

XXXX XXXX

*

BEFORE DAVID HOFSTETTER,

v.

*

AN ADMINISTRATIVE LAW JUDGE

*

OF THE MARYLAND OFFICE OF

BALTIMORE COUNTY

*

ADMINISTRATIVE HEARINGS

PUBLIC SCHOOLS

*

OAH NO.: MSDE-BCNY-OT-07-24217

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DECISION

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STATEMENT OF THE CASE

This case arises from a request by XXXX and XXXX XXXX (“Parents”), on behalf of their son XXXX XXXXX (“Student”), for a due process hearing to review the placement of the Student. Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C.A. § 1400 *et seq.* (2000 and Supp. 2007). The request was filed with Baltimore County Public Schools (“BCPS”) on November 7, 2005 and transmitted to the Office of Administrative Hearings (“OAH”). A resolution session was held on December 16, 2005, and on December 23 the parties notified OAH that they did not resolve the matter. The case was scheduled for a hearing on January 17, 2006, but, at the Parents' request, OAH rescheduled it to January 31, 2006.

On or about January 25, 2006, Parents filed a Motion for Summary Decision. Thereafter, OAH informed the parties that the hearing on the merits previously scheduled for January 31st

would be converted to a motions hearing. On January 30, 2006, BCPS filed its response to the Parents' Motion and its own Motion for Summary Decision.

A hearing was held on the cross-motions on January 31, 2006, before David Hofstetter, Administrative Law Judge. 20 U.S.C.A. § 1415(f) (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. Michael J. Eig, Esquire, represented the Parents and J. Steven Cowles, Esquire, represented BCPS. The record closed on January 31, 2006 at the conclusion of the hearing.

I issued a decision on the merits on February 21, 2006.¹ The decision granted BCPS's Motion, denied the Parents' Motion, and denied the latter's request for reimbursement for the 2005-2006 school year. Parents appealed that decision to the United States District Court for the District of Maryland under IDEA, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 1983, and Maryland law.

On April 25, 2007, [Judge], United States District Judge, issued his Memorandum Opinion in the case. [Judge] agreed with this ALJ's earlier determination that Parents' letter of September 12, 2005 indicating that they had decided to move their son from [School 1] to [School 2], and requesting that BCPS reimburse the costs of [School 2], triggered a duty for the school system to respond under 20 U.S.C. § 1415(b)(3). Slip Opinion at 11-12. BCPS's failure to do so "constitute[d] a procedural violation of the IDEA." *Id.* at 12. The next step, then, is to determine "under Section 1415(f)(3)(E)(ii) . . . whether that violation '(I) impeded the child's

¹ Because 45 days from the date of notice of the outcome of the resolution session provided insufficient time for the preparation of this decision, the parties requested that a decision issue within 60 days of the date of such notice. COMAR 13A.05.01.15.

right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.'" *Id.*

Finding that there is "a genuine issue of material fact as to whether The Student was denied a FAPE," slip opinion at 10, [Judge Bennett] both parties' motions for summary judgment and remanded the matter to OAH so that "both parties [might] have . . . an opportunity during the administrative process to present testimony and other evidence as to the appropriateness of both [School 1] and [School 2]." *Id.*

I held the hearing on remand on August 29-30, 2007. 20 U.S.C.A. § 1415 (Supp. 2007); 34 C.F.R. § 300.507 (2006); Md. Code Ann., Educ. § 8-413 (2006); Code of Maryland Regulations ("COMAR") 13A.05.01; and Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings. Michael J. Eig, Esquire, again represented the Parents. Lisa Settles, Esquire, represented BCPS. The record closed on August 30, 2007, at the conclusion of the hearing.²

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. 2007); COMAR 28.02.01.

ISSUE

The first issue on remand is whether BCPS's procedural violation resulted in denial of "a free appropriate public education," or FAPE, to the Student on any of the three grounds set forth in 20 U.S.C.A. § 1415(f)(3)(E)(ii): that is, whether the violation

² At that time, the parties requested that a decision issue within thirty (30) days of the close of the record. COMAR 13A.05.01.15.

- (I) impeded the child's right to FAPE;³
- (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the parents' child; or
- (III) caused a deprivation of educational benefits.

As a second issue, if I find that the Student was denied a FAPE, then I must determine whether [School 2] offered him an appropriate education.⁴

SUMMARY OF THE EVIDENCE

Exhibits

The Parents submitted the following exhibits, which were admitted into evidence:

1. Due Process Hearing Request, dated December 9, 2005
2. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated December 28, 2005
3. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated November 21, 2005
4. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated November 17, 2005
5. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated September 12, 2005
6. Declaration of Dr. XXXX XXXX, January 23, 2006

³ As part of this analysis, "there must be a factual determination as to whether [School 1] would have offered [Student] a FAPE in the 2005-2006 school year." Slip Opinion at 12.

⁴ The slip opinion contains this footnote:

The Plaintiffs concede that [School 2] has not been certified by the [S]tate of Maryland as a state-approved special education school. Under the IDEA, in order for a school to offer a FAPE, the school must "meet the standards of the State educational agency." 20 U.S.C. § 1401(9)(B) (2006). However, because the record lacks any evidence as to BCPS's decisionmaking process when it selected [School 1] to implement [Student]'s IEP during the 2005-2006 school year, it is unclear at this time whether that factor would preclude [School 2] from even being considered as a potential placement. This issue should be explored on remand." Slip opinion at 12 n. 7 (record citation omitted). BCPS's decision making process regarding placement is discussed below.

7. Declaration of XXXX XXXX, January 23, 2006
8. IEP Team Summary, dated July 1, 2005
9. [School 2] Progress Reports, December 2005
10. [School 1] Speech-Language Pathology Annual Progress Report, April 6, 2005
11. Occupational Therapy Progress Report, May 2005
12. Speech-Language Quarterly Progress Report, February 2005
13. Neuropsychological Evaluation, December 30, 2004
14. BCPS Educational Assessment, April 23, 2004
15. [School 1] Speech-Language Pathology Annual Progress Report, Spring 2004
16. [School 1] Occupational Therapy Progress Report, June 2003

BCPS submitted the following exhibits, which were admitted into evidence:

1. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated January 11, 2005
2. IEP Team Summary, April 13, 2005
3. Classroom Teacher's End-of-Year Progress Report, May 2005
4. [School 1] Psychotherapy Progress Report, May 2005
5. BCPS Speech and Language Assessment, June 1, 2005
6. BCPS Occupational Therapy Assessment Report, June 1, 2005
7. BCPS Classroom Observation, June 20, 2005
8. IEP Team Summary, June 23, 2005
9. BCPS Educational Assessment, July 25, 2005
10. BCPS Psychological Assessment, July 26, 2005

11. IEP Team Summary, July 29, 2005
12. IEP, July 29, 2005
13. Parental Receipt of Non-Public Referral, August 02, 2005
14. BCPS Determination of School Location, August 10, 2005
15. Letter from M.J. Eig, Esq. to J.S. Cowles, Esq., at BCPS dated September 12, 2005
16. Due Process Hearing Request, dated December 9, 2005

Testimony

[Mother], Parent, testified in her own behalf and on behalf of her son.

The following witnesses testified on behalf of BCPS:

- XXXX XXXX, Ph.D., school psychologist at [School 3] and [School 4], admitted as an expert in school psychology;
- XXXX XXXX, Associate Head and Education Director at [School 1]; and
- XXXX XXXX, Ph.D., school psychologist at [School 1], admitted as an expert in clinical psychology and developmental disorders, all testified on behalf of BCPS.

FINDINGS OF FACT

At the joint request of the parties and for the sake of clarity, I amend the facts found upon the evidence presented at the hearing on January 31, 2006, as follows:

1. The Student is fifteen (15) years old (date of birth XXXX, 1992) and has been diagnosed with various learning disabilities.
2. The Student is identified as a student entitled to special education and related services under IDEA.

3. During the 2000-2001 school year, the Parents enrolled the Student in a private school, [School 1], a division of XXXX. Pursuant to a settlement agreement, BCPS partially or fully funded the Student's placement at [School 1] for the 2002-2003, 2003-2004, and 2004-2005 school years.
4. On or about January 11, 2005, the Parents requested that the school system agree to place and pay for the Student at [School 1] for the 2005-2006 school year.
5. On April 13, 2005, BCPS convened an IEP meeting concerning the student. The Student's mother participated in that meeting. The team recommended and the Student's mother agreed that various updated assessments and observations would be performed.
6. The recommended assessments and observations were performed by BCPS in a timely manner.
7. The IEP team, including the Student's mother, convened again on June 23, 2005 to review the results of the observations and assessments. The team determined that an updated educational assessment of the Student was necessary, and the mother consented to the assessment. The educational assessment was performed in a timely manner.
8. On July 29, 2005, the IEP team met again to review the educational assessment. The team drafted an IEP which included goals in areas of reading, math, written language, speech, fine motor skills, and social, emotional, and behavioral issues. The IEP team, including the mother,

approved the IEP, which specified that the Student continued to require a nonpublic placement.

9. On or about August 10, 2005, BCPS's Office of Nonpublic Placements forwarded a Notice that [School 1] was able to implement the Student's IEP. The Notice specified that BCPS would be "fiscally responsible for [the Student's] educational programming."
10. At some point, the Parents questioned whether the Student was making sufficient progress at [School 1] and determined that he would be better served at [School 2] ("[School 2]").
11. In late August 2005, the Parents secured the Student's acceptance at [School 2].
12. On September 6, 2006, the Student began attending [School 2].
13. On September 12, 2005, the Parents sent notice to BCPS of their decision to move the Student to [School 2], stating that they had "determined that he would be more appropriately placed at [School 2]." The letter also requested that BCPS place and fund the Student at [School 2].
14. BCPS did not respond to the September 12, 2005, letter from the Parents.
15. On November 17, 2005, the Parents wrote to BCPS requesting a response to their placement request.
16. On November 21, 2005, the Parents wrote to BCPS noting the lack of a response to their placement request and notifying BCPS that they intended to file for a due process hearing.
17. On December 9, 2005, the Parents filed for a due process hearing.

Upon careful review of the evidence presented, including documents and testimony, at the August 29-30 hearing, I find the following additional facts by a preponderance of the evidence:

18. The Student's IEP did not include a school assignment.
19. The Student's assignment to [School 1] was conveyed to Parents in a BCPS Office of Nonpublic Placements form dated August 10, 2005.
20. The Student's mother had previously indicated to members of the IEP team that she was concerned about her son's apparent lack of academic progress during the 2004-2005 academic year.
21. Neither BCPS nor [School 1] responded substantively to the mother's expressed concern during the IEP issuance and placement process.
22. The Parents had no meaningful opportunity to discuss their concerns about the Student's progress during that process.
23. The Parents' concern about the Student's lack of progress was the basis for their desire that the Student be reassigned to [School 2].
24. [School 2] was an appropriate placement for the Student.

DISCUSSION

Statutory Background

In 1975, the United States Congress first enacted legislation to ensure that handicapped or disabled children are provided with educational resources adapted to their needs. The most recent codification of those laws is known as IDEA. 20 U.S.C.A. §§ 1400-1487 (2000 & Supp.

2007).⁵ The court in *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007)

explained the IDEA's principal purpose:

The IDEA provides every disabled child with the right to a “free appropriate public education” (FAPE) designed to meet his specialized needs. [20 U.S.C.A.] § 1400(d)(1)(A). Congress has defined a FAPE as

special education and related services that ... (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate ... education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. § 1401(9).

484 F.3d at 674 -675. FAPE thus refers to the special education and related support services that are required to be provided to disabled children under the IDEA. FAPE is the core concept of both the federal special education regulatory program and corresponding state enactments. *See* 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417.3 (2006); and COMAR 13A.05.01.

A school system's duty to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit a disabled child to derive educational benefit from that instruction. As observed by the United States Supreme Court in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982),

[i]mplicit in the congressional purpose of providing access to a ‘free appropriate public education’ is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child We therefore conclude that the basic “floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to give education benefit to the handicapped child.

⁵ All sections of the IDEA individually cited herein are found in the 2007 Supplement to Title 20 of U.S.C.A. unless otherwise noted.

458 U.S. at 200, 201 (emphasis added). *Accord, Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990). Under *Rowley* and its progeny, the question is whether a student's Individualized Education Plan, or IEP, is “reasonably calculated to enable the child to receive educational benefits,” not whether it will enable the student to maximize his or her potential. *Id.* at 207; *see also* 189-90. The courts have indicated that the IDEA provides a basic floor of opportunity. It guarantees at least some educational benefit through access to special education and related services, but not “any particular outcome” for an individual child. *King v. Bd. of Educ. of Allegany County*, 999 F. Supp. 750, 767 (D. Md. 1998).

To the maximum extent possible, the IDEA seeks to mainstream educationally disabled children into regular public schools. Each child is to be placed in the “least restrictive environment” (“LRE”) consistent with his or her educational needs. 20 U.S.C.A. § 1412(a)(5) (Supp. 2007). If a public school system is unable to meet a given child's needs, an appropriate private placement may be provided at public expense. *Id.*, § 1412(a)(10)(B)-(C).

In addition to substantive criteria for the provision of FAPE, the IDEA includes important procedural goals. Chief among them is to involve parents to the greatest extent possible in educational decisions regarding their children. Numerous provisions require parental participation: *see, for example*, 20 U.S.C.A. §§ 1412(a)(10)(A)(iii); 1414(a)(1)(D)-(E), (c)(1), (3)-(4), (d)(1)(B)-(D), (3)(A),(D),(F); and 1415(a)-(b), (d)-(j). Indeed, the *Rowley* Court observed that

[i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.

458 U.S. at 205-206 (internal citation omitted). Commenting again upon the IDEA several years later, the Supreme Court stated that, procedurally, it "guarantee[s] parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-12 (1988).

Section 1415(b)(3)(B) is among the procedural provisions to which the *Rowley* and *Honig* passages refer. It requires a school system to provide "[w]ritten prior notice to the parents of the child . . . whenever the local educational agency . . . refuses to . . . change[] the . . . educational placement of the child, or the provision of a free appropriate public education to the child." Section 1415(c)(1) specifies the information a school system is required to provide in response to a parental request to make a covered change:

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.

Procedural Posture

As noted above, [Judge] affirmed my original conclusion that BCPS violated the notice requirements in 20 U.S.C.A. §§ 1415(b)(3)(B) when it failed to respond to the Parents' letter of September 12, 2005, indicating that they believed [School 2] would be a better placement for

their son than [School 1], to which he had been assigned. Slip opinion at 11-12. Two corollary conclusions are implicit in that holding: first, because notice obligations under § 1415(b)(3)(B) only could have been triggered by parents' indicating that they wanted to "change[] the . . . educational placement of the child, or the provision of a free appropriate public education to the child," the September 12 letter did so; and second, as an effective notice of parental desire for such a change under that provision, the letter met all applicable requirements of the IDEA.⁶

The Parents here do not challenge the adequacy of the IEP prepared for the Student. The Student's mother testified that the IEP offered a FAPE, and counsel for Parents expressly conceded that at the hearing. Instead, I understand the Parents to claim that BCPS's failure to respond to their request resulted in denial of "a timely, legal, or appropriate placement," and thus a denial of FAPE.⁷ Our charge on remand is to ascertain whether BCPS's adjudicated procedural violation denied the Student a FAPE under the facts of this case, and if so, whether he received an appropriate education at the private school where his parents privately placed him.

Analysis

When a local education agency fails to comply with procedural requirements under IDEA, the legal consequences depend upon several factors. A relatively early decision held that serious procedural noncompliance can by itself support a finding that the child has not been provided with a free, appropriate public education. *Hall v. Vance County Board of Educ.*, 774 F.2d 629, 634 (4th Cir. 1985). Later decisions, however, have tended to focus on the

⁶ I therefore reject BCPS's arguments to the contrary at the hearing on remand. The issue of whether the Parents' letter of September 12, 2005, met their notice obligations under IDEA, and the corresponding version of Md. Code Ann, Educ., § 8-413(i) then in effect, is no longer before us.

⁷ Parents' Motion for Pre-Hearing Summary Decision at 8. While that Motion is not before me at the present procedural stage of the case, I deem arguments therein on issues still before me to remain part of the record for the purposes of this decision.

effects of procedural violations, at least when parents seek reimbursement of their educational expenditures. In *DiBuo v. Board of Education of Worcester County*, for example, the same Fourth Circuit held that

a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must *actually interfere with the provision of a FAPE* before the child and/or his parents would be entitled to reimbursement relief

309 F.3d 184, 190-91 (4th Cir. 2002) (emphasis added). Congress eventually incorporated elements of this and similar decisions into the 2004 amendments to the IDEA, codified at 20 U.S.C.A. § 1415(f)(3)(E)(ii):⁸

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

The instant case involves a disagreement about the Student's placement. Any observation that there is disagreement within relevant case law regarding the nature and significance of placement decisions under IDEA, the role of parents in those decisions, and the relationship of placement to an IEP would be an understatement. Strong differences of opinion exist even within the Fourth Circuit, as evidenced by its recent decision in *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007).

In that case, the school system determined that no appropriate public placement was available, and the IEP indicated that the student would be placed in an unspecified private day school in the area. When his mother inquired as to which such school, she was told about two

⁸ The same three tests for finding that a procedural violation resulted in denial of FAPE also apply under Maryland

possibilities. The school system later sent inquiries to five area private day schools, and the two that were previously identified responded that they believed they had appropriate programs to meet the child's special needs. The mother was dissatisfied with those schools as placements for her son, however. She refused to sign the IEP, and requested a due process hearing under IDEA.

At that hearing, the parents did not argue that no day school in the area would be able to meet their child's needs, but indicated that they themselves had been unable to find one that could do so. The parents also argued that the IEP's failure to identify any *particular* school, rather than a general *type* of school, denied the student FAPE. They thus sought reimbursement for the costs of returning him to an out-of-state boarding school that he had attended the previous year, and with which they were "very happy." 484 F.3d at 676.

The *A.K.* majority agreed with the parents, concluding that the absence of a named school amounted to a violation of 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII). That provision requires that an IEP state the "anticipated . . . location" of educational services and modifications to be provided. "[A]n offer that fails to identify the school at which special educational services are expected to be provided," the court reasoned, "may not be sufficiently specific for the parents to effectively evaluate." *Id.* at 680-81, citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994), and *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001).

In *A.K.*, the Fourth Circuit held that the school system's failure to specify a school was a substantive, rather than a procedural, violation of the IDEA, since it involved a "deficiency in what ACPS was offering rather than in the procedure by which the offer was developed or conveyed." 484 F.3d at 679 n. 7. While so holding, it recognized that one of its earlier decisions had held that failure to finalize an IEP prior to the beginning of the school year was a procedural

law. Md. Code Ann., Educ. § 8-413(g)(2) (2006).

defect. *M.M. v. School District of Greenville County*, 303 F.3d 523, 533-35 (4th Cir. 2002). The majority apparently viewed A.K.'s IEP as defective rather than incomplete like M.M.'s IEP, however, because the opinion notes that "[A.K.'s] parents bore the burden here of proving that the IEP was substantively deficient." 484 F.3d at 679.

In the present case, the Student's IEP also indicated a type of placement ("private separate day school") rather than a particular institution.⁹ Because the Parents have not alleged that the Student's IEP is deficient in this regard, I do not address that issue here. In light of its relevance to our analysis, however, I must consider how the Student ultimately was assigned to [School 1].¹⁰

The Student's IEP for the 2005-2006 school year received final approval from the IEP team on July 29, 2005.¹¹ As noted above, the IEP does not identify any particular school to deliver the included services. That identification is contained in another document, dated August 10, 2005, and captioned "OFFICE OF NONPUBLIC PLACEMENTS DETERMINATION OF SCHOOL LOCATION(S)."¹² Within the first paragraph of text, one finds the following statement: "Based on a review of the educational record *and IEP*, the Office of Non-Public Placement determined the following non-public school(s): [School 1] is able to implement the student's IEP." (Emphasis added.)

In this latter document, the word "placement" appears only in the title of the BCPS office involved. At the hearing, however, both parties repeatedly referred to the assignment of the

⁹ BCPS Exh. #12, final unnumbered page captioned "SPECIAL ED AND RELATED SERVICES," indicating under the heading of "Environment" that all services will be delivered in "H – Private separate day school." *Cf. id.* at 19, "PLACEMENT DETERMINATION."

¹⁰ See slip opinion at 12 n. 7: "[B]ecause the record lacks any evidence as to BCPS's decisionmaking process when it selected [School 1] to implement [Student]'s IEP during the 2005-2006 school year, it is unclear at this time whether that factor would preclude [School 2] from even being considered as a potential placement. This issue should be explored on remand."

Student to [School 1] as his "placement." The Placement Office's form indicates the Student's school assignment was *based on* his IEP, and thus suggests that that assignment was not itself *a part of* the IEP, but rather a related step that *followed* the final approval of that plan.

This view is consistent with the existence of an ongoing *placement process*, one that begins with the preparation of a student's IEP and continues with the assignment of that student to one or more schools.¹³ While the *A.K.* opinion is unclear regarding what qualifies as "placement" in this context,¹⁴ I see nothing in the relevant statute or regulations that would require limiting application of the term "placement" to either one or the other part of that process. Both the IEP and school assignment are part and parcel of the delivery of FAPE, since neither can be realized without the other. I conclude, therefore, that the Student assignment to a specific school was a placement decision under the IDEA and necessary to ensure delivery of a FAPE.¹⁵

¹¹ BCPS Exh. #12 at 1.

¹² BCPS Exh. #14.

¹³ *Cf. A.W. v. Fairfax County School Board*, 372 F.3d 674, 683 (4th Cir. 2004) ("there are separate statutory and regulatory provisions regarding "placement," including provisions suggesting that the IEP and placement issues are separate and successive considerations . . .")

¹⁴ The *A.K.* court cites and borrows from its earlier *A.W.* opinion. In *A.W.*, a student challenged his removal to a different classroom within his elementary school while a disciplinary matter was pending. At issue was interpretation of the term "educational placement" as used in the "stay-put provision" of 20 U.S.C.A. § 1415(j). Instead of limiting certain broad *dicta* in *A.W.* to the rather unusual facts and specific statutory provision at issue there, the *A.K.* majority states, again in *dicta*, that "only if [a] change [in schools] ... 'result[ed] in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting'" did a change in "placement" occur—apparently meaning for the purposes of 20 U.S.C.A. § 1415(b)(3)(B) as well. 484 F.3d at 681 n. 10, quoting 372 F.3d at 682. This is not merely baffling but also illogical. Saying that *only* if a reassignment results in such a dilution or departure does the move amount to a change in placement sets up a paradigm under which a given student's reassignment from school A to school B potentially qualifies as a change in placement, but the same student's reassignment from school B to school A does not. This rule appears unworkable, and I decline to attempt its application in this case.

¹⁵ *Cf. A.K.*, 484 F.3d at 681:

[T]his case presents an excellent example of the circumstances under which *inclusion of a particular school in an IEP can be determinative of whether a FAPE has been offered*. The parents agree that an appropriate private day school could provide a FAPE; they favor keeping A.K. at Riverview only because they have not found a private day school in their area that could meet A.K.'s specialized needs. Yet, the IEP development process concluded without any significant discussion of whether such a school existed, or if it did, how it would be a satisfactory match for A.K.

(Emphasis in original deleted, and emphasis added.)

Having determined that The Student's assignment to [School 1] was a placement decision, and therefore an integral and necessary part of delivering FAPE, I now turn to the first question posed under the District Court's remand: whether BCPS's failure to respond to Parents' letter asking for the Student's reassignment to [School 2] meets any of the three criteria in 20 U.S.C.A. § 1415(f)(3)(E)(ii) and § 8-413(g)(2) of the Maryland Education Code for determining that a child did not receive FAPE due to a procedural violation. Slip opinion at 12. In other words, did the violation:

- (I) impede the Student's right to a FAPE,
- (II) significantly impede the Parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to their child, or
- (III) cause a deprivation of educational benefits?

Impediment to the Student's right to a FAPE. The record, including testimony at the hearing, reveals no threats to The Student's right to a FAPE for the 2005-2006 school year. He had been identified previously as a student entitled to specialized education and related services under the IDEA; indeed, I found above that "[p]ursuant to a settlement agreement, BCPS partially or fully funded [his] placement at [School 1]" for the three preceding school years.

There is no hint that anyone involved in developing the Student's IEP doubted whether he qualified for a free appropriate public education. Rather, the record shows that during the process of developing that IEP the Student's right to a FAPE was reconfirmed, and his achievements and needs at that time were merely gauged by means of standardized tests and teachers' reports. I find no deficiency in the finalized IEP for 2005-2006, nor do the Parents contest its sufficiency.

The Parents instead introduced evidence that the Student did not attain any measurable academic achievement during his previous year at [School 1].¹⁶ The Student's mother also testified that her private educational consultant was concerned that the Student was not making the progress that he was capable of. According to unchallenged testimony, the mother also mentioned her concerns about the Student's perceived lack of academic progress during the 2004-2005 academic year in at least one IEP team meeting during the spring of 2005, and again in a separate meeting that she and the consultant had with Ms. XXXX during that same time frame. The mother essentially testified that, although other members of the IEP team expressed "surprise" about the Student's standardized test scores being so "low," she never received any substantive response to her concerns from either BCPS or [School 1].

BCPS not only did not challenge the mother's testimony on these points, but testimony from its witnesses tended to confirm it. Ms. XXXX, the Associate Head and Education Director of [School 1], recalled that the mother was concerned about the Student's progress during the 2004-2005 year, especially his progress in reading. Ms. XXXX testified that in general achievement tests showing very little movement are a cause for concern, and that she herself would have hoped to see the Student make more progress during that year than the standardized tests revealed. Ms. XXXX also acknowledged that no one had ever indicated that The Student was incapable of making more progress. Dr. XXXX, an expert in school psychology, is charged by BCPS with comparing the results of cognitive and academic achievement testing for special

¹⁶ Documents in the record show that all but one of the Student's scores—both cluster scores and individual achievement scores—on the Woodcock-Johnson IV Test of Achievement in December, 2004 showed less than a full grade equivalent's progress since the administration of the Woodcock-Johnson III Test in December, 2003. Parents' Exh. ##13-14. The student thus was further behind his age peers at the end of 2004 than he was a year earlier. Even crediting Dr. XXXX testimony that standard scores are a better measure of progress for a student like [Student] than grade equivalents, and that variations in standard scores of plus or minus six points are not statistically significant, both the Student's standard scores and his grade equivalents tend to support the claim that he made no or trivial

education students, including the Student. Dr. XXXX conceded that the data indicated The Student had not closed the gap between himself and non-disabled peers during the 2004-2005 year. And XXXX XXXX, a Ph.D. in clinical psychology who counsels students at [School 1], including one-on-one and group sessions with the Student during his time at there, felt that the Student had made real progress in reading during the 2004-2005 year but admitted that the standardized tests didn't "capture" this.

This evidence is more than sufficient to meet the Parents' burden of production on the issue of the Student's failure to attain any academic achievement during the school year in question. It fails, however, to meet their burden of persuasion. The Parents offered no expert testimony to support their claim. Most significantly, no one who was qualified to offer the opinion stated that with the Student's average-to-low-average intelligence he would have made some progress relative to his peers during the 2004-2005 school year if he had received appropriate academic and related services. In fact, the private neuropsychological evaluation that the Parents obtained in December 2005 states that "[a]cademically, [the Student] appears to be making progress at a rate consistent with neurotypic peers" ¹⁷

The Parents have not shown by a preponderance of the evidence that the Student made no academic progress during the 2004-2005 school year at [School 1]. They thus have not proven that BCPS's failure to respond to their letter requesting the assignment of the Student to a different school for 2005-2006 year interfered with the delivery of a FAPE during that year. I conclude that the violation did not impede the Student's right to a FAPE under the first prong of

progress in the intervening school year. *Cf. Board of Education of Frederick County v. I.S.*, 325 F. Supp. 2d 565, 587 (D. Md. 2004).

¹⁷ Parents Ex. #13 at 19 (unnumbered).

the test in 20 U.S.C.A. § 1415(f)(3)(E)(ii). Unless the second prong of that test is to be collapsed into the first, however, that is not the end of our inquiry.

Significant Impediment to the Parents' Opportunity to Participate in the Decision-making Process Regarding the Provision of a FAPE. Parents' letter requesting the Student's reassignment to [School 2] for the 2005-2006 school year triggered a duty on the part of BCPS to notify the Parents if the school system "refused" the request. 20 U.S.C.A. § 1415(b)(3)(B). That required notice included, among other things, "an explanation of why the agency . . . refuse[d] to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis" § 1415 (c)(1)(B).

Because BCPS failed to issue the mandated notice, no explanation of the school system's action was forthcoming. No dialogue regarding the school system's rationale and supporting data for its stance—which the notice requirement was intended to facilitate—occurred *at that time*. It is at that point, rather than when the IEP was prepared, that under the second prong of the test in § 1415(f)(3)(E)(ii) we must look at possible impediments to the parents' right to participate in the decision-making process regarding FAPE for their son.

I have already noted the importance of parental participation under the IDEA. As the Supreme Court observed in *Rowley*, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of *participation at every stage of the administrative process* as it did upon the measurement of the resulting IEP" 458 U.S. at 205-206 (internal citation omitted and emphasis added). *At every stage* of the administrative process, the Court said, parents are *entitled to participate in decision-making* under the IDEA—not just when a new IEP is being formulated. *At every stage* they are guaranteed "an opportunity for *meaningful input* into *all decisions* affecting their child's

education" *Honig v. Doe*, 484 U.S. 305, 311-12 (1988) (emphasis added).

I recognize that the Parent's letter was written just after the beginning of the school year to be covered by the new IEP, and just over a month after the Student's school assignment was issued—an inconvenient time, at best, to ask for a change in that school assignment. The mother also admitted that she hadn't raised the question of placing the Student at another school during any meetings of the IEP team in the preceding spring and summer. Instead, the reassignment issue was presented to BCPS for the first time during the part of an academic year when the school system probably would have found it most difficult to address in a substantive way. I recognize how frustrating, and even infuriating, it might have been to those who had invested time and effort in the IEP process over the course of many months to be approached at that juncture and in that manner. While such understanding helps to explain BCPS's lack of a response, however, it does not excuse it.

I also have considered whether the Parents' letter to BCPS was timed to avoid giving BCPS, and [School 1], an opportunity to amend the IEP to address Parent's underlying concerns about achievement without reassigning the Student to the school of Parents' choice.¹⁸ On the record in this case that appears unlikely. The mother testified that both she and her husband were heavily invested in [School 1], in terms of both their time and energies. The mother also repeatedly stated, and I found her credible, that she was unaware of any other school in the Baltimore area that might be able to implement the Student's IEP until some time during the summer of 2005. Not only were she and her husband not planning to send the Student to [School

¹⁸ Such a perception has been noted in numerous decisions under the IDEA, including the recent dissent in *A.K.*: "Perhaps more important than the notice [about schools to which the student might be assigned] provided in the June 9 IEP meeting is the apparent determination of A.K.'s parents to keep him at Riverview no matter what the outcome of the IEP proceedings." 484 F.3d at 686.

2] during most of the time that she was involved in developing the IEP, they were not even aware of that school's existence.

Moreover, although the Parents' interest in a reassignment was news to the IEP team, the Parents' underlying concerns were not. According to her unchallenged testimony, the mother raised the Student's apparent lack of academic progress at [School 1] during the previous academic year in at least one IEP team meeting during the spring of 2005, and again in a separate meeting that she and a private educational consultant had with Ms. XXXX during that same time frame. The mother indicated that although the other members of the IEP team expressed "surprise" at The Student's scores, she never received any substantive response to these concerns from either BCPS or [School 1]; no new or different approaches were proposed to improve his academic achievement scores, and *no placement alternatives were mentioned or discussed*.

This is important, because parents' participation in the placement process is necessary to provide FAPE. According to the Supreme Court, their opportunity for *meaningful input into all decisions* affecting their child's education is guaranteed *at every stage* of the administrative process. Neither the relevant statutes nor the principal precedents indicate that this right is limited to the time before a school assignment is made for any given academic year.

I do not assume that all denials of a parental request for a change in placement will "*significantly impede* the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE to their child." In this case, however, Parents have shown that there was no substantive discussion of placement for the 2005-2005 school year, either during the preparation of Student's IEP or immediately prior to his school assignment. Nor did discussion of that issue take place after the Student was assigned to [School 1], because in violation of the explicit requirements of the IDEA BCPS provided no statement of its reasons for

refusing to consider a change of assignment. The failure to do so resulted in BCPS's denying Parents an opportunity to discuss both their desire for a reassignment and their underlying concerns, and evidence, that the Student had not made academic progress during the previous year at [School 1]. Since neither that alleged lack of progress nor Student's assignment had been meaningfully addressed with Parents during the IEP issuance process, I conclude that such a denial could significantly impede their opportunity to participate in the placement decision-making process.

I also realize, however, that essentially frivolous issues can be raised by parents for the first time after an IEP has been finalized and a student placed for a given year. In order to avoid encouraging claims based on such issues—which Congress surely did not intend—I conclude that, if it is to become the basis for a finding that FAPE has been denied under 20 U.S.C.A. § 1415(f)(3)(E)(ii)(II), any issue ought to both (1) involve an essential element of a FAPE, and (2) be supported by substantial evidence in the record.

I already have determined that the placement decision is an integral part of providing a FAPE, and the school assignment is a necessary part of placement. As for the second consideration, parents ought not to be required to prove that they were correct and the school system was wrong in order to vindicate their right to have meaningful input into decisions affecting their child. I concluded above that Parents failed to establish by a preponderance of the evidence that the Student did not attain any real academic achievement in 2004-2005. They *did* present substantial evidence to that effect, however. They also testified, and the testimony of BCPS's witnesses tended to confirm, that the Student should have been capable of achieving

more.¹⁹ Since this perceived lack of progress was the reason for their interest in a change of assignment, and it is supported by substantial evidence in the record, I conclude that BCPS's procedural violation significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child under 20 U.S.C.A. § 1415(f)(3)(E)(ii)(II), and therefore denied Student FAPE for the 2005-2006 academic year. In light of this determination, it is unnecessary to address the third criterion under subsection (III) of that provision.

[School 2]

Having determined that BCPS denied the Student FAPE, I address the second question on remand: whether [School 2] ("[School 2]") was an appropriate placement for him. Parents' claim that this school was an appropriate placement is supported by substantial evidence in the record.

Mr. XXXX testified that at [School 2] the Student has a structured, language-based program that includes one-on-one instruction in reading and math. She also indicated that the school's language therapist works with all of the teachers on specific methods to utilize in teaching the Student and others.

¹⁹ BCPS took the position that the standardized tests were not a good measure of the Student's progress. I note that a local school system always has the option of adopting other, alternate measures of progress under the IDEA. 34 C.F.R. §§ 300.320(a)(2)(ii),(6)(II), 300.704(b)(4)(x) (2006). BCPS apparently did not do so for this student, however, and it will not now be heard to complain about the evaluation measures that it chose to utilize.

The sworn Declaration of Dr. XXXX XXXX, the neuropsychologist who evaluated the Student in December of 2005, indicates that he is familiar with [School 2], that it "provides an excellent special education for children with specific language based learning disabilities such as [the Student]," and that the Student "will greatly benefit from his educational placement at [School 2], especially in combination with the multi-sensory teaching methods, small group instruction and daily tutoring sessions provided at the school."²⁰

XXXX XXXX, a speech and language pathologist who provides speech and language services to students at [School 2], stated in her sworn Declaration that she provides one-on one speech therapy to the Student three times a week, that she works with the Student's classroom teachers in order to integrate selected strategies "into his entire school day," and that she "believe[s] that [the Student's] speech and language needs and other educational needs can be and are being met" at [School 2].²¹ The Student's November 18, 2005 Progress Report from [School 2] also is very detailed, providing both narrative and graphic indications of the Students' progress during the first portion of the 2005-2006 school year.²²

BCPS has attempted to dispute none of the evidence regarding [School 2]'s appropriateness for the Student. Under *Carter v. Florence County School District Four*, 950 F.2d 156 (4th Cir. 1991), *cert. granted*, 507 U.S. 907 (1993), parents who place a child in a school that has not been approved as a school for the education of disabled students may still be reimbursed for their expenditures as long as the school is found to offer an *appropriate* education to the child. Such an education was defined as "an education that is reasonably calculated to enable the child to receive educational benefits." 950 F.2d at 164. Based on the uncontradicted

²⁰ Parents' Exh. #6 at 1-2.

²¹ Parents' Exh. #7 at 2.

²² Parents' Exh. #9.

evidence reviewed above, I find by a preponderance that [School 2] offered an appropriate education to the Student in the school year 2005-2006.

Reimbursement

The IDEA provides that parents may obtain reimbursement of educational expenses incurred by them for a child under the IDEA under certain conditions:

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

(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 school 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.A. § 1412(a)(10)(C).²³ Having determined that BCPS's violation of the notice requirement in § 1415(b)(3)(B) denied the Student a FAPE during the academic year 2005-2006 under subsection (f)(3)(E)(ii)(II), I conclude that reimbursement of the Parents' documented educational expenses for the Student during that year is an appropriate remedy under the IDEA.

CONCLUSIONS OF LAW

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

²³ This authorization is subject to exceptions not relevant here. 20 U.S.C.A. § 1412(a)(10)(C)(iii).

First, the procedural violation by BCPS resulted in a denial of FAPE to the Student for the 2005-2006 school year; and

Second, [School 2] was an appropriate placement for the Student during the 2005-2006 academic year.

ORDER

I ORDER that the Parents shall submit documentation of any educational expenses incurred during the academic year 2005-2006 for which they seek reimbursement to BCPS within sixty (60) days following the issuance of this order. **I FURTHER ORDER** that BCPS shall reimburse all such documented expenses within sixty (60) days following receipt of the documentation from Parents.

October 1, 2007
Date Decision Issued

David Hofstetter
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.