

XXXX XXXX

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

\* BEFORE SONDRAL. SPENCER  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No: MSDE-PGEO-OT-06-30926

\* \* \* \* \*

**DECISION**

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

**STATEMENT OF THE CASE**

This case arises from a request by XXXX XXXX (Parent) on behalf of XXXX XXXX (Student) for a hearing to review the identification, evaluation or placement of the Child. The request was filed with the Prince George's County Public Schools (PGCPS) on July 7, 2006, and PGCPS transmitted the request to the Office of Administrative Hearings for hearing.

I held a hearing on August 23 and 24, 2006, at the Edgar Allan Poe Elementary School, 2001 Shadyside Avenue, Suitland, Maryland. The Parent was represented Jerrold Miller, Esquire. Gail Veins, Esquire, represented PGCPS.

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 Student’s Individualized Education Program (IEP) for the 2006-2007 School Year, including placement in [Program 1] at [School 1], reasonably calculated to provide educational benefit; and if not,
2. Is PGCPS required to fund placement for the Student in a private separate day school?

**SUMMARY OF THE EVIDENCE**

A. Exhibits

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

- D #1 Undated copy of Request for Mediation/Due Process Hearing
- D #2 Undated Notice of Intent to Place Student in a Private Placement
- D #3 July 26, 2006 Letter to the Parent from [School 2]
- D #4 Not offered
- D #5 IEP 2006-2007 School Year
- D #6 March 13, 2006 XXXXXXXXXXXXXXXXXXXX Occupational Therapy Evaluation
- D #7 Psychological Assessment from XXXX XXXX, Ph.D.
- D #8 February 16, 2006 XXXXXXXXXXXXXXXXXXXXXXXXXXXX Center, XXXXXXXX Hospital Speech and language Evaluation

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

- PGCPS #1 Prior Written Notice, Notice Date February 24, 2006
- PGCPS #2 2005-2006 Report Card
- PGCPS #3 Undated Team Summary and Interpretation of the Multifactorial Evaluation from XXXX Schools<sup>1</sup>
- PGCPS #4 November 1, 2004 PGCPS Occupational Therapy Report
- PGCPS #5 Prior Written Notice, Notice Date July 14, 2006
- PGCPS #6 IEP 2006-2007 School Year<sup>2</sup>

B. Testimony

The Parent testified on her own behalf and presented the testimony of the following witnesses:

1. XXXX XXXX, Ph. D., Clinical Psychologist, admitted as an expert in psychology; and
2. XXXX XXXX, High School Director, [School 2], admitted as an expert in special education.<sup>3</sup>

The following witnesses testified on behalf of PGCPS:

1. XXXX XXXX, PGCPS Special Education Teacher, admitted as an expert in special education;
2. XXXX XXXX, PGCPS Occupational Therapist, admitted as an expert in occupational therapy;

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<sup>1</sup> Prior to attending PGCPS, the Student attended public school in XXXX County, [State].

<sup>2</sup> This is the same exhibit as D#5 except that it contains handwritten and types revisions to the objectives discussed at the resolution meeting on July 24, 2006.

<sup>3</sup> Ms. XXXX testified telephonically.

3. XXXX XXXX, PGCPs Special Education Teacher, admitted as an expert in special education and school psychology;
4. XXXX XXXX, PGCPs Speech/Language Pathologist, admitted as an expert in speech/language pathology; and
5. XXXX XXXX, PGCPs Special Education Instructional Specialist, admitted as an expert in special education.

### **FINDINGS OF FACT**

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

1. The Student is a 14 year-old boy, born on XXXX, 1992. He has been identified as a student with specific learning disabilities in reading and math.
2. The Student lived in XXXX County, [State] and attended public school in [State] until the 2004-2005 school year when he moved to Maryland.
3. During preschool, the Student was identified as having speech and language delays and motor delays and started receiving special education services. He received speech and language therapy and occupational therapy as part of his IEP while in [State] and also received physical therapy from 1997 to 2003.
4. At the age of five, the Student was diagnosed with Attention Deficit/Hyperactive Disorder (ADHD) and was placed on medication. The Student currently takes Ritalin and Focalyn for ADHD and Wellbutrin for depression.
5. While in [State], the Student received tutoring at the [Center] for a period of 18 months.
6. Testing performed on January 22, 2004 in [State] showed that Student had a full scale IQ of 68 placing him in high end of the mildly retarded range of intellectual functioning.

7. On April 27, 2004, while still in [State], the Student was administered the Woodcock-Johnson III Tests of Achievement. The Student was 12 years old and in the sixth grade (6.8) at the time of testing. The test results were as follows:

	Age
Oral Language	7.9
Total Achievement	7.1
Broad Reading	6.10
Broad Math	7.0
Broad Written Language	7.7

8. The Student moved to Prince George's County during the 2004-2005 school year and initially attended the seventh grade at [School 3] until he was placed in [Program 2] ([Program 2]) at [School 4] in April 2005.

9. [Program 2] is a self contained program for learning disabled children. The class size is usually 6 to 10 students. The content of the curriculum is the same as the general education curriculum but accommodations and modifications are used to assist the students. The students in [Program 2] are working towards a high school diploma.

10. On November 29, 2004, the Student underwent an occupational therapy evaluation at PGCPS using the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI).<sup>4</sup> The Student's standard score on the Visual-Motor Integration subtest (67) fell within the low range (age proximity 6.2; percentile 1). The Student's standard score on the Visual Perception (77) and Motor Coordination (74) subtests fell within the below average range (age proximity 7.8 and 6.9; percentile 6 and 4). The evaluator concluded that the Student had functional fine motor skills and that his difficulty with written work output appeared to be related to deficits with language processing skills. The evaluator recommended modified writing demands, minimizing the amount of copying and allowing the Student to write in print.

11. On June 6, 2005, the Student was administered the Woodcock-Johnson III Tests of Achievement. The results were as follows:

	Age	Grade
Broad Reading	7.9	2.5
Broad Math	7.1	1.7
Broad Written Language Academic Knowledge	7.9	2.3
	9.9	4.6

The test results showed that the Student demonstrated educational needs in the following areas:

Consumer Math	Fractions – Decimals	Measurement
Geometric Concepts	Grammar	Reading Comprehension
Graphs- Tables	Literature Appreciation	Computation
Reading Vocabulary	Spelling	Story Problems
Vocabulary development	Word Attack Skills	Calculator Skills
Problem Solving Strategies		

12. The Student was promoted from the seventh grade to the eighth grade and remained at [School 4] in the [Program 2] program for the 2005-2006 school year.

13. The Student was enrolled in a private intensive reading program from January 2006 through May 2006.

14. A psychological assessment of the Student was performed by Dr. XXXX XXXX over a four day period in December 2005 and January 2006. The test results on the Woodcock-Johnson III Tests for Achievement were as follows:

	Grade Equivalent
Listening Comprehension	8.4

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<sup>4</sup> The VMI determines the extent of unification of a student's eye directed hand movements using a pencil.

Written Expression	3.8
Academic Fluency	3.8

Subtests

Reading Fluency	3.7
Passage Comprehension	2.7
Understanding Directions	10.4
Picture Vocabulary	4.3
Oral Comprehension	7.1
Math Fluency	2.8
Writing Fluency	4.6
Writing Samples	3.2
Handwriting	2.1

15. The Wechsler Individual Achievement Test II was also conducted by Dr. XXXX

and the results were as follows:

	Grade Equivalent
Word Reading	2.2
Reading Comprehension	4.2
Pseudoword Decoding	1.2
Numerical Operations	1.2
Math Reasoning	2.1
Spelling	2.5
Written Expression	5.8

16. Dr. XXXX concluded that the Student requires placement in a full time special education program designed for students with multiple and severe learning disabilities with access to speech and language and occupational therapy and counseling related services. The Student requires small group and individual instruction with students of average intellectual ability and teachers trained in special education. He should not be placed with students who are predominately mentally retarded or in the autistic spectrum or behaviorally/emotionally-disordered spectrum.

17. On February 16, 2006, the Student received a speech and language evaluation at the XXXXXXXXXXXXXXXXXXXX Center at XXXXXXXX Hospital in XXXXXXX, XX. The Student's hearing was within functional limits. The Student scored in the 17<sup>th</sup> percentile ( age equivalent 6.3) on a test designed to assess his ability to produce consonants in the initial, medial and final positions of words. The Student's receptive language skills are moderately to severely disordered and his expressive language skills are moderately disordered. The Student has mild to moderate difficulty identifying associations between words, moderate difficulty recalling details and severe difficulty making comparisons, analyzing temporal/sequential relationships and inferencing. The evaluator concluded that the Student's language deficits adversely impact his academic success and recommended individual therapy once a week for 60 minutes.

18. On March 13, 2006, the Student received an occupational therapy evaluation at the XXXXXXXXXXXXXXXX. The Student's standard score on the VMI subtest (70) fell within the low range as did his score on the Visual Supplement (74) and Motor Supplement (77). His fine motor skills score were in the average range for manual dexterity and for upper-limb, or eye-hand coordination. His scores were below average to well below average for tasks requiring motor control of a writing tool. His scores indicated difficulty with visually-directed motor tasks, such as writing, as well as with general visual processing. The Student's handwriting is characterized by inconsistent sizing of letters and words, use of both upper and lower case formation, mix of cursive and print, lack of punctuation, spelling errors, poor letter formation and poor connection between letters which affects legibility. The evaluator recommended strategies and alternatives such as computer use, use of a tape recorder, a buddy system for note taking, and short-answer/multiple choice assignments to assist the Student.

19. In his 8<sup>th</sup> grade reading/language arts class, the Student had difficulty reading but was able to comprehend what was read to him by the teacher. Because of the abilities of the other students in the class, as well as the Student, the teacher read the text to the students and the content was discussed or the students were given questions to answer in written discussion format. In written assignments, the Student's ideas were clear but he displayed problems with handwriting,<sup>5</sup> vocabulary and grammar. The accommodations offered the Student in this class consisted of extension of time to complete assignments, repetition of directions and text read by the teacher.

20. In his 8<sup>th</sup> grade social studies class, the Student understood the content area if it was read to him by the teacher. The pace in the social studies classroom was slower because the students had difficulty reading.

21. The Student completed the eighth grade with the following grades and was promoted to the ninth grade:

	1	2	3	4	Final
Science 8	B	B	B	A	B
US History	C	B	B	B	B
Algebra 8	C	D	C	C	C
Reading/Language Arts 8	D	B	D	D	D
Health 8	C	C			C

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<sup>5</sup> The Student was allowed to print his written responses.

Art 8	B	B
F/C Science 8	C	C
Music 8	B	B
Tech Ed	C	

22. The Student's 2006-2007 IEP identifies objectives in the academic areas of mathematics, reading, and writing skills and the vocational/transition area of career awareness. In addition to 22:30 hours of direct special education services, the IEP identifies consultative speech/language pathology services. The accommodations and modifications recommended for the Student include extra response and processing time, verbatim reading of entire test, multiple or frequent breaks, extended time, reduced distractions and calculation devices. The IEP does not identify any direct occupational therapy or speech/language therapy. The IEP identifies the proposed placement as the [Program 1]<sup>6</sup> at [School 1].

23. [School 2] is a private special education day school in XXXX, Maryland for language/learning disabled students that offers a hands-on multisensory curriculum with a team approach. The high school consists of 46-50 disabled students and is located on one floor of a wing of the building. The population of the school consists of learning disabled and high functioning autistic students. The teacher to student ratio is small. [School 2] follows the Maryland Voluntary State Curriculum and local public school curriculum guides. The school offers after-school extracurricular activities such as teen activity club, weight lifting club, intramural sports, chess club, yearbook club, student council, school dances and after-school

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<sup>6</sup> [Program 1] is similar to the [Program 2] program.

open study hall. The school offers occupational therapy, speech/language therapy and psychological counseling.

## DISCUSSION

### **Motion for Directed Verdict**

As a preliminary matter, the Parent filed a Motion for Directed Verdict. A Motion for Directed Verdict is not a proper motion to file in an administrative hearing before the OAH. A Motion for Directed Verdict, codified as former Maryland Rule of Procedure 552, concerned a Motion for Judgment in jury trials and provided as follows:

a. Motion for – Grounds to Be Stated.

In an action tried by a jury any party may move, at the close of the evidence offered by an opponent or at the close of all the evidence, for a directed verdict in his favor on any or all of the issues. Such motion shall state the grounds therefore. An objection on behalf of the adverse party to such motion shall be entered as of course.

b. Offer of Evidence After Denial – Effect.

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so, and to the same extent as if the motion had not been made, and in so doing, he withdraws the motion.

c. Reservation by the Decision by Court.

Instead of granting the motion for directed verdict, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury, but for the purpose of the appeal such reservation constitutes as denial of the motion, unless judgment is rendered for the moving party pursuant to Rule 563 (Judgment N.O.V.).

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d. Entry of Verdict by Clerk

Upon the granting by the court of an instruction directing a verdict, the court shall instruct the clerk to enter such a verdict, and to note that it has been entered by the court's instruction. It shall not be necessary for the jury, by its foreman, or

otherwise, to render such verdict.

Md. Rule 552 (1977). *See also, Hill v. Lewis*, 21 Md. App. 121, 318 A.2d 850 (1974). The rule is applicable to any proceeding tried by a jury. Clearly, this administrative proceeding is not a jury trial and thus, the Motion, as titled, may not be granted.

In 1984, Rule 552 was superceded by Md. Rule 2-519, entitled “Motion for Judgment.” The Motion applied to all court proceedings and was not limited to jury trials. That rule currently provides, as relevant:

**(a) Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

**(b) Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

MD Rules, Rule 2-519.

The most analogous Motion to that filed by the Parent is a Motion for Judgment, which is governed by COMAR 28.02.01.16 and, which states:

E. Motion for Judgment.

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion for judgment is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an

opposing party, the judge may:

(a) Proceed to determine the facts and to render judgment against an opposing party; or

(b) Decline to render judgment until the close of all evidence.

(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

COMAR 28.02.01.16E is patterned after Md. Rule 2-519. Under both, COMAR 28.02.01.16E and Md. Rule 2-519, a party may move for judgment only upon the close of the opposing party's evidence. In this case, the Parent moved for judgment prior to the hearing, before any evidence had been adduced. Therefore, under the circumstances, I do not have the authority to grant a Motion for Judgment.

The only other related motions the Parent could have made include a Motion for Summary Decision or a Motion to Dismiss. Regarding the latter, an ALJ may grant a Motion to Dismiss when she finds that an initial pleading fails to state a claim upon which relief may be granted. COMAR 28.02.01.16C. I do not believe that the Parent intended to file such a motion because the outcome would result in the dismissal of the very claim they filed for resolution via due process.

Under the OAH Rules of Procedure, a party may move for summary decision on any substantive issue in a case. The motion may be granted when it is determined that “[t]here is no genuine issue as to any material fact” and the moving party “is entitled to prevail as a matter of law.” COMAR 28.02.01.16D. The summary decision provisions in the OAH Rules of Procedure are analogous to the summary judgment rule set forth in Rule 2-501 of the Maryland Rules of Procedure. Only a “genuine dispute” as to a “material fact” is relevant in opposition to a motion for summary judgment. *Seaboard Surety Co. v. Kline, Inc.*, 91 Md. App. 236, 242, 603 A.2d 1357,

1360-1361 (1992). A material fact is one that will “somehow affect the outcome of the case.” *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608, 614 (1985); *Washington Homes v. Interstate Land Development Co.*, 281 Md. 712, 717, 382 A.2d 555, 557 (1978).

A party opposing a motion for summary decision must show with some precision that there is a genuine dispute of fact. *Nerenberg v. RICA of Southern Maryland*, 131 Md. App. 646, 750 A.2d 655 (2000). Bald allegations and mere surmise are insufficient to establish a genuine dispute of fact. *Nerenberg v. RICA, supra*.

The substantive issue in this case is whether the PGCPS failed to provide the student with FAPE when it determined that the proper location for his educational placement was in Prince George’s County public high school rather than a private school.

The substantive issue of the Motion is that PGCPS failed to provide FAPE when it failed to abide by 20 U.S.C. § 1415 (c)(2)(B) which requires that the school system respond within ten days when a parent files a due process complaint unless the school system provided the parents with prior written notice regarding the issue of the complaint. Particularly, the Parent asserts that the school systems failures violated the notice provisions of the IDEA. The parents cite *Massey v. Dist. of Columbia*, 400 F. Supp.2d 66 (2005) in support of their argument.

20 U.S.C. 1415 (c)(2)(B) dictates the requirements of the school system’s response to a parent’s complaint requesting due process and provides, as relevant:

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include--

**(aa)** an explanation of why the agency proposed or refused to take the action raised in the

complaint;

**(bb)** a description of other options that the IEP Team considered and the reasons why those options were rejected;

**(cc)** a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

**(dd)** a description of the factors that are relevant to the agency's proposal or refusal.

According to the clear language of the statute, the local educational agency (LEA) is deemed to have responded to a complaint when one of two things occurs. First, the LEA has effectively responded if it sent a prior written notice to the parent regarding the subject of the complaint. If, however, the LEA *has not* sent a prior written notice to the parent, it must send a response including all of the requirements listed in section 1415 (c)(2)(B)(i)(aa) – (dd). The language of the statute does not purport to impose the requirements of subsections (aa) – (dd) on the contents of the prior written notice if one was sent to the parent, as the provision explicitly states that the “*response . . . shall include*” the specific information required under subsections (aa) – (dd) (emphasis added). In this case, there is no dispute that the PGCPs sent the parent a prior written notice, with a notice date of February 24, 2006. Therefore, the requirements listed in section 1415 (c)(2)(B)(i)(aa) – (dd) are not applicable.

20 U.S.C.A. § 1415 (c)(1) dictates what must be included in the content of a prior written notice:

(1) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include--

**(A)** a description of the action proposed or refused by the agency;

**(B)** an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

**(C)** a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

**(D)** sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

- (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
- (F) a description of the factors that are relevant to the agency's proposal or refusal.

Because the PGCPS sent the Parent prior notice, so long as that notice meets the requirements of § 1415 (c)(1), the PGCPS' responsibilities regarding a response to the Parent's complaint will be met. A quick review of the Prior Written Notice for the March 10, 2006 IEP meeting reveals that the school systems substantially complied with the requirements of section 1415 (c)(1). Although the Parent contends that the notice failed to explain why PGCPS proposed the placement it did, under the heading, "Other Relevant Information" the notice provides:

The IEP Team is not aware of any other factors than those previously addressed. [Mother] did not agree with [Student]'s proposed placement for the next year and did not sign his IEP. She feels [Student] needs more intensive services for math speech and language and she feels he needs counseling services. . . . *[Mother] plans to request mediation and/or due process hearing. Team is not in agreement with [Mother]'s position. [Student]'s needs can be met for [sic] at an area high school.*

Furthermore, the Parent asserts that the notice fails to describe any evaluation, procedure, assessment, record, or report used as a basis for the proposed placement. It is true that the notice generally reports that the IEP team relied on "assessments and other relevant information related to . . . cognitive[,] math [and] reading without specificity. However, that section also refers to the content of the IEP that was developed to meet the student's needs. According to the school system, it forwarded the contents of the IEP to the Parent when it sent her the Prior Written Notice, and thus, the Parent was fully aware of the bases for the team's placement decision. The school system further asserts that any argument that the school system's deficient notice prevented the Parent from preparing for the due process hearing is disingenuous because the Parent participated in a resolution meeting at which time the issue of the school system's

placement of the student and the Parent's disagreement with that placement was fully fleshed out.

Although it is true, as the Parent points out, that the school system is required to comply with the notice provisions of the IDEA, any violation of those provisions does not result in the foregone conclusion that the school system failed to provide FAPE. To the contrary, in order to constitute a failure to provide FAPE, the procedural inadequacies must have "result[ed] in the loss of educational opportunity." *Evans v. Board of Educ. Of Rhinebek Cent. School Dist.*, 930 F. Supp. 83, 93-94 (D.N.Y. 1996); *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940 (4<sup>th</sup> Cir. 2003) (holding that, even if the school system failed to provide the parents with prior written notice of its refusal to reimburse the parents for private education, such a failure did not interfere with the provision of a FAPE); *Alexis v. Board of Educ. For Baltimore County Public Schools*, 286 F. Supp.2d 551, 558 (D.Md. 2003);

I find that the school system substantially complied with the requirement that it respond to the Parent's complaint within 10 days or have provided prior written notice and that any deficiency in this notice did not amount to a denial of FAPE. I further find that, even if I determined that there was some question as to whether the school system's prior written notice met the requirements of the IDEA, at the very least, a genuine issue of material fact would exist as to whether any such deficiency amounted to a denial of FAPE. Therefore, I cannot grant the Motion for Summary Decision. I, furthermore find that the Parents reliance on *Massey* is misplaced.

In *Massey*, the District Court for the District of Columbia held that the school system failed to provide FAPE when it failed to timely respond in writing within 10 days after the parents filed a request for due process. The school system argued that it met the technical

requirements of the statute because it provided the parents with prior written notice a few days after the parents filed their due process complaint. The court held, however, that the prior notice was insufficient because “[s]ince DCPS had not issued a Prior Notice for Tiffany at the time of receiving the due process hearing request, it was obligated to respond in writing within ten days.” *Massey* 400 F. Supp.2d at 71. The court further reasoned that that the school system was required to include, in that written response, the information in 1415 (c)(2)(B)(i)(I)(aa)-(dd).

In determining that the school system failed to provide FAPE, however, the court did not rely solely on the school system’s failure to respond in writing to the parents’ complaint within ten days. To the contrary, the court determined that the school system committed violated numerous procedural violations of the IDEA, which, cumulatively, amounted to the denial of FAPE. Particularly, in that case, in addition to its failure to respond in writing, the school system failed to timely develop an IEP or provide the student with an educational placement and failed to hold a resolution conference within fifteen days after the parents filed a complaint as required by section 1415 (f)(1)(B). The cumulative nature of these violations, held the court, amounted to the conclusion that the parents would likely prevail.<sup>7</sup>

This case is easily distinguishable from *Massey*. Unlike *Massey*, in this case, the parent fully participated in the IEP process and was fully aware of the school system’s refusal to place the child in private school. Furthermore, the school system sent the parent a prior written notice *before* the parent filed its request for due process. According to the school system, the parent also participated in a resolution session which fully addressed the substantive issue contained in the request for due process, and thus, provided her with ample ability to prepare for the hearing. Any

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<sup>7</sup> In *Massey*, the parents sought an injunction requiring the school system to place the student in the parent’s desired educational placement. Therefore, the court did not determine whether or not FAPE had ultimately been denied; rather, it addressed whether the parents were *likely* to prevail on the merits of their claims.

deficiency in the prior written notice in this matter, in no way, approaches the cumulatively egregious procedural deficiencies present in *Massey*.

Accordingly, based on the above discussion, the Motion filed by the Parent is denied.

### **Merits of Appeal**

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 Student 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 PGPCS 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 PGCPs IEP team, including the Student’s parent designed an IEP for the Student and reviewed it annually, most recently on March 10, 2006. The IEP team recommended that the Student be placed in the [Program 1] at [School 1] 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. The Parent disagreed with the placement and requests placement in [School 2], 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 has proved that the Student’s IEP and placement in the [Program 1] at [School 1] would not provide

the Student with a free appropriate public education but has failed to establish that placement at [School 2] is appropriate.

The Parent testified that the Student has been receiving special education and related services since preschool including private tutoring and an intensive reading program. Even with these services, according to the Parent, the Student continues to have severe difficulties in handwriting, reading and math. For that reason, the Parent stated, the Student was evaluated at the XXXXXXXXXXXXXXXXXXXXXXXX in February 2006, the XXXXXXXXXXXXXXXXXXXXXXXX in March 2006 and a private psychologist in December 2005 and January 2006. At the hearing, the Parent stressed the recommendations made by the psychologist, the speech and language pathologist and the occupational therapist.

In her report, which was confirmed by her testimony, the Parent's expert, Dr. XXXX, concluded that formal testing on the WISC-IV revealed significant levels of variability between the different domains tested such that an overall IQ score was not a valid representation of the Student's ability. She noted that the Student's articulation was difficult to understand and that he tended to confuse and/or drop verb endings. The Student's verbal reasoning and problem solving fell in the average range but his nonverbal reasoning fell in the extremely low range. His capacity to use verbal memory during problem solving was extremely low and his visual processing speed was borderline to low average. Dr. XXXX described the Student as a child with average verbal abilities who has severe learning disabilities in a number of specific academic areas and in the area of nonverbal reasoning. She further noted that the Student's ability to define words was low average and his general fund of information was extremely low. Social-emotional testing of the Student revealed an adjustment disorder with mixed anxiety and depressed mood secondary to his struggles in school and peer relations. Achievement testing

revealed severe learning disabilities in the areas of reading, writing, and math. The Student's overall reading ability was significantly below predicted levels based on his Verbal Comprehension Index. His decoding, sight word and word attack skills were in the extremely low range. In math, the Student demonstrated a severe to profound math learning disability with calculating and work problem score below the 0.1 percentile. His automatic command of math facts was below the 0.1 percentile. Dr. XXXX noted that it is questionable that the Student can function at all within a regular math curriculum; even one adapted to the needs of a special education student.

According to Dr. XXXX, given the degree of the Student's delay in reading, writing and math, it is unlikely that he will be able to make sufficient progress in a four year high school program to obtain a high school diploma. Dr. XXXX noted that the Student requires state of the art reading remediation designed to promote accurate phonological processing to an automatic level and fluent reading. In the area of math, the Student's fundamental conceptual/nonverbal deficits may make it difficult for him to progress beyond functional daily living skills in math.

Dr. XXXX' conclusions regarding the Student's deficits in handwriting were confirmed by the occupational therapy examination performed at the XXXXXXXXXXXXXXXXXXXX. The examination revealed that the Student's fine motor skills were in the average performance range for manual dexterity and for upper-limb, or eye-hand coordination but that his scores were below average to well below average for tasks requiring motor control of a writing tool. The evaluator noted that the Student's scores on the Beery Test of Visual-Motor Integration had not changed since the administration of the test in 2004. Although the evaluator did not recommend direct occupational therapy services, she did recommend that alternative strategies for writing be

implemented such as keyboarding skills, a fluency program and handwriting remediation. She also recommended strategies to assist the Student with organization of his work.

The Parent also presented the results of a speech and language evaluation. The evaluator concluded that the Student's deficits in receptive language and expressive language adversely impacted his social interactions and his academic success and recommended that the Student receive individual language therapy once a week for 60 minutes.

In light of the result of the formal evaluations, Parent argued that the IEP objectives developed by PGPCS were unrealistic because the Student's reading, math and writing scores are significantly below grade level. In each area identified by the Parent, Dr. XXXX agreed that the objectives were unrealistic. In math, Dr. XXXX opined that since the Student did not have calendar or money skills, he can only achieve daily living skills in math. She testified that the Student cannot understand the concepts of square roots or exponents or solve for the unknown in an inequality, which are the math objectives on his IEP. In reading, Dr. XXXX agreed that the third objective, that the Student will take his time when reading out loud or to himself, and reread the text if he does not understand it the first time, is a good objective but noted that the other objectives would be difficult for the Student because of his poor spelling skills. She emphasized that handwriting and keyboarding skills, expressive language skills and spelling skills needed to be included in the IEP.

Finally, the Parent testified that [School 2] would provide the speech and language, occupational therapy and counseling services that the Student requires in an environment where the Student would progress. The Director of the high school at [School 2] confirmed that the Student would receive speech and language, occupational therapy and counseling services. She also noted that the Student would be in a high school diploma program and that the content and

requirements of the program would be identical to the program at [School 1] because [School 2] follows the Maryland Voluntary State Curriculum. On cross-examination, the Director acknowledged, however, that an IEP for the 2006-2007 school year had not been developed by [School 2] for the Student.

Interestingly, the PGCPS witnesses painted such an entirely different picture of the Student that it appeared the parties were talking about two unrelated individuals. Ms. XXXX, the Student's 8<sup>th</sup> grade reading/language arts teacher, noted that the Student was able to comprehend 8<sup>th</sup> reading material and that his reading and vocabulary level was 6<sup>th</sup> or 7<sup>th</sup> grade. She explained that the students were given a copy of the text to follow as she read out loud. According to Ms. XXXX, the Student had calendar skills, participated in class, worked well with others and assisted others with assignments. She acknowledged that the Student demonstrated deficits in handwriting, vocabulary and grammar but stressed that his comprehension level was on grade level. She also acknowledged that the Student received a D in reading/language arts because of poor test and quiz grades. According to Ms. XXXX, the objectives for reading on the 2006-2007 IEP are appropriate for the Student and consistent with the requirements for the Maryland State Assessment and High School Assessment tests.

Ms. XXXX, the Student's 8<sup>th</sup> grade social studies teacher, described the Student as the shining star of the class. Like Ms. XXXX, Ms. XXXX read the text to the students in her class. She noted that the Student was able to understand classroom discussions and had good expressive language skills. According to the speech/language pathologist, Ms. XXXX, the Student does not require direct speech/language services. Overall, the PGCPS witnesses painted the picture of a student who was making educational progress and accessing the curriculum.

In her closing argument, the Parent noted and I agree that the testimony seemed to describe two different children. The Parent argued that the credibility of the PGCPs witnesses is at issue and that I must find that the PGCPs witnesses were less than truthful. I disagree with the Parent. I do not have any doubt that the PGCPs witnesses were sincere in their descriptions of the Student but I find that their representations were influenced by the fact that the Student was sociable, likable and not a behavior problem, not by his capacity to access his educational program. This finding is supported by the results of the objective testing done by the Parent's witnesses in addition to the testing done by PGCPs and other testing results reported on the 2006-2007 IEP. Simply stated, the testimony of the PGCPs witnesses cannot be reconciled with the January 2004 test results which reveal that the Student has an IQ of 68 (mildly retarded) and that in the 8<sup>th</sup> grade, he is functioning at a second or third grade level in math, reading and writing. Nor can their testimony be reconciled with the fact that the results on the Woodcock-Johnson III Tests for Achievement were almost identical in April 2004 and June 2005, showing that the Student had made little if any progress.

During the hearing, I waited for the parties to address whether the Student's lack of educational progress was related to any intellectual deficits. Dr. XXXX was the only witness that addressed the Student's intellectual capacity. She stated that the Student could only achieve daily living skills in math and that he would not be able to obtain a high school diploma if he had to pass algebra and geometry. In her written report, Dr. XXXX did not report the results of her IQ testing but noted that her assessment was very similar to the assessment in January 2004 that resulted in a score in the mildly retarded range. PGCPs continually pointed out that the objectives on the Student's IEP were appropriate because the Student was on track to receive a high school diploma. The Student is starting the ninth grade with, at best, third grade math and

reading skills. Even assuming that the Student's reading and math levels are sixth grade, as reported by PGCPS, it is inconceivable that the Student will advance to grade level while in high school given the reality that as students move from middle school to high school more of the facts, vocabulary development and conceptual development available from the curriculum come from reading material which this Student simply cannot access.

Throughout his educational experience, the Student has received special education services in addition to private tutoring but he is still functioning significantly below grade level. Although the Student has received special education services, I find that his disability has not been properly identified by the PGCPS. Before an appropriate IEP can be developed, the Student's intellectual capacity must be reassessed because the lack of progress demonstrated by the Student may be evidence of limited intellectual ability in addition to learning disabilities. I conclude that thorough testing of the Student's intellectual ability is necessary to determine if the Student has the intellectual capacity to access a general education curriculum with modifications and accommodations. If the testing reveals impairment of the Student's intellectual capacity, then an IEP must be developed that provides educational benefit to a student with limited intellectual ability.

Finally, even though I found that PGCPS failed to provide the Student a free appropriate public education, the Parent still failed to prove that [School 2] can provide the Child with some educational benefit. An IEP is the tool for providing special education and related services to a disabled student and absent an IEP, I cannot determine that the program developed for a student is designed to provide educational benefit. [School 2] has not developed an IEP for the Student. Thus, the Parent had failed to provide evidence that [School 2] is an appropriate placement for the Student.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Parent did prove that PGCPS failed to provide the Student with a free appropriate public education but failed to prove 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 Student at a private separate day school, funded by Prince George's County Public Schools is **DENIED** and further **ORDER**, that the Prince George's County Public Schools reassess the Student's intellectual capacity and develop an Individualized Education Plan consistent with the results of the reassessment.

September 7, 2006

Date

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Sondra L. Spencer  
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.