

XXXXXX XXXXX

v.

MONTGOMERY COUNTY
PUBLIC SCHOOLS

* BEFORE BRIAN ZLOTNICK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-08-20995

* * * * *

DECISION

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ORDER

STATEMENT OF THE CASE

On June 2, 2008, [Mother] and [Father] (Parents), on behalf of XXXXX XXXXX (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (Supp. 2007).

I conducted a hearing on August 13, 15, September 3 and 8, 2008 at MCPS, 850 Hungerford Drive, Rockville, Maryland.¹ Holly Parker, Esquire, represented the Parents and Jeffrey Krew, Esquire, represented MCPS. The Parties² agreed to permit me 30 days from the close of the record on September 8, 2008, to issue a decision in this case.

¹ A hearing date was scheduled for August 29, 2008, but was postponed at the request of the Parents' attorney, Holly Parker, because she was unable to fly home from Grenada due to Hurricane Hannah.

² At times throughout this decision, the Parents and MCPS are collectively referred to as the Parties, and individually referred to as the Party.

The hearing was held pursuant to the following laws: Individuals With Disabilities Education Improvement Act 2004 (IDEIA), 20 U.S.C.A. § 1415 (Supp. 2007); 34 C.F.R. § 300.511 (2007); Md. Code Ann., Educ. § 8-413 (2006); Code of Maryland Regulations (COMAR) 13A.05.01; and Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 28.02.01.

ISSUES

1. Did the Individual Education Program (IEP) developed by MCPS for the 2007-2008 school year provide the Student with a Free and Appropriate Public Education (FAPE)?
2. Should MCPS reimburse the Parents for the Student's private placement at the [School 6] during the 2007-2008 school year?
3. Are the Parents entitled to reimbursement from MCPS for the Student's private evaluation?
4. Did the Student make adequate educational progress when she attended [Program 2] at [School 5] during the 2006-2007 school year?
5. If there was a denial of FAPE, is the Student entitled to compensatory education?

SUMMARY OF THE EVIDENCE

A. Exhibits

MCPS submitted the following exhibits that were admitted into evidence:

- Bd. #1 - October 1, 2004 Educational Assessment Report
- Bd. #2 - November 2, 2004 Triennial Report of Psychologist
- Bd. #3 - November 19, 2004 Speech-Language Status Report
- Bd. #4 - January 5, 2005 application for admission to [School 6]
- Bd. #5 - April 8, 2005 letter from [School 6] to the Parents
- Bd. #6 - March 2006 Speech/Language Reassessment and Status Report
- Bd. #7 - Secondary Teacher Referrals from the Student's 6th grade English, Social Studies, Health, and Math teachers
- Bd. #8 - May 17, 2006 IEP
- Bd. #9 - Student's final report card for the 2005-2006 school year
- Bd. #9A - Secondary Teacher Referrals from the Student's 7th grade English, Reading, World Studies, College Education, Math and Social Studies teachers
- Bd. #10 - March 28, 2007 application for admission to [School 6]
- Bd. #10A - Secondary Teacher Reports from the Student's 7th grade Corrective Reading, English, World Studies, and Physical Education teachers
- Bd. #11 - E-mail communications between [Mother] and XXXXX dated April 20 and 21, 2007
- Bd. #12 - April 23, 2007 letter from [School 6] to the Parents
- Bd. #13 - May 2007 Psychological/Educational Evaluation
- Bd. #14 - May 22, 2007 letter from [School 6] to the Parents
- Bd. #15 - June 1, 2007 Speech/Language Status Report
- Bd. #16 - June 4, 2007 credit card receipt
- Bd. #17 - Student's final report card for the 2006-2007 school year
- Bd. #17A - Secondary Teacher Reports from the Student's 7th grade Science and Social Studies teachers
- Bd. #18 - July 5, 2007 Review of Non-MCPS Psychological Report
- Bd. #19 - July 7, 2007 Review of Non-MCPS Educational Assessment Report
- Bd. #20 - July 9, 2007 IEP
- Bd. #21 - [School 6] Program Agreement signed by [Mother] on July 16, 2007
- Bd. #22 - August 28, 2007 letter from Holly L. Parker, Esquire, to XXXXX
XXXXX
- Bd. #23 - August 28, 2007 letter from XXXXX XXXXX, to Holly L. Parker, Esquire
- Bd. #24 - June 2, 2008 Request for Mediation/Due Process Hearing
- Bd. #25 - June 12, 2008 letter from Jeffrey A. Krew, Esquire, to Holly L. Parker, Esquire with attached copy of July 9, 2007 IEP
- Bd. #26 - May 30, 2007 Professional Resume of XXXXX XXXXX

The Parents submitted the following documents that were admitted into evidence:³

- Parent Ex. # 34 - 2006 Maryland School Assessment (MSA) report
- Parent Ex. # 37 - April 9, 2007 letter from Holly Parker, Esquire, to XXXXX XXXXX
- Parent Ex. # 38 - April 13, 2007 letter from XXXXX to the Parents
- Parent Ex. # 39 - April 17, 2007 letter from XXXXX to Ms. Parker
- Parent Ex. # 42 - April 24, 2007 letter from XXXXX XXXXX, to Ms. Parker
- Parent Ex. # 43 - May 22, 2007 IEP
- Parent Ex. # 47 - 2007 MSA report
- Parent Ex. # 51 - May 22, 2007 Authorization for Assessment
- Parent Ex. # 64 - XXXXX's classroom observation notes from her September 14, 2007 visit to [School 6] (includes #64A and #64B)
- Parent Ex. # 65 - November 28, 2007 e-mail from XXXXX XXXXX to XXXXX's office
- Parent Ex. # 68 - XXXXX's classroom observation notes from her January 23, 2008 visit to [Program 2]
- Parent Ex. # 70 - Student's May 2, 2006 Honor Roll Certificate
- Parent Ex. # 71 - Student's Outstanding Achievement Award for 2005-2006
- Parent Ex. # 72 - Student's 2006-2007 Excellence in English Certificate

B. Testimony

The following witnesses testified on behalf of the Parents:

1. [Mother], the Student's mother
2. XXXXX XXXXX, School Psychologist
3. XXXXX XXXXX, IEP Testing Coordinator, [School 6], accepted as an expert in special education
4. XXXXX XXXXX, Special Education Teacher, MCPS
5. XXXXX XXXXX, accepted as an expert in psychology
6. XXXXX XXXXX, Director, High School program at [School 6], accepted as an expert in special education

The following witness testified on behalf of the MCPS:

1. XXXXX XXXXX, Special Education Teacher, accepted as an expert in special education

³ The Parents submitted their exhibits in a non-sequential order.

FINDINGS OF FACT

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

1. The Student is fourteen years old (DOB XX/XX/XX) and her primary disability listed on her IEP is specific learning disabilities which affects her abilities in decoding, comprehension, basic writing skills, written expression, math calculations and reasoning, basic math facts, processing and visual-motor integration. The most recent psychological report of the Student, dated May 2007, from XXXXX XXXXX, expressed XXXXX's opinion that the Student has Attention-Deficit/Hyperactive Disorder, Predominately Inattentive Type and Learning Disorder, Not Otherwise Specified with global deficits in reading, written expression, math, executive dysfunction, processing speed, visual-motor integration and weaknesses in visual-spatial processing. (Board Ex. #s 13 & 20).

2. The Student moved to Montgomery County from [Country] prior to the 2001-2002 school year. She was enrolled in a special education program during her first grade year in [Country]. She began the 2001-2002 school year in the 2nd grade at [School 1] but was transferred to [Program 1] at [School 2] for the remainder of her 2nd grade year. (Testimony of [Mother]).

3. The Parents and the Student moved to XXXXX prior to the 2002-2003 academic year. She attended [School 3] for her 3rd, 4th, and 5th grade years from 2002 to 2005 where she continued to receive special education services. (Testimony of [Mother], transcript pg. 29).

4. MCPS completed an educational assessment of the Student on October 1, 2004 utilizing the Woodcock-Johnson III Tests of Achievement. She received the following scores:

<u>CLUSTER SCORES</u>	<u>STANDARD SCORE</u>	<u>DESCRIPTION</u>
Broad Reading	64	Very Low
Broad Math	79	Low

Broad Written Language	57	Very Low
<u>SUBTEST</u>	<u>STANDARD SCORE</u> (Average = 100)	<u>DESCRIPTION</u>
Letter Word Identification	62	Very Low
Reading Fluency	69	Very Low
Passage Comprehension	78	Low
Calculation	82	Low Average
Math Fluency	73	Low
Applied Problems	79	Low
Spelling	60	Very Low
Written Fluency	59	Very Low
Writing Samples	71	Low
Word Attack	84	Low Average
Picture Vocabulary	92	Average
Academic Knowledge	89	Low Average

(Board Exhibit #1).

5. XXXXX XXXXX, MCPS Psychologist, conducted a psychological evaluation of the Student on October 18, 2004. XXXXX noted that the Student had made significant progress in the last few years, but her academic skills remain significantly below age expectations. The Student benefited from small group instruction that provided her with the cuing and positive feedback that allowed her to make progress and to remain motivated. (Board Exhibit #2).

6. The Student enrolled at [Program 2] for her 6th grade year in 2005 after the Parents were told by administrators at the Student's home school, [School 4], that her needs were too intensive to be handled in [Program 1]. (Testimony of [Mother], Transcript pg. 31).

7. The Student began attending the [Program 2] for her 6th grade year, the 2005-2006 academic year. Her 6th grade English teacher, XXXXX XXXXX, reported that the Student was average in oral expression and reading comprehension and below average in basic reading skills and written expression when compared to expectations for students in the 6th grade. XXXXX indicated she is a model student with good work ethics, manners and behavior and that

she loves learning. XXXXX also found that the Student's writing, spelling, punctuation and decoding skills were a concern. (Board Exhibit # 7).

8. The Student's 6th grade Social Studies and Health teachers reported that she was average in oral expression and below average in basic reading skills, reading comprehension and written expression. Her Math teacher reported that the Student was average in oral expression, math reasoning and math calculation when compared to the expectations for students in the 6th grade. (Board Exhibit #7).

9. During the 6th grade, the Student made progress in her IEP organizational skills objectives by obtaining all "4s" in the 3rd quarter which indicates that progress has been made toward the objective and it appears the objective will be met by the end of the duration of the IEP. In Math, the Student achieved two "3+s", two "3s", two "2+s" and two "2s" on her eight IEP objectives. A "2" indicates that progress is not sufficient to meet this objective and a "3" indicates that progress has been made toward the objective but the objective may not be met by the end of the IEP period. She achieved her Speech and Language objectives by the end of the IEP period. In English she received five "4s" and one "2" on her IEP objectives. She received four "4s" in her Reading Comprehension objectives and three "4s" and two "2s" in her Reading/Language Arts objectives. (Board Exhibit #8).

10. The Student's final grades for 6th grade were as follows:

<u>SUBJECT</u>	<u>GRADE</u>
Music	A
Physical Education	B
Introduction to Computers	B
Creative Facts	B
Art	B
Health Education	A
Math	B
English	A

Social Studies B
Reading B

(Board Exhibit #9)

11. The IEP team recommended continued placement for the Student at [Program 2] for the 2006-2007 academic year with special education classroom instruction in English, Math and Reading and co-taught classes in Social Studies and Science with related services of Speech and Language Therapy and Occupational Therapy on a bi-monthly 30 minute consult basis. [Program 2], however, ultimately placed her in self contained special education classes for English, Math, Reading, Social Studies and Science. (Board Exhibit #8 & Testimony of XXXXX).

12. The Student returned to [Program 2] for the 2006-2007 academic year for 7th grade.

13. She was placed in XXXXX XXXXX's 7th grade [Program 3] reading class at the beginning of the school year. [Program 3] is a research based reading comprehension program in which there were special and general education students. After two to three weeks in XXXXX's [Program 3], the Student was transferred to a corrective reading class because of her significant needs in decoding and word attack. (Testimony of XXXXX – Transcript at pg. 305).

14. The Parents obtained a private psychological/educational evaluation of the Student in April of 2007 and a report was issued in May 2007 which yielded following results:

<u>CLUSTER/SUBTEST</u>	<u>STANDARD SCORE</u>	<u>PERCENTILE</u>
Oral Language	90	26
Oral Expression	89	23
Story Recall	103	59
Understanding Directions	86	18
Picture Vocabulary	85	16
Broad Reading	61	0.5

Basic Reading Skills	67	1
Letter-Word Identification	58	0.2
Reading Fluency	68	2
Passage Comprehension	66	1
Word Attack	78	7
Broad Written Language	67	1
Basic Writing Skills	67	1
Written Expression	72	3
Spelling	63	1
Writing Fluency	69	2
Writing Samples	81	11
Editing	71	2
Broad Math	67	1
Math Calculation Skills	62	1
Calculation	63	1
Math Fluency	68	2
Applied Problems	75	5
Calculation (calculator use allowed)	95	39
Academic Skills	55	0.1
Academic Fluency	65	1
Academic Applications	68	2
Academic Knowledge	88	21

(Board Exhibit #13)

15. The Student's overall intelligence is within the borderline range and her rate of acquisition of academic skills is slower than that of students whose intelligence is above the borderline range. (Testimony of XXXXX and XXXXX and Board Exhibit #13).

16. The Student can make educational progress without achieving grade level status or mastery of IEP objectives. Her report card grades are modified to reflect her special education status because to grade her otherwise would mean that the Student would be penalized for her learning disability. The Student's report card grades measured her progress toward mastery of her IEP goals. (Testimony of XXXXX and XXXXX).

17. The Student does not exhibit any social, emotional or behavioral issues that would impact her ability to learn and she does not exhibit significant signs of depression or anxiety.

(Testimony of XXXXX and Board Exhibit #13).

18. The Student's 7th grade English class had a 12 to 1 teacher to student ratio with a para-educator and speech pathologist who worked in the class on a 50% basis. The Student only has a basic understanding of phonics and her decoding skills are vastly below her comprehension skills. (Testimony of XXXXX).

19. The Student's final grades for 7th grade were as follows:

<u>SUBJECT</u>	<u>GRADE</u>
Art	B
Physical Education	A
FACS Grade 7	B
Health Education	A
College Education	B
Introduction to Computers	A
English Grade 7	A
Reading 7	A
World Studies	A
Mathematics	B
Science	A

(Board Exhibit #17)

20. The Student's 7th grade English teacher reported that she was below average in oral expression, basic reading skills and written expression and was between average and below average in reading comprehension after the first three quarters of the 2006-2007 academic year. The Student's Reading, College Education, and World Studies teachers found that she was below average in oral expression, basic reading skills, reading comprehension and written expression after the first three quarters of the 2006-2007 school year. Her Social Studies teacher rated her between average and below average in oral expression and below average in basic reading skills,

reading comprehension, and written expression. The Student was motivated to complete her classroom assignments and displayed great effort in all of her classes. (Board Exhibit #9A).

21. The Student's instructional grade level performance for reading rose from a 2, a 2nd grade level, in February 2006 to a 2.5-2.9 level by the end of 7th grade in July 2007. (Board Exhibits 8 & 20).

22. The Student's Maryland School Assessment (MSA) scores for 2006 were 378 in Reading and 350 in Math. Her Reading score fell in the "basic" range which means that she was unable to adequately read and comprehend grade appropriate literature and informational passages. Her Math score also fell in the "basic" range which means that she demonstrated only partial mastery of the skills and concepts defined in the Maryland Mathematics Content Standards. Her MSA scores for 2007 were 379 in Reading and 370 in Math, which were both in the "basic" range. (Parent Exhibits 34 & 47).

23. The Student's MAP-R Rit Reading score rose from a 171 in the fall of the 2006-2007 academic year to a 184 in the spring of the 2006-2007 school year. The average increase in scores on MAP-R Rit Reading test for all 7th grade students, including general education students, is a little less than three and a half points. The Student's 13 point increase in her Rit Reading score indicates phenomenal progress. (Testimony of XXXXX, transcript pgs. 615-616 and Board Exhibit #20).

24. The Student made meaningful progress in XXXXX's reading class. Her reading program's chart, where students plotted their success, indicated her improvement in reading. Her writing samples from the beginning of 7th grade to later in the year also showed improvement in her ability to properly use spacing and to keep her writing on the paper's lines. The Student felt

more comfortable reading out loud in XXXXX's 7th grade English class and her fluency improved toward the end of 7th grade. (Testimony of XXXXX, Transcript pg. 257).

25. A draft IEP was developed for the Student's 8th grade year (2007-2008) on July 9, 2007. [Mother] participated in the July 9, 2007 IEP meeting. It recommended self contained special education instruction for her science, math, English, and reading classes and co-taught instruction by a special education teacher and a general education teacher for her social studies class. The IEP also specified 34 sessions of speech and language services to be provided in 45 minute sessions. It also called for a monthly 30 minute occupational therapy service for the Student. The IEP recommended continued placement at [Program 2] for the 2007-2008 academic year. The services called for in the July 9, 2007 IEP could be appropriately provided to the Student at [Program 2] for the 2007-2008 academic year. (Testimony of XXXXX and XXXXX and Board Exhibit #20).

26. On March 28, 2007, the Parents completed an application for admission to the [School 6] for the Student's 8th grade year of 2007-2008. The Parents were concerned with the Student's lack of progress at [Program 2]. (Testimony of [Mother] and Board Exhibit #10).

27. The Parents decided to unilaterally place the Student at [School 6] for the 2007-2008 academic year. [School 6] is a private school that serves students with moderate to severe language difficulties and does not service general education students. The 8th grade classes have a ten to one student to teacher ratio and a teacher assistant is assigned to each class. [School 6] utilizes either classroom based reading services with research based reading programs or a reading specialist who works with the students through the utilization of researched based programs such as the Wilson program. (Testimony of [Mother] and XXXXX).

28. The Student flourished socially at [School 6] and made progress in reading during her year at [School 6]. (Testimony of XXXXX and [Mother]).

DISCUSSION

The Law

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (Supp. 2008), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2006 & Supp. 2008), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (Supp. 2008).

In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. 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).

The IDEA contains the following, similar definition of FAPE:

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

20 U.S.C.A. § 1401(9) (Supp. 2008). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2006); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy”

or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), *citing Rowley*. Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 177.

“Educational benefit” requires that, “...the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also* *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002), *citing Rowley*, 458 U.S. at 192; *see also* *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *Board of Educ. of Montgomery County, v. S.G.*, 2006 WL 544529 (D. Md. March 6, 2006). Thus, the IDEA requires an IEP to provide a, “...basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also, Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Board of Educ. of Frederick County v. Summers*, 325 F.Supp.2d 565 (D. Md. 2004).

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. 300.114(a)(2)(i) & 300.117. Yet, mainstreaming disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom

cannot be achieved. *Id.* Accordingly, in such a case, FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district.

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 bear the burden of proving here that the Student's proposed 2007-2008 IEP and placement are not reasonably calculated to provide her FAPE.

In *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), the Supreme Court established a two-part test that must be satisfied before a court will order reimbursement for private placement. First, it must be determined that services provided under an IEP at a public school are inappropriate. Second, the private placement sought by the parents must be appropriate under the IDEA.

The Positions of the Parties

In this case the Parents raise substantive objections to the proposed placement at [Program 2] for the 2007-2008 academic year. Specifically, they argue that the IEP's proposed placement of the Student at [Program 2] fails to provide FAPE, and that FAPE was provided at [School 6] during the Student's 8th grade year there. The Parents seek reimbursement for their unilateral placement of the Student at [School 6] for the 2007-2008 school year, and reimbursement for the private evaluation they obtained from XXXXX.

MCPS argues that the IEP developed for the 2007-2008 school year is appropriate and can be implemented at [Program 2], which is the least restrictive environment and that the Student made meaningful educational progress at [Program 2] during the 2006-2007 school year.

The Parents' Procedural Objection

The Parent cited various procedural errors committed by MCPS in its request for a due

process hearing, but did not assert these positions at the hearing. At the hearing, the Parents did assert that the July 9, 2007 IEP was a draft and not a final IEP and that it erroneously identified the [Program 2] program as a [Program 1] program.

The Supreme Court has recognized that procedural compliance with the provisions of IDEA is critical to the efficient operation of the law, and that serious procedural noncompliance can support a finding that the child was not provided with a free appropriate education. *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). However, not every procedural violation constitutes a failure to provide the child with a free appropriate education. A case by case assessment of the violation must be conducted and a determination made as to the seriousness of the noncompliance, *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997), and whether, as a result of the procedural failure, the child lost any educational opportunity. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); and *see*, *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992).

The Parents have not presented any evidence to demonstrate that the mischaracterization of the [Program 2] program as a [Program 1] program or that the July 9, 2007 IEP was a draft IEP resulted in a loss of educational opportunity for the Student. Further, [Mother] testified that the draft status of the July 9, 2007 IEP and the designation of [Program 2] as a [Program 1] program were not factors in their decision to unilaterally place the Student at [School 6] for the 2007-2008 school year. Accordingly, I find that the draft status of the July 9, 2007 IEP and the designation of the [Program 2] program as a [Program 1] program did not constitute a serious procedural noncompliance that resulted in the loss of educational opportunity to the Student. *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Burke County Bd. of Educ. v. Denton*, 895

F.2d 973 (4th Cir. 1990); and *see, Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992).

The Parents' Substantive Claims: Whether the IEP Could Be Implemented and a FAPE Provided for the Student at [Program 2] for the 2007-2008 School Year and if she made meaningful educational progress at [Program 2] during the 2006-2007 school year

Considering the evidence presented in this case, there can be little doubt that the IEP drafted during the July 9, 2007, IEP meeting was reasonably calculated to provide the Student with a FAPE for the 2007-2008 school year. The IEP calls for a comprehensive special education program for the Student, staffed by an interdisciplinary team of well-qualified and highly experienced professionals. As the Parties agreed that there is no real dispute as to the goals of the IEP, only as to the means of delivering educational benefit to the Student, I conclude, as discussed below, that the Parents have not met their burden of showing that the proposed IEP, with placement at [Program 2], would not provide a FAPE for the Student.

The Student's mother testified that the Student has not been achieving educational progress at [Program 2] and that the 2007 IEP called for more of the same with continued placement at [Program 2] for the 2007-2008 academic year. The Parents asserted that a more intensive setting is necessary to enable their child to progress from a 2nd grade reading level. Their expert witness, XXXXX, utilized a team of evaluators from her practice to conduct a psychological/educational evaluation of the Student in May 2007. XXXXX recommended the following:

[The Student] needs a full-time self-contained special education setting, with a small student to teacher ratio and with teachers who are specifically trained in working with students with special needs. Occupational therapy, speech/language therapy and academic remediation need to be integrated into her daily program. Additionally, her educational programming should include life skills and a vocational component, as she advances in grade. Teachers need to be flexible in their demands and aware of [the Student's] significant learning disabilities,

attentional inconsistencies, Executive Dysfunction, and weaknesses in Processing Speed so that her learning needs can be addressed.

The July 2007 IEP specifies a self-contained special education setting for the Student's English, Reading, Math, and Science classes with her Social Studies class being a co-taught program with a general education and a special education teacher. The IEP also specified the inclusion of occupational and speech/language therapy during the 2007-2008 academic year. The Parents asserted that the Student was not receiving a meaningful education at [Program 2] because she continued to perform below grade level in all of her academic classes. They asserted that [School 6] provided the intensive self-contained setting necessary for the Student to progress.

The Parents also argued that the Student's lack of educational progress at [Program 2] established that she failed to receive a meaningful education there during the 2006-2007 academic year. They point to the Student's declining score in the Woodcock-Johnson III Broad Reading cluster score from a "64" in 2004 to a "61" in 2007 and her Passage Comprehension score decline from a "78" in 2004 to a "66" in 2007 as evidence of her lack of educational progress in reading. The Parents also asserted that the Student's instructional grade level performance for reading score of 2.5-2.9 at the end of her 7th grade demonstrated that she was still reading at a 2nd grade level upon her entrance to the 8th grade. The Parents strongly argued that the Student's lack of progress in her reading ability is unacceptable and forced them to decide to unilaterally place her at [School 6] for the 2007-2008 academic year. While it is undisputed that the Student's Broad Reading and Passage Comprehension scores declined from 2004 to 2007 and that she was reading at a middle to high 2nd grade level at the end of 7th grade, I disagree with the Parents' contention that the Student failed to make meaningful educational progress at [Program 2] during the 2006-2007 academic year.

The Parent's expert witness, XXXXX, recommended a full time special education setting for the Student. However, I found her recommendation to be less than convincing for several reasons. First, she only met with the Student for a five to ten minute period of time and never conducted a clinical interview of her. Further, XXXXX never interviewed the Student's teachers at [Program 2] to gain their perspective on how she performed. She also made assumptions based on one visit to [Program 2]. She visited an 8th grade Math class that the Student would have attended and opined that the oral instructions provided by the teacher could not have been processed by the Student. XXXXX also observed a corrective reading class that the Student would have attended at [Program 2] during the 2007-2008 school year. The class had five students and they were working on phonics, a skill that XXXXX agreed that the Student needs. XXXXX, however, disagreed with the methodology used in the corrective reading class. She asserted that the class utilized repetition while she believed that the Student needs a multi-sensory model instead. However, the Supreme Court in *Rowley*, 458 U.S. at 208, held that while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. "Ultimately, the Act [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials."

Barnett v. Fairfax County, 927 F.2d 146,152 (1991), *cert. den.* 502 U.S. 859 (1991).

Furthermore, in accordance with *M.M. v. Sch. Dist. of Greenville County*, 303 F.3rd 523, 532 (4th Cir. 2002) and *Faulders v. Henrico County Sch. Bd.*, 190 F. Supp. 2d 849 (E.D. Va. 2002), I found the testimony of the educational professionals that worked with the Student on a

consistent basis to carry more weight than the opinion offered by the Parent's expert witness, XXXXX, who only met briefly with the Student.⁴

XXXXX, accepted as an expert in special education, was the Student's English-7 teacher during the 2006-2007 school year. She worked closely with the Student and also consulted with the Student's other teachers at [Program 2]. She noted that the Student's reading fluency improved from the fall of her 7th grade year to the spring of 7th grade. She also testified that she spoke with the Student's 7th grade corrective reading teacher, XXXXX, and she reported that the Student was making progress in her corrective reading class. XXXXX was also convincing when she opined that the Student was making a great deal of progress toward the goals of her IEP as well as with the common tasks expected of every 7th grade student.

The Parents further argued that the report card grades received by the Student in her 6th and 7th grade school years failed to accurately measure her progress as she remained below grade level in the majority of her academic courses. Again, I was convinced by XXXXX's explanation of the grading process utilized for students with an IEP. She indicated that the Student's report card grades were more a measure of her progress toward the mastery of her IEP goals instead of her progress toward reaching the grade level of her similarly aged peers. The Student's academic grades in the 6th and 7th grade reflect such progress in that those grades were all "As" or "Bs".

An important factor to consider is the Student's ability to learn. XXXXX testified that the Student's deficiency in long-term memory affects her ability to learn and retain the knowledge that had already been taught to her. XXXXX qualified her statement in her report

⁴ XXXXX XXXXX, IEP Testing Coordinator at [School 6], was accepted as an expert in special education and testified on behalf of the Parents. However, XXXXX only testified regarding the Student's performance at [School 6] and offered no opinions regarding the appropriateness of the Student's IEPs or whether she received a meaningful education at [Program 2].

that the Student demonstrated overall intelligence functioning within the borderline range by arguing that the Student's IQ level of 70 was not accurate because of the variability of her sub-test scores. However, the Student's overall intelligence score on Woodcock-Johnson III test administered in May 2007 did result in a borderline score of 70 which placed the Student in the 2nd percentile. This brings us to the Student's rate of acquisition of knowledge. XXXXX testified that a student with borderline intelligence would attain knowledge at a slower rate than students with above borderline intelligence. XXXXX also stated that the Student's scores were borderline thus indicating that her rate of acquisition would be slower. Furthermore, both XXXXX and XXXXX testified that a student could make educational progress even if they fail to reach their respective grade levels. Accordingly, the Student's borderline intelligence impedes her ability to acquire knowledge at the same rate as above borderline intelligence students. Therefore, her ascendency from a 2.0 grade level in reading in February 2006 to a 2.5-2.9 level by July 2007 is not indicative of a lack of education progress, but a reflection of the Student's cognitive limitations.

The Student remained in the "Basic" range for Math and Reading in her 2006 and 2007 MSA exams. Her Math MSA score rose from 350 in 2006 to 370 in 2007. Her MSA Reading score rose from 378 in 2006 to 379 in 2007. The Parents argued that the Student's small increase in her reading scores on the MSA further demonstrates the Student's lack of educational progress. I disagree. Her Norm-Referenced Test (NRT) percentile ranking, when compared to students in the same grade from across the United States, rose from the 20th percentile in 2006 to the 78th percentile in 2007 for Math. Similarly, her NRT percentile in Reading rose from 23 in 2006 to 51 in 2007. Further, the Student's Reading MAP-R Rit score rose from 171 in the fall of the 2006-2007 school year to 184 by the spring of the 2006-2007 school year. XXXXX credibly

testified that the Student's 13 point increase in her Rit Reading scores was indicative of phenomenal progress as the average student's increase in their Rit Reading scores was a little less than three and a half points. Additionally, the Student made meaningful progress in XXXXX's reading class where her reading chart plotted her success. Further, XXXXX also noticed the improvement in her writing samples from the beginning of 7th grade to later in the year and that her reading fluency improved as well.

In sum, I find that the Parents have failed to meet their burden to establish that the Student was denied a FAPE at [Program 2] during the 2006-2007 school year and that the IEP proposed for the 2007-2008 failed to provide her with a FAPE for her 8th grade year. MCPS has demonstrated that the Student is making meaningful educational progress.

As discussed above, the issue before me is not whether the proposed IEP provides the best services available to maximize educational benefit for the Student. Nor is the issue a contest between whether [School 6] or the proposed [Program 2] placement is a more preferable option. Rather, the test is whether the school system provides a student with "personalized instruction with sufficient support to permit the handicapped child to benefit educationally." *Rowley*, 458 U.S. at 177. In this case, I conclude that the proposed IEP meets this standard. When the parents of a disabled child assert that the educational program provided by a non-public school provides a better education than the public school program proposed by state education officials, the fact that the program proposed by the parents is allegedly better does not mean that the program proposed by the State is inappropriate. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983). The *Hessler* court explained that there is no requirement that the state provide a child with the best education – public or private – that money can buy, nor is the state required to maximize the potential of the student. All that is required is that the disabled child

benefit educationally from the program. Because the Student flourished socially and made progress in her reading at [School 6] during the 2007-2008 school year does not mean, *ipso facto*, that [Program 2] would be an inappropriate placement. While it is understandable that the Parents want placement at [School 6] because in their opinion it provides the optimal program for the Student, all that the law requires is a showing that the Student would benefit educationally from placement at [Program 2]. XXXXX and XXXXX both testified that placement at [Program 2] was appropriate for the Student and that her IEP could be implemented there. XXXXX and XXXXX both asserted that [School 6] was the appropriate placement for the Student. Regardless, the Parents failed to meet their burden to establish that [Program 2] was an inappropriate placement for the Student.

Least Restrictive Environment (LRE)

In addition to IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the least restrictive environment to achieve a FAPE. Pursuant to federal statute, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, mainstreaming disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.* and 34 C.F.R. § 300.114(a)(2). That does not mean, however, that in such a case, placement of a child in a private school setting, at the public school district's expense, is the only option available that would allow a child to receive a FAPE. If a public school setting has a self-contained special education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment

would be accomplished by placement at the public school program.

In the matter before me, there is no evidence that the Student suffers from any emotional or behavioral issues that impact her ability to learn. In fact, the majority of the Student's teachers report that the Student enjoys school and imbues an enthusiastic approach to her education. The Parents reported that the Student flourished socially at [School 6] and that she was invited over to another [School 6] student's house, which was the first time she was ever invited over to a classmate's house for a play-date. The Parents did send an e-mail to the Student's corrective reading teacher, XXXXX on April 20, 2007 expressing concerns that the Student was being picked on by her classmates. However, XXXXX responded that neither she nor her para educators that are assigned to her class have noticed any bullying of the Student. Furthermore, XXXXX testified that the Student seemed happy in her Art and College Education mainstreamed classes and that she always seemed happy at lunch and was talking with others there. XXXXX further opined that there is no justification for segregating the Student in a separate special education school.

In light of the evidence and the IDEA's "least restrictive environment" mandate, I cannot conclude that the school system's proposed IEP was not reasonably calculated to provide the Student educational benefit at [Program 2]. While the Parents clearly believe that she would receive greater educational benefit from the environment at [School 6], that is not the standard for determining whether the school system has offered FAPE in the least restrictive environment. I find that the nature of the Student's disability is such that she does not require removal from a regular education environment and can receive educational benefit from interaction with her non-disabled peers at [Program 2].

Claim for Reimbursement for the XXXXX Educational Evaluation

The Parents argued that they should be reimbursed for the cost of a privately-obtained psychological/educational educational evaluation from XXXXX. I find that the Parents have not satisfied their burden of proving entitlement to reimbursement.

The parents of a child with a disability are entitled to a number of procedural safeguards, including the opportunity to obtain an independent educational evaluation (IEE) of the child. 20 U.S.C.A. § 1415(b)(1). Under the applicable regulations, “ ‘independent educational evaluation’ means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question[.]” 34 C.F.R. § 300.502(a)(3)(1). The regulations further provide that parents are entitled to an IEE at public expense, provided certain conditions are met:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either-

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

34 C.F.R. § 300.502(b).

The Parents have provided no evidence to indicate that they requested an independent educational evaluation from MCPS. The Parents testified that they sought XXXXX's evaluation

because of their concern regarding the Student's lack of educational progress. There is no evidence that prior to the Parents' decision to have the Student independently evaluated by XXXXX in May 2007, that they ever asked MCPS to have an independent evaluator conduct an educational assessment of her. Accordingly, one of the antecedent conditions of the "public expense" component of 34 C.F.R. § 300.502(b) has not been met.

Most significantly, the May 2007 evaluation from XXXXX indicated that the Parents requested this evaluation. There is no indication that the evaluation was done at the recommendation of one of the educators who worked with the Student. (Board Exhibit #13).

In summary, the Parents failed to meet their burden to establish that [Program 2] was not an appropriate placement in the least restrictive environment for the 2007-2008 school year. When FAPE has been offered that meets the special education and related services needs of a student with a disability, and the parents elect not to accept the program offered to their child by the public agency and instead choose to enroll their child in a independent school facility or residential setting, the public agency is not required to pay for that student's education. Thus, the Parents are not entitled to reimbursement for their placement of the Student at [School 6] for the 2007-2008 school year.

Finally, both parties argued regarding the appropriateness of [School 6] as a private placement for the Student. Pursuant to *Burlington* and *Carter*, the appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of FAPE. See *Florence County_Sch. Dist. Four v. Carter*, 510 U.S. 7 and *School Comm. Of Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359. In this matter, I have concluded that the IEP, with its placement at [Program 2], does offer the Student FAPE. Accordingly, an analysis pursuant *Burlington* and *Carter* is inapplicable.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the July 9, 2007 IEP with placement at [Program 2] for the 2007-2008 school year, is reasonably calculated to provide a FAPE for the Student, and that the Student could reasonably be expected to make meaningful educational progress under that IEP. Further, I conclude that MCPS did not commit any procedural errors that resulted in the loss of educational opportunity for the Student. I also conclude that the Parents are not entitled to reimbursement of the private psychological/educational evaluation they obtained from XXXXX in May 2007. Finally, the Parents are not entitled to reimbursement for their unilateral placement of the Student at [School 6] for the 2007-2008 school year. *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997); *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985); *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); IDEA, 20 U.S.C.A. §§ 1400–87 (2000); 34 C.F.R. § 300.502(b); COMAR 13A.05.01.07-.09.

ORDER

I **ORDER** that the Complaint filed against MCPS by [Mother] and [Father] on behalf of their daughter, [Student], is **DENIED** and **DISMISSED**.

October 2, 2008
Date Decision Mailed

Brian Zlotnick
Administrative Law Judge

#100226

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) (2006).

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.