

XXXX XXXX

* BEFORE THOMAS G. WELSHKO,

v.

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

BALTIMORE COUNTY

* OF ADMINISTRATIVE HEARINGS

PUBLIC SCHOOLS

* OAH NO.: MSDE-BCNY-OT-06-53487

* * * * *

DECISION

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

STATEMENT OF THE CASE

On December 18, 2006, XXXX XXXX and XXXX XXXX (the Parents), on behalf of XXXX XXXX (the Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation or placement of the Student by Baltimore County Public Schools (BCPS).

The OAH scheduled a hearing for February 1 and 9, 2007. I convened the hearing, as scheduled, at the Office of Administrative Hearings in Hunt Valley, Maryland. At the hearing, J. Stephen Cowles, Attorney-at-Law, Baltimore County Public Schools, 6901 N. Charles Street, Baltimore, Maryland 21204, represented BCPS. Holly L. Parker, Attorney-at-Law, 10722 Lexington Street, Kensington, Maryland 20895, represented the Parents. The OAH allocated insufficient hearing days for the hearing,

which necessitated continuing the case, by agreement of the parties, to March 5, 2007. I closed the record on that date.

I conducted the hearing pursuant to the following legal authority: Individuals With Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C.A. § 1415 (Supp. 2006); 34 C.F.R. § 300.507 (2006); Maryland Annotated Code, Education Article, section 8-413;¹ Code of Maryland Regulations (COMAR) 13A.05.01; and Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings.

Sections 10-201 through 10-226 of the Administrative Procedure Act, Maryland Annotated Code, State Government Article (Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2006)); and the Rules of Procedure of the Office of Administrative Hearings, COMAR 28.02.01, govern the procedure in this hearing.

The Code of Federal Regulations sets a time limit of forty-five days from the filing of the *Request for Mediation/Due Process Hearing* for the issuance of a decision in special education hearings. 34 C.F.R. § 300.515(a)(2) (2006). When it became apparent that the hearing would exceed this time limit, the parties waived the forty-five day deadline. At the conclusion of the hearing on March 5, 2007, the parties agreed that my decision would be due on April 2, 2007, twenty-eight days after the close of the record.

ISSUE(S)

The issues on appeal are:

1. Did BCPS improperly determine that the Student was ineligible for special education and related services for the 2005 – 06 school year?

¹ Md. Code Ann., Educ. § 8-413 (2006).

2. Was the Student eligible for special education and related services for the 2006 – 07 school year?

3. Assuming that the Student was eligible for Special Education and related services during the times relevant, did BCPS commit procedural violations that deprived the Student of educational opportunity?

4. If the Student was eligible for special education and related services during the 2005 – 06 and 2006 – 07 school years and BCPS committed procedural violations that deprived the Student of educational opportunity, is BCPS required to reimburse the Parents for funds that they expended, to date, to place the Student at [School 1]?

5. If the Student was eligible for special education and related services during the 2006 – 07 school year, is BCPS required to pay the Student’s tuition at [School 1] for the remainder of the 2006 – 07 school year?

SUMMARY OF THE EVIDENCE

A. Exhibits

The Parents offered thirteen exhibits; BCPS offered sixteen exhibits. The parties also offered one joint exhibit. I admitted all exhibits into evidence. (I have attached a detailed Exhibit List as an Appendix.)

B. Testimony

Parents’ Witnesses

The Student’s Parents called the following witnesses:

XXXX XXXX, the Student’s first grade teacher at [School 2]. Ms. XXXX testified as an adverse witness;

XXXX XXXX, School Psychologist, BCPS, currently employed at

[School 3] and [School 2]. Ms. XXXX testified as an adverse witness. BCPS later had Ms. XXXX admitted as an expert in school psychology;

XXXX XXXX, Assistant Vice Principal of [School 2]. Ms. XXXX testified as an adverse witness;

XXXX XXXX, Principal of [School 2]. Ms. XXXX testified as an adverse witness;

XXXX XXXX, Ph.D., licensed Psychologist with the XXXX. I admitted Dr. XXXX as an expert in Psychology with a specialty of working with gifted and talented children with learning disabilities;

XXXX XXXX, former Elementary School Teacher with Montgomery County Public Schools, now working for XXXX. I admitted Mr. XXXX as an expert in special education with an emphasis on the gifted-talented domain. Mr. XXXX also testified as a rebuttal witness for the Parents;

The Student's Mother.

BCPS's Witnesses

BCPS called the following witnesses:

XXXX XXXX, Special Educator, [School 2];

XXXX XXXX, School Psychologist, BCPS, currently employed at [School 3] and [School 2]. As noted previously, I admitted Ms. XXXX as an expert in School Psychology.

FINDINGS OF FACT

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

Facts Concerning the Student's Educational Profile.

1. The Student was born on XXXX, 1999. (Parent (P) Ex. 5/28²)

² Because of the five-day disclosure rule, parties generally mark their exhibits in advance. Parties rarely offer exhibits in their pre-marked order. Therefore, I have given each exhibit two numbers. The first number designates the order in which the exhibit was admitted; the second signifies the pre-marked number. Some exhibits were not pre-

2. As an infant, the Student was “bright-eyed, smiling and engaging.” She was also a poor sleeper and highly sensitive to sensory experiences (i.e., loud noises, types of clothing, taking baths, etc.). (BCPS Ex. 6/17 at 2)

3. The Student’s cognitive abilities are in the “superior” and “very superior” ranges; nevertheless, she has weaknesses in processing visual-spatial information. The Student also suffers from Attention Deficit Hyperactivity Disorder (ADHD). (BCPS Ex. 7/18)

4. The Student concocts elaborate fantasy worlds for self-play, usually involving prehistoric animals such as dinosaurs and woolly mammoths. During school recess periods, the Student rarely permits other students to engage in her fantasy games, because she will only allow them to participate if they play in her fantasy world the way she wants them to play. (Tr. 1, Feb. 5, 2006 at 50:12 – 51:13; test. Mother, Mar. 5, 2007³)

Facts Related to the Chronology of Events.

5. The Student began pre-school at a XXXX school. She attended that school for a year and a half beginning at age three. The Parents removed her to kindergarten at [School 4] in 2004, a private religious school, because she did not adapt well to the pre-school environment at the XXXX school. (Test. Mother, Mar. 5, 2007; BCPS Ex. 6/17 at 3)

6. The curriculum proved too rigid and restrictive for the Student at [School

marked. They only bear one number. A dash appears in lieu of the second number in those cases.

³ I cannot cite to the transcript pages for the third day of hearing because the parties never requested a transcript of the proceedings for that day.

4]. The Parents moved the Student to kindergarten at [School 2] in May 2005. (Test. Mother, Mar. 5, 2007; P Ex. #13)

7. The Student entered first grade at [School 2] ([School 2]) in September 2005. (Test. Mother, Mar. 5, 2007)

8. The Student had a behavioral incident on her first day of class in first grade at [School 2]. Her teacher, Ms. XXXX, directed the children in the Student's class to write items in their journals. When the Students finished writing, the teacher told the class to put their journals away. The Student refused. The teacher went to the Student's desk and removed the journal. She then called the Parents to schedule a Student Support Team (SST) meeting. (Test. Mother, Mar. 5, 2007)

9. A week after the first day of classes, the SST met. The SST recommended that the Student use a behavior chart. (Test. Mother, Mar. 5, 2007)

10. The Student had the following behavioral incidents:

- September 14, 2005: refused to follow teacher's directions.
- September 20, 2005: given time out for disrupting a lesson.
- October 18, 2005: consistently making a beeping noise in class; continued to do so after being told to stop by her teacher.
- October 20, 2005: squeezed another child's arm and stuck her tongue out at Ms. XXXX.
- November 1, 2005: misbehaving in class and sent to the Principal XXXX XXXX's office. Attempted to run out of the office. Also said, "what if I throw this?" "What if I put my feet on the wall?" She repeatedly kept saying to secretarial staff, "who are you? She was testing limits.
- November 7, 2005: drew across her desktop twice and touched other children. Told to stop, but did not. Threw school supplies.

- November 10, 2005: grabbed at her teacher, made animal noises, couldn't sit in chair, refused to do work, hit another student in the face.
- November 29, 2005: refused to do work, grabbed her teacher, kicked off her shoes and meowed like a cat.
- January 6, 2006: grabbed her teacher, made it difficult for the other students to learn by crying and making baby noises. She only started her work two minutes before dismissal.
- January 12, 2006: refused to do work.

(Tr. 2, Feb. 9, 2007 at 256:9 – 257:10; P Ex. 2/31)

11. [School 2] instituted a Behavior Intervention Plan (BIP) for the Student on October 6, 2005. The reason that [School 2] administrative personnel gave for instituting the BIP was “[the Student] continues to display significant behavioral and emotional issues and has for an extended period of time in several school settings and at home.” (P Ex. 5/28)

12. Examples of behavioral strategies and interventions contained in the BIP include the following:

- Remind [the Student] about and provide her with praise for showing good social skills such as following directions. She will need continual, simple, and firm reminders of what the directions and expectations are for a task, activity, classroom, etc. She will also benefit from continual specific and positive praise for doing what she is supposed to do. It will be important to use language that focuses on what [the Student] should be doing, rather than what she should not be doing. Also refrain from asking [the Student] why she engaged in a given behavior, and focus on an appropriate choice in the future.
- [The Student] will benefit from regular routines and having visual schedules of what activities will come next in the

classrooms. [The Student] may also benefit from having [her] own personal visual schedule for the day or during academic periods so that she knows what work or activities she needs to accomplish.

- [The Student] can earn a sticker on an individual chart every time she follows a rule or direction. After she increases her ability to consistently follow rules and directions for several weeks, a new goal can be added. Future goals can include: I completed my work, I followed all teacher/adult directions, I got started on my work right away. Each day as she earns stickers, [the Student] can see the stickers add up on her chart. She can earn a tangible reward or privilege in school every time she earns a set number of stickers. The sticker chart can be sent home daily for parent signature as well as verbal and tangible reinforcement each day at home. This will also be a good communication tool between parents, teachers, and [the Student] in order to discuss her behavior that day. Teachers and staff may wish to also utilize descriptive notes as needed. It may be helpful to use a reinforcement inventory periodically or at the beginning of each week to determine what [the Student] may be motivated to work for, since motivations change frequently.
- [The Student] may benefit from receiving consistent individual attention from her teacher for just a few minutes on a daily basis. Providing unconditional positive attention may help [the Student] to want to follow her teachers' rules at other times throughout the school day. During talking time, [the Student] should be allowed to discuss anything she wants, without adult reference to rules or her behavior. During recess for two to three minutes may be a good opportunity.
- If [the Student] displays inappropriate or off-task behaviors, she will be given one or two reminders with verbal and visual cues of what the rules or expectations are. If time or location permits, it may be helpful for the adult or teacher to write out what [the Student] needs to do, or a choice of two things, have her read it aloud, think, and make an appropriate choice. She will be given the chance to improve her behavior and behave appropriately.
- If [the Student] is very upset, she might need to take time out to think or release some of her energy, go to a "cool

down” place, or take a walk in the building with adult supervision until she can calm down and make a good choice. Additional school staff members may also provide assistance as needed to help [the Student] make good choices and behave appropriately.

- If [the Student’s] behavior escalates severely and she cannot follow directions at all or calm down, [the Student] may be referred to see an administrator in the main office, depending on how disruptive her behavior may be. [The Student’s] parents will be called, any problems will be discussed with ongoing communication, and Baltimore County disciplinary actions will be taken as needed.
- If [the Student] displays behavior that is dangerous to herself or others, the use of crisis intervention, techniques and physical restraint by trained school staff will be necessary. Crisis intervention techniques of speaking with a student attempting to get them [sic] to calm down and make good choices are typically utilized. However, if a student attempts to physically harm herself or others, physical restraint techniques may be needed in order to prevent further harm to the Student or others.

(P Ex. 4/29)

13. To assist the Student with addressing her movement issues during class, the Student’s teacher gave her physical aids, such as a fidget ball and a cushion. (Test. XXXX, Mar. 5, 2007)

14. The Student had the following observed classroom performance from late September 2005 through early December 2005:

- September 28, 2005: the Student was participating in a gifted and talented class. When she should have been attending to the teacher’s instruction on the overhead, she was playing with her leg, looking around and rested her head on her desk. Because she was so off task, the teacher intervened and finally got the Student to write her name and a sentence on her paper. The Student was on task only 29% of the time during the classroom observation of September 28, 2005. Other students were on task 86% of the time.

- September 29, 2005: during a mathematics class, the Student was turned around in her chair, and spent time looking around instead of working. She was zoned out in her own world. The teacher unsuccessfully redirected her twice. When she appeared to listen to the teacher, she still refused to follow the teacher's directions. Later, she started drawing on her green folder and did not attend to instruction at all. When the teacher directed the class to put their mathematics manipulatives away, the Student tossed hers on another student's desk. Later, when the teacher read a story to the class, the Student attended appropriately most of the time. She was on task 27% of the time.
- November 14, 2005: the Student was in a morning reading and language class. The teacher was reviewing words on the board with different "o" sounds. The Student might have been listening, but looked around and played with her pencil instead of looking at the teacher or the board and writing words down on paper. At one point, she fell out of her chair and onto the floor. Next the teacher played a tape of a story, and the Students had to follow along in their own books. The Student spent time looking around instead of following in her book, and the teacher had to redirect her twice. She then started following along with the other students. She also participated in handwriting practice on a piece of paper. The Student was on task 63% while the other girls in the class were on task 97% of the time.
- November 30, 2005: the Student was in a morning XXXX (XXXX) reading instruction class. During this class, the Student's focus was inconsistent. She played with something on her desk quite a bit. She then followed the teacher's directions to the class and got her reading book out. She did not follow additional directions to sit on the carpet. She stood by another desk and did not sit on the carpet until directed by the teacher. Once seated, the Student alternated between looking around and attending to the teacher's lesson. At one point, she picked dirt off the floor and put it in her mouth. The teacher had to redirect her to follow along in her book. The Student attended 47% of the time, while the other girls were on task 97% of the time.
- December 5, 2006: the Student was participating in a Social Studies class. She sat on the floor with her peers

while the teacher taught a lesson about directions (north, south, east and west). The Student laid down on the floor. About two minutes later, the teacher directed the Students to their desks. Instead, she stood by the classroom door. After thirty to sixty seconds, the Student went to her desk. She seemed to attend to the lesson, which involved the use of overhead maps. She moved a lot in her chair, and her teacher had to redirect her. She chewed on her lunch bag while attending visually to the presentation. When called on, she gave two correct answers. She then laid her head on her desk. She continued to move around a lot in her chair and chew on her lunch bag. Overall, she was on task 73% of the time.

(Test. XXXX, Mar. 5, 2007; P Ex. 5/9)

15. The Student’s perceived difficulties in school prompted the Parents to have her psychologically tested by XXXX XXXX, Ph.D. of the XXXX in November 2005. (Test. Mother, Mar. 5, 2007; BCPS Ex. 6/17)

16. Psychological testing on November 7 and 8, 2005, using the Wechler Intelligence Scale for Children – Fourth Edition (WISC-IV), showed the Student to have the following intelligence profile scores:

Summary of the Student’s Scores on the WISC-IV

<u>Subject Area</u>	<u>Score</u>	<u>Range</u>	<u>Percentile</u>
Verbal Comprehension	144	Very Superior	99.8
Perceptual Reasoning	115	High Average	84.0
Working Memory	120	Superior	91.0
Processing Speed	112	High Average	79.0

<u>Subject Area</u>	<u>Score</u>	<u>Range</u>	<u>Percentile</u>
Full Scale Score	130	Very Superior	98.0

(BCPS Ex. 7/18)

17. On November 7 and 8, 2005, the Student had the following scores on the Woodcock-Johnson Tests of Achievement – Revised:

Student’s Scores on the Woodcock-Johnson Tests of Achievement – Revised

<u>Subject Area</u>	<u>Score</u>	<u>Percentile Rank</u>	<u>Grade Equivalent</u>
Broad Reading	124	94	2.3
Broad Written Language	130	98	2.5
Broad Math	125	95	2.4

(BCPS Ex. 7/18)

18. Psychological testing further revealed that the Student had the following strengths and weaknesses:

- The Student demonstrated highly exceptional verbal abilities, especially on tasks that tapped her creative thinking, conceptual and associative reasoning, language skills and verbal memory.
- The Student’s superior cognitive abilities allowed her to perform above her peers on measures of reading comprehension, written and oral expression and mathematical knowledge.

- The Student demonstrated weaknesses in her ability to process visual-spatial information. These weaknesses affected the Student's understanding of social cues and boundaries and her interaction with her peers.
- The Student showed weaknesses in her ability to regulate her emotions when faced with difficult tasks or frustrating situations. The Student's performance in school is also affected by her weaknesses in attention, self-monitoring and impulse control. Her behavior during testing met the criteria for Attention Deficit Hyperactivity Disorder (ADHD).

(Tr. 2, Feb. 9, 2007 at 316:1 – 344:23; BCPS Ex. 6/17 at 12 – 13)

19. In December 2005, the Parents requested that BCPS convene an Individualized Education Plan (IEP) meeting to determine whether the Student qualified for special education and related services because of her difficulties in the classroom. [School 2] staff scheduled that meeting for December 7, 2005 at the school. (Test. Mother, Mar. 5, 2007)

20. The IEP meeting took place as scheduled. The Parents; XXXX XXXX, Educational Advocate; XXXX XXXX, Principal; XXXX XXXX, Assistant Vice Principal; XXXX XXXX, School Psychologist; XXXX XXXX, Guidance Counselor; XXXX XXXX, General Education Teacher; and XXXX XXXX, Special Education Classroom or Resource Teacher, constituted the IEP Team. (BCPS Ex. 16/18)

21. The participants shared their knowledge about the Student during the meeting. Both Ms. XXXX and Ms. XXXX discussed their classroom observations of the Student. Mr. XXXX emphasized the Student's recent diagnosis of ADHD by Dr. XXXX, and he suggested that the Student had a learning disability (LD) based on the results of Dr. XXXX's psychological testing on November 7 and 8, 2005. (BCPS Ex. 16/18)

22. The IEP team determined it could not make any decisions about the Student's eligibility for special education and related services without having Dr. XXXX's report. The team decided to reconvene the meeting later in the month when that report was available. (BCPS Ex. 16/18)

23. A second IEP meeting took place on December 22, 2005. The Parents; Ms. XXXX; Ms. XXXX; Ms. XXXX; Ms. XXXX, Ms. XXXX; Ms. XXXX; Mr. XXXX; XXXX XXXX, Gifted-Talented Resource teacher; and XXXX XXXX, of Central Area Special Education; and Ms. XXXX, Occupational Therapist, constituted the IEP Team. (BCPS Ex. 5/9)

24. The Parents and Mr. XXXX contended that the Student qualified for special education and related services because psychological testing indicated she had ADHD, an LD and a possible emotional disturbance (ED). School personnel disagreed. They averred that because the Student was working on or above grade level, the [School 2] program did not deny her educational opportunity and, therefore, she did not require special education and related services. Ms. XXXX further noted that the Student had to be two grade levels behind to qualify for special education based on an LD. (Test. Mother, Mar. 5, 2005; BCPS Ex. 5/9)

25. At the end of the December 22, 2005 IEP meeting, Ms. XXXX told the Student's mother that if they [the Parents] were not going to mediation, [School 2] staff would develop a "504 Plan"⁴ for the Student. (Tr. 2, Feb. 9, 2007 at 409:9 – 409:21)

26. On December 22, 2005, School personnel devised an updated BIP for the

⁴ A "504 plan" provides services to students with disabilities under the provisions of the Rehabilitation Act of 1973, 29 U.S.C.A §§ 701 through 794e (1999 & Supp. 2006), in a regular education setting.

Student. (BCPS Ex. 1/14)

27. On January 13, 2006, the Parents sent a written notice to [School 2] Principal XXXX XXXX that effective February 6, 2006, they were removing the Student from [School 2] and transferring her to [School 1] ([School 1]), a private school that is a division of the XXXX. (Test. Mother, Mar. 5, 2007; BCPS Ex. 15/20)

28. On January 30, 2006, the Parents entered an \$11,388.88 Enrollment Contract with [School 1] for the remainder of the 2005 – 06 school year. (P Ex. 12/-)

29. In September 2006, the Parents reenrolled the Student in [School 1] for the 2006 – 07 school year. Tuition for the full year is \$26,250.00, which [School 1] allowed the Parents to pay in installments. (P Ex. 12/-)

30. The program at [School 1] is reasonably calculated to provide the Student with educational benefit and, therefore, is an appropriate placement. (Joint Ex. 1, stipulation of the parties)

DISCUSSION

I. Introduction.

I conclude that BCPS did not deny the Student a FAPE by finding her ineligible for special education in December 2005. Although the Student has documented disabilities, such as ADHD, emotional issues and a suspected learning disability with regard to visual-spatial information processing, those disabilities did not affect her educational performance and, thus, she does not qualify for special education. I have set out the reasons for my decision in detail below.

II. Legal Authority.

The IDEA, 20 U.S.C.A. §§ 1400 – 1419 (Supp. 2006), 34 C.F.R. Part 300,

sections 8-401 through 8-417 of the Maryland Annotated Code, Education Article⁵; and COMAR 13A.05.01 govern identification, assessment and placement of students in special education. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412.

Congress identified as one of the primary purposes of this law “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C.A. § 1400(d)(1)(A). The Fourth Circuit has explained “a FAPE requires the school district to provide instruction that suits the child’s needs as well as related services to ensure that the child receives some educational benefit from instruction.” *A.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004). The court in *Lawson* explained:

Under the act, the state must provide children with “meaningful access” to public education. *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The FAPE must only be “calculated to confer *some* educational benefit on a disabled child.” *MM*, 303 F.3d at 526 (citing *Rowley*, 458 U.S. at 207, 102 S.Ct. 3034) (emphasis added). The Supreme Court has held that under IDEA Congress intended to provide a satisfactory level of educational opportunity, not the best education that money could buy. *See Rowley*, 458 U.S. at 189, 102 S.Ct. 3034. The Court noted that “[w]hatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Hartmann v. Loudoun County Bd. of Ed.*, 118 F.3d 996, 1001 (4th Cir.1997) (“States must ... confer some educational benefit upon the handicapped child, but the Act does not require the furnishing of every special service necessary to maximize each handicapped child’s potential.”) (internal citations and quotation marks omitted).

In addition to IDEA's requirement that the state provide each student with some educational benefit, the Student must be placed in the least restrictive environment to achieve the FAPE. The disabled child is to

⁵ Md. Code Ann., Educ. §§ 8-401 through 8-417 (2006).

participate in the same activities as non-disabled children to the “maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A); *see also* 34 C.F.R. § 300.550 (“That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily.”); Md. Regs. Code tit. 13A § 05.01.10⁶ (regulations concerning least restrictive environments). We stated in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989), “mainstreaming of handicapped children into regular school programs ... is not only a laudable goal but is also a requirement of the Act.”

Id. (all citations and comments in original).

Under the holding of *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), parents of a child deemed eligible for special education and related services who reject the placement proposed by school officials may unilaterally enroll the child in a private placement. The parents may then request reimbursement for the funds that they have expended to pay for that placement. “If the school district's IEP is inappropriate and the private placement is proper, the school district may be ordered to reimburse the parents for their expenses. *See Id.* The essential question in such a case is whether the private placement confers an educational benefit on the child.” *Board of Educ. of Montgomery Co. v. Hunter*, 84 F.Supp.2d 702, 705 (D. Md. 2000). *Also see Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7, 14, 114 S.Ct. 361, 365, 126 L.Ed.2d 284 (1993). Congress essentially codified the *Burlington* and *Carter* holdings in Title 20, section 1412(10)(c)(iii) of the United States Code Annotated. *Burlington* has been extended to allow parents to seek reimbursement in situations such as in this case, where the local education agency has denied a student special education eligibility and the Student’s parents have unilaterally placed him or her in a private school. *See e.g.*,

⁶ COMAR 13A.05.01.10.

Springer v. Fairfax Co. Sch. Bd., 134 F.3d 659 (4th Cir. 1998).

The burden of proof in this case lies with the Parents because they are the party challenging BCPS's decision to deny special education and related services to the Student. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 535 and 537 (2005).

The threshold question here is whether the Student is in fact "a disabled child." The Parents strongly contended that she is; BCPS strongly contended that she is not disabled for the purposes of IDEA.

III. Contentions of the Parties.

A. The Parents.

The Parents averred that the Student qualified for special education and related services under three defined disabilities—specific learning disability, other health impairment and emotional disturbance. The United States Code Annotated and Code of Federal Regulations define those terms.

Title 20, section 1401(3) of the United States Code Annotated defines "child with a disability" as follows:

(3) Child with a disability

(A) In general

The term "child with a disability" means a child--

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

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

Title 20, section 1401(30) of the United States Code Annotated defines specific learning disability as follows:

(30) Specific learning disability

(A) In general

The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

(B) Disorders included

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(C) Disorders not included

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

Title 34, section 300.8(c)(4), (9) and (10) of the Code of Federal Regulations define “emotionally disturbance,” “other health impaired,” and “specific learning disability” as follows:

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

...

(4)(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

* * *

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and

(ii) Adversely affects a child's educational performance.

...

(10) Specific learning disability--

(i) General. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding

or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.⁷

34 C.F.R. § 300.8(c)(4), (9) and (10) (2006).

The Parents argued that the Student fits the profile of a child who is “emotionally disturbed” as defined by Title 34 section 300.8(c)(4). They noted that Ms. XXXX, the Student’s primary first grade teacher in 2005, recounted incidents in which the Student was disrespectful or distracting in class. For example, she stuck her tongue out at Ms. XXXX on more than one occasion. Moreover, even when the Student engaged in fantasy play, she rarely allowed other children to participate. The Parents emphasized that the most significant manifestation of this “emotional piece” was her two-day suspension from school in November 2005. This incident occurred when the Student misbehaved in class, and Ms. XXXX sent her to the Principal XXXX’s office. While in Ms. XXXX’s office, she attempted to run out of the office and out of the school. She also asked provocative questions, such as, “what if I throw this,” or “what if I put my feet on the wall?” She also repeatedly asked secretarial staff, “who are you?” Additionally, the Parents indicated that toward the end of her attendance at [School 2], the Student began

⁷ These definitions are also found in COMAR 13A.05.01.03B(20), (44) and (65), respectively, without any substantive difference from those found in the United States

to express doubts about her abilities, remarking, “I use to be smart, but now I’m not” or words to that effect.

The Parents further argued that the Student fit the profile of a child who is “other health impaired (OHI),” as defined by Title 34, section 300.8(c)(9) of the Code of Federal Regulations. Section 300.8(c)(9)(i) specifically states a student is OHI if he or she has ADHD. Dr. XXXX XXXX, a licensed psychologist associated with XXXX, administered an extensive battery of psychological tests to the Student in November 2005 and, based on that testing, conclusively diagnosed her with ADHD. The Parents underscored the Student’s lack of attention and “fidgeting” in class as prime examples of how the Student’s ADHD affected her classroom performance.

The Parents also contended that the Student fit the profile of a child who is “learning disabled,” as defined by Title 34, section 300.8(c)(10) of the Code of Federal Regulations. They noted that Dr. XXXX’s testing revealed that the Student has striking weaknesses her ability to process visual-spatial information. These weaknesses affected the Student’s understanding of social cues and boundaries and her interaction with her peers.

The Parents fully acknowledged that the Student ostensibly did not suffer academically at [School 2] because, despite her emotional problems, ADHD and visual-spatial processing deficits, she is a “gifted and talented” child. Dr. XXXX’s testing showed her verbal comprehension, perceptual reasoning, working memory and processing speed on the WISC-IV were all in the high average to very superior ranges. Her full scale score of 130 placed her in the 98th percentile of all students her age or in

Code Annotated or the Code of Federal Regulations.

the “very superior range.” On the Woodcock – Johnson Test of Achievement – Revised, the Student scored in the 94th percentile in the Broad Reading category, the 98th percentile in Broad Written Language category and in the 95th percentile in the Broad Math category. Although she was in the first grade, she was performing as one would expect a mid-year second grade student to perform. Yet, the Parents maintained that the Student’s disabilities did affect her educational performance because she was unable to participate fully in the school curriculum because of her absences from class.

The Parents further contended that BCPS committed significant procedural violations that contributed to its flawed decision in finding the Student ineligible for special education. Most prominently, during the December 7 and December 22, 2005 IEP meetings, BCPS never conducted a formal review of Dr. XXXX’s report as Title 34, section 300.306 of the Code of Federal Regulations requires. 34 C.F.R. § 300.306 (2006). Additionally, the Parents charged BCPS with violating of Title 34, section 300.311(b) of the Code of Federal Regulations by failing either to have all IEP team members sign-off as being in agreement with the team decision or, in the event all members did not agree, by failing to have each member sign-off on the report individually and stating whether he or she agreed or disagreed with the team decision. The Parents pointed out that at least one member of the [School 2] IEP team, in effect, agreed that the Student qualified for and required special education and related services. 34 C.F.R. § 300.311(b) (2006). In commenting about whether she believed that the Student required occupational therapy services, Ms. XXXX, the Occupational Therapist, remarked, “[i]nterfering behavioral and attentional issues are impacting [the Student’s] ability to perform age expected educational tasks, and if fine motor or visual motor issues

are also present, they are not prominently displayed. Should the behavioral and attentional issues be abated, it is possible that after further observation a full occupational assessment may be warranted.”

The Parents also criticized the [School 2] IEP team members for withholding special education from the Student so as not to “label” her prematurely. The IDEA, in fact, eschews labeling; the IDEA directs IEP teams to determine eligibility and formulate an education plan, if necessary, based on each child’s individual needs.

The Parents, therefore, argued that BCPS denied FAPE to the Student by denying her special education and related services and requested full reimbursement for all of the time she has been at [School 1], the private school where they placed her in February 2006.

B. BCPS.

BCPS contended that the Student did not qualify Special Education and related services because despite her ADHD and other problems, she was still mastering the first grade curriculum at [School 2]. It suggested that its non-special education interventions were beginning to succeed in ameliorating the Student’s behavioral problems when the Parents removed the Student to [School 1] in February 2006.

First, BCPS noted that the IDEA indeed directs public education agencies to avoid the premature “labeling” of children as being disabled. It referenced Title 20, section 1400(c)(5)(F) of the United States Code Annotated,⁸ which states:

(c) Findings

Congress finds the following:

⁸ In his closing argument, counsel for BCPS erroneously stated this section was “1401(c)(5)(F).”

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

...

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

BCPS maintained that its use of a BIP for the Student in the general educational curriculum avoided the kind of “labeling” that this section refers to, and the use its use of non-special education techniques to program for this Student, in general, demonstrated its adherence to the “whole-school” approach.

Next, BCPS noted that, by definition, the Student does not have a specific learning disability. According to Title 34, section 300.309 of the Code of Federal Regulations, for a student to have a “specific learning disability,” that student must show a lack of academic achievement in specifically delineated areas. 34 C.F.R. § 300.309 (2006). Here, the Student was succeeding in *all* her academic subjects. In fact, as a first grader, Dr. XXXX XXXX’s testing revealed that she was achieving at a 2.3 grade level or greater in all measured areas of achievement. That testing also revealed that the Student could write a story—with an appropriate beginning, middle and end, albeit with some spelling issues.

Although BCPS conceded that *Rowley* did not address special education eligibility, it nonetheless argued that that case was instructive in assessing whether a student qualified for special education by noting, “while advancement from grade to grade does not *per se* establish that the Student is receiving educational benefit, the [use

of] the grading and advancement system constitutes an important factor in determining whether educational benefit is being conferred.”⁹ 458 U.S. at 203, 102 S. Ct. at 3049. Here, BCPS again emphasized that the Student was making extraordinary progress. It also suggested that even when observations indicated that the Student might have been off-task (looking around the room, lying down and so on), she nonetheless was attending and absorbing her lessons.

BCPS further stated that it had no obligation to do its own evaluation. It considered Dr. XXXX’s report along with voluminous amounts of data about the Student’s educational performance from the Student’s teachers and School Psychologist XXXX XXXX. That was all it had to do under the law.

BCPS emphasized that Dr. XXXX’s expert testimony was of limited value because she clearly focused on providing special education to the Student so she could maximize her potential. Dr. XXXX admitted this on cross-examination. (Tr. 2, Feb. 5, 2007 at 351:20 – 352:10) This view conflicts with the holding in *Rowley* and the holdings in its myriad progeny. Under IDEA, a local education agency only has to provide an “appropriate education”; it has no legal obligation to maximize a student’s potential.

In summary, BCPS maintained that in its use of non-special education tools to address the Student’s behavioral issues (e.g., the BIP and the use of fidget balls and cushions), the Student was making more than adequate progress in the general education curriculum. It used the “whole-school” approach mandated by Title 20, section 1400(c)(5)(F). BCPS cited *P.R. and B.R. Ex. Rel. C.R. v. Woodmoor Local School*

⁹ This quotation is from BCPS’s closing argument, not specifically from *Rowley*.

District, 46 IDELR 134, 106 LRP 51057 (N.D. Ohio 2006) in support of its position.

Although BCPS stipulated that [School 1]’s program did confer educational benefit to the child, it nonetheless maintained that its own program was succeeding and there was no need for the Parents to remove the Student from BCPS and place her in a private school. Therefore, BCPS asked that I deny the Parents’ request for tuition reimbursement for the 2005 – 06 and 2006 – 07 school years.

III. Analysis.

I find merit in the both parties’ arguments. Nevertheless, the outcome of this case hinges (1) on whether the Student has a disability and, if so, (2) whether that disability affected her “educational performance.” Absent a State statute or regulation that has expanded the definition of “educational performance” beyond academic achievement,¹⁰ I must conclude that the Student’s apparent disabilities did not affect her academic achievement and, therefore, she does not qualify for special education and related services.

A. ADHD.

I except Dr. XXXX’s conclusion that the Student suffers from ADHD. The Student exhibited classic ADHD behavior in class, such as fidgeting in her seat, failing to attend to her teacher, frequently going off task, and making animal noises while the other student engaged in their lessons. Additionally, BCPS personnel at [School 2] recognized that the Student had behavioral problems, later discovered to stem from ADHD, and instituted a BIP for the Student after her first month in first grade. According to Title 34,

¹⁰ Maine, for example, has by regulation defined “educational performance” to include communications skills, interpersonal relationships, career preparation and health education. *Mr. and Mrs. I v. Me. Sch. Admin. Dist. 55*, 416 F.Supp.2d 147, 157 –

section 300.8(c)(9), ADHD falls under the category of an OHI for the purposes of special education eligibility.

Yet, the evidence does not support the Parents' view that the Student's ADHD affected her educational performance. Despite having ADHD, the Student's achievement test scores from November 2005 revealed that even though she was in the first grade, the Student was performing at the second grade level. Since Title 34, section 300.8(c)(9) of the Code of Federal Regulations requires an other health impairment to "adversely affect" a student's educational performance to be considered an educational disability for the purposes of IDEA, the Student does not qualify for special education under the OHI criterion. Otherwise, providing special education to the Student would only serve to maximize her potential. According to *Rowley* and the numerous other federal appellate cases that have followed *Rowley*,¹¹ potential-maximizing is inimical to the purpose of special education.

B. Emotional Disturbance.

The Parents also maintained that the Student qualifies for special education based on having emotional issues. They focused primarily on Title 34, section 300.8(c)(4)(i)(B) of the Code of Federal Regulations, because Dr. XXXX's evaluation show that the Student had an inability to build or maintain satisfactory interpersonal relationships with her peers and teachers, and Title 34, section 300.8(c)(4)(i)(C), because she exhibited inappropriate types of behavior or feelings under normal circumstances.

58 (D. Me. 2006), citing Maine Special Education Regulations (MSER) § 2.7.

¹¹ See e.g., *Hessler v., State Bd. of Ed. of Md.*, 700 F.2d 134 (4th Cir 1983); *Conklin v. Anne Arundel Co. Bd. of Educ.*, 946 F.2d 306 (4th Cir. 1991); *Briley v. Bd. of Educ. of Baltimore Co.*, 87 F.Supp.2d 441 (D. Md. 1999), and many others too numerous to mention.

It is true that the Student had difficulty in maintaining satisfactory interpersonal relationships with her peers and teachers, as illustrated by her exclusion of children from her fantasy games and the hostile behavior she exhibited toward her teachers, such as sticking her tongue out at them, grabbing them and refusing to follow their directions. It is also true that she exhibited inappropriate types of behavior and feelings under normal circumstances—for example, making animal noises in class for no apparent reason and expressing feelings of inadequacy. It may also be true these emotional issues were apparent “over a long period of time and to a marked degree.” Yet, the Parents failed to demonstrate that the Student’s emotional problems affected her educational performance. As noted in *Springer*, there must be some causal connection between a student’s emotional difficulties and educational progress to demonstrate that the Student has a disability stemming from an emotional disturbance under Title 34, section 300.8(c)(4). 134 F.3d at 666.

The Student’s Parents averred that the Student’s emotional/behavioral issues undoubtedly affected her educational performance because of the frequency that she spent in the principal’s office, along with the time she spent away from school altogether because of her suspension. Nonetheless, I will repeat that despite these episodes, the Student made educational progress. As with the previous alleged disability, an emotional disturbance must affect a student’s level of achievement in school. Here, whatever emotional disturbances the Student exhibited at [School 2], they did not affect her educational performance.¹²

¹² The Parents cited *XXXX XXXX v. Montgomery County Public Schools*, OAH No. MSDE-MONT-OT-XXXXXXXXXX (Office of Administrative Hearings, XXXX, 2000) in support of their position that a student with emotional issues can qualify for special

C. Specific Learning Disability.

The Parents contended that the Student has a “specific learning disability,” because she had a significant deficit in her ability to process visual-spatial information. As noted, a child has a specific learning disability when he or she has a disorder in “1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C.A. § 1401(30). Nevertheless, as BCPS correctly emphasized, Title 34, section 300.309 of the Code of Federal Regulations also requires that there be a showing that a student have a lack of academic achievement in specifically delineated areas. Dr. XXXX’s testing revealed that the Student excelled in all of the areas of grade-level academic achievement listed in Title 34, section 300.309(a)(1),¹³ irrespective of having processing problems with visual-spatial information relative to her other areas of performance. Thus, she does not have a specific learning disability as defined by the Code or the applicable regulations.

D. Conclusion – The Student Does Not Have an Educational Disability.

Even though the Student exhibited demonstrable disabilities, none of these

education. XXXX XXXX is a decision of the OAH that no appellate court has reviewed and, therefore, it has no precedential value. Furthermore, the facts of that case differ from those presented here because the Student in XXXX XXXX did experience a decline in educational performance as evidenced by his failing grades. Thus, in XXXX XXXX, a causal connection did exist between his emotional disturbance and his educational performance.

¹³ Those areas are oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation and mathematics problem solving. These areas parallel the “disorders of basic psychological processes.” See 20 U.S.C.A. § 1401(30).

disabilities affected her educational performance. Consequently, the Student did not qualify for special education and related services in December 2005, and the Parents presented no additional evidence that currently she qualifies for special education. Consequently, I am denying the Parents request for tuition reimbursement for their private placement of the Student at [School 1].

Inasmuch as I found the Student ineligible for special education, I find no need to examine BCPS's alleged procedural violations.

IV. Summation.

One commentator has suggested that “educational performance” could be a concept that compasses more than academic achievement.¹⁴ Nevertheless, in Maryland, current law provides that a student is only eligible for special education when he or she has a disabling condition that impedes his or her ability to learn and make academic progress.

Although the Student in this case has identifiable deficits that have manifested themselves in profound behavioral problems, she also has considerable strengths that have allowed her to overcome those deficits and learn in the general education environment. Since the Student does not have a disabling condition that has affected her educational performance, she is ineligible for special education and related services.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude the following as a matter of law:

1. BCPS properly determined that the Student was ineligible for special education and related services for the 2005 – 06 school year. 20 U.S.C.A. § 1401(3)

¹⁴ Robert A. Garda, Jr., *Who is Eligible under the Individuals with Disabilities*

(Supp. 2006); 20 U.S.C.A. § 1401(30) (Supp. 2006); 34 C.F.R. § 300.8(c)(4), (9) and (10) (2006); *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Springer v. Fairfax Co. Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998).

2. The Student was ineligible for special education and related services for the 2006 – 07 school year. 20 U.S.C.A. § 1401(3) (Supp. 2006); 20 U.S.C.A. § 1401(30) (Supp. 2006); 34 C.F.R. § 300.8(c)(4), (9) and (10); *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Springer v. Fairfax Co. Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998).

3. Given that the Student was ineligible for special education and related services during the times relevant, BCPS did not commit procedural violations that deprived the Student of educational opportunity. *Springer, Id.*

4. BCPS is not required to reimburse the parents for funds that they expended, to date, to place the Student at [School 1] during the 2005 – 06 and 2006 – 07 school years. 20 U.S.C.A. § 1412(10)(C)(iii); *Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

Improvement Act?, 35 J.L. & Educ. 291, 299 – 306 (2006).

ORDER

I **ORDER** that the Parents' request for tuition reimbursement for their unilateral placement of the Student in [School 1], a division of XXXX, for the 2005 – 06 and 2006 – 07 school years be **DENIED** and **DISMISSED**.

March 30, 2007
Date Decision Mailed

Thomas G. Welshko
Administrative Law Judge

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 review 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 OAH 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.