

XXXX XXXX,	*	BEFORE LORRAINE EBERT FRASER,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
V.	*	OF THE MARYLAND OFFICE
PRINCE GEORGE'S COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH No: MSDE-PGEO-OT-12-32444
* * * * *	*	

DECISION

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STATEMENT OF THE CASE

On August 14, 2012, XXXX and XXXX XXXX (Parents), on behalf of their child, 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 Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On September 7, 2012, counsel for the Parents notified the OAH that a resolution conference was held on August 27, 2012 that did not resolve the case. On September 11, 2012, the OAH scheduled a telephone prehearing conference for September 20, 2012 after conferring with the parties regarding their availability.

I held the telephone prehearing conference on September 20, 2012. The Parents were represented by Mark B. Martin, Esquire. Jeffrey A. Krew, Esquire, represented PGCPS. During the prehearing conference, counsel for the Parents stated that he intended to file a motion to shift

the burden of production and a motion for partial summary decision. By agreement of the parties, motions were due on September 27, 2012, responses to the motions were due on October 11, 2012, and my ruling was due on October 26, 2012. I issued my ruling on October 18, 2012. Also by agreement of the parties, based on the availability of witnesses and counsel, the hearing was scheduled for October 31, November 1, 7, 8, 9, and 14, 2012. During the prehearing conference, the parties waived the forty-five day timeframe for the decision due date and agreed my decision would be due thirty days from the close of the record.

I held the hearing on the scheduled dates. Mr. Martin represented the Parents and Mr. Krew represented PGCPs. At the close of the hearing on November 14, 2012, Mr. Martin requested that the record remain open until November 20, 2012 in order for him to submit a list of authorities to supplement his closing argument. The record closed on November 20, 2012.

The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2010). The parties agreed to an extension of time until thirty days after the record closed, December 20, 2012, for me to issue a decision. 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) (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; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUE

The issues is whether the Student was provided with a free, appropriate public education during the 2010-2011, 2011-2012, and 2012-2013 school years.

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Parents:¹

- Parents 5 Hyperactivity, Attention, and Learning Problems Clinic Evaluation, XXXXX Medical Center, 12/18/07
- Parents 9 Psychiatric Evaluation, XXXXX XXXX, M.D., 6/1/08
- Parents 12 Letter to the Student's mother from XXXXX XXXX, Coordinating Supervisor, Office of Charter and Contract School Development, 5/3/10
- Parents 13 IEP, 5/17/10
- Parents 15 Student Performance Report, [School 1], 5/24/10
- Parents 16 Report Card, [School 2] ([School 2]), 1st quarter 2011
- Parents 17 Maryland Student Withdrawal/Transfer Record, 10/8/10
- Parents 18 Draft IEP, 5/17/10
- Parents 19 Email to the Student's mother from XXXX XXXX, 12/9/10
- Parents 20 MSA 2010 Student Results
- Parents 22 Draft IEP, 3/29/11
- Parents 23 Progress Report on IEP Goals, [School 3] ([School 3]), 4/8/11
- Parents 24 Progress Report, [School 3], 5/6/11
- Parents 25 Email from XXXX XXXX, PGCPs, 6/3/11

¹ The Parents premarked their exhibits. Only those exhibits admitted into evidence are listed in this decision.

- Parents 26 Letter to XXXX XXXX, Principal, [School 3], from the Student's mother, 6/14/11
- Parents 27 Progress Report on IEP Goals, [School 3], 6/17/11
- Parents 28 Report Card, [School 3], 6/22/11
- Parents 29 Letter to the Parents from XXXX XXXX, Chief, Complaint Investigation and Due Process Branch, Division of Special Education/Early Intervention Services, MSDE, 6/23/11
- Parents 30 PGCPS Psychological Report, 6/30/11
- Parents 31 PGCPS Assessment Report, 7/12/11
- Parents 32 Letter to the Parents from XXXX XXXX, Ed.D., Assistant State Superintendent, Division of Special Education/Early Intervention Services, MSDE, 7/28/11
- Parents 33 Parents' Commitment, [School 4] ([School 4]), 8/3/11
- Parents 34 IEP, 8/9/11
- Parents 36 Maryland Student Withdrawal/Transfer Record, 8/22/11
- Parents 38 Letter to the Parents from XXXX XXXX, School Counselor, [School 4], 11/28/11
- Parents 39 Maryland School Assessment Home Report, Spring 2011 Reading and Math Results
- Parents 41 Email to the Student's mother from XXXX XXXX, 6th & 7th grade Science teacher, 1/9/12; Measures of Academic Progress (MAP) scores, January 2012
- Parents 42 Inschool Tutoring Acceleration Program Progress Report, [School 4], 1/9/12
- Parents 43 Letter to the Parents from XXXX XXXX, Principal, [School 4], 1/17/12
- Parents 44 Report Card, [School 4], 1/30/12
- Parents 45 Notice of IEP Team Meeting, 2/4/12
- Parents 47 Letter to XXXX XXXX, Principal, [School 4], from Mr. Martin, 2/29/12
- Parents 48 Letter to XXXX XXXX, Principal, [School 3], from Mr. Martin, 2/29/12
- Parents 49 Email to XXXX XXXX from the Student's mother, 4/26/12
- Parents 51 Student Enrollment Memorandum, 5/14/12

- Parents 52 Letter to XXXX XXXX, Esquire, PGCPs, from Mr. Martin, request for mediation, 5/23/12
- Parents 53 IEP, 8/9/11, amended 8/10/12
- Parents 54 Letter to XXXX XXXX, Esquire, PGCPs, from XXXX XXXX, Law Office of Mr. Martin, 6/13/12
- Parents 56 Email to the Student's mother from XXXX XXXX, Ph.D., Special Education Instructional Specialist, PGCPs, 7/17/12
- Parents 58 IEP, 8/1/12
- Parents 60 Prior Written Notice, PGCPs, 8/6/12
- Parents 61 Letter to XXXX XXXX, Esquire, PGCPs, from Mr. Martin, request for due process hearing, 8/14/12
- Parents 63 Parental Consent to Provide RTI Services, 10/18/12
- Parents 64 Letter to the Parents from XXXX XXXX, Special Educator, [School 4]
- Parents 65 Report Card 2011-2012, 7th grade
- Parents 67 Curriculum Vitae of XXXX XXXX, Ed.D.
- Parents 68 Letter to XXXX XXXX, Principal, [School 3], from XXXX XXXX, Ed.D., 10/24/12
- Parents 70 MSDE Parental Rights
- Parents 71 Affidavit of XXXX XXXX, 10/10/12
- Parents 72 List of documents the Parents received from [School 4]
- Parents 73 Letter to the Parents from XXXX XXXX, Admissions Director, [School 5], 7/22/11
- Parents 74 Photograph of the Student, 2011-2012

I admitted the following exhibits on behalf of PGCPs:²

- PGCPs 3 IEP, 3/29/11

² PGCPs premarked its exhibits. Only those exhibits admitted into evidence are listed in this decision.

- PGCPS 4 IEP Team Meeting Sign-In Sheet, 6/16/11; Meeting Notes, 6/16/11; Notice and Consent for Assessment, 6/16/11
- PGCPS 9 IEP, 8/9/11, amended 8/10/11
- PGCPS 10 Email to Mr. XXXX from the Student's mother
- PGCPS 11 Prior Written Notice, 2/27/12
- PGCPS 16 Emails between the Student's mother and XXXX XXXX, 9/25/12 & 10/1/12
- PGCPS 18 Curriculum Vitae of XXXX XXXX
- PGCPS 19 Curriculum Vitae of XXXX XXXX
- PGCPS 20 Curriculum Vitae of XXXX XXXX, Ph.D.
- PGCPS 21 Curriculum Vitae of XXXX XXXX
- PGCPS 23 Curriculum Vitae of XXXX XXXX
- PGCPS 24 Curriculum Vitae of XXXX XXXX
- PGCPS 29 Curriculum Vitae of XXXX XXXX, PsyD
- PGCPS 30 Progress Report on IEP Goals, [School 4], 11/7/12

B. Testimony

The Parents presented the following witnesses:

- XXXX XXXX, Ph.D., Special Education Instructional Specialist, PGCPS
- The Student's mother, XXXX XXXX
- XXXX XXXX, Ed.D., Educational Consultant, admitted as an expert in Special Education

PGCPS presented the following witnesses:

- XXXX XXXX, Special Education Chair, [School 3] admitted as an expert in Special Education

- XXXX XXXX, PsyD, School Psychologist, admitted as an expert in School Psychology and Psychometrics
- XXXX XXXX, Special Education Teacher at [School 4], admitted as an expert in Special Education
- XXXX XXXX, middle school teacher at [School 4] for Reading, Language Arts, History, and Geography, admitted as an expert in teaching middle school
- XXXX XXXX, math teacher at [School 4], admitted as an expert in general education
- XXXX XXXX, Special Education Resource Teacher at [School 4], admitted as an expert in Special Education
- XXXX XXXX, Ph.D., Special Education Instructional Specialist, PGCPs, admitted as an expert in Special Education

FINDINGS OF FACT

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

1. The Student was born in XXXX 1999. He has attended PGCPs throughout his schooling.
2. For kindergarten through fifth grade, the Student attended [School 1].
3. On December 18, 2007, while the Student was in third grade, XXXX XXXX, Ph.D., Licensed Psychologist, and XXXX XXXX, Psychology Extern, both of the XXXXX Medical Center, assessed the Student.
4. On the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Student had a full scale IQ of 84, which is in the low average range. On the Verbal Comprehension Index of the WISC-IV, the Student had a standard score of 79, which was in the 8th percentile and in the borderline range. On the Perceptual Reasoning Index, the Student had a standard score of 102, which was in the 55th percentile and in the average range. On the Working Memory

Index, the Student had a standard score of 83, which was in the 13th percentile and in the low average range. On the Processing Speed Index, the Student had a standard score of 85, which was in the 16th percentile and in the low average range.

5. On the Wechsler Individual Achievement Test 2nd Edition (WIAT-II), the Student's achievement scores were commensurate with his cognitive ability, as measured on the WISC-IV. His reading standard score was 94, which was in the 34th percentile; his math standard score was 108, which was in the 70th percentile, and his written language standard score was 91, which was in the 27th percentile. Based on his scores, the Student did not have a learning disability.
6. On the Berry-Buktenica Developmental Test of Visual Motor Integration (Berry VMI), the Student's standard score was 78, which was in the 7th percentile and in the low range of visual-motor functioning.
7. On the Children's Depression Inventory (CDI), the Student scored in the average range.
8. On the Multidimensional Anxiety Scale for Children (MASC), the Student scored in the slightly below average range.
9. On the Conner's Continuous Performance Test (CPT), the Student demonstrated an average ability to sustain attention and inhibit impulsive responding while engaging in an unstimulating task.
10. During testing, the Student's concentration and focus were generally consistent and adequate; however, instructions had to be frequently repeated. Based on these observations and parent and teacher reports of inattention, the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD).

11. On May 3, 2010, the Student was accepted to attend [School 2] for the 2010-2011 school year.
12. On May 17, 2010, while the Student was in fifth grade, an IEP Team meeting was held to develop the Student's IEP for the next year, including the remaining month of fifth grade through May of 2011. The Team described his present levels of performance as follows.
13. In reading comprehension, the Student was performing on a 4.5-5 grade level. He was in the below grade level reading group in his general education classroom. He was able to read fluently with expression, identify the parts of a story, and answer questions based on the story. He corrected his work when reminded but rushed through assignments. His MSA Benchmarks and Scholastic Reading Inventory (SRI) scores placed him on the basic to low proficient level.
14. In math problem solving, the Student was performing on a 4.5-5 grade level. He was following the fifth grade curriculum. He could follow multiple steps using a calculator. He could compare decimals and fractions and find mean averages, although he had difficulties with decimal division. His MSA Benchmarks scores were on the basic level.
15. In written language mechanics, the Student was performing on a 4.5-5 grade level. He spelled most words correctly on assignments and chose words he could spell instead of more difficult words. He did very well on grade level spelling tests. He completed his written work as quickly as possible, needing many reminders in the beginning of the year to take more time. By the end of the year he had improved and only needed reminders once or twice a week. He sometimes did not write the word he intended to write but was able to correct the mistake when it was pointed out to him. He needed to add more detail, vary his sentence length, and improve his proofreading.

16. In self-management, the Student had greatly improved his ability to ignore distractions in the general education classroom. He did not yell out or distract others. He stayed focused during most of the class. He quickly complied when he needed redirection from looking at other groups. He usually finished his work within the allotted time. The Team felt the Student had done a good job of managing his behavior but maintained self-management objectives for middle school because he would be attending a new school and changing classrooms for each subject.
17. Under organization, the Student no longer needed reminders throughout the day to stay organized and follow classroom procedures. He put his work in the correct folders and his notebook and desk were neat and organized.
18. Under health/medical, the Team noted that the Student had not taken ADHD medication for several months. The Team also noted that the Student was not wearing his eyeglasses, and said his need for glasses would be re-evaluated.
19. The Parents stated that they had seen a noticeable improvement in the Student's work habits, focus, and academic performance. They told the rest of the Team that the Student would be attending [School 2].
20. The Team found that the Student's ADHD impacted his cognition, processing, and sustained attention. As a result, he had difficulty in reading comprehension, math applications, expressing writing, completing assignments, organization, and self-management.
21. The Student did not need any assistive technology to access the general education curriculum but a calculator or calculation device was permitted for performing multi-step operations.
22. The IEP identified the following accommodations for the Student: human reader (or recording) of text and tests to help him stay on task; monitoring of test responses to ensure he

was responding to the correct question; calculation devices; extended time for responses and tasks; multiple breaks to prevent frustration; and reduced distractions, including sitting close to the teacher and testing in small groups.

23. The IEP identified the following supplementary aids, services, program modifications, and supports for the Student: modification of the length of assignments and tests, simplification of content, repetition of directions, redirection to focus; visual and graphic organizers; tactile objects; spelling and grammar organizers; sentence frames and starters; math manipulatives; seating close to the teacher and the board; study guides, notes, and outlines; highlighting of important information; breaks to prevent inattentiveness and frustration; books on tape; mnemonics; visual prompts; positive reinforcement; checking his agenda book every morning and afternoon for accuracy; access to textbooks online or a copy sent home; and reminders to wear his eyeglasses.
24. The Team found that the Student did not need Extended School Year (ESY) services because he was following the fifth grade curriculum, made progress on all his IEP objectives, and made honor roll. The Team did not believe it was likely that his skills would substantially regress over the summer break.
25. The IEP included the following goals for the Student: reading comprehension - make meaning from grade appropriate text and demonstrate understanding; math problem solving - will apply a variety of concepts, processes, and skills to solve grade appropriate calculation problems; written language - will compose texts using the pre-writing and drafting strategies of effective writers and speakers; self-management - will remain engaged in a learning activity for a minimum of thirty minutes with no more than two reminders; and organization - will maintain organization of books and materials in all settings.

26. For May 17 to June 16, 2010 (the remainder of fifth grade), the IEP required seven hours and thirty minutes of special education services provided in the general education classroom. The primary provider was a special education classroom teacher and the other provider was a general education teacher.
27. For August 23, 2010 to May 16, 2011 (sixth grade), the IEP required twenty-three hours and forty-five minutes of special education services provided in the general education classroom. The primary provider was a special education classroom teacher and the other provider was a general education teacher co-teaching in a general education classroom.
28. In May 2010, benchmark assessments were conducted. The Student scored basic³ on the Math 5 FAST, basic on the Grade 5 RELA⁴ FAST 3, and low proficient on the SRI Form B Level 15.
29. From August 23 to October 7, 2010, the Student attended [School 2] for sixth grade. During this time, the Student did not receive the special education instruction and related services required by his IEP.
30. On October 8, 2010, the Student's mother withdrew him from [School 2]. The Student then began attending [School 3], his home school, for sixth grade.
31. Sometime around early December 2010, the Student was involved in a physical altercation with another student, during which the Student was punched in the eye.
32. As of January 28, 2011, the Student was making sufficient progress to meet his reading comprehension and written language goals.
33. On March 29, 2011, the IEP Team met to review and revise the Student's IEP. The Student's mother and Dr. XXXX participated. The Team determined that the Student required eight

³ Basic is lower than proficient.

⁴ Reading, English, and Language Arts.

hours of one-on-one tutoring as compensatory services to address the lack of special education services provided to him from August 23 to October 7, 2010 while he attended [School 2].

34. In Reading, the Student was able to identify characters, the setting, the problem, and some elements of plot in a story with reminders and verbal prompts. He struggled with identifying organizational aids and patterns and explaining how they contribute to meaning. He also struggled with figurative language, summarizing informational text, and explaining the relationships among characters, settings, and events in a story. He was not able to obtain grade level proficiency even with modifications and accommodations. He struggled reading grade level text without teacher supports and when responding to comprehension questions. He was unable to sustain focus and required repeated prompting to get started and keep going. When he was first enrolled at [School 3], his level of distractibility was elevated. His ability to focus and attend to a given task notably improved when he started taking ADHD medication.

35. In Math, the Student continued to perform below grade level with modifications and accommodations. His distracted and impulsive behavior was escalating as the curriculum became more rigorous. He had some success working individually with a teacher and in groups of two or three. He frequently had difficulty expressing ideas and answering questions. He was sometimes unable to follow or recall details of math procedures. He often needed a calculator for basic computation in order to apply the concept being taught. He had difficulty analyzing word problems. He required graphic organizers, fact tables, and flow and formula charts because he was unable to recall the information without the supports. His

ability to perform in class was negatively impacted by the size of the class. He frequently did not turn in his homework.

36. In writing, the Student had difficulty beginning a writing activity without a model, including details from text and his own thoughts, and completing extended writing activities. He needed support to combine sentences, add modifiers and sensory words, vary sentence length and revise text. He had difficulty providing a topic sentence but was able to identify supporting details with some support. He needed reminders to review his work.
37. In Self-Management, the Student greatly improved in reading when he started taking ADHD medication. His ability to ignore distractions increased. He continued to need redirection but he was not disruptive. With constant prompting he was able to finish his work in the allotted time. In math, he was easily upset or frustrated when given directions and criticism, and when redirected to stay on task. He frequently interfered with and agitated other students, causing physical and verbal interactions. He frequently was confrontational and combative with peers and teachers. He often did not follow routines and seemed to ignore, or was unaware of, the consequences of his inappropriate behavior. Sometimes, he had difficulty working in a small group and often did not contribute effectively. At times, he copied others' work.
38. In organization, the Student struggled. He was seldom able to find needed materials, often searching for a pencil, blank paper, or his journal. He had difficulty remembering assignments to be completed and did not use his agenda book regularly. As a result, he missed assignments and often misplaced assignments.
39. The Team noted the Student was taking medication for ADHD but did not identify when he began taking it. They also noted that he did not wear his eyeglasses during the school day.

40. The Team discussed the Student's performance in Social Studies and the additional support that was added in that class for him. They noted that the Student was not completing his work in Social Studies and he was allowed to take it home to complete.
41. The Team revised the Student's reading comprehension goal as follows: will develop and apply comprehension skills through exposure to a variety of print and non-print texts.
42. The Team added a math calculation goal for the Student: will apply a variety of concepts, processes, and skills to solve problems.
43. The Team revised the Student's math problem solving goal as follows: will algebraically represent, model, analyze, or solve mathematical or real-world problems involving patterns or functional relationships across content areas.
44. The Team maintained the Student's written language goal: will compose texts using the pre-writing and drafting strategies of effective writers and speakers.
45. The Team revised the Student's self-management goal as follows: will remain engaged in the learning activity for a minimum of fifteen minutes, with no more than two reminders.
46. The Team maintained the Student's organization goal: will maintain books and materials organized across all settings.
47. The Student was offered ESY services but the Student's mother declined because of family plans.
48. The Team did not change the remainder of the IEP.
49. As of April 8, 2011, the Student was making sufficient progress to meet the following goals: reading comprehension, math problem solving, written language, self-management, and organization. He was not making sufficient progress to meet his math calculation goal.

50. As of June 17, 2011, the Student was making sufficient progress to meet the following goals: reading comprehension, math calculation, written language, self-management, and organization. He was not making sufficient progress to meet his math problem solving goal.
51. From October 8, 2010 to the end of the 2010-2011 school year in June, the Student received the special education instruction and related services required by his IEP.
52. The Student's quarterly and final grades for the 2010-2011 school year were as follows:

	1	2	3	4	Final
World Culture/Geography	E	E	D	E	E
Science	E	D	D	D	D
Navigator Math	C	C			C
MSA Reading	B	C			C
Physical Education			A	B	A
Health Education			A	D	B
Math	I	C	D	D	?
Reading, English, Language Arts	D	C	D	D	D

53. The Student's teachers in World Culture/Geography, Science, and Health Education noted the Student had missing and incomplete assignments. His teachers in World Culture/Geography and Math noted poor test/quiz grades. His World Culture/Geography teacher also noted he was disruptive in class. The Student turned in homework once or twice per class, per week.
54. On June 16, 2011, an IEP Team meeting was held. The Student's mother and Dr. XXXX attended. Dr. XXXX stated that the Student had not made any progress, that he believed that there had not been consistent implementation of the IEP, that the Student's behavior had deteriorated, that a Functional Behavior Assessment had not been conducted, and that the Student could not be appropriately serviced at [School 3]. Dr. XXXX wanted a Functional

Behavior Assessment and Behavior Improvement Plan completed and the Student referred to a Central IEP (CIEP) team.

55. The Team discussed the Student's behavior and performance. The Student had a D on his last progress report in Science because he failed to show his work during an assessment, failed to complete work, and failed to turn in work. The Student had a D in Language Arts. When needed, the Student was pulled out of Language Arts for additional support; however, there were times he would not go. The Student had an E for three of four quarters in Social Studies and had not made meaningful progress. In book club, sometimes the Student had read the book, other times he had not, but he did participate in discussion. For his behavior, the Student had one referral in January, two in February, two in March, and one in June. He received a one-day in-school suspension for throwing a book and a bottle at another student. His moods were unpredictable and he could get angry when redirected. The Team reviewed the numerous strategies that were being used. The IEP team agreed the Student needed updated academic and psychological assessments.
56. Also on June 16, 2011, the Parents filed a complaint with MSDE alleging that PGCPS did not ensure that the Student's IEP was implemented during the 2010-2011 school year and did not ensure that the IEP Team convened to address the Student's lack of expected progress toward achieving his annual IEP goals.
57. On June 30, 2011, XXXX XXXX, School Psychologist, PGCPS, assessed the Student in response to the Parents' concerns about the Student's lack of academic progress. She noted specific concerns included not completing assignments, being easily distracted, and shutting down when frustrated. Specific interventions used included positive reinforcement of appropriate behavior, peer tutoring, 1:1 instruction, and multiple breaks.

58. During the assessment, the Student easily engaged in conversation, carefully considered all options before selecting an answer, had an appropriate level of attention and motivation, and an appropriate response speed. He was offered several breaks but chose to continue working.
59. On the Kaufman Assessment Battery for Children (KABC-II), the Student's score was average on the sequential scale (ability to hold information and use it quickly) and below average on the learning (ability to store information and retrieve it later), simultaneous (non-verbal problem solving), planning (reasoning and logic), and knowledge (acquired knowledge) scales.
60. On the Berry VMI, the Student's standard score was 88, which was in the 21st percentile and in the average range of visual-motor functioning.
61. The Parents and the Student's Math and Language Arts teachers rated him on the Conners-Third Edition. The Student had elevated ratings in inattention and hyperactivity/impulsivity. The following behaviors were observed frequently: has a short attention span, avoids or dislikes things that take a lot of effort and are not fun, does not pay attention to details, makes careless mistakes, has trouble changing activities, is inattentive and easily distracted, gets bored, gives up easily on difficult tasks, is constantly moving, gets over-stimulated, fidgets or squirms in his seat, is restless or overactive, interrupts others, and talks out of turn. He often needed extra explanation of instructions and complex tasks broken into smaller tasks. His Math teacher noted he often could not decide which things were important and forgot to turn in completed work. His Language Arts teacher noted that he often got into trouble, annoyed others on purpose, did not seem sorry for misbehaving, occasionally had trouble keeping friends, appeared unaccepted by the group, and had poor social skills.

62. The Parents and the Student's Math teacher rated him on the Behavior Rating Inventory of Executive Function (BRIEF). His Math teacher noted he had significant difficulty with executive functioning tasks. His Math teacher also noted he had significant difficulty inhibiting impulses, shifting attention, regulating emotion, initiating, planning, self-monitoring, and sustaining working memory. He had some difficulty organizing materials. The Parents only reported some difficulty sustaining working memory and planning and organizing.
63. Ms. XXXX concluded that the Student's ADHD behaviors were significantly impacting his ability to benefit from the instruction provided. In addition, his weaknesses in several areas of cognitive functioning were also likely impacting his academic performance.
64. Ms. XXXX made the following recommendations: seat him near the teacher and surround him with positive role models, keep his area structured and organized, use a pre-arranged signal to get his attention before giving directions, make eye contact, use his name for instructions specific to him, give one or two directions at a time, keep assignments structured and shorten if needed, guide him through the first problem of a set, provide examples to model, encourage him to turn in work even if not complete, monitor behavior and attentiveness frequently, enforce consequences consistently, immediately praise positive behavior and performance, minimize down time, and teach him specific memory strategies such as verbal rehearsal, chunking, making ridiculous visual images of items to be remembered, and creating first letter mnemonic strategies.
65. On July 11, 2011, XXXX XXXX, Universal Design⁵ for Learning Special Education Resource Support Teacher, PGCPs, gave the Woodcock Johnson III Test of Achievement to the Student. The Student was cooperative but skipped writing several sentences and seemed

⁵ Design? Designee? There appears to be a typographical error on the document.

to give up easily. He scored average on brief writing. He scored low average on broad reading, brief reading, academic skills, and academic applications. He scored low on broad math, broad written language, brief math, and academic knowledge. He scored very low on academic fluency.

66. Ms. XXXX concluded that the Student needed support in order to navigate the general education curriculum and considerable time to concentrate on problems, questions, and prompts in order to formulate his responses and write his answers on paper. He needed academic fluency modifications and accommodations and significant support to help him work within the general education curriculum.
67. On July 18, 2011, an IEP Team meeting was held to review the recent assessment results. The Student's mother attended.
68. On July 28, 2011, MSDE notified the Parents of the results of its investigation. MSDE found that the Student did not receive the special education instruction and related services required by his IEP while attending [School 2]. MSDE also found that the IEP team determined that the Student was entitled to eight hours of one-on-one tutoring as compensatory education for the services that were not provided at [School 2] and concluded that no further corrective action was necessary. MSDE further found that the Student was provided with the services required by his IEP while attending [School 3], that the IEP Team convened on March 29 and June 16, 2011 and discussed the Student's progress, and that the Team determined that updated assessments were needed in order to revise the IEP and address the Student's lack of progress. MSDE concluded that the Team took action to address the Student's lack of expected progress toward achieving his annual goals.

69. On August 9, 2011, an IEP Team meeting was held to revise the Student's IEP. The Student's mother participated by telephone. The IEP was updated to include the results from the Student's recent assessments; however, his present levels of performance, accommodations and modifications were not changed from the March 29, 2011 revisions. The existing goals remained the same, although objectives were added and revised.
70. A social/emotional goal was added to the IEP: the Student will accept responsibility for his behavior without negative reactions when corrected by an adult. The Team agreed a behavior contract would address his behavioral challenges.
71. The Student's placement was changed; he would receive all academic instruction in the XXXX Classroom at [School 3]. He would be in a small special education class with a special educator and an instructional assistant for twenty-three hours and forty-five minutes per week. He would be in general education for six hours and fifteen minutes per week for his non-academic subjects.
72. On August 22, 2011, the Student's mother withdrew him from [School 3] and transferred him to [School 4] for seventh grade. At that time, or sometime shortly thereafter, XXXX XXXX, Compliance Specialist at [School 3], informed the Parents that [School 4] could not provide twenty-three hours and forty-five minutes of special education services in an XXXX Classroom.
73. At [School 4], the Student was in a general education class of fourteen students. The Student and one other student had IEPs. Of the thirty-two students in the seventh grade at [School 4], almost all of them were functioning at or above grade level; two or three students had below average cognition. [School 4] did not have an XXXX Classroom.

74. XXXX XXXX was the Student's special education teacher and he was assigned an instructional assistant, XXXX XXXX. Ms. XXXX reviewed the Student's IEP with all of his teachers.
75. Sometime between August 29 and September 9, 2011, the Student took the fall Stanford 10. He scored in the 2nd percentile for total reading, the 1st percentile for vocabulary, the 4th percentile for comprehension, the 6th percentile for total math, the 13th percentile for math problem solving, and the 3rd percentile for math procedures.
76. As of October 10, 2011, the Student was making sufficient progress to meet his reading comprehension and math calculation goals.⁶
77. The Student's first quarter grades were as follows:
- | | |
|---------------------------------|---|
| Reading, English, Language Arts | C |
| Spanish | D |
| Science | B |
| World Culture/Geography | B |
| Math/Pre-Algebra | C |
78. As of December 17, 2011, the Student was making sufficient progress to meet his reading comprehension and math calculation goals.⁷
79. Sometime before January 9, 2012, the Student took the Measures of Academic Progress (MAP) assessment for Science. The Student scored 189, which is equivalent to a beginning of third grade mean score.
80. On January 17, 2012, school personnel notified the Parents they were considering the Student for retention because he had not demonstrated appropriate levels of achievement and would benefit from additional experience with the same grade level curriculum.

⁶ There are no progress reports on the remaining goals.

⁷ There are no progress reports on the remaining goals.

81. The Student's second quarter grades were as follows:

Reading, English, Language Arts	D
Spanish	C
Health Education	C
Science	E
World Culture/Geography	A
Math/Pre-Algebra	E

82. On February 24, 2012, an IEP meeting was held to review the Student's academic progress at [School 4]. The Student's mother and Dr. XXXX participated. PGCPS noted that the Student's IEP required twenty-three hours of special education services per week in an intensive special education setting with a special educator and a paraprofessional.⁸ PGCPS explained that [School 4] is not an intensive special education setting and, as a result, cannot provide the required services outside of the general education setting.

83. As of March 3, 2012, the Student was making sufficient progress to meet his reading comprehension and math calculation goals.⁹

84. As of May 7, 2012, the Student was making sufficient progress to meet his reading comprehension goal.

85. On May 14, 2012, the Student's mother enrolled him at [School 4] for the eighth grade.

86. As of June 12, 2012, the Student was making sufficient progress to meet his social emotional/behavioral, self management, and organizational goals. He was not making sufficient progress to meet his math calculation, math problem solving, and written language goals. Teachers cited inconsistent work habits and missing assignments.

87. For the 2011-2012 school year, the Student's teachers and instructional assistant provided the Student with all of the accommodations, modifications, supports, and services identified in his IEP, except the Student did not receive all of his academic instruction from a special

⁸ The IEP requires twenty-three hours and forty-five minutes of special education per week.

⁹ There are no progress reports on the remaining goals.

educator in a self contained classroom. His instruction was provided by general educators in general education classrooms with the assistance of a special educator, Ms. XXXX, and an instructional assistant, Ms. XXXX. He was pulled out of class for reading interventions. He met once a week with the Guidance Counselor in a small group. His teachers also provided after school tutoring.

88. The Student's grades for the 2011-2012 school year were as follows:

	1	2	3	4	Final
Reading, English, Language Arts	C	D	D	E	D
Spanish	D	C	D	A	C
Science	B	E	B	B	C
World Culture/Geography	B	A	A	A	A
Math/Pre-Algebra	C	E	E	E	E
Health Education		C			
Music			A		
Art				A	A

89. On August 1, 2012, an IEP team meeting was held to revise the Student's IEP. The Student's mother, Dr. XXXX, and Mr. Martin participated. The Parents wanted the Student to attend a private separate day school ([School 5]) or to stay at [School 4].

90. In reading comprehension, the Student had the following strengths: he was a fluent reader and was able to recognize grade level sight words and high frequency words effortlessly, he read sentences and passages at the speed expected for his grade level, and he could identify characters and the setting of a story. With cuing and repeated presentation of text, he could remember and sequence events. He had the following weaknesses: he struggled to retain information, he was easily distracted and had difficulty reading long passages independently, he needed frequent support to identify key points when reading a passage, and he had difficulty answering comprehension questions without a statement starter.

91. In math calculation, the Student had the following strengths: he had a good understanding of addition, subtraction, multiplication, and division. He could independently perform simple math calculations using calculation devices, extended time, and highlighted key words. He had the following weaknesses: he struggled to identify key points that aid in analyzing problems and finding the correct operation to determine the solution, and he had difficulty retaining information and expressing ideas, recalling the details of math procedure, and following through with a new lesson. He needed repetition, clarification, and several opportunities for re-teaching to gain mastery of new concepts.
92. In math problem solving, the Student had difficulty recognizing key words in a word problem to identify the process needed to solve the problem.
93. In written language, the Student had the following strengths: he wrote letters legibly, he wrote words and sentences clearly, and he began sentences with capital letters. With cues, he ended his sentences with proper punctuation. He had the following weaknesses: he struggled to complete essays, he produced incomplete and fragmented topic knowledge, he poorly planned and revised texts even with prompting, and he had poor attention and concentration in completing writing tasks. His written responses contained minimal information and detail.
94. In social emotional/behavioral, the Student interacted well with his peers and adults. At times, he needed redirection from talking and socializing during class time. He had some disagreements with friends that disrupted the class.
95. In self-management, the Student had difficulty managing his behavior when upset. At times, he was insubordinate and refused to complete any work. The increased difficulty of the work caused him to shut down and not complete any work. He had a difficult time focusing when

a peer said something he did not like and it took him at least twenty minutes to refocus.

When upset, he impulsively blurted out at other students during class time and became very oppositional to school staff. Once his parents were contacted and he was given time to de-escalate, he was able to refocus and begin working.

96. In organization, the Student had inconsistent work habits in all content areas. He had difficulty completing and submitting class work and homework on time. He had several missing assignments. He completed all take home projects. He often said that he had completed his homework but could not find it.
97. The following testing and instructional supports were to be provided to the Student: extended time, calculation devices, reduced distractions, breaking down multi-step directions, organizational support, agenda book, folders for daily parent-teacher communication, positive reinforcement, preferential seating close to the teacher, repetition/clarification of directions, long range assignments broken into segments with staggered due dates, highlighting of key terms, graphic organizers, visual aids, checklists for assignment completion, time-out location to de-escalate, redirection cues, daily check in/out with adults, written instructions for assignments, modified class work and homework, multiple options for presentation of information, and copies of class notes.
98. A reading comprehension goal was added: the Student will read critically to evaluate literary texts.
99. A math calculation goal was added: the Student will identify, write, and solve equations and inequalities.
100. The math problem solving goal was modified slightly: the Student will algebraically represent, model, analyze, or solve mathematical or real-world problems.

101. The written language goal was modified slightly: the Student will compose texts using the revising and editing strategies of effective writers and speakers.
102. The previous social emotional/behavioral goal was eliminated.
103. The self management goal was revised: the Student will comply with adult directions and refrain from off task behavior/disruption when he is upset.
104. The organization goal was revised: the Student will develop and utilize organizational strategies (e.g. agenda book, checklists) to support the completion of classroom and homework assignments.
105. The Student's placement was unchanged: he required intensive special education instruction in all academic areas outside of general education for twenty-three hours and forty-five minutes per week. He would be in general education for eight hours and forty-five minutes a week for his non-academic subjects. The Team recommended the Student return to [School 3] where he could receive the intensive services. [School 4], his school choice placement by lottery, did not provide such intensive instruction.
106. The Team referred the Student for an assistive technology evaluation and agreed to schedule a parent/teacher conference prior to the start of the school year.
107. The Team refused to refer the Student to the CIEP for consideration of a more restrictive placement; a separate day school would not allow the Student an opportunity to interact with non-disabled peers.
108. In August 2012, the Student returned to [School 4] for the eighth grade.
109. Sometime before October 17, 2012, the Student took the Measures of Academic Progress (MAP) assessment for Reading and Math. Based on his scores, the intervention teachers

began providing the Student with additional reading and math instruction during his resource period.

110. From August 2012 until the beginning of November 2012, the Student's teachers provided him with all of the accommodations, modifications, supports, and services identified in his IEP, except the Student did not receive all of his academic instruction from a special educator in a self contained classroom. His instruction was provided by general educators and special educators in general education classrooms.
111. As of November 7, 2012, the Student was not making sufficient progress on the following IEP goals: reading comprehension (both goals), written language, math problem solving, organization, and one of the math calculation (fractions and division) goals. Reasons included: missing assignments, low test scores, and that his skills are far below grade level. He was making sufficient progress on his other math calculation goal (equations) and self-management goal.
112. The Student needs to receive his academic instruction from a special educator in a self-contained classroom in order to make sufficient progress on his IEP goals. He is able to successfully participate in a general education classroom for his non-academic subjects, such as Art, Music, Physical Education, and Health Education.

DISCUSSION

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 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 provides that all children with disabilities have the right to a free, appropriate public education. 20 U.S.C.A. § 1412(a)(1)(A) (2010). The IDEA defines FAPE as "special education and related

services that . . . have been provided at public expense, under public supervision and direction, and without charge; . . . meet the standards of the State educational agency; . . . and are provided in conformity with the individualized education program required under section [1414(d) of this title].” 20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012); COMAR 13A.05.01.03B(27).

In *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

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

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

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all services necessary to maximize his or her potential.” *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983)(citing *Rowley*, 458 U.S. 176). Rather, FAPE entitles a student to an IEP that is “reasonably calculated” to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 204.

To provide FAPE, the educational program offered to a student must be tailored to the particular needs of a child with disabilities by the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3) (2010). The IEP identifies a student's present levels of academic and functional performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those goals and objectives, and indicates the extent to which the child will be able to participate with children without disabilities in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A).

In addition to the IDEA's requirement that a child with disabilities receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, meaning that children with disabilities must be educated with children without disabilities in the regular education environment to the maximum extent appropriate. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117 (2010). Removal of a child from the regular educational environment occurs only when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.*

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents in this case bear the burden of proof.

The Parents contend that the Student did not make appropriate educational progress during the 2010-2011 and 2011-2012 school years and that the IEP for the 2012-2013 school year does not meet his educational needs. The Parents argue that he needs to be placed in a self-contained special education school ([School 5]) for at least two years to receive compensatory educational services and to remediate PGCP's failures during 2010-2011 and 2011-2012.

PGCP's asserts that the Student received all of the services set forth in his IEPs for the 2010-2011, 2011-2012, and 2012-2013 school years, with the exception of placement in a self-

contained class during 2011-2012 and 2012-2013. PGCPS argues that the Parents simply do not want the Student to attend [School 3], his home school, because they believe it is a low performing, rough school. PGCPS maintains that the Student's low average intelligence, [School 4]'s accelerated curriculum, and his failure to do his homework explain why Student is not progressing as the Parents would like. PGCPS contends that the Parents placed the Student at [School 4] knowing that [School 4] does not have self contained classes. PGCPS argues that the Parents cannot not now complain that the Student's IEP was violated. PGCPS asserts that [School 5] is not an appropriate placement for the Student because he will not have any interaction with non-disabled peers.

The 2010-2011 School Year

Beginning on August 23, 2010, the 2010-2011 IEP required twenty-three hours and forty-five minutes per week of special education services provided in the general education classroom. The primary provider was a special education classroom teacher and the other provider was a general education teacher co-teaching in a general education classroom. Based on the Student's successful fifth grade year in a co-taught classroom and his progress on his IEP goals, I find the 2010-2011 IEP was reasonably calculated to provide the Student with a free appropriate public education in the least restrictive environment.

From August 23, 2010 to October 7, 2010, the Student attended [School 2] for sixth grade. The Parents were dissatisfied with [School 2] and withdrew him from the school on October 8, 2010. On June 16, 2011, the Parents filed a complaint with MSDE alleging that PGCPS did not ensure that the Student's IEP was implemented during the 2010-2011 school year and did not ensure that the IEP Team convened to address the Student's lack of expected progress toward achieving his annual IEP goals. MSDE conducted an investigation and, on July

28, 2011, MSDE found that the Student did not receive the special education instruction and related services required by his IEP while attending [School 2]. MSDE further found that the IEP Team determined that the Student was entitled to eight hours of one-on-one tutoring as compensatory education for the services that were not provided at [School 2]. MSDE concluded that no further corrective action was necessary. At the hearing, the parties did not present any evidence that contradicted MSDE's findings. Thus, there is no basis for me to alter MSDE's findings. Accordingly, I find the eight hours of one-on-one tutoring were sufficient to remedy the lack of services provided to the Student at [School 2].

From October 8, 2010 to the end of the school year in June, the Student attended [School 3]. Ms. XXXX was the Student's special education teacher in World Culture/Geography (Social Studies); she was also his case manager. She gave a copy of the Student's IEP snapshot to each of his teachers. The Student's teachers reported his progress to Ms. XXXX and she recorded it on the progress reports in January, April, and June 2011. As of April 8, 2011, the Student was making sufficient progress to meet all of his goals except his math calculation goal. As of June 17, 2011, the Student was making sufficient progress to meet all of his goals except his math problem solving goal. During the March 29, 2011 IEP meeting, Ms. XXXX stated that the Student was not completing his work in Social Studies class but he was given the opportunity to take the work home to complete, in addition to his homework. Mr. XXXX, the principal, discussed the support provided to the Student in Social Studies. During the June 16, 2011 IEP meeting, the Student's teachers discussed all the modifications and accommodations provided to him and his failure to complete work and failure to turn in work. Based on the documents and Ms. XXXX's testimony, I find that the Student's teachers provided the Student with all of the accommodations, modifications, supports, and services identified in his 2010-2011 IEP. I note

that MSDE found after its investigation that the Student was provided with the services required in his IEP while at [School 3]. MSDE further found that the IEP Team convened on March 29 and June 16, 2011, discussed the Student's progress, and determined that updated assessments were needed in order to revise the IEP and address the Student's lack of progress. MSDE concluded that the Team took action to address the Student's lack of expected progress toward achieving his annual goals.

Despite the proper implementation of the Student's IEP, the Student's final grades were an E in World Culture/Geography, Ds in Science and Reading/English/Language Arts, and most likely a D in Math.¹⁰ Based on the concerns discussed during the June 16, 2011 IEP meeting, the Team determined that the Student needed updated academic and psychological assessments. Thus, the Team recognized the Student's lack of academic progress with the services that were provided and sought additional information.

I note that the Parents did not present any evidence that the services identified in the IEP were not provided. In fact, when the Student's mother was asked specifically what services she felt were not provided she declined to answer the question. In her June 14, 2011 letter to the principal of [School 3], Mr. XXXX, the Student's mother made a number of broad complaints but did not give any specifics, such as which teacher, which class, or what specifically she did or did not see being provided. She gave her conclusions and opinions but no facts. XXXX XXXX, Ed.D., Educational Consultant, testified regarding his knowledge of the Student based on his review of documents, conversations with the Parents, and participation in some IEP meetings. Dr. XXXX opined that the intensity of the services provided and the interventions used with the Student at [School 3] were inappropriate. He did not testify that the services in the IEP were not

¹⁰ The Student had an Incomplete for the first quarter, a C second quarter, and Ds in the third and fourth quarters. A question mark was placed where the final grade should have appeared.

provided, nor could he make such a statement because he did not observe the Student at [School 3]. However, Dr. XXXX's opinion is consistent with the opinion of the rest of the IEP Team on June 16, 2011: that the Student needed more services than those provided under the 2010-2011 IEP.

The June and July 2011 Assessments

The assessments requested at the June 16, 2011 IEP meeting were performed on June 30, 2011 and July 11, 2011. In her June 30, 2011 Psychological Report, Ms. XXXX concluded that the Student's ADHD behaviors were significantly impacting his ability to benefit from the instruction provided. In addition, she concluded that his weaknesses in several areas of cognitive functioning were likely impacting his academic performance. Based on her assessments, Ms. XXXX made the following recommendations for the Student: seat him near the teacher and surround him with positive role models, keep his area structured and organized, use a pre-arranged signal to get his attention before giving directions, make eye contact, use his name for instructions specific to him, give one or two directions at a time, keep assignments structured and shorten if needed, guide him through the first problem of a set, provide examples to model, encourage him to turn in work even if not complete, monitor behavior and attentiveness frequently, enforce consequences consistently, immediately praise positive behavior and performance, minimize down time, and teach him specific memory strategies such as verbal rehearsal, chunking, making ridiculous visual images of items to be remembered, and creating first letter mnemonic strategies.

In her July 11, 2011 Assessment Report, Ms. XXXX described the instructional implications for the Student, based on her testing. Ms. XXXX concluded that the Student needed support in order to navigate the general education curriculum and considerable time to

concentrate on problems, questions, and prompts in order to formulate his responses and write his answers on paper. He needed academic fluency modifications and accommodations and significant support to help him work within the general education curriculum.

During the hearing, XXXX XXXX, PsyD, School Psychologist, reviewed all of the Student's assessment results and testified regarding his identified areas of need. Dr. XXXX did not personally observe or test the Student. Dr. XXXX explained that the Student's cognitive testing reveals that the Student requires a lot more time and repetition than other students and that grasping new concepts will be more difficult for him than for others. Based on the results of the Conners-Third Edition, Dr. XXXX described the Student's inattention as mild and his hyperactivity and impulsivity as mild to moderate. He opined that an intensive special education classroom would be appropriate for the Student because the smaller setting would limit external distractions and help him organize, plan, self-regulate, not lose things, and redirect. He explained that the teachers in the smaller, intensive setting would be able to work with the Student at his level, which would be beneficial when the Student was struggling to grasp a new concept. He stated that the Student has some age appropriate skills and needs the opportunity to be challenged when he is ready. He opined that there would be no academic benefit from segregating the Student entirely from non-disabled peers.

On July 18, 2011, the IEP Team reviewed the results of the assessments and planned to revise the Student's IEP based on this new information. I find that the IEP Team properly recognized that more needed to be done to address the Student's lack of progress and took prompt action.

The 2011-2012 School Year

On August 9, 2011, the IEP Team revised the Student's IEP based on the June and July assessments. The most significant change to the IEP was that the Team changed the Student's placement for all of his academic instruction from a co-taught general education classroom to an intensive special education classroom. A special education teacher would be the primary provider of instruction with assistance from an instructional assistant and the guidance counselor. The Student would continue to participate with his non-disabled peers in his non-academic classes and extracurricular activities. Based on the Student's performance at [School 3] for sixth grade and his lack of progress on his IEP goals, I find the 2011-2012 IEP was reasonably calculated to provide the Student with a free appropriate public education in the least restrictive environment.

On August 22, 2011, the Student's mother withdrew him from [School 3] and transferred him to [School 4] for seventh grade. The Student's mother was aware that [School 4] did not have an XXXX Classroom and that the Student would be in a regular education class with thirteen other students.

In the Student's class at [School 4], he and one other student had IEPs. Of the thirty-two students in the seventh grade at [School 4], almost all of them were functioning at or above grade level; two or three students had below average cognition, including the Student. XXXX XXXX was the Student's special education teacher and he was assigned an instructional assistant, XXXX XXXX. Ms. XXXX reviewed the Student's IEP with all of his teachers. The Student's first quarter grades at [School 4] were Bs in Science and World Culture/Geography, Cs in Reading, English, Language Arts and Math/Pre-Algebra, and a D in Spanish. However, on January 17, 2012, the Parents were notified that the Student was being considered for retention

because he had not demonstrated appropriate levels of achievement and would benefit from additional experience with the same grade level curriculum. The Student's second quarter grades showed some improvement – he had an A in World Culture/Geography and Cs in Spanish and Health Education – and some decline – he had a D in Reading, English, Language Arts, and Es in Science and Math/Pre-Algebra.

On February 24, 2012, an IEP meeting was held to review the Student's academic progress at [School 4] and respond to the Student's mother's concerns. PGCPs noted that the Student's IEP required twenty-three hours¹¹ of special education services per week in an intensive special education setting with a special educator and a paraprofessional. PGCPs again explained to the Student's mother that [School 4] is not an intensive special education setting and, as a result, cannot provide the twenty-three hours and forty-five minutes of special education services in an intensive setting. The Student's special education services were being provided in the general education setting.

The Student's third quarter grades were mixed – he maintained an A in World Culture/Geography and had an A in Music; his Science grade rose from an E to a B; his Spanish grade declined from a C to a D; he maintained a D in Reading, English, Language Arts; and he maintained an E in Math/Pre-Algebra. The Student's fourth quarter grades were also mixed – he maintained an A in World Culture/Geography and had an A in Art; he maintained a B in Science; his Spanish grade rose from a D to an A; his Reading, English, Language Arts grade declined from a D to an E; and he maintained an E in Math/Pre-Algebra. The Student's final grades for his academic subjects were an A in World Culture/Geography, Cs in Science and Spanish, a D in Reading, English, Language Arts, and an E in Math/Pre-Algebra.

¹¹ The IEP requires twenty-three hours and forty-five minutes of special education per week.

During the hearing, the Parents complained that they were not provided with quarterly progress reports regarding his progress on his IEP goals and objectives. XXXX XXXX testified that Ms. XXXX was responsible for preparing the Student's progress reports. Ms. XXXX explained that Ms. XXXX's visa expired and she was deported sometime after the last day of school in June 2012. Ms. XXXX stated that in preparation for the August 2012 IEP Team meeting, she reviewed the Student's records and found what she described as sketchy progress reports, explaining that they were not sufficiently detailed. Ms. XXXX then spoke to the Student's teachers and completed the June 2012 progress reports herself. Ms. XXXX said she did not know if Ms. XXXX sent any progress reports to the Parents. Thus, I find that the Parents were not provided with quarterly progress reports. However, the Parents were aware of the Student's progress. The Parents received the Student's quarterly report cards and were made aware the Student was experiencing problems at least as early as January 17, 2012, when they received the letter from [School 4] regarding his possible retention in seventh grade. In addition, the Student's progress was discussed during the February 24, 2012 IEP Team meeting. Further, the Student's teachers frequently communicated with the Parents. The failure of PGCPS to provide the Parents with quarterly progress reports did not deprive the Student of any educational benefit. Further, the Parents were notified on at least a quarterly basis of the Student's progress through his report cards.

XXXX XXXX, the Student's teacher at [School 4] for Reading, Language Arts, History, and Geography, and XXXX XXXX, the Student's math teacher at [School 4] during 2011-2012, both testified that they met regularly with Ms. XXXX every week or every two weeks. Both described the accommodations and modifications they made for the Student. Both also described how, even with these supports, the Student was not able to keep pace with the other students,

especially as the school year progressed and the work became more rigorous. They both stated that the Student performed better when he worked in small groups. Mr. XXXX testified that the Student was pulled out of the classroom for reading intervention and received in-school tutoring for reading, and that he provided additional assistance to the Student on projects and work after school. Mr. XXXX testified that the Student did not like being pulled out of class for assistance so he worked with Ms. XXXX to minimize the times the Student was pulled out.

Thus, I find that for the 2011-2012 school year, the Student's teachers and instructional assistant provided the Student with all of the accommodations, modifications, supports, and services identified in his IEP, except the Student did not receive all of his academic instruction from a special educator in a self-contained classroom. His instruction was provided by general educators in general education classrooms with the assistance of a special educator, Ms. XXXX, and an instructional assistant, Ms. XXXX. He was pulled out of class for reading interventions. He met once a week with the Guidance Counselor in a small group. In addition, his teachers provided after-school tutoring. The Student's final grades, in particular the D in Reading, English, Language Arts, and E in Math/Pre-Algebra, show that he needed more intensive services in a special education class and that special education services within a general education class even with additional tutoring were insufficient to meet his needs.

According to guidance from MSDE, charter schools, such as [School 4], are required to comply with IDEA and are not permitted to refuse to enroll a student with disabilities. Parents' Exhibit # 66. However, MSDE recognizes the potential for conflict between parental choice and IEP team decision making.

Tension is clearly visible in the implications of the charter school principle of parental choice, which creates a new dynamic for special education. The foundation of special education is the principle of team decision-making aimed at meeting the needs of an individual student. Decisions regarding what is

appropriate for a student with a disability who is eligible for services under IDEA, including determining services needed and where those services will be delivered, rest with an IEP team made up of educational professionals and the child's parent. Charter schools, by definition, challenge that foundational decision making principle of special education by asserting the primacy of parental choice.

Id. at p. 18.

In this case, had the Student's IEP placement for 2011-2012 been twenty-three hours and forty-five minutes per week in a co-taught general education class, [School 4] would have been able to fully implement the Student's IEP. However, [School 4] could not fully implement the Student's 2011-2012 IEP because it did not have a self-contained special education class in which the Student would receive instruction primarily from a special educator. Had [School 4] created such a class, it would have placed the Student in a special education class by himself for the majority of the school day. Isolating the Student in a class by himself does not meet the requirements of placing him in the least restrictive environment. The Student does not need to be isolated by himself in order to receive academic benefit from instruction. Moreover, such isolation would be harmful to the Student in many ways, including damaging his self esteem and interpersonal skills. The Parents were aware [School 4] did not have a self-contained special education class and that [School 4] could not fully implement the Student's IEP, yet they enrolled him at [School 4] anyway. In doing so, the Parents refused the special education placement offered to the Student in his IEP, a placement which the Team determined was necessary in order for the Student to receive educational benefit. The Parents cannot now complain that PGCPs failed to implement the Student's 2011-2012 IEP.

[School 4], as a public charter school, is required to implement the Student's IEP, and it has implemented his IEP, with the exception of placing the Student in a self contained special

education class. However, PGCPS is not required to offer every placement option at every location.

In *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), the court held that IDEA did not require that the child in that case be educated in his neighborhood school because his IEP required services that were provided at a centralized location. The court explained that schools “have significant authority to determine the school site for providing IDEA services.” *Id.* at 380. The court, citing one of its prior decisions, noted that centralized programs allow a school district to allocate staff and other limited resources to regional programs in order to better provide for disabled children. *Id.* at 381 (citing *Flour Bluff Independent School District v. Katherine M.*, 91 F.3d 689, 693-694 (1996)).

In this case, PGCPS offered the Student a placement in a self-contained special education class in his neighborhood school, [School 3], a placement that could implement all of the services required by his IEP in the least restrictive environment. The Parents rejected [School 3] and chose a different location, [School 4]. PGCPS is not required to create a placement at any location a parent chooses.

The 2012-2013 School Year

On August 1, 2012, the IEP team met to revise the Student’s IEP. The Student’s mother, Dr. XXXX, and Mr. Martin participated. The Parents wanted the Student to attend a private separate day school ([School 5]) or to stay at [School 4]. The Team reviewed the Student’s present levels of performance and revised his goals and objectives accordingly. The Team did not change the Student’s placement. The Team found the Student continued to require intensive special education instruction in all academic areas outside of general education for twenty-three hours and forty-five minutes per week. The Student would be in general education for eight

hours and forty-five minutes a week for his non-academic subjects. The Team recommended the Student return to [School 3] where he could receive the intensive services, noting that [School 4] could not provide such intensive instruction.

Based on the Student's performance at [School 4] for seventh grade and his lack of progress on his IEP goals, I find the 2012-2013 IEP was reasonably calculated to provide the Student with a free appropriate public education in the least restrictive environment. The Student clearly needs specialized instruction for his academic subjects; however, he does not need specialized instruction for non-academic subjects. The Student had As in Music and Art and a C in Health Education during the 2011-2012 school year at [School 4].

XXXX XXXX and XXXX XXXX are the Student's special education teachers at [School 4] for the 2012-2013 school year. Ms. XXXX is with the Student during Math and Science for one hour per day for four days per week and she is his case manager. Ms. XXXX works with the Student in a small group on small group days (Day 2).¹² Ms. XXXX is with the Student for one hour per day four days per week during Reading and Language Arts and for thirty minutes of Science per day. Ms. XXXX works with the Student in a small group during Reading and during Science if it is a small group day (Day 2).

Ms. XXXX testified that the Student is trying but he is struggling and not making sufficient progress. She explained that the Student, along with the rest of his class, is being given work one grade level above his current grade. She stated that the Student is not performing on grade level and that giving him advanced work is detrimental, frustrating, and may be the reason he is not doing his homework. She explained that the Student can learn but he cannot keep up with the pace of the general education class. She stated that in an intensive class the Student would work one-on-one more and would be able to learn at his own pace and master

¹² Day 1 is whole class instruction. Day 2 is small group instruction.

a skill before moving on to the next one. She described him as a social butterfly and on an eighth grade level socially. She said in the hallways or afterschool the Student is always talking to someone, laughing, and having a good time. Mr. XXXX teaches the Student again this school year in Reading and Language Arts, History, and Geography. He expressed concern that the Student was not going to be able to keep up with the class, especially as the workload became harder as the year progresses. Ms. XXXX testified that whole class instruction is very difficult for the Student; there are a lot of distractions and he requires a lot of prompting to stay on task. She explained that he has difficulties processing verbal commands, he is inattentive, he sometimes does not seem interested, he needs constant prompting, and when the assignment or test is too challenging he shuts down. She stated that the Student does not turn in his homework consistently as it is assigned, and that, as a result, he is not building a foundation as the work progresses. She described the Student as very well-liked and popular, he is always chatting with friends before class, and he is well-received, although at times he can be a little immature. She stated that the Student would benefit greatly in a small self contained special education class because he would be able to access the curriculum on a lower level but would still have social access to his non-disabled peers.

The Student's performance at [School 4] as of November 7, 2012 illustrates his need for a more intensive setting. According to his progress report, the Student was not making sufficient progress on the following IEP goals: reading comprehension (both goals), written language, math problem solving, organization, and one of the math calculation (fractions and division) goals. The reasons for his lack of progress included: missing assignments, low test scores, and that his skills are far below grade level. He was making sufficient progress on his other math calculation goal (equations) and self management goal.

Based on the testimony of Ms. XXXX, Ms. XXXX, and Mr. XXXX, and the November 7, 2012 progress report, I find that from August 2012 until the beginning of November 2012, the Student's teachers provided him with all of the accommodations, modifications, supports, and services identified in his IEP, except the Student did not receive all of his academic instruction from a special educator in a self contained classroom. His instruction was provided by general educators and special educators in general education classrooms. The Student is not making sufficient progress on his IEP goals and objectives; however, because he needs to receive his academic instruction from a special educator in a self contained classroom. He is able to successfully participate in a general education classroom for his non-academic subjects, such as Art, Music, Physical Education, and Health Education.

Dr. XXXX's Opinion Regarding Current and Future Placement

Dr. XXXX opined that the Student needs to be placed in a separate special education school, such as [School 5]. As stated above, Dr. XXXX's knowledge of the Student was based on his review of documents, conversations with the Parents, and participation in some IEP meetings. Dr. XXXX did not observe or work directly with the Student during the 2010-2011, 2011-2012, or 2012-2013 school years, although he had observed the Student previously during elementary school. Thus, Dr. XXXX does not have any current independent knowledge of the Student. As a result, his opinion does not carry as much weight as those of the Student's classroom teachers, who have direct knowledge of the Student's abilities. Moreover, Dr. XXXX's conclusion that the Student needs a placement in a separate special education school is not supported by the facts in evidence. The Student was able to earn As, Bs, and Cs in Music, Art, Physical Education, and Health Education in the general education classrooms at [School 3] and [School 4]. Moreover, the Student is very social, acts in a manner consistent with his age,

and has friendships with non-disabled peers. There is simply no factual support for Dr. XXXX's opinion that the Student must be segregated from non-disabled peers for the entire school day.

In summary, the Student was not provided with a free, appropriate public education from August 23, 2010 to October 7, 2010 while the Student attended [School 2]. However, PGCPS remediated that failure by providing the Student with eight hours of one-on-one tutoring as compensatory education. The Student was provided with a free, appropriate public education from October 8, 2010 through the end of the school year in June 2011 at [School 3]. The Student was offered a free, appropriate public education for the 2011-2012 and 2012-2013 school years in a self contained special education class at [School 3]. However, the Parents rejected the placement offered and placed him in a general education class at [School 4]. The staff at [School 4] implemented the Student's IEP to the extent that they could but they could not place the Student in a self-contained special education class by himself. As a result of the Parents' decision to enroll the Student at [School 4] during 2011-2012 and 2012-2013, the Student did not make sufficient progress on his IEP goals; it was not a failure of PGCPS to offer services. Therefore, the Student is not entitled to compensatory education. Further, there is no basis to order placement of the Student at a private special education school at public expense.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was not provided with a free, appropriate public education from August 23, 2010 to October 7, 2010 while the Student attended [School 2]. However, I conclude that PGCPS remediated that failure by providing the Student with eight hours of compensatory education. I conclude that the Student was provided with a free, appropriate public education from October 8, 2010 through the end of the school year in June 2011. I further conclude that the Student was

offered a free, appropriate public education for the 2011-2012 and 2012-2013 school years in a self contained special education class at [School 3]. 20 U.S.C.A. §§ 1401(9), 1412(a)(1)(A), 1412(a)(5), 1414(d)(1)(A) (2010); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Hessler v. State Bd. of Educ.*, 700 F.2d 134 (4th Cir. 1983); *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003).

ORDER

I **ORDER** that the Due Process Complaint filed by the Parents on August 14, 2012 is **DISMISSED**.

December 20, 2012
Date Decision Mailed

Lorraine Ebert Fraser
Administrative Law Judge

LEF/

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.