

XXXX XXXX

v.

MONTOMERY COUNTY

PUBLIC SCHOOLS

\* BEFORE MARY SHOCK

\* AN ADMINISTRATIVE LAW JUDGE

\* OF THE MARYLAND OFFICE

\* OF ADMINISTRATIVE HEARINGS

\* OAH No: MSDE-MONT-OT-06-31922

\* \* \* \* \*

**DECISION**

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ORDER

**STATEMENT OF THE CASE**

This case arises from a request by XXXX XXXX (“Parent”) on behalf of XXXX XXXX (“Child”) for a hearing to review the identification, evaluation or placement of the Child. The request was filed with Montgomery County Public Schools (“MCPS”) on July 14, 2006, and MCPS transmitted the request to the Office of Administrative Hearings for hearing.

The hearing was held on August 18, 2006, before Mary Shock, Administrative Law Judge, at the MCPS office, 850 Hungerford Drive, Rockville, Maryland. The Parent appeared and represented himself. Sharon F. Gooding, Esquire, represented MCPS.

The hearing was held pursuant to the following laws: Individuals With Disabilities Education Improvement Act of 2004 ("IDEA"), 20 U.S.C.A. § 1415 (Supp. 2005); 34 C.F.R. § 300.507 (2004); Md. Code Ann., Educ. § 8-413 (2004); 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. 2005); COMAR 28.02.01.

### **ISSUES**

1. Is the Child’s Individualized Education Program (“IEP”) for the 2006-2007 School Year, including placement in the [Program] program at [School 1], reasonably calculated to provide educational benefit; and if not,

2. Is MCPS required to fund placement for the Child in a private separate day school?

### **SUMMARY OF THE EVIDENCE**

A. Exhibits

The following exhibits were admitted into evidence on behalf of the Parent:

- PRT #1        Neuropsychological Evaluation, dated April 8, 2005
- PRT #2        Multidisciplinary Team Evaluation, dated April 28, 2005 and May 19, 2005
- PRT #3        Psychiatric Evaluation, dated April 28, 2005 and May 19, 2005
- PRT #4        Speech and Language Evaluation, dated May 12, 2005
- PRT #5        Letter from MCPS to Parent, dated October 5, 2005

The following exhibits were admitted into evidence on behalf of MCPS:

- MCPS #1       Request for Mediation/Due Process Hearing, dated July 14, 2006
- MCPS #2       Report of School Psychologist, dated July 27, 2005

- MCPS #3 Functional Behavioral Assessment, dated October 3, 2005
- MCPS #4 Updated Functional Behavioral Assessment, dated October 3, 2005
- MCPS #5 IEP 2005-2006 School Year
- MCPS #6 MCPS Program for Students with Autism Spectrum Disorders, Report, dated September 26, 2005
- MCPS #7 Progress Reports, dated October 20, 2005
- MCPS #8 IEP 2006-2007 School Year
- MCPS #9 IEP Team Meeting notes, dated April 27, 2006

B. Testimony

The Parent testified on his own behalf and did not call any other witnesses.

The following witnesses testified on behalf of MCPS:

1. XXXX XXXX, M.A., MCPS, School Psychologist, admitted as an expert in school psychology and special education; and
2. XXXX XXXX, M.A., MCPS, Special Education Supervisor, admitted as an expert in special education.

**FINDINGS OF FACT**

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

1. The Child is a seven-year-old boy, born on XXXX, 1999. He has a diagnosis of high functioning autism. (PRT #1-#3).
2. The Child's autism-related difficulties include attention, memory, social skills, pragmatic language and visual, fine and sensory motor skills. (MCPS #5 and #7).

3. The Child's language skills in syntax, semantic and supra-linguistic language domains are in the low-average range. His receptive and expressive language skills are in the average range. (PRT #4).

4. The Child has an overall average verbal ability. His areas of need include nonverbal ability, comprehension of instructions, verbal fluency, visual-motor precision, visual-motor integration, visual memory, math, social skills and attention/executive and adaptive behavior skills. (MCPS #5).

5. The Child attended kindergarten at [School 2], the Child's home school, for the 2004-2005 School Year in the general education classroom in the resource program. (MCPS #5).

6. The Child attended first grade at [School 2] for the 2005-2006 School Year in the general education classroom with individual instruction from the special education resource teacher four mornings a week and occupational therapy one hour a week. (MCPS #5).

7. In the first grade, the Child participated in a social skills group at school that met once a week for eight weeks.

8. In both kindergarten and first grade, the Child had difficulty with attention and his activity level. He was frequently off-task and required adult assistance to complete activities. He wandered around the classroom. (PRT #1, MCPS #5).

9. In first grade, the Child had kindergarten objectives and was given instruction on that level. His performance was inconsistent and he made uneven and limited progress on the goals and objectives identified in his 2005-2006 IEP. By the end of the school year, the Child performed on a mid-kindergarten level. (MCPS #5, #7 and #8).

10. In October 2005, when the Child was in the first grade, MCPS conducted a Functional Behavioral Assessment to address the Child's disruptive and unsafe behaviors including engaging in off-task behavior instead of doing the assigned academic activity, wandering around the classroom and away from the group, and touching others. (MCPS #2). A para-educator was assigned to the Child for two hours a day in an effort to keep him on-task.

11. As a result of his behavior and difficulty paying attention, the Child participated less in classroom activities and completed less work than he is capable of completing. He also required more adult attention than his peers in order to participate in class activities. (MCPS #2).

12. The Child's difficulties with attention and engagement in instruction made it difficult for him to access the curriculum in the general education classroom. He requires individualized and slower paced instruction in all academic subjects.

13. The Child's 2006-2007 IEP identifies goals and objectives in the academic areas of mathematics, reading, written language and auditory processing and in the areas of visual-motor and social-emotional skills. (MCPS #8).

14. The [Program] program has a small teacher-student ratio and provides slower paced instruction than the general education classroom.

### **DISCUSSION**

The governing statute is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400 – 1420 (2000 and Supp. 2005). 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 employment and independent living." 20 U.S.C.A. § 1400(d)(1)(A). The Fourth Circuit has recently explained that "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, 318 (4<sup>th</sup> Cir. 2004).

The question presented in this case is not whether the Child must be afforded an opportunity to make optimal progress or even whether he is being provided with the best education available, but whether the educational program and related services offered by MCPS are "reasonably calculated to enable a child to achieve passing marks and advance from grade to grade." *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S.173 (1982). The courts have clearly stated that IDEA does not guarantee any student "the best education, public or nonpublic, that money can buy" or "all [the] services necessary to maximize educational benefits." *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4<sup>th</sup> Cir 1983). What is required, quite simply, is an appropriate education. *See also Conklin v. Anne Arundel Co. Bd. of Educ.*, 946 F.2d 306 (4<sup>th</sup> Cir. 1991) and COMAR 13A.05.01.03. The IDEA contemplates that the Child will receive this appropriate education in the least restrictive environment possible. *A.B. v. Lawson*, 354 F.2d at 319.

As noted in *Burlington*, the Supreme Court has held that parents can obtain private school tuition reimbursement in instances where the local school district has failed to offer their child a free appropriate public education. *School Committee of the Town of Burlington, Massachusetts v. Dept. of Educ. of Massachusetts*, 471 U.S. 359 (1985). The Fourth Circuit also addressed the reimbursement issue in *Carter v. Florence County School Dist. Four*, 950 F. 2d 156 (4<sup>th</sup> Cir. 1991). The *Carter* court ruled that reimbursement was proper upon a demonstration that the private school placement complied with the IDEA's minimum standard of appropriateness, namely that it was reasonably calculated to provide educational benefit, after showing that the

public school placement was improper under IDEA. 510 U.S. at 13 – 16.

The 1998 amendments to IDEA codified the *Burlington* and *Carter* decisions and established some limitations on reimbursement in certain circumstances. Title 20, Section 1412(a)(10)(C) of the United States Code states the following, in pertinent part:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency.

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(2000).

Therefore, under the *Burlington-Carter* test and section 1412(a)(10)(C) (with some limitations), parents are entitled to private school reimbursement, or, as in the present case, prospective funding, when the program offered by the local school district affords no meaningful educational benefit to a student and the private placement selected by the parents offers at least some educational benefit.

The tool for providing all these services is the Individualized Education Program (“IEP”).

20 U.S.C. § 1414(d). Congress instructed the school system to review the child’s IEP

“periodically, but not less than annually to determine whether the annual goals for the child are being achieved” and to revise the IEP as appropriate to address, in part, any lack of expected progress toward the annual goals. 20 U.S.C. § 1414(d)(4)(A)(i), (ii).

In accordance with this process, the MCPS IEP team, including the Child’s Parents designed an IEP for the Child and reviewed it annually, most recently on April 27, 2006. (MCPS #8). Based on the Child’s limited progress on his goals and objectives in the first grade, the IEP team recommended that the Child be placed in the [Program] program for the 2006-2007 School Year, a self-contained special education classroom in a general education school with art, music, physical education, lunch and recess with the general education students, and the related service of occupational therapy. The Parent disagreed with the placement and requests placement in [School 3], a private separate day school. The burden of proof in an administrative hearing challenging an IEP, rests with the party seeking relief, which, in the present case, is the Parent. *Schaffer v. Weast*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 528, 2005 WL 3028015 (2005). For the reasons discussed below, I find that the Parent failed to prove that the Child’s placement in the [Program] does not provide the Child with a free appropriate public education.

The Parent testified that the Child has been a student at [School 2] since kindergarten. He stated that the Child was experiencing difficulties in school and that MCPS requested that the Parents obtain verification of the Child’s disability. For that reason, the Parent stated, the Child was evaluated at the XXXX Medical Center in April and May 2005. (PRT #1-#4). Neuropsychological, speech and language, psychiatric and multidisciplinary team evaluations were conducted and the Child was found to meet the criteria for a diagnosis of high functioning autism. At the hearing, the Parent stressed the recommendations made by the professionals at

XXXX Medical Center and pointed out what he believes are the two most significant recommendations made by the neuropsychologist. (PRT #1):

1. **The primary recommendation regarding [the Child] is that he be understood as a child with an Autism Spectrum Disorder,** which makes him eligible for individualized support and understanding in the school setting. Children with [the Child's] combination of difficulties are easily misunderstood and are highly susceptible to overload. When overwhelmed, the combination of difficulties interpreting social cues and novelty, together with anxiety, can produce an inflexible, ineffective student. As a result, it is essential that his educational program be carefully planned and managed. [Emphasis in the original].
2. **Educational placement:** It is essential that [the Child's] team include a speech and language pathologist, behavior management expert, and special educators who are trained and experienced in working with autism spectrum disorders. [The Child] continues to require an individualized educational program. This should include both time in integration with typically developing peers as well as time in a specialized setting. It would be beneficial for [the Child] to have the explicit support an integrated environment would provide for the continued development of his language, play, social skills, as modeled by his typically-developing peers. However, in order for [the Child] to benefit fully and be successful in the integrated setting, he will require the support of additional personnel in the classroom. The role of such personnel would include facilitating social interaction with peers and assisting [the Child] in negotiating the demands of the classroom. Further, we continue to support full-time involvement to maximize [the Child's] learning and opportunities for interaction with peers. Given his tendency to become overwhelmed in large groups, a small group setting with a low student-to-teacher ratio is recommended. In addition, we endorse the importance of a specialized component to [the Child's] school day to directly address his areas of challenge using methods specifically designed for children with diagnoses on the Autism Spectrum. Specifically, this instruction should take place in a substantially separate classroom. We emphasize that, like [the Child], the children in this setting should be of at least average intellectual functioning, with difficulties that would place them in the high end of the Autism Spectrum. [Emphasis in the original].

The Parent argues that MCPS sees the Child as a student with attention issues and not with autism. He maintains that MCPS staff does not understand autism and thus cannot design and implement an IEP for the Child. He stated that the Child's inattentiveness is caused by the

teachers' inexperience with high functioning autism. As a result, the Child is misunderstood and seen only as an inflexible and ineffective student.

The Parent also noted that all the evaluations from the XXXX Medical Center recommended speech and language services but that the Child is not receiving those services separately. Finally, the Parent testified that [School 3] will provide speech and language and behavioral management services and that the teachers at the school are experienced with children with autism. On cross-examination, the Parent acknowledged that he and his wife pushed for the Child to remain in the general education classroom for first grade but because the Child's home school did not work out, he now believes MCPS staff cannot teach autistic children and he requests a private separate day school.

MCPS agrees that the Child meets the criteria for a diagnosis of high functioning autism. It also agrees that that the Child's placement in his home school for the first grade in the general education class but with individual instruction and occupational therapy, resulted in only limited and inconsistent academic progress. MCPS notes that after a year in the general education program, the Child is only functioning on a mid-kindergarten level in math, reading and writing. As a result, MCPS contends that placement in the [Program], a self-contained special education classroom, and occupational therapy, is reasonably calculated to provide educational benefit to the Child for the second grade.

XXXX XXXX, M.A., MCPS School Psychologist, admitted as an expert in special education and school psychology, testified that she agreed with the diagnosis of high functioning autism. She stated that students with autism can be served in many educational settings. She explained the diagnostic criteria for autism and the spectrum of the disorder, which includes significant communication difficulties ranging from mild delays to severe language impairments

where assistive technology is required, social skills deficits including lack of eye contact, and restrictive, repetitive, or self-stimulating behavior such as spinning, object fixation and handclapping. Ms. XXXX testified that she observed the Child in both the kindergarten and first grade classrooms and participated in his IEP team meetings. She did not observe him spinning, fixating on objects or engaging in self-stimulating behaviors such as handclapping. She testified that the Child presented with attentional deficits.

Ms. XXXX further testified that placement was discussed at the Child's IEP team meetings. He was in the general education classroom for both kindergarten and first grade with increased individual instruction from two hours to four hours, and then, in an effort to assist the Child to remain on task, a para-educator was assigned for several hours a day for one-to-one services. Still, the Child's progress was uneven.

XXXX XXXX, M.A., MCPS, Special Education Supervisor, admitted as an expert in special education, testified she has known the Child since she first observed him in pre-school. Like Ms. XXXX, she stated that the Child's special education instruction has increased since kindergarten from consultative services, to two hours of direct instruction, to four hours of direct instruction, to a one-on-one aid. Ms. XXXX testified that the areas of concern for the Student include his academic progress, interaction with peers, and staying on task. She stated that the Child needs a more structured educational plan in order to progress. She testified that the Child should be in the [Program] program, which is a self-contained classroom in a general education building with lunch, recess, art, music and physical education with general education students. Ms. XXXX further explained that the student-teacher ratio in the [Program] program is from nine to eleven students to one teacher and one para-educator. Also, the general education curriculum with instructional strategies is provided in the program but at a slower pace with re-

teaching and concept essentials broken down. Thus, she testified, the Child will not become frustrated and overloaded.

Additionally, Ms. XXXX testified that the Child's speech and language deficits are in social situations not in accessing the curriculum. She stated that speech and language services through the school system only address a student's ability to access the curriculum; the social use of language is not properly covered in an IEP. Because the Child's speech and language deficits are in the area of pragmatic language or the social use of language, the social skills group will address those needs. Finally, Ms. XXXX testified that the Child's IEP is reasonably calculated to provide the Child educational benefit and can be implemented in the [Program] at [School 1].

As stated above, the two-pronged test to determine if MCPS is required to fund a private educational placement is whether MCPS failed to provide educational benefit to the Child, and if so, whether [School 3] will provide some educational benefit. I note at the outset that the Parent has requested a move along the spectrum of placements from lesser to very restrictive, from a classroom with students who are not educationally disabled to a private special education day school. However, the Parent provided little evidence to support the move to such a restrictive environment, alleging only that the MCPS staff cannot teach autistic students and questioning why MCPS did not call the Child's teachers and para-educator to testify at the hearing.

The Parent had the right to present the testimony of any relevant witnesses he chose, including the Child's teachers, to prove that those teachers are not trained and experienced in teaching students with autism disorders or that MCPS was unable to design and implement the Child's IEP. Without that testimony, the evidence in this case establishes that the IEP team, which included the Parents, attempted to implement the Child's educational program in the least restrictive environment and increased the level of support as the Child failed to make more than

limited progress. While during the 2005-2006 School Year the Child made some progress on his goals and objectives, his behaviors impeded his access to the curriculum and prevented full achievement of his goals and objectives. He began the first grade on a beginning kindergarten level and ended on a mid-kindergarten level. The 2006-2007 IEP and the Behavioral Intervention Plan are designed to target the Child's difficulties with attention and wandering and thus improve his academic performance. The smaller, more structured classroom, with instruction at a slower pace, will not frustrate or overload the Child and will enable him to attend to academic activities. There is no evidence that the MCPS cannot implement the IEP as written or that the Child cannot be educated in special education classroom in a general education public school.

Citing the neuropsychologist's recommendations, (PRT #1), the Parent repeatedly asserted that MCPS failed to understand the Child as a student with an autism spectrum disorder and saw him only as disruptive. While it is true that the Child's teachers have documented that the Child has attention issues and formulated a Behavioral Intervention Plan in response, that does not mean that they fail to recognize the Child's diagnosis of autism and the impact it has on his education. (MCPS #4). MCPS accepts the Child's diagnosis of high functioning autism and seeks more individualized support for the Child in the [Program] program. As stated above, the special education classroom with a low teacher ratio and slower paced instruction will address the Child's susceptibility to overload. Additionally, as recommended by the neuropsychologist, the Child has an IEP that includes time with typically-developing peers as well as in a specialized setting. He had support in the first grade, a resource teacher and a para-educator for part of the day, and he will have the support of a teacher and a para-educator in the [Program] program.

Additionally, the Parent failed to show that speech and language services, beyond those incorporated into the academic curriculum and practiced in the social skills group, are inadequate. The Child's goals and objectives, particularly in reading, written language and auditory processing, address speech and language. (MCPS #8). Because the evidence establishes that the Child's receptive and expressive language skills are in the average range, (PRT #4), he is equipped to access the curriculum without additional speech and language services. As Ms. XXXX testified, speech and language services through the school system only address a student's ability to access the curriculum, the social use of language is not properly covered in an IEP. Here, the evidence shows that the Child's area of difficulty is with pragmatic language, or the social use of language. (PRT #2 and #3). The social aspects of communication are addressed in MCPS's social skills group in which the Child participated in the first grade and will again participate in the coming school year. I conclude that the Child's 2006-2007 IEP with placement in the [Program] program is reasonably calculated to provide the Child educational benefit and thus, a free appropriate public education.

Finally, even if I were to find that MCPS failed to provide the Child a free appropriate public education and, therefore, private placement is appropriate, the Parent still failed to prove that [School 3] can provide the Child with some educational benefit. The Parent merely testified, without corroborating evidence including even the address of the school, that [School 3] can provide what the Parent seeks, namely, direct speech and language services and a staff trained to teach students with high functioning autism.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Parent did not prove that MCPS failed to provide the Child with a free appropriate public education and that placement in a private separate day school is required for the Child to achieve some educational benefit. 20 U.S.C. § 1412 (2000); Md. Code Ann., Educ. § 8-413 (1999); *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993); *School Committee of the Town of Burlington, Massachusetts v. Dept. of Educ. of Massachusetts*, 471 U.S. 359 (1985).

## ORDER

I **ORDER**, that the Parent's request for placement of the Child at a private separate day school, funded by Montgomery County Public Schools is **DENIED**.

August 28, 2006  
Date

\_\_\_\_\_  
Mary Shock  
Administrative Law Judge

## REVIEW RIGHTS

Within 180 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(h) (2004).

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.