and documentary evidence offered by MCPS, insufficient to meet his burden of proof.

Issues regarding testing for disabilities other than speech-language

The Parent argues that the IEP for the 2012-2013 school year is inadequate because it does not provide for comprehensive testing and evaluation of the Student for disabilities other than speech-language issues. The Parent argues that the Student should be evaluated for behavioral issues, autism, cognitive issues, and motor issues. MCPS argues that there is no evidence of disability in any of those areas and that no testing or evaluation is therefore necessary.

Any parent is able to make a referral or, in other words, to request an assessment to determine whether a child has a disability. COMAR 13A.05.01.04A. The governing regulation regarding determination of whether testing and assessment is required is COMAR 13A.05.01.04B:

B. Determination of Need for Assessment.

- (1) The public agency shall ensure:

(a) That assessment procedures are administered as needed, in accordance with Regulation .05 of this chapter; and

(b) The student's parent receives written notice of any assessment procedure the public agency proposes or refuses to conduct, in accordance with Regulation .12 of this chapter.

(2) The public agency shall provide the student's parent written notice in accordance with Regulation .12 of this chapter if the public agency:

(a) Determines that no additional data is needed; or

(b) Does not suspect the student of being a student with a disability or a student with a developmental delay in accordance with this chapter.

(3) If the parent disagrees with the decision as described in §B(2) of this regulation, the parent may appeal the decision in accordance with Regulation .15B and C of this chapter.

In this context, an “assessment” is “the process of collecting data in accordance with Regulation .05 of this chapter, to be used by the IEP team to determine a student's need for special education and related services.” COMAR 13A.05.03.01B(3). MCPS is not automatically obliged to conduct all or, indeed, any, evaluations requested by a parent. As set forth above, the regulations contain provisions for determining whether there is a need for an assessment. MCPS’ position is that there is simply no reliable evidence to suggest that the Student is in need of special education services, including evaluations, as demanded by the Parent. MCPS informed the Parent of this fact orally at the June IEP meeting and in writing, pursuant to COMAR 13A.05.01.04B(2)(a) and (b), in the IEP on the page headed “Prior Written Notice.” MCPS Ex. 7. It is thus clear that MCPS has met all legal *procedural* requirements regarding the determination that additional testing is not necessary; the Parent does not claim otherwise. For the reasons set forth below, I also agree with MCPS that, as a substantive matter, the Parent has not established by a preponderance of the evidence that the Student should be tested for other conditions.

The Parent testified that the Student has a number of developmental delays and disorders which he believes demand testing by MCPS. His basis for this view is undoubtedly influenced, in part, by his medical background, but a fair analysis of his testimony leads to the conclusion that his views are overwhelmingly based on the anecdotal impressions of a concerned parent.⁵ For example, the Parent testified repeatedly that the Student is unable to do various tasks that her older brothers could do at her age. Although the Parent discussed at length his experiences with the Student and his impression of her abilities, he produced no documentation or witnesses (other than himself) to rebut MCPS' expert and documentary evidence. I will discuss each area in which the Parent believes the Student should receive testing and assessment.

Behavioral Issues

The Parent argues that the Student has severe behavioral issues and that additional assessments should be performed on the Student to determine what type of behavioral interventions are necessary. The Parent presented no evidence that the Student suffers from any significant behavioral problems. His testimony was, in substance, that at home the Student sometimes gets upset when she is faced with a difficult task or does not win at a game. He also testified that she sometimes does not follow the rules of a game and cheats or becomes upset when she loses. T. 54-55.

He also pointed to the fact that when the Student first began speech therapy with Ms. XXXX in September 2011, there were a small number of times when she cried, or crawled under

⁵ The Parent is a medical doctor and sought to be accepted as an expert in medicine. After a brief voir dire, MCPS did not object and I so accepted the Parent. Despite being accepted as an expert in medicine, the Parent did not clearly offer an opinion as to any specific medical matter. He did not seek to be, and was not, accepted as an expert in special education, psychological disorders, behavioral disorders, motor disorders, cognitive disorders, or autism. The Parent did claim that he was "one of the top experts in the United States" on autism (T. 102) but presented scant evidence of that and, at any rate, did not seek to be qualified as an expert in that field. Although the Parent's long narrative testimony (offered, for the most part, without intervening objections by MCPS), is certainly full of "opinions," they are not the "expert opinions" in the evidentiary sense of the term.

the table, or exhibited similar behavior. MCPS Ex. 2. As Ms. XXXX testified, and as common experience tells us, such behavior is not at all unusual for a four-year-old. T. 49, 137-138. Moreover, Ms. XXXX also testified that even this relatively minor behavior problem disappeared after a couple of sessions, perhaps due to a program of positive reinforcement introduced by Ms. XXXX and the Mother. T. 150-151. Finally, no caregiver or professional who had contact with the Student ([School 2] staff, Child Find professional staff, Ms. XXXX, Ms. XXXX) saw any basis to conclude that a behavioral problem (or any non-speech-language problem) exists. The Parent has not shown that the Student has any significant behavioral problems or that further testing in this area is appropriate.

Autism and Cognitive Issues

The evidence does not establish a basis for cognitive or autism testing. The Student tests at or above grade level in reading and math and shows no cognitive defects. She is, everyone agrees, a very intelligent child and there is no indication that she is unable to process information and succeed at age-appropriate tasks. Again, the Parent relies on his own anecdotal accounts of cognitive problems. For example, the Parent reports that the Student is less computer literate than were her brothers at the same age and that the Student, when “unable to perform,” sometimes has a “cognitive crisis and shuts down.” Parent Ex. 3. He also reports that the Student seems to have problems learning the rules of games and doing math problems appropriate for her age. T. 53-54. He states that the Student is “far behind in her ability to deal with the same games that [her brother] used [at her age]. T. 47. He also testified that the Student is unable to provide accurate and logical explanations of events such as would be appropriate for her age. T. 42-43. He testified that the Student seems to misunderstand questions because she “lacks a cognitive infrastructure.” T. 43. However, Ms. XXXX testified that this had never been her experience and

that the Student's comprehension and response to questions was just as one would expect for a child her age. T. 155.

Regarding the question of whether the Student may be autistic, the Parent relies primarily on his knowledge that one of her brothers is autistic and that there may be a genetic component to autism. T. 52. Based on the Parent's concerns about what he considers to be the Student's cognitive and behavioral issues, as well as her supposed elevated risk of autism given her brother's condition, the Parent believes she should be tested for autism. Again, no professional working with the Student has ever considered autism as even a possible condition affecting the Student. For example, Ms. XXXX, who is experienced in working with children with autism, testified, "Absolutely no behaviors that I saw [from the Student] were consistent with children with autism . . ." T. 166.

Motor Skills Issues

Neither the [School 2], nor the Child Find evaluator, nor Ms. XXXX, the MCPS speech-language pathologist who assessed the Student after the Child Find evaluation, nor Ms. XXXX, the MCPS speech-language pathologist, identified any motor skills issues concerning the Student.⁶ Indeed, Ms. XXXX (who worked with the Student weekly for a full school year) when asked if she had concerns regarding the Student's motor skills, testified: "No, not at all. I had no concerns regarding her motor [skills] in working with her." T. 136.⁷ The Parent's evidence regarding motor skills consisted chiefly of his testimony that the Student is unable to master basic skills of ping-pong and that her brothers, at the same age, were much more proficient at

⁶ The one possible exception to this statement is that the Child Find evaluation reported that the Student had slightly low muscle tone and that her grasp was deemed "acceptable but not proficient." MCPS Ex. 2. (Despite this she was able to copy with pencil and paper at a six-year old level. *Id.*) Even assuming that these statements relate to "motor skills," the Parent has presented no evidence that issues with the Student's muscle tone or grasp in any way affect the Student's ability to receive educational benefit from her program at MCPS.

ping pong and other games than she is. T. 55-58. The Parent also argued that the Student is “accident-prone,” frequently coming home from the [School 2] with scrapes and bruises. T. 70-71, 77. Beyond his assertion, the Parent presented no evidence of the Student being “accident-prone” nor any explanation of how this fact might relate to her educational progress.

Summary Regarding Testing Requests

In sum, none of the Parent’s anecdotal accounts are sufficient to establish a need for further testing in any area other than speech-language. Significantly, the Parent offered no evidence at all of the Student’s supposed developmental and cognitive deficits other than his own testimony. For example, no testimony or records from her pediatrician or other care-provider was offered. Indeed, no testimony from *any* other person – pediatrician, caregiver, family member, babysitter, or the Mother– was offered. There is no evidence of any need for additional testing other than Parent’s own impressions of the Student’s supposed delays. Most importantly, the Parent’s assessments are in direct conflict with those of special education professionals at MCPS and elsewhere. No professional after testing and/or working with the Student, believes that the Student has any cognitive, developmental, or behavioral deficits (including autism), other than an articulation problem, which might merit special education services. MCPS Exs. 2, 4, 6, 7; T. 165-167.

⁷ Ms. XXXX further testified that if she had any concerns regarding the Student’s motor skills development, she would have referred her for an occupational therapy evaluation. T. 136.

Stay-put Issues

In this case, the Parent argues that the stay-put provisions of the law require that the Student must remain at [School 1] during the pendency of this matter. The Parent's argument misunderstands the law, and ignores the process by which the Student came to attend [School 3]. The Parent and the Mother lived together with their three children until they separated in approximately January 2012. Initially, the Mother moved to an apartment near the former marital home and the children continued to live with the Parent until late June or July of 2012, when they began to live primarily with the Mother. In or around late August 2012, the Mother moved to an apartment in the [School 3] district. As the children were then living with the Mother, she enrolled them, including the Student, in the appropriate home schools.

The relevant statute is found at 20 U.S.C. section 1415(j) (2010):

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

The implementing regulation is found at 34 C.F.R. section 300.518:

§ 300.518 Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

The central consideration in determining whether there has been a stay-put violation lies in determining the meaning of the phrase "current educational placement." Another consideration in this case is the right of each parent as to educational decision-making.

In *AW ex rel. Wilson v. Fairfax County School Bd.*, 372 F.3d 674 (4th Cir. 2004), a disabled student, by his parents, sued the local education agency, alleging that his mid-year disciplinary transfer to a different elementary school constituted a violation of the stay-put provisions of the IDEA that required an educational placement remain undisturbed for the duration of any proceedings related to a disciplinary decision. After a manifestation determination review concluded that the disabled student's conduct had not been a manifestation of his disability or the result of a failure to properly implement his IEP, a school administrator directed that the student be transferred to another Gifted & Talented (GT) program at a different elementary school for the remainder of the school year despite the fact that a due process review was still on-going. Noting that the IDEA did not expressly define the term, the Court stated that a resolution of the appeal in that case required a clearer understanding of the term "educational placement." The Court held:

Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that *the touchstone of the term "educational placement" is not the location to which the student is assigned but rather the environment in which educational services are provided.* To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of "mainstreaming" and affording access to a FAPE, the goal of protecting the student's "educational placement" served by the "stay-put" provision appears to be met. *Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.*

Id. at 682 (emphasis added). The Court held that the disciplinary transfer of the disabled student to an equivalent GT program at a different school before the due process requested review was completed was not a change in educational placement violating the IDEA's stay-put provision:

In light of our conclusion that "educational placement" fixes the overall instructional setting in which the student receives his education, rather than the precise location of that setting, we conclude that AW's transfer between such materially identical settings does not implicate the "stay-put" provision of § 1415(j). *See White*, 343 F.3d at

380. The parties do not dispute that the GT program at the nearby elementary school to which the FCSB transferred AW was materially identical in its educational offerings and that AW would be placed in an identical setting (a regular GT program classroom). Moreover, there is nothing in the record to suggest that the new location selected for AW by the FCSB would work such a change in the student's routine that the new location cannot fairly be described as an identical setting.

Id. at 683.

Similarly, in *A.K. ex rel. J.K. v. Alexandria City School Bd.*, 484 F.3d 672 (4th Cir. 2007), the Court held that the school district had failed to offer a FAPE as required in order to comply with the IDEA, when a disabled student's IEP, as proposed for the upcoming school year, did not identify a particular school at which it anticipated the student would be educated, but merely stated that an unspecified private day school would be appropriate. In a footnote to the opinion, the Court emphasized:

That is not to say that a change in the school where services were to be provided would constitute a change in placement. *Rather, a change in school constitutes a change in placement only if the change "result[ed] in a dilution of the quality of [the] student's education or a departure from the student's LRE-compliant setting."*

Id. at 681 n.10 (citing *AW*, 372 F.3d at 682).

In the present case, MCPS' expert witness testified that the Student is receiving special education services at [School 3] which are materially identical to those which she would receive if enrolled at [School 1]. The Parent did not offer any evidence to the contrary and does not appear to contest this proposition. Rather, the Parent simply misunderstands the import of the stay-put provisions of the law. As set forth above, stay-put does not refer to location at which services are provided, it refers to the provision of the services themselves. The Parent's claim of violation of the stay-put doctrine is without merit.

As of the date of the hearing, there were custody issues pending in circuit court between the Parent and the Mother, but there was no court order awarding custody to either party or

setting the custody as joint. Under section 5-203(d)(2) of the Family Law article of the Maryland Code, where there is no court-ordered award of custody, “[n]either parent is presumed to have any right of custody that is superior to the right of the other parent.” Therefore, the Mother has rights and obligations with respect to the education of the Student that are precisely equivalent to those of the Parent. As the Student was living with her, the Mother elected to enroll the Student in a school different from that preferred by the Parent.

The Parent further argued that the Mother did not move to her new apartment in the [School 3] area until August 31 or September 1, 2012. He also alleges that classes at MCPS began on August 26, 2012 and that, therefore, on the first day of school the Student’s “official residence” was still with him. T. at 83. Even assuming these facts to be true, they are not relevant. As set forth above, the Mother enrolled the Student at [School 3] because that was her home school (or would be so within days of the start of the school year). No court order or any other legal restriction prevented her from doing so. Indeed, it is logical and proper that a student should go to the home school based on her residence during the school year. Most significantly, MCPS was merely a bystander in the matter – it took no action to move the Student from one school to another; it simply accepted her enrollment in her home school based on the residence of the custodial parent.

To summarize, I find that the fact that MCPS, by allowing the Student to be enrolled at [School 3] by the Mother, did not violate the stay-put provisions of the law because there has been no change in educational placement. Further, even if there were a change in educational placement, it was not initiated by MCPS, but was solely the result of the Mother’s enrollment decision. The Parent clearly disagrees with the decision to enroll the Student at [School 3], but

his disagreement raises no stay-put issue and is properly understood to be with the Mother, not with MCPS.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Parent has failed to meet his burden of proof to establish that the speech-language services in the Student's 2012-2013 IEP is not reasonably calculated to provide a FAPE. 20 U.S.C. §1401(3) (Supp. 2012); 34 C.F.R. 300.8 and 34 C.F.R. 300.39(b)(3) (2012); COMAR 13A.05.01.03B; COMAR 28.02.01.12E; *Schaffer v. Weast*, 546 U.S. 49 (2005).

I further conclude, as a matter of law, that the Parent has failed to meet his burden of proof to establish that any testing or assessment, other than in the speech-language area, is necessary to provide the Student with a FAPE. 20 U.S.C. §1401(3) (Supp. 2012); 34 C.F.R. 300.8 and 34 C.F.R. 300.39(b)(3) (2012); COMAR 13A.05.01.03B; COMAR 28.02.01.12E; COMAR 13A.05.01.04A-B; *Schaffer v. Weast*, 546 U.S. 49 (2005).

I further conclude, as a matter of law, that the Parent has failed to meet his burden of proof to establish that MCPS failed to comply with the stay-put provisions of the law. 20 U.S.C. §1415(j); 34 C.F.R. 300.518; *AW ex rel. Wilson v. Fairfax County School Bd.*, 372 F.3d 674 (4th Cir. 2004); *Schaffer v. Weast*, 546 U.S. 49 (2005).

ORDER

I **ORDER** that Parent's Due Process Complaint is **DISMISSED**.

October 26, 2012
Date Decision Mailed

David Hofstetter
Administrative Law Judge

DH/rbs

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.