

XXXX XXXX

v.

MONTGOMERY COUNTY PUBLIC

SCHOOLS

* BEFORE KIMBERLY A. FARRELL,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH NO.: MSDE-MONT-OT-12-32722

* * * * *

DECISION

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

STATEMENT OF THE CASE

On August 16, 2012, XXXX¹ XXXX, M.D., (Parent), on behalf of his child, XXXX XXXX (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 Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on September 5, 2012. The Parent and the Student's mother, XXXX XXXX, participated. The Parent is an attorney who has been licensed to practice law in the past, but who no longer practices law.² Ms. XXXX, also an attorney, is not a party to the case, but was included as a participant in the prehearing conference, including helping to select the hearing date. Zvi Greismann, Esquire, represented MCPS. By agreement of the OAH, the parties and Ms. XXXX, the hearing was scheduled for September 21, 2012.

¹ Dr. XXXX sometimes uses his original given name of XXXX and sometimes uses XXXX. Both names appear in the exhibits for this case.

² Student exhibit #1, page 1.

The hearing proceeded as scheduled. The Parent represented the Student. Mr. Greismann represented MCPS. Ms. XXXX did not attend. The hearing was completed on September 21, 2012.

The due date of this decision is determined by the date of the waiver of the resolution conference, which is the triggering event described in the federal regulations. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2010). The parties agreed to waive a resolution conference in this matter on August 27, 2012. Forty-five days from that date is Thursday, October 11, 2012. Concerned that additional time might be necessary to fully research and write a decision, the parties requested an extension of time for thirty days from the hearing date for me to issue a decision. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2008). That date would have fallen on a weekend, so the extended date set for issuance of this decision was October 19, 2012, the Friday before that weekend. The extra time proved unnecessary and this decision is being issued within forty-five days of the waiver of the resolution conference.

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) (2009); 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.

ISSUES

1. Did MCPS fail to offer and provide a free appropriate public education (FAPE) to the Student in that it failed to identify him as a child with a disability, eligible for an individualized education program (IEP); and
2. Did MCPS fail to offer and provide FAPE to the Student based on an alleged failure to conduct a functional behavioral assessment³ or other related necessary evaluations and assessments of the Student?
3. Did MCPS fail to comply with applicable stay-put requirements under the facts of this case?

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Student:

- | | |
|------------|--|
| Student #1 | Curriculum vitae of the Parent, with attachments |
| Student #2 | Daily Success Charts for the Student, May 21 and May 31, 2012, and June 1, 2012 |
| Student #3 | Email from the Parent to Principal XXXX, May 14, 2012; email from Principal XXXX to the Parent, May 14, 2012; email from the Parent to various staff and administrators at [School 1] ([SCHOOL 1]); Change of School Assignment (COSA) Information Booklet 2012-2013 |
| Student #4 | There is no exhibit #4. Material originally intended to be Student #4 was submitted as part of another exhibit. |
| Student #5 | Correspondence from the Parent to the principal of [SCHOOL 1], undated |
| Student #6 | Copies of portions of MCPS enrollment forms |
| Student #7 | MCPS Board of Education document entitled, "GOAL 1: Ensure Success for Every Student" |

³ A functional behavioral assessment is defined in the Education Article as follows:

(d) *Functional behavior assessment.* -- "Functional behavior assessment" means the systematic process of:

(1) Describing problematic behavior exhibited in the educational setting, including identification of environmental and other factors and settings that contribute to or predict:

- (i) The occurrence or nonoccurrence of the behavior; and
- (ii) The maintenance of the behavior over time; and

(2) Using the information gathered to guide the development of an effective and efficient behavior intervention plan.

Student #8 Portions of various pleadings from XXXX v. XXXX, Montgomery County Circuit Court Case No. XXXX

I admitted the following exhibits on behalf of MCPS:

MCPS #1 "Prior School Experience" form, April 4, 2011
MCPS #2 Educational Management Team (EMT) invitation letter to the Parent and to "Mrs. XXXX," September 19, 2011
MCPS #3 Student Record Card, spring 2012
MCPS #4 Academic data summary for the Student, November 2011, January 2012, and end of school year 2012 summaries and reports, and Student work samples
MCPS #5 Behavior Charts for the Student, and a summary, undated
MCPS #6 EMT invitation letter to the Parent and "Mrs. XXXX," April 18, 2012
MCPS #7 [SCHOOL 1] kindergarten report card, June 12, 2012
MCPS #8 Early Childhood Observational Report Kindergarten Report Card – Mathematics, undated
MCPS #9 Report to Parents on Student Progress, January 23, 2012
MCPS #10 Resume of XXXX XXXX
MCPS #11 Resume of XXXX XXXX
MCPS #12 Resume of XXXX XXXX
MCPS #13 Not offered and not admitted⁴

B. Testimony

The Parent testified. He was accepted as an expert witness as a physician.

MCPS presented the following witnesses:

- XXXX XXXX, Assistant Principal at [SCHOOL 1], accepted as an expert in general education and school administration
- XXXX XXXX, Teacher, accepted as an expert in Elementary Education
- XXXX XXXX, Coordinator, XXXX Program, [SCHOOL 1], accepted as an expert in general education and administration

STIPULATION

The parties stipulated that the Student is an "above average" student.

FINDINGS OF FACT

⁴ In accordance with prehearing instructions, MCPS provided its exhibits in a tabbed and indexed notebook. The last exhibit was the resume of a witness not called to testify and the document was never offered.

I find the following facts by a preponderance of the evidence: The Student is a young boy born XXXX, 2006. He is highly intelligent.

1. Prior to fall 2011, the Student had a low level of energy. He suffered frequently from XXXX and other medical problems attributed by the Parent to nutritional issues. The Parent started the Student on a planned and controlled diet and the Student responded well, becoming far more energetic and shedding the XXXX and related medical problems.

2. In the fall of 2011, the Student was enrolled and registered for kindergarten at [SCHOOL 1], which was the Student's "home school," meaning that it was the public school to which he was assigned based on his residence.

3. The Student was five years old entering kindergarten and is a general education student not receiving any special education or related services.

4. In the fall of 2011, the Student resided with the Parent, Ms. XXXX, and two siblings. The Parent worked extensively with the Student before and after school, trying to shape his behavior and help him learn.

5. [SCHOOL 1] has a "Go for the Green" program that reflects a student's behavior using colors. Every student starts every day on green. If the child has difficulties, the day's color for that child may be changed to yellow. Certain unacceptable behaviors or repeated behaviors may result in the color for the day being changed to red.

6. In September 2011 there were approximately twenty school days. The Student experienced four yellow days and five red days. Three yellow day infractions were for hitting another person; one was for not following directions. Red day infractions included two days for kicking, and one each for throwing things, spitting, and hitting. Some days with color changes involved more than one type of undesirable behavior.

7. Some instances of bad behavior that were labeled "hitting" or "kicking" arose from situations where the Student, seated on the floor with others, would be extremely careless

in flailing around, in contrast to a situation where the Student was deliberately intending to hurt or annoy another person. Careless hitting or kicking would generally result in a color change to yellow, as opposed to deliberate striking, which usually resulted in a color change to red.

8. When compared with other kindergarten students at [SCHOOL 1], the Student's color record for September was typical. Testimony of XXXX.

9. On September 26, 2011, the Student was not listening to his teacher, not following directions, throwing items in the classroom, wandering around the classroom and not doing his assigned work. He was told that his color for the day would be changed from yellow to red. This upset the Student and he dropped his backpack on another student's head when the other student was kneeling or crouching on the floor. The Student received an "office referral" for this incident. He was sent to the school office, where he had to discuss his behavior with Acting Assistant Principal XXXX XXXX.

10. Mr. XXXX was in the position of Acting Assistant Principal while the usual Assistant Principal, Ms. XXXX, was on leave.

11. Each time the Student had a red or yellow day, a Student Reflection Form was prepared.

12. A Student Reflection Form lists the act that got the child in trouble, and calls for the child to decide if he or she needs to show more respect, cooperation, or integrity. The student then chooses what course of action to pursue in the future. Each form is signed by the student, by a member of [SCHOOL 1] staff, and then is sent home for signature by a parent or guardian.

13. The Student would sometimes claim he was not given the forms when they had been given to him and he also sometimes claimed to have lost forms.

14. Each student has a Go for the Green monthly calendar. Students color in the block for each day with red, green, or yellow as appropriate. The calendar goes home with the child so that parents or guardians may review it.

15. The Parent believed that the Student was coloring over red and yellow blocks with other colors to try to conceal the actual color he earned for difficult days. The Parent and the Student's teacher, Ms. XXXX, agreed that she would write "y" for "yellow" or "r" for "red" on the calendar if appropriate so that there would be no question of the Student changing or hiding the appropriate color.

16. In addition to the Student's behavior in the school building, he experienced problems on the school bus. From time to time the Student would spit on, kick, or hit other students while on the bus. The first documented incident occurred early in the school year. The Student's bus driver made a complaint to a safety monitor who in turn reported it to Mr. XXXX. Mr. XXXX spoke with the Student and with the Parent. He escorted the Student to the bus to demonstrate and emphasize appropriate behavior. All kindergarten students are supposed to be seated at the front of the bus, but in reality that does not always happen.

17. The Parent was alarmed and dismayed by the Student's misbehavior. On or before September 19, 2011, he requested an IEP meeting with [SCHOOL 1] staff. Prior to the request for a meeting, the Student had two yellow and two red days.

18. A student who has an Individualized Education Plan (IEP) may have an IEP meeting. For those who do not have an IEP, MCPS uses the term Educational Management Team (EMT) meetings instead of IEP meetings.

19. At the Parent's request, an EMT meeting was scheduled and held on Thursday, October 6, 2011. The meeting was attended by at least the following people: Principal XXXX, Acting Assistant Principal XXXX, a counselor, a special education resource teacher, a reading teacher, the Student's teacher – Ms. XXXX, and the Parent.

20. The Parent wanted comprehensive testing of the Student, but it was the consensus of the EMT that such evaluations were not called for at such an early point in the Student's transition to kindergarten. Those in attendance at the EMT meeting decided to try to reduce the Student's unacceptable behavior by developing some monitoring system that would reward him for good behavior. Although the Parent wanted an IEP for the Student immediately, he agreed to wait and see what happened.

21. The Student's teacher, Ms. XXXX, first tried a program that was posted on a wipe board in the classroom. This was unsuccessful so she designed a program called "Keeping on Track" for the Student. This intervention began on October 17, 2011.

22. During the month of October 2011, the Student had four yellow days and five red days. The yellow days included infractions for playing after multiple warnings, two instances of throwing items, and one episode of squirting milk on another student. The red day infractions included running, two instances of hitting, one instance of not following directions, and one day for which the reason for the color change was not documented.

23. In November 2011, the Student had one yellow day for crawling around on the floor, and one red day for punching another student in the face on November 17, 2011. The punching incident resulted in an office referral.

24. Around this time the Student had another incident on the school bus. This time he was sticking his foot and leg into the aisle trying to trip one or more other students. The Student had to go speak with Ms. XXXX, the Assistant Principal. The Student readily admitted to his misbehavior. He and Ms. XXXX worked on a plan that called for the Student to sit in the very front seat of the bus on the passenger side in the window seat. This eliminated much of the ability of the Student to try to trip others. The bus driver was included in the plan. He was to help ensure that the Student sat where he was supposed to and he had stickers to give the Student to reward him for days with good behavior. The Student liked receiving the stickers. He and

Ms. XXXX developed a very good rapport. As a consequence, the Student came to enjoy going to the school office to speak with Ms. XXXX and would ask to be allowed to do so.

25. Ms. XXXX personally checked with the bus driver at least three times after the sticker program was initiated. The bus driver never reported any additional problems with the Student, although there was at least one day and possibly more when he did not receive a star.

26. Back in the classroom, the Student's behavior was improving, but he was not earning rewards as contemplated by the Keeping on Track plan. Ms. XXXX decided to start a new intervention with the Student beginning November 21, 2011. This system involved Ms. XXXX creating a paper which the Student was able to take home each night to share with his parents. The paper was referred to as a "success chart."

27. In December 2011, the Student had one yellow day, for failing to pay attention and stay on task, and one red day for biting. The Student began earning rewards for his improved behavior, including extra computer time to engage in learning activities.

28. In January 2012, the Student had no red days, and only one yellow day. The yellow day infraction was failing to follow directions.

29. The Student's January 23, 2012 end of semester report noted strengths in attendance, explanation of answers, thinking skills and word choices. Areas marked as needing improvement included completing assignments in the time given, paying attention during instruction, taking care of his materials, and handwriting. Ms. XXXX indicated that the Student had demonstrated qualities of being an inquirer, a communicator, and a principled, open-minded, caring individual.

30. In February 2012, the Student had all green days.

31. Beginning February 5, 2012, the Student and Ms. XXXX agreed that the daily success chart papers were no longer necessary and discontinued them.

32. In March 2012, the Student had no red days and one yellow day. The yellow day infraction was for flinging one of his shoes in the school hallway.

33. In April 2012, the Student had no yellow days and one red day. The red day infraction was for drawing on a table.

34. In May, the Student had no yellow days, but experienced three days of color change to red. The red days were May 3, 7, and 9, 2012, and the infractions were not remaining on task, running around and scratching a student,⁵ and screaming and yelling. On May 10, 2012, Ms. XXXX and the Student decided to reinstate the success chart program.

35. At about the same time, the Parent again requested an IEP meeting. In accordance with MCPS policy, an EMT meeting was convened on May 17, 2012. The Parent continued to believe that the Student should be evaluated due to the behavior issues.

36. The Parent was not dissatisfied with the level of effort made by the [SCHOOL 1] staff and administration, but in his opinion they were looking at what was wrong without digging to find out why it was occurring, and the Parent wanted a formal written document so that when things fell through the cracks it would be possible to tell who was responsible.

37. Problem behavior was occurring at home throughout the academic year, as well as at school. The Student would break things or hit or kick a sibling. The Parent believes that the Student's behavior is "extraordinarily abnormal" and well outside acceptable boundaries.

Testimony of Parent.

38. The EMT again disagreed with the Parent's opinion that professional testing was needed. Examining the improvement in the Student's behavior and his academic progress, the EMT declined to order testing or evaluation. They did agree to certain interventions to continue into the fall of 2012 when the Student was expected to attend first grade at [SCHOOL 1]. The

⁵ It is not entirely clear, but appears that the scratching of a peer may have occurred while the Student was "sword fighting" with a pencil.

Parent did not like that the plan was informal, as opposed to being an IEP, but he was not unhappy with the components included for the next school year, except that it did not include formal testing.

39. After reinstating the success chart program, the Student had all green days for the remainder of May and until school let out around June 13, 2012.

40. The Student knew all twenty-six letters of the alphabet in both upper and lower case prior to starting kindergarten. By November 2011, he knew the sound of all of the letters. The Student learned all expected kindergarten words by March 2012 and was working on learning first grade words. The Student finished the school year reading above grade level. In math, the Student was on grade level all year. Starting in the second quarter, he was doing math extensions, which means he was doing additional work beyond the basic curriculum. Extensions could be additional kindergarten work or could include first grade math concepts. In the third and fourth quarters he continued on grade level math study with extensions and XXXX Math, which is a computer program used to challenge students who are able to complete math exercises beyond the extension work. The Student finished the year on grade level in handwriting and writing.

41. The Student's end-of-year report card reflects that the Student was "proficient" in all but two of the areas reviewed. He received "I" signifying "in progress" for "monitors his own behavior," and "sustains attention to a task over a period of time." He did not receive any "N" ratings, which represents a behavior or skill that a student is unable to demonstrate.

42. Early in 2012, Ms. XXXX moved out of the family residence. She initially moved to an apartment nearby in the [SCHOOL 1] area.

43. The Student stayed with his mother overnight on occasion between the time she left the family home and July 2012. In July 2012 the Parent had to travel on business. The Student stayed with his mother while the Parent was away.

44. When the Parent returned from his business trip, the Student continued to stay with Ms. XXXX. The Parent has not consented to this arrangement.

45. At some point Ms. XXXX filed court proceedings against the Parent seeking child support and raising other issues.

46. As of the date of the hearing, there is no court order governing the custody of the children.

47. Ms. XXXX secured a new home farther away from the home of the Parent. This new home has a different home school – [School 2] ([SCHOOL 2]).

48. Ms. XXXX enrolled the Student in [SCHOOL 2]. She did not advise the Parent of her intentions or her actions. He was taken by surprise to learn that the Student was enrolled in [SCHOOL 2].

49. Ms. XXXX brought the Student to [SCHOOL 1] so that he could say goodbye to Ms. XXXX.

50. The Student is currently attending [SCHOOL 2] in the first grade.

51. Both of the Student's siblings are students with a disability. The Parent has had extensive contact with MCPS in the special education context because of this.

52. The Parent is licensed to practice medicine in the State of Maryland. He has a juris doctor in law and is admitted to practice in one or more federal court(s). He earned the equivalent of a Master of Science degree in Physics from the [University]. He also has a Ph.D. in Psychology, a Masters of Science in Statistics and Mathematics and a Master of the Arts in Psychology.

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.

MCPS moved for judgment at the close of the Student's case, on the ground that the Student failed to meet his burden of proof. The burden of proof lies with the Student because he is challenging MCPS' determination that he should not be formally evaluated and is not eligible for special education and related services. *Schaffer v. Weast*, 546 U.S. 49 (2005). I declined to render judgment until the close of all evidence. COMAR 28.02.01.12E(2)(b). Pursuant to COMAR 29.02.01.12E(3), "[a] party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion." MCPS elected to present evidence by way of calling witnesses and offering exhibits. Accordingly, I will address the case on its merits.

Merits

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 [FAPE] 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).

Threshold issues in this case are whether the Student is a child with a disability, and, if so, whether he is in need of special education. To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in 20 U.S.C. section 1401(3) (2010 & Supp. 2012) and the applicable regulations. The statute provides as follows:

(a) In General

The term “child with a disability” means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance...orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(b) Child aged 3 through 9

The term “child with a disability” for a child aged 3 thorough 9...may, at the discretion of the State and the local educational agency include a child –

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

See also Md. Code Ann., Educ. § 8-401(a)(2) (Supp. 2012); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

MCPS has never suspected the Student to be a child with a disability. The Parent suspects that the child has a disability. Any parent is able to make a referral or, in other words,

to request an assessment to determine whether a child has a disability. In Maryland, the governing regulation is COMAR 13A.05.01.04:

.04 Referral.

A. Referral to a Public Agency.

(1) A student with a suspected disability who may need special education shall be referred, in writing, to a public agency.

(2) An initial referral may be initiated by:

(a) The student's parent; or

(b) A representative of a public agency.

(3) A public agency shall promptly request parental consent to assess a student to determine if the student needs special education and related services:

(a) When, prior to a referral, the student has not made adequate progress after an appropriate period of time when provided instruction, as described in §B(1) of this regulation; and

(b) Whenever a student is referred for an evaluation.

(4) A public agency shall adhere to the time frames described in Regulation .06A of this chapter, unless the student's parent and the IEP team extend the time frame by mutual written agreement.

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 case, the Parent requested an IEP meeting very early in the school year – less than a month after school started. There is no evidence that the referral was in writing. Nevertheless, MCP promptly scheduled an EMT meeting. The team discussed the Student’s behavior. Very little time had passed in the school year. COMAR 13A.05.01.04A(3)(a) recognizes that a consideration in a referral should be whether a student has failed to make adequate progress after an appropriate period of being provided instruction. MCPS staff did not consider the Student’s behavior to be as problematic as the Parent did. Both his kindergarten teacher and [SCHOOL 1]’s assistant principal characterized the Student’s behavior as “typical” or “average.” The Parent, on the other hand, believes that a single office referral for any reason should be sufficient to trigger an evaluation of a student. MCPS wanted to try strategies to help the Student conform to his new environment’s expectations.

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 any or all tests or evaluations requested by a Parent. There are provisions in the regulations for determining whether there is a need for an assessment, as cited above. MCPS’ position was that, given the short time that the Student had been in school and the information available from school personnel and the Parent, no further data was needed at the time and that the approach should be to try to find a strategy that would assist the Student in adjusting to kindergarten.

The Parent testified that he was promised at this meeting that MCPS would have a behavioral expert of some type evaluate his child. I do not believe that MCPS made that promise at the October 6, 2011 EMT meeting. It is not clear whether the Parent requested a functional behavioral assessment (FBA) of the Student at this meeting or whether his request was couched in more general terms. The Parent emphasized during his testimony that he was not so interested

in the labels attached to the testing that he felt should be conducted. He just wanted to get to the bottom of the reason for the Student's bad behavior, which he believes is disability-related.

MCPS was obliged to notify the Parent in writing that it did not suspect the Student of being a child with a disability. COMAR 13A.05.01.04B(2)(b), 13A.05.01.12. There is no evidence that it did so.

In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 173, 102 S.Ct. 3034 (1982), the Supreme Court made clear that the question of whether a student is receiving FAPE has a procedural and a substantive component. When a procedural violation occurs, further inquiry is necessary:

(E) Decision of hearing officer.

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

- (I)** impeded the child's right to a free appropriate public education;
- (II)** significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III)** caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(i) and (ii).

There is no evidence that MCPS' failure to provide written notice to the Parent after the October 2011 EMT meeting impeded the Student's right to FAPE or significantly impeded the Parent's right to participate in decision-making about the Student. Additionally there is no evidence that the procedural error caused a deprivation of educational benefit.

In the months following the October 2011 EMT meeting, Ms. XXXX worked on finding a strategy to encourage the Student to conform his behavior to MCPS' expectations. Her first two approaches did not succeed as hoped. Although the Student's behavior improved, he was not earning rewards as contemplated by the plan. The intervention was modified to a "success chart." This worked for the Student. His behavior continued to improve and he began to enjoy the rewards of extra computer time or other approved activities. The improvement in the Student's behavior was two-fold. There were fewer incidents of any type of misbehavior but also the incidents that did occur tended to involve less physical hitting or kicking by the Student.

The Student made progress with his behavior. He also made progress academically. The Parent agreed with MCPS that the Student is above average in his academic performance. In May 2012, the Student had several red days close together. Around that same time the Parent again requested an IEP meeting. To facilitate discussion, he sent detailed correspondence requesting both "an IEP and a § 504 plan, including a Behavioral Intervention Plan." Student #3, page 2 of 5.

MCPS again convened an EMT meeting. They reviewed the documentation regarding the Student's progress. MCPS continued to be of the opinion that no evaluations needed to be conducted, and that it was not going to arrange for professional testing. The Parent and MCPS did agree on some interventions to be continued in the fall. As mentioned above, the Parent was not unhappy with the components put together at the EMT meeting, but he wanted a formalized IEP or 504 plan. He intended to file a Due Process Complaint after the meeting, but did not do so immediately for various reasons, including his belief that school personnel would likely be unavailable during the summer, and his own personal and business plans.

There is no evidence in the record to show that MCPS notified the Parent in writing that it did not suspect the Student of being a student with a disability, but even if there was such a procedural error, there were no negative consequences. The Student was not deprived of any

educational benefit, and the Parent filed a Due Process complaint, so his ability to participate in the process or exercise his right to appeal was not adversely impacted.

The Parent expressed his concern that the Student is a “bomb” waiting to “explode.” He thinks it is possible that in a sufficiently stressful situation the Student could harm himself or others. The Parent advised that the Student was unusually small in his very early years – short and so slim that he fell below the 0% on the standard children’s growth chart. The Student experienced medical problems and issues with nutrition. The Parent reported that the Student had speech and language delays. The Parent opined that the Student’s genetic history, coupled with the environmental factors he has experienced, in addition to the behavior he has exhibited, serve as markers or predictors that point to a disability.

The Parent characterized the Student prior to the fall of 2011 as low energy. The Parent credits changes in the Student’s nutritional intake to eliminating some of the Student’s ongoing medical issues and to providing the Student with more energy. The Parent has worked with the Student on reading and writing and has provided a home setting rich in opportunities for the Student to engage in learning activities that he finds fun – particularly those involving electronic games selected by the Parent for their educational value. However, the Parent noticed behavior problems that arose as the Student became more and more energetic.

The Parent also believes that the Student is clever in concealing his bad behavior. As examples he explained that the Student tried to color over red or yellow squares on his Go for the Green calendar. The Parent also described an incident where the Student was reported to have misbehaved on the bus. The Parent asked many questions designed to find out what happened, asking for example, did you hit the other student, did you kick the other student, did you strike the other student, did you make contact with the other student, did you spit on the other student, etc. The Student answered “no” to all the questions until the Parent thought to ask if the Student had touched anything the other student was touching. The Student then advised that the other

student was holding candy in his hand. The Student kicked the candy out of the peer's hand without making contact with the peer himself. The Parent reported that the Student will also answer that he cannot remember to try to avoid discussing incidents that he does not want to review.

The Parent testified that the Student intentionally uses his intelligence to create "havoc." In instances of spitting, for example, the Parent is persuaded that the Student has become better at engaging in the behavior without getting caught, rather than that the Student has reduced his incidents of spitting. The Parent also emphasized that the Student is able to engage in patient long-term planning of misbehavior over several days to reach a goal. As an example, the Parent related that the Student took some Tylenol pills because he believed they would taste good. The Student cached them and moved them over several days to a location where he felt he would not be caught eating them. The Parent is concerned by this level of planning and concealment of mischievous activities.

The Parent is concerned that when the Student is asked why he does these things, his response is often that his brain told him to do it. The Parent believes that the Student has no understanding of the wrongfulness of his conduct and that the Student believes that simply saying he is sorry wipes out his wrongdoing. The Parent explained his theory that if the Student does not do "small doses" of wrongful things along the way, then the Student will end up doing something wrong that will be much bigger in scope.

The Parent agrees that the Student's behavior has improved, but he believes that the Student still misbehaves too much. He compares the Student's behavior against the Student's siblings, against his memories of his own days in school in [Country], and against XXXX children today. The Parent has taken his children to [Country] during summers and sometimes enrolls them in activities there. He has had to pay extra for the Student to participate because of

the Student's behavior. The Parent firmly believes that the Student's behavior is not normal and that MCPS should not consider it to be normal.

The Parent stated that he fields frequent complaints from other parents and from the bus driver about the Student's behavior. He initially stated that that this occurred every day, but in later testimony said that it happened nearly every week. The Parent indicated that he had imposed upon the bus driver, urging him not to report any misbehavior by the Student so that the Student would not face suspension or expulsion.

The Parent apparently was of the impression that all of the Student's trips to the school office, which were numerous, were because he was "sent" there due to bad behavior. He believed the interaction was unsuccessful in correcting the Student's behavior because the Student thought of going to the office in terms of going to see his friend, Ms. XXXX. The Student told the Parent they had nice chats, but he could not recall any particular content. The evidence showed that the Student was not being "sent" to the office, but was going out of his way to interact with Ms. XXXX because he liked her so much. He would ask to be allowed to go see her as a reward so that he could show off his green days and other charts and stars indicative of success. The encounters did not have an agenda and that probably accounts for the Student describing them as nice chats about nothing in particular. The warmth of the relationship between Ms. XXXX and the Student is further evidenced by Ms. XXXX bringing the Student to [SCHOOL 1] to say goodbye to her.

The Parent is dissatisfied with MCPS in general due to his experiences with his other children, his other son in particular. According to the Parent, MCPS also rejected his request for evaluation of that student to see if he was a child with a disability. After costly private testing the child was diagnosed with a disability but, according to the Parent, MCPS would not accept the private testing and demanded more and more and more evaluations and information, taking far too long to be satisfied that that child was, indeed, a child with a disability. Nothing about

the other son is before me and MCPS appropriately did not respond to any of the testimony about the other child, so I have no idea what its side of the story might be, but I mention it here because the Parent is so thoroughly dissatisfied with MCPS on every level. He believes that as a whole MCPS deliberately fails to test children for disabilities so that it will not have to pay for special education and he believes that the school district turns its back on any suggestions or attempts aimed at evaluating its successes and failures, again, so that it can save money by not investing in special education. The Parent believes that MCPS should do comprehensive evaluations on demand because he asserts that doing so would be less costly than the litigation expenses incurred in fighting a request for evaluation.

The Parent repeatedly asserted that one office referral or even one phone call from the school to discuss a behavior problem proved that the Student's behavior was interfering with his schooling and education or, to put it in other terms, caused a deprivation of educational benefits. The Parent also asserted that MCPS admitted that there was a behavior problem because it scheduled meetings.

MCPS was obliged to convene the meetings when it was asked to do so by the Parent. Scheduling a requested EMT meeting does not act as an admission that a child has a particular problem, that the problem rises to the level of a disability, or that the problem negatively impacts the child's ability to access the school curriculum such that special education is required as a result.

For its part, MCPS stated in its opening statement and provided evidence from three witnesses that it does not consider the Student's behavior to be alarming. It was variously characterized as "average," "pretty typical," and that of an "excitable kindergartener." Kindergarteners are not used to school routine and expectations. In the opinion of the Assistant Principal, the Student's behavior was not unusual or severe. She offered the observation that the

Student would not have been on her radar except for the one bus incident after she came back from leave and the Parent's intervention and insistence that the Student was a problem.

The Student's teacher, Ms. XXXX echoed the comments of Ms. XXXX. She summarized the Student's kindergarten year as "very successful." She described the Student as bright and inquisitive and able to do a lot of work, particularly math, in his head. She reiterated that the Student's red and yellow days and the difficulties associated with them were "no more than average" for a kindergarten student. Ms. XXXX's testimony made clear that some instances of bad behavior that were labeled "hitting" or "kicking" arose from situations where the Student, seated on the floor with others, would be careless in flailing around, in contrast to a situation where the Student was deliberately intending to hurt or annoy another person. Ms. XXXX reported progress and improvement in interaction with peers, in general classroom behavior, and at recess. She believed that the Student was ready for first grade both academically and behaviorally.

The Parent has failed to meet his burden of proving that the child is a student with a disability, or that MCPS has inappropriately failed to assess or evaluate the Student to determine if he is a child with a disability. The Student was new to kindergarten and all that it entails. He, like many many other kindergarten students, required daily warnings, reminders, instructions, and admonishments about what was expected and required. In addition to being in a new environment, he was experiencing a level of energy he had not experienced before and a simultaneous reduction in XXXX and other medical problems. Also, though neither party mentioned it as a factor in the Student's behavior, I would have expected that the change in family life with the Student's mother moving out of the family home might have impacted the Student. He was able, however, to settle down and demonstrate vast improvement in his behavior both reducing the number of incidents and learning more and more to keep his hands and feet to himself. He also met or exceeded all academic expectations.

I have concluded that the Parent has failed to demonstrate that the Student is a child with a disability, but even if I were persuaded that the Student had a disability, there is no evidence to show that the Student needs to receive, by reason of a disability, special education and related services. In the context of special education, the definition of a child with a disability has two components – one, that the child has a recognized disability, and two, that the child requires special education and related services as a consequence of the disability. The evidence does not support such a conclusion in this case. I further find that MCPS was not incorrect in relying on the information at its disposal to determine that additional testing was not required. Accordingly, MCPS did not fail to provide FAPE to the Student by failing to identify him as a student with a disability or by failing to provide him with an IEP.

Time may prove Dr. XXXX right in his belief that the Student has a disability. He has insight into the Student’s medical history and how that fits into the family medical history. As the Student’s father and a physician, he has a perspective that MCPS does not share. On the evidence presented, however, I find no basis for ordering MCPS to conduct professional evaluations or a FBA at this time. Even if the Student has a disability, he would not qualify for an IEP unless, by reason of his disability, he requires special education and related services. There is simply no evidence of this prong of the definition of “a child with a disability” being fulfilled at this time.

Finally, the Parent also alleges that MCPS’ acquiescence in Ms. XXXX’s enrollment of the Student in [SCHOOL 2] constitutes a violation of the so-called “stay-put” provision governing special education cases. The governing statute is found at 20 U.S.C. section 1415(j):

(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.

20 U.S.C.A. § 1415(j) (2010).

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.

One consideration is determining whether there has been a stay-put violation lies in deciphering the meaning of the phrase “current educational placement.” Another consideration in this case is the relative positions of the Parent and Ms. XXXX as decision-makers for the Student.

As support for his position that the Student must remain at [SCHOOL 1] pending the outcome of this proceeding and any appeals that flow from it, the Parent cited language from *George A. v. Wallingford Swarthmore School District*, 655 F. Supp. 2d 546, 549 (E.D. Pa., 2009):

The stay-put provision operates as an automatic injunction and prevents schools from unilaterally altering a student's educational placement and thereby excluding disabled students from school. *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 (3d Cir. 1996); *Honig v. Doe*, 484 U.S. 305, 323, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). The language of the stay-put provision clearly demonstrates Congress' intent that "all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 190 (3d Cir. 2005) (quoting *Drinker*, 78 F.3d at 865).

When examined, neither the cited language nor the case as a whole supports the Parent's position. First, it begs the question of what constitutes a student's educational placement. Noting that when no IEP has been in effect, “the stay-put placement is that under which the child is actually receiving instruction at the time the dispute arises,” the court goes on clarify that:

...the stay-put provision is not construed so narrowly as to mandate the student remain in the exact physical location where he or she was schooled at the time the

dispute arose. See Michael C. v. Radnor Twp. Sch. Dist., Civ. A. No. 98-4690, 1999 U.S. Dist. LEXIS 1352, 1999 WL 89675, at n.10 (E.D. Pa. Feb. 4, 1999) ("The term 'placement,' however is not synonymous with 'place' . . ."); see also A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 680 (4th Cir. 2007) (holding that stay-put provision refers to overall educational environment, not precise location where student is educated)[.]

George A., 655 F. Supp. 2d at 550.

The *George A.* Court also noted a decision cited by MCPS on this issue - A. W. v. Fairfax County Sch. Bd., 372 F.3d 674, 681 (4th Cir. 2004) . In *A.W.* the United States Court of Appeals for the Fourth Circuit interpreted educational placement as follows:

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. 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).

MCPS argued that the Student was going to go into first grade in the general education curriculum at [SCHOOL 1] and had instead gone into first grade in the general education curriculum at [SCHOOL 2]. There was no evidence of any differences in the curriculum. The idea that the Student's special education and related services as outlined in his IEP had to be preserved in the move from [SCHOOL 1] to [SCHOOL 2] is not a factor under the facts of this case, because at this juncture there is no IEP and the Student is not receiving special education services. The Student's educational placement is not changed by his being at [SCHOOL 2] instead of [SCHOOL 1].

The second problem with the Parent's reliance on *George A.* is found in this case's factual distinction. The Parent quoted the following: "stay-put...prevents schools from unilaterally altering a student's educational placement." *George A.*, 655 F. Supp. 2d at 550. In this case, MCPS did not "unilaterally" change the Student's assigned school. Ms. XXXX did.

The Parent cited the Family Law Article as it relates to the powers and duties of parents:

§ 5-203. Natural guardianship; powers and duties of parents; support obligations of grandparents; award of custody to parent.

(a) *Natural guardianship.* -- (1) The parents are the joint natural guardians of their minor child.

- (2) A parent is the sole natural guardian of the minor child if the other parent:
- (i) dies;
 - (ii) abandons the family; or
 - (iii) is incapable of acting as a parent.

(b) *Powers and duties of parents.* -- The parents of a minor child, as defined in Article 1, § 24 of the Code:

- (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and
- (2) have the same powers and duties in relation to the child.

....

(d) *Award of custody to parent.* --

- (1) If the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents.
- (2) Neither parent is presumed to have any right to custody that is superior to the right of the other parent.

Md. Code Ann., Fam. Law §5-203.

As of the date of the hearing, there were custody and support issues pending in circuit court between the Parent and Ms. XXXX, but there was no court order awarding custody to either party or setting the custody as joint. Therefore, Ms. XXXX has rights and obligations with respect to the education of the Student that are exactly matched to those of the Parent. She elected to enroll the Student in a school different from that preferred by the Parent. The Parent asserted that he had had substantially all of the contact with MCPS regarding the Student's education and that he had negotiated with MCPS. He had researched and filed the Due Process

complaint. He stopped short of actually saying what he implied, which is that he should have superior rights with respect to decision-making about the Student's education. But in terms of reliance on *George A.*, the problem for the Parent is that in this case MCPS did nothing to unilaterally move the Student and did not assist or encourage Ms. XXXX to change the Student's school. It merely enrolled the Student in a new home school as requested by a person who had full legal authority to make the change.

The Parent also argued that the domicile of the Student was relevant to the stay-put analysis. He cited a portion of Family Law section 5-204 which states that if the parents of a minor child live together and the child lives with them, then the domicile of the child is the same as that of the parents. Md. Code. Ann., Fam. Law § 5-204 (2006). While true, this was only applicable until January 2012. After that, the parents of the Student were no longer living together. In that case, Family Law section 5-204(b) sets a child's domicile as follows:

- (b) *Domicile of minor child if parents live apart.* -- If the parents of a minor child live apart, the domicile of the child is the same as that of:
- (1) the parent to whom custody is awarded; or
 - (2) if custody has not been awarded, the parent with whom the child lives.

The facts support a finding that the Student has been living with Ms. XXXX since July 2012; however, the Parent disputes this and suggests that while the Student has been sleeping at Ms. XXXX's house since that time, he is not "living" there. Regardless, it is not clear how domicile figures into the stay-put analysis, and, if it were relevant, then it would be the domicile provision found in the Education Article that would control in this case, not the one found in the Family Law Article. The Education Article specifies that the domicile of a child with a disability is "the county in which the parent or guardian who has legal custody of the child is domiciled." Md. Code Ann., Educ. § 8-401(b) (Supp. 2012). In this case, both parents are domiciled in Montgomery County, so that is the domicile of the Student, as opposed to the "domicile" being a

concept that would refer to a specific address of the geographic area assigned to a particular home school like [SCHOOL 1] or [SCHOOL 2].

In further support of his theory that stay-put has been violated by the Student being enrolled at [SCHOOL 2], the Parent cites *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22 (D.D.C. 2004) and *Laster v. District of Columbia*, 394 F. Supp. 2d 60 (D.D.C. 2004). While both cases contain discussions of stay-put, neither case bears any factual resemblance to this case and both decisions recognize the basic principle that “educational placement” is a concept that encompasses more than just a location, looking at the special education and related services that are being provided to a student when a dispute arises. Neither case advances the Parent’s position.

To summarize, I find that the enrollment of the Student at [SCHOOL 2] by Ms. XXXX, and MCPS permitting the Student to attend that school is not a violation of stay-put because there has been no change in educational placement. Further, even if there were a change in educational placement, it was not unilateral on the part of MCPS, but was solely the result of Ms. XXXX’s request, a request she is completely within her legal rights to make.

CONCLUSIONS OF LAW

I conclude as a matter of law that:

1. MCPS did not fail to offer and provide FAPE to the Student. It did not fail to identify him as a child with a disability, eligible for an individualized education program (IEP). 20 U.S.C.A. § 1400(d)(1)(A) (2010); Md. Code Ann., Educ. § 8-403 (2008); COMAR 13A.05.01.04.
2. MCPS did not fail to offer and provide a FAPE to the Student because it declined to conduct a functional behavioral assessment or other related necessary evaluations and assessments of the Student. COMAR 13A.05.01.04.

3. MCPS did not fail to comply with applicable stay-put requirements under the facts of this case. 20 U.S.C. § 1415(j); *George A. v. Wallingford Swarthmore School District*, 655 F. Supp. 2d 546, 549 (E.D. Pa., 2009); *A. W. v. Fairfax County Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004) ; Md. Code Ann., Fam. Law §5-203.

ORDER

I **ORDER** that the Student’s Due Process complaint is Denied and Dismissed.

October 3, 2012
Date Decision Mailed

Kimberly A. Farrell
Administrative Law Judge

KAF/kkc

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.

