

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE MARINA L. SABETT**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-MONT-OT-15-35653**

*** * * * ***

DECISION

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ORDER

STATEMENT OF THE CASE

On October 23, 2015, Dr. XXXX XXXX and XXXX XXXX (Parents), on behalf of the Student, filed a Request for a Due Process Hearing and Mediation (Request) with the Office of Administrative Hearings (OAH), alleging that the Montgomery County Public Schools (MCPS) committed substantive violations under the Individuals with Disabilities Education Act. 20 U.S.C.A. § 1415(f)(1)(A) (2010). MCPS declined to mediate, but a resolution meeting was held on November 5, 2015. On November 5, 2015, the parties notified the OAH that although they participated in a resolution meeting, no agreement was possible. 34 C.F.R. § 300.510(a) and (c) (2015).

I held a telephone pre-hearing conference on November 12, 2015. The Parents were represented by Holly Parker, Esquire. Jeffrey Krew, Esquire, represented MCPS. During the pre-hearing conference, the parties’ representatives were advised of the time requirements for issuing a decision. In accordance with the regulations governing the time frames for the issuance

of special education decisions, the decision in this case would have been due on or before December 20, 2015, which is forty-five days after both parties executed the November 5, 2015 Notice of Outcome of Resolution Meeting indicating that no agreement was possible. 34 C.F.R. § 300.515(a) (2015). The representatives jointly agreed, however, to waive the time limits set forth in 34 C.F.R. § 300.515 and Code of Maryland Regulations (COMAR) 13A.05.01.15C due primarily to Mr. Krew's trial and appellate schedule, and witness unavailability on behalf of both parties during and immediately before the holiday breaks in November and December. Ms. Parker stated that waiver of the time limits would not prejudice the Student because he is currently in a placement.

Specifically, Mr. Krew confirmed that on November 16-20, 2015, he was scheduled to participate in an administrative hearing before OAH Administrative Law Judge XXXX. On December 8, 2015, he had an appellate argument before the Fourth Circuit Court of Appeals for which he had various mock arguments scheduled for the week of November 30, 2015, and a court hearing on December 17-18, 2015. MCPS schools were closed and school witnesses were unavailable November 25, 2015 (half day), November 26-27, 2015, and December 24-31, 2015. This Administrative Law Judge was on previously scheduled leave December 9, 21, 22, 23, 28 and 31, 2015. Further, the parties mutually agreed that the decision be issued within thirty days of the close of the record. Based upon Mr. Krew's and Ms. Parker's agreement, I agreed that I would render a decision on the merits no later than thirty days after the close of the record in this case.

I held the hearing on December 11, 14, 15 and 16, 2015 and on January 5, 6 and 15, 2016.¹ Ms. Parker represented the Parents and Mr. Krew represented MCPS. The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and COMAR 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did MCPS offer the Student a free appropriate education (FAPE) in the least restrictive environment (LRE) for the relevant portions of the 2014–15 school year and for the 2015–16 school year?
2. If MCPS did not offer a FAPE in the LRE, are the Parents entitled to reimbursement for their unilateral placement of the Student at [School 1] for the relevant portions of the 2014-15 and 2015-16 school years?
3. If MCPS did not offer a FAPE in the LRE, are the Parents entitled to placement of the Student at [School 1] for the remainder of the 2015-16 school year?

¹ On December 16, 2015, at the beginning of MCPS' case, the Student's mother indicated that she had invited the press to be present at the Student's hearing. The Student's mother had not previously informed MCPS or this ALJ of her intent to make the hearing public. Indeed, the Student's/Parents' attorney was unaware of such invitation to the press until one hour prior to when the press attempted to join the hearing at approximately 10:00 a.m. MCPS objected to the presence of the press at the hearing on the basis of concerns about MCPS witnesses disclosing confidential information about the Student or other students and the consequences of this under the Health Insurance Portability and Accountability Act (HIPPA) and the Family Educational Rights and Privacy Act (FERPA). I upheld that objection and maintained a closed hearing on that date. COMAR 28.02.01.11B(11). By letter dated December 22, 2015, MCPS withdrew its objection to an open hearing after being advised that the reporter intended to be present at the hearing when it reconvened on January 5, 2016. At the outset of the hearing on January 5th, both of the Parents were present and indicated that they wanted to exercise their right to an open hearing on the Student's behalf under 34 C.F.R. 300.512(c)(2015). After ensuring on the record and under oath that the Parents understood the ramifications of exercising such right, the hearing was made open to the public, including the press. The Parents declined to acknowledge their request for an open hearing in writing.

4. If MCPS did not offer a FAPE in the LRE for the 2014-15 and 2015-16 school years, what, if any, compensatory education should be provided to the Student to remedy that denial?

SUMMARY OF THE EVIDENCE

Exhibits²

I admitted the following exhibits on behalf of the Parents:

- | | | |
|----|-----------|--------------------------------------|
| 3 | 1/6/13 | XXXX Report – Dr. XXXX |
| 4 | 10/8/13 | XXXX Final Report XXXX |
| 5 | 10/29/13 | Ltr from [School 2] |
| 6 | 11/13/13 | XXXX Report |
| 7 | 12/13 | Psychological Report – Dr. XXXX XXXX |
| 8 | 2013–2014 | Lower School Progress Reports |
| 9 | 1/5/14 | XXXX Report |
| 10 | 1/14/14 | XXXX Report |
| 12 | 2/21/14 | XXXX Report |
| 13 | 5/24/14 | XXXX Report |
| 14 | 8/15/14 | XXXX Report |
| 15 | 9/15/14 | Ltr from XXXX to XXXX |
| 16 | 9/30/14 | Ltr from XXXX to XXXX |
| 17 | 10/13/14 | Private/Religious Packet |
| 18 | 10/15/14 | Ltr from XXXX to XXXX |
| 19 | 10/22/14 | Ltr from XXXX to XXXX |
| 20 | 10/27/14 | Ltr from XXXX to Parents |

² The parties pre-marked their exhibits. Only the exhibits that were admitted into evidence are listed here, unless otherwise noted.

21	11/21/14	Ltr from XXXX to XXXX
22	11/20/14	Student Progress Report [School 1]
23	12/10/14	Ltr from XXXX to XXXX
24	12/11/14	Ltr from XXXX to XXXX
25	12/16/14	PEP Plan draft
26A	12/16/14	Authorization for Testing
26B	12/18/14	IEP team response for with Dr. Ltr
27	12/18/14	Ltr from XXXX to XXXX
28	1/22/15	IEP Team notes, 1-2
29A	1/26/15	Draft Report of School Psychologist
30	1/28/15	Ltr from Dr. XXXX
31	1/30/15	Ltr from XXXX to XXXX
32	2/5/15	Ltr from XXXX to XXXX
33	2/9/15	Ltr from XXXX to XXXX
34	2/11/15	Ltr from XXXX to XXXX
36	2/19/15	Authorization for Assessments
38	3/20/15	IEP
39	3/28/15	Evolving Treatment of XXXX
46	6/4/15	XXXX Report
48	8/20/15	Due Process Hearing Request
61	11/27/15	[School 1] Payment Summary 02/01/13–08/31/16
63	8/24/15	PEP [School 1]
64	1/8-3/19/15	Notes of Nurse XXXX

65		Notes of XXXX and XXXX and Cover Letter from Krew to Parker
66		Notes of Dr. XXXX
67	2/24/15	E-mail from Dr. XXXX to Mother (w/undated e-mail from M to X)
68		Picture of the Student and his therapy dog on the beach
69	1/14/15	Cover letter from Parker to Krew enclosing seizure record
70	Resume	XXXX XXXX, M.D. (ID ONLY) ³
71		Various letters from Parker to Krew
B	Resume	XXXX XXXX, Special Educator, [School 1]
D	Resume	Dr. XXXX XXXX, Psychologist
E	Resume	Dr. XXXX XXXX, Psychologist
F	Resume	Dr. XXXX XXXX, Assistant Professor, Neurology and Pediatrics, XXXX Medical Center
H	Resume	XXXX XXXX, Teacher, [School 1]

I admitted the following exhibits on behalf of MCPS:

1	10/29/13	Letter to Parents from XXXX XXXX, Head of Lower School, [School 2]
1-A	3/1/14	[School 1] Application for Admission
1-B	4/3/14	Letter to Parents from XXXX XXXX, [School 1]
1-C	4/17/14	[School 1] 201 4-2015 Enrollment Agreement
2	13-14 S.Y.	Lower School Progress Report - [School 2]
2-A	8/28/14 – 4/14/15	[School 1] Health Room Documentation
2-B	9/11/14	E-mail to Parents from XXXX XXXX, MS OTR/L, [School 1]
3	9/15/14	Letter to Zvi Greismann from Holly Parker
3-A	10/13/14	E-mail to XXXX XXXX from Mother
3-B	11/10/14	E-mail to XXXX XXXX, [School 1] from Parents
4	11/12/14	Letter to Holly Parker from XXXX XXXX
5	11/21/14	Draft [School 1] Personal Education Plan
6	12/5/14	IEP Team Meeting Documentation

³ This document was excluded on the basis of 34 C.F.R. § 300.512(a)(3) and the Prehearing Conference Order entered in this case. *See also* issue raised in December 9, 2015 letter from Krew to Parker at Parents Ex. 65.

7	12/10/14	Letter to Holly Parker from XXXX XXXX
8	12/16/14	MCPS Authorization of Assessment
9	1/12/15	MCPS Student's Individual Health Care Plan
10	1/20/15	Occupational Therapy Evaluation - XXXX XXXX, M.S., OTR/L, MCPS
11	2/6/15	Report of Speech-Language Assessment - XXXX XXXX, M.A., CCC-SLP, MCPS
12	1/22/15	MCPS Team Consideration of External Report
13	1/22/15	IEP Team Meeting Documentation
14	2/12/15	Report of School Psychologist - Observation for Initial Evaluation - XXXX XXXX, Ed.S., NCSP, MCPS
15	3/9/15	Physical Therapy Evaluation - XXXX XXXX, PT, MCPS
15-A	3/15/15	E-mail to XXXX XXXX and XXXX XXXX, [School 1], from Parents
16	3/20/15	MCPS Individual Health Care Plan
17	3/20/15 2/19/15	IEP Team Meeting Documentation
17-A	3/25/15	[School 1] 2015-2016 Enrollment Agreement
18		[School 1] Student's Epilepsy Accommodations with Seizure Observation Records
19-A	15-16 S.Y.	7 th Grade: Guide for Teachers and Staff – [School 1]
22	10/23/15	Request for Mediation/Due Process Hearing
23	11/3/15	Letter to Holly Parker from Jeffrey Krew
23-A	11/9/15	E-mail to XXXX XXXX from Mother
23-B	12/3/15	Seizure Observation Record – [School 1]
24		COMAR 10.27.11 Department of Health & Mental Hygiene - Board of Nursing - Delegation of Nursing Functions
25		XXXX XXXX Curriculum Vitae
27		XXXX XXXX Curriculum Vitae
28		XXXX XXXX Curriculum Vitae
29		XXXX XXXX Curriculum Vitae
30		XXXX XXXX Curriculum Vitae
31		XXXX XXXX, RN Curriculum Vitae

Testimony

The Parents testified⁴ and presented the following witnesses:

- XXXX XXXX, seventh grade teacher at [School 3];
- XXXX XXXX, a resource counselor at [School 3];
- XXXX XXXX, a nurse administrator with the Montgomery County Health Department;
- XXXX XXXX, an MCPS instructional specialist;
- XXXX XXXX, a school psychologist at [School 3];
- XXXX XXXX, Principal at [School 3];
- Dr. XXXX XXXX, admitted as an expert in psychology;
- XXXX XXXX, a seventh and eighth grade math teacher at [School 1];
- XXXX XXXX, the education director at [School 1], admitted as an expert in special education;
- Dr. XXXX XXXX, admitted as an expert in pediatric neurology; and
- Dr. XXXX XXXX, a school psychologist at [School 1].

MCPS presented the following witnesses:

- XXXX XXXX, admitted as an expert in special education;
- XXXX XXXX, admitted as an expert in occupational therapy;
- XXXX XXXX (Nurse XXXX), a nurse at [School 1];
- XXXX XXXX, admitted as an expert in speech-language pathology;
- XXXX XXXX, admitted as an expert in physical therapy in a school setting;
- XXXX XXXX, admitted as an expert in school psychology; and
- XXXX XXXX, a nurse administrator with the Montgomery County Health Department.

⁴ Although Dr. XXXX, the Student's mother, testified in the Student's case in chief, Mr. XXXX, the Student's father, testified in rebuttal only.

FINDINGS OF FACT

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

1. The Student was born in XXXX 2002.
2. The Student was born with a right-sided brain malformation resulting in epilepsy. As a consequence, his medication protocol is modified as needed, impacting his attention. Parent Ex. 7, at 1.
3. During his elementary school years, the Student did not attend an MCPS school as the Parents' chose, at their expense, to send him to private school. 12/4/15 Parties' Proposed Joint Stipulation of Fact (Joint Stipulation)⁵, ¶ 2.
4. The Student attended [School 2] ([School 2]) from kindergarten through fifth grade. MCPS Ex. 1-A, at 3.
5. The Student never received special education or related services from [School 2]. XXXX Tr. 436-37.
6. During the 2013-14 school year, the Student was attending [School 2] in the fifth grade.
7. By letter dated October 29, 2013, [School 2] informed the Parents that the Student would not be issued a re-enrollment contract for the 2014-2015 school year for enrollment in [School 2]'s Middle School. MCPS Ex. 1.
8. In that October 29, 2013 letter, [School 2] acknowledged that the Student "progressed through Lower School as a creative and thoughtful student, a fierce competitor, and a kind friend." Nonetheless, in support of their decision regarding re-enrollment, [School 2] noted as follows:

[The Student] currently requires 1:1 teacher support to manage his focus and his workload, as well as his overall academic output throughout each school day. In

⁵ I have adopted all of the parties' Proposed Joint Stipulations of Fact except for ¶ 9, as described *infra*.

addition, [the Student] requires close teacher monitoring of his social interactions with peers, as his emotional regulation and his ability to work cooperatively in a group is inconsistent. Even with the given supports of a teacher with a high level of training and expertise with learning differences, [the Student] requires additional support to find minimal success in our fifth grade program.

The structure and program of our Middle School do not offer the best match with [the Student's] challenges. The required higher level of independence and the increased academic expectations are significant in sixth grade and continue to progress exponentially in seventh and eighth grades.

Id.

9. In the October 29, 2013 letter, [School 2] further suggested that the Student would benefit from “a school placement that will offer him an increased level of support within a small class setting,” with “access to a learning resource teacher or a learning specialist who could advocate for his 1:1 academic support as needed.” *Id.* [School 2] added, “Importantly, [the Student] also requires a school setting that can assure his physical, social and emotional well-being, while continuing to boost his skills as a learner and a self-advocate.” *Id.*
10. The Student’s fifth grade teacher had fifteen children in her class and she was the only teacher. XXXX Tr. 386.
11. At some point after the Student’s mother received the October 29, 2013 letter, the mother began looking at private schools for the Student that had a full-time nurse on staff. *Id.* at 387. The Student’s mother and father filed an application on his behalf to the [School 4], [School 5] and [School 6]. He was rejected from these schools. *Id.* at 387.
12. On January 3, 2014, Dr. XXXX XXXX produced a Psychological and Educational Evaluation regarding the Student at his Parents’ request to “to determine his current functioning levels and placement needs.” Parents Ex. 7, at 1.

13. Dr. XXXX administered various tests to the Student, including the Wechsler Intelligence Scale for Children-IV (WISC-IV) and the Reynolds Intellectual Assessment Scale (RIAS) to determine his intellectual functioning. *Id.*
14. Dr. XXXX found that the Student's "unique set of thinking and reasoning abilities make his overall intellectual functioning difficult to summarize by the full-scale IQ." Accordingly, she used the highest of all index scores, which was the Verbal Comprehension score of 121, as opposed to a full-scale IQ. *Id.* at 4, 11. She then used the "discrepancy model" to make a determination of his learning disability, a model that she acknowledged was discredited after the IDEA was amended in 2008 in favor of other methods to determine learning disability. XXXX Tr. 308-09.
15. Similarly, Dr. XXXX administered the RIAS test to the Student twice in the span of two weeks when the test protocol for the RIAS calls for it to be administered somewhere between six months to a year after the last administration of the test. *Id.* at 316. She administered it once in accordance with the manual and then again, two weeks later, in which she allowed the Student to read the questions. *Id.* at 260-61, 315. She administered it in this manner to try and "get the best" out of the Student but acknowledged that the tests results were not valid because she did not conduct the test in accordance with the testing protocols. *Id.*
16. The test was also invalid because of the "practice effect," which is that each time a person takes the same test, they are reasonably expected to do better each time. *Id.* at 316-18; XXXX Tr. 1237-1241.
17. Dr. XXXX was not familiar with the MCPS IEP in this case. *Id.* at 324.
18. Dr. XXXX never attended an IEP meeting and did not speak with any of the Student's teachers at the [School 1] and never observed him there. *Id.* at 298-99.

19. With regard to the Student's medical issues and disabilities, Dr. XXXX opined as follows:

His parents work diligently with medical professionals to calibrate his medications, therefore, his situations should improve over time. During the course of this evaluation, which was conducted over several weeks for one hour each session, his medication protocol was changed due to the occurrence of seizures. More than likely, [the Student's] behavior and academic weaknesses are due to a combination of factors including side effects of medication, a learning disorder in the area of nonverbal organization with and without a fine motor response, and ADHD. In this examiner's opinion, the impact of [the Student's] medication protocol's (sic) fluctuates with the type of medication and dosage. Throughout testing, his attention waxed and waned which appeared to be due to changes in the medication protocol.

Parents Ex. 7, at 11.

20. There was no language in her report that the Student needed to be segregated from his non-disabled peers. XXXX Tr. 330-31.

21. By application executed by his mother on March 1, 2014, the Student applied to the [School 1] ([School 1]) for admission in the sixth grade during the 2014-2015 school year. MCPS Ex. 1-A.

22. The [School 1] Application was filled out completely and the Parents attached a statement that addressed why the Parents believed that the [School 1] would be a good fit for the Student:

After reading about and visiting [School 1] we believe this school would be a perfect match for [the Student]. [The Student] is exceptionally bright but has learning differences that his current school has been unable to accommodate, leaving [the Student] feeling frustrated and feeling misunderstood. [The Student] does best in a caring and patient environment with a low student-to-teacher ratio that uses innovative techniques and multisensory learning, which we feel [School 1] can provide. After speaking to a student during our visit and hearing how [School 1] transformed his life and allowed him to become a happy, confident learner in an accepting environment we were very impressed and we want [the Student] to have the same experience.

Id. at 5.

23. By letter dated April 3, 2014, [School 1] offered the Student a space for the 2014-2015 school year. MCPS Ex. 1-B.
24. On April 17, 2014, the Parents signed the [School 1] 2014-2015 Enrollment Agreement. MCPS Ex. 1-C. The Agreement was accepted by [School 1] on May 16, 2014. *Id.*
25. Under the terms of the Agreement, the Parents acknowledged that they were contractually obligated to pay the full [School 1] tuition of \$38,110.00 for the 2014-2015 school year (which they chose to do in ten equal monthly installments commencing June 1, 2014) unless they cancelled on or before May 30, 2014. *Id.*
26. During the 2014-2015 school year, the Student was in the sixth grade and attended the [School 1], at the Parents' expense. Joint Stipulation, ¶ 1.
27. There are no non-disabled peers for the Student to interact with at [School 1] as [School 1] only serves students with educational disabilities. XXXX Tr. 369.
28. On September 15, 2014, the Parents advised MCPS's attorney that the Parents placed the Student at [School 1] and that the Parents were seeking placement and funding of the Student by MCPS. Joint Stipulation, ¶ 3.
29. On September 15, 2014, the Parents advised MCPS that they were requesting MCPS hold an IEP meeting. Joint Stipulation, ¶ 4.
30. Upon receipt of the Parents' attorney's September 15 letter, MCPS forwarded to the Parents a private school referral packet, which contained various educational screening forms for completion by either the Parents or individuals at the Student's current school placement. Joint Stipulation, ¶ 5.

31. The referral packet came with very explicit directions for completing the packet, including a checklist for ensuring that all of the forms were completed and who should complete them.

Parents Ex. 16, at c-e.

32. Although the packet was signed and dated by the Student's mother on October 13, 2014, the Parents and the Student's teachers failed to complete most of the packet, except for very general information including the name and home address of the Parents and the Student, the Student's birth date, the fact that he was attending [School 1] and that English was his primary language. Parent Ex. 17.

33. On October 13, 2014, the Student's mother sent an e-mail to XXXX XXXX regarding her evaluation of the Student and his need for further Occupational Therapy (OT) services:

Hi XXXX.

I wanted to follow up regarding your evaluation of [the Student]. I am not sure if you felt he needs further OT services. He has had OT basically his entire life until recently.

We are working with Holly Parker on getting [the Student] funded and would like those recommendations in his PEP if you think they are needed so if he gets funded the county would pay for it.

Thanks.
XXXX

MCPS Ex. 3-A.

34. On October 15, 2014, in response to MCPS' request that the referral packet be completed, Ms. Parker sent a letter indicating that it was unclear what the Parents were being asked to provide and that "several of the forms did not appear to be for the parents." Parents Ex. 18. Instead, Ms. Parker sent various reports that she indicated documented the Student's "specific special education needs." *Id.*

35. On October 31, 2014, the Parents' attorney sent a letter to MCPS indicating that although additional documentation was requested by XXXX XXXX, the Parents had no additional documentation to provide, and declined to give MCPS permission to contact [School 1] at that time. Parents Ex. 17, at 10.
36. By letter dated November 12, 2014, MCPS acknowledged receiving medical records, report cards, and private school rejection letters. Joint Stipulation, ¶ 6. Nonetheless, as of that date, MCPS informed the Parents that MCPS had no parent input, no school input, and no testing information. MCPS Ex. 4. MCPS also informed the Parents that in order to have a productive "screening meeting," it would be imperative that the Parents and [School 1] complete the paperwork mailed to the Parents in September. *Id.*
37. In the November 12, 2014 letter, MCPS also renewed its request for permission to contact [School 1] to gather information regarding the Student's educational needs in preparation for the December 5, 2014 screening meeting. *Id.*
38. On December 5, 2014, MCPS convened an IEP team meeting. The Parents, their attorney and an individual from [School 1] participated. Joint Stipulation, ¶ 7. At the meeting, the Parents provided a [School 1] Personal Education Plan (dated November 2014), the Student's quarter 1 grades, and a January 2014 Psychological and Education Evaluation. MCPS Ex. 6, at 3; XXXX Tr. 1296.
39. By letter dated December 10, 2014, MCPS requested that the Parents supply the IEP team with work samples, teacher reports, and any other data needed to evaluate the Student's strengths and needs as the Parents did not bring any of the completed screening documents to the December 5, 2014 meeting. MCPS Ex. 7.

40. On December 16, 2014, the Parents provided authorization for MCPS staff to complete assessments at [School 1] and complete classroom observations at the school. Joint Stipulation, ¶ 8. The Parents added that “[a]ll testing is to be done at [School 1]” as a condition of the assessments. MCPS Ex. 8. Although the authorization was presented to the Parents at the December 5, 2015 meeting, the authorization was not executed by the Parents at that time. *Id.*
41. By letter dated December 18, 2014, which was drafted by the Student’s mother and signed by her colleague Dr. XXXX, “To Whom it May Concern” was instructed as follows:

My patient, [the Student], has a very large right XXXX (brain malformation) resulting in refractory epilepsy, left-sided weakness, and various associated learning differences.

[The Student] is currently taking the medications [medications] for epilepsy and continues to have breakthrough seizures. In addition he uses XXXX 12.5 mg rectal gel for active seizures. If a seizure self resolves prior to the administration of XXXX 12.5 mg [the Student] still needs the administration of XXXX 5 mg or [medication] 0.25mg due to his likelihood of having seizure clusters.

Because of the severity of [the Student’s] epilepsy, and his propensity to go into status epilepticus, [the Student] requires his emergency medications to be in close proximity to him at all times. [The Student] further requires an on-site nurse to provide emergency medication and emergency medical care as needed. He also requires one-on-one supervision at all times, including transitions, recess, unstructured time, and bathroom trips due to his risk of status epilepticus.

Some triggers for [the Student’s] epilepsy include inadequate sleep, dehydration, flashing lights, illness, and stress. These factors may require accommodations including adjusted start time for school, frequent water breaks, and a low stress environment.

Finally, [the Student] has a medically prescribed seizure alert service dog that may accompany [the Student] to school and school-related activities.

Thank you very much. I am writing this letter upon the request of his parents. With his parents’ permission, please feel free to contact me at 3017655469 if you have any questions.

Parents' Ex. 26; XXXX Tr. 591; XXXX Tr. 649. Dr. XXXX could not recall what she changed in the original draft. XXXX Tr. 591.⁶

42. The December 18, 2014 letter was the first time that Dr. XXXX had put something in writing to indicate that the Student needs a nurse at school. *Id.* at 588.
43. In January 2015, XXXX XXXX, Ed.S., NCSP, an MCPS school psychologist, observed the Student at [School 1]. Joint Stipulation, ¶ 10.
44. On January 20, 2015, XXXX XXXX, M.S., OTR/L, an MCPS occupational therapist, completed the occupational therapy assessment. Joint Stipulation, ¶ 11.
45. On January 22, 2015, MCPS convened an eligibility determination IEP team meeting. The Parents, their attorney and individuals from [School 1] participated. Joint Stipulation, ¶ 13.
46. On January 23 and February 3, 2015, XXXX XXXX, M.A., CCC-SLP, an MCPS speech-language pathologist, completed the speech-language assessment. Joint Stipulation, ¶ 12.
47. On February 19, 2015, MCPS convened an IEP team meeting to develop the Student's IEP. The Parents, their attorney and individuals from [School 1] participated. Joint Stipulation, ¶ 14.
48. At some point prior to February 24, 2015, the mother of the Student sent an e-mail to Dr.

XXXX as follows:

I have a question/favor to ask you. MCPS nursing supervisor would like to talk with you about [the Student]. As you may know we are in the process of creating an (sic) first IEP with MCPS and the medical component is a part of it.

Could you please call me possible this week before I give them permission to speak with you?

Thanks.

XXXX

⁶ As the information in this FOF is inconsistent with Proposed Joint Stipulation of Fact ¶ 9, I specifically reject ¶ 9. It states: "On December 18, 2014, Dr. XXXX XXXX authored a letter describing the Student has a very large XXXX (brain malformation) resulting in refractory epilepsy, left-sided weakness, and various associated learning differences. The letter was provided to MCPS."

Parents Ex. 67.

49. On February 24, 2015, Dr. XXXX sent the following e-mail about her conversation with

XXXX XXXX to the mother of the Student:

I just spoke to Miss XXXX and I clarified the plan re: XXXX. She was initially asking that if the XXXX is near him, then they may not wait it out and he'll end up getting the 12.5 mg. I explained to her that if he is actively seizing, they shouldn't "wait it out" and go ahead and give the XXXX 12.5 mg since he has a tendency to cluster and he may get prolonged seizures. I clarified that if the seizures stops (sic), then he should get either [medication] ODT or XXXX 5 mg. I also recommended an on site nursing staff. She initially questioned why since he (sic) seizures seems (sic) to be spaced apart and based on the notes, his seizures are short. I explained to her that [medication] has calmed things down, but we are not sure if the seizures will build up again since he has an underlying structural abnormality. She voiced good understanding.

Id.

50. In her conversation with Nurse XXXX, Dr. XXXX said that having an on-site nurse at the Student's school would be "good." XXXX Tr. 1336. Dr. XXXX further indicated that the Student having breathing difficulty or a life-threatening event as a result of a seizure had not happened in a long time. *Id.*

51. On March 9, 2015, XXXX XXXX, an MCPS physical therapist, completed the physical therapy assessment. Joint Stipulation, ¶ 15.

52. On March 20, 2015, MCPS convened an IEP team meeting. The Parents, their attorney and individuals from [School 1] participated. Joint Stipulation, ¶ 16.

53. The team finalized the Student's IEP and made a placement recommendation. Joint Stipulation, ¶ 17.

54. The March 20, 2015 IEP (IEP) lists the Student's "Primary Disability" as "Other Health Impaired." MCPS Ex. 17, Bates 03.

55. Under the category of “[a]reas affected by disability,” the IEP indicates “reading fluency, written math and problem solving, spoken language, functional fine motor performance, emotional regulation, problem solving, and navigating peer relations; health.” *Id.*
56. The IEP team “discussed [the] Nov 2014 (sic) Psycho-Educational report provided by family, teacher reports, report card, family concerns, letter from [the Student’s] doctor, [School 1] faculty concerns, [and the] [School 1] student plan” and used this information as the “documented basis” for finding the Student eligible for special education and related services. *Id.*, Bates 05.
57. The IEP details the Student’s participation on various assessments including the findings, sources, and levels of performance on the assessments in the areas of reading, math, written language, oral language, social/emotional behavior, health, functional mobility, and fine visual motor skills. *Id.*, Bates 07-012.
58. In terms of the present level of academic achievement and functional performance, the Parents provided the following input as detailed in the IEP:
- Parents feel [the Student] requires a small environment to be successful, with someone trained in special education. [The Student] also requires OT/PT services, psychological services, and 1:1 observation at all time. [The Student] requires a nurse on site to manage his safety if his medicine fails. [The Student] requires speech-language services.
- Id.*, Bates 013.
59. The Student’s strengths and interest areas according to the IEP are that he is “a very bright child who has excellent verbal skills” and he is “likeable with a good sense of humor...loves sports—playing and watching . . . is an avid chess player . . . loves to read . . . [and] a ‘sports fanatic.’” *Id.*

60. The IEP further indicated that the Student's disability affects his involvement in the general curriculum as follows:

Large XXXX with refractory epilepsy and associated left sided weakness and implications on his learning impacts his reading fluency, written expression, math fluency and problem solving, spoken language, functional fine motor performance, emotional regulation, problem solving, and navigating peer relations.

Id.

61. The IEP provides for the Student to receive services at his home middle school, [School 3] ([School 3]), as follows: one self-contained resource class per day; four supported classes in math, science, social studies, and English; a "pull-out" session for counseling thirty minutes weekly by a mental health provider; fifteen minutes monthly of consultation by a psychologist; forty-five minutes per week for speech/language therapy outside of the general education classroom; and sixty minutes per month of occupational therapy outside of the general education classroom. *Id.*, Bates 041.

62. The self-contained resource class would be a small class, between four to twelve special education students, with a specified curriculum in which the student works on their IEP goals and on organizational skills. XXXX Tr. 141.

63. With regard to the four supported classes, there would be two educators in the room, a content person in that area for that particular subject and a second person in the room - either a special educator or paraeducator. These classes are within a general education classroom of approximately twenty-five students, although such co-taught classes often tend to be smaller at sixteen to eighteen students. *Id.* at 142, 770.

64. The special educators at [School 3] are all dual certified in special education and the content area to which they are assigned. *Id.* at 773-74. Additionally, many of these dual certified teachers at [School 3] are certified in more than one content area. *Id.* at 774.
65. The paraeducators have to be qualified in a special education setting before they are even interviewed by MCPS. XXXX Tr. 240.
66. This co-taught curriculum is part of the XXXX (XXXX) program at [School 3]. Under the XXXX program there are students who are below, on or above grade level. While the program is not designed for students with severe cognitive difficulties, conversely, there are some very gifted children in the program. XXXX Tr. 764.
67. Most of the students in the XXXX program have a type of learning disability in reading, writing or math, and can be coded with about any disability code, including “other health impairment.” *Id.* at 763.
68. In the XXXX program, the content teacher is given copies of “what needs to happen with the IEP . . . the goals, the accommodations and . . . what is going on with the student.” *Id.* at 769. There is a meeting at the beginning of the year and several planning meetings during the year to plan for these students, as well as weekly team meetings among the content teacher and the special educator or paraeducator to discuss everything with regard to the children in that program to ensure that all of the teachers communicate and that “everything is on track” with regard to the student. *Id.*
69. The special education teacher also plans lessons with the content teacher. The special education teacher looks at the accommodations that the student has or modifications he might need so that the special educator can be ready to implement accommodations and/or modifications for the student in the class. *Id.* at 773.

70. The paraeducator works directly under the direction and control of the special educator and very specifically focuses on the students with the IEPs in the room. *Id.* at 788.
71. The IEP also provides for various instructional and testing accommodations such as multi-sensory presentation accommodation of notes and outlines to “support the Student’s ability to write fluently and with complexity. Audiobooks will support longer reading assignments.”
MCPS Ex. 17, Bates 017.
72. Other instructional and testing accommodations in the IEP include response accommodations for the Student:

[The Student’s] deficits in writing fluently and with complexity can be supported with the response accommodations of a word processor and graphic organizers for responses of one paragraph or longer. [The Student’s] attention needs to be supported with monitoring of test responses to help him stay on task and cue him to take a break when needed to refocus.

Id., Bates 019.
73. Instructional and testing accommodations in the IEP also include a “50% extended time and multiple frequent breaks” to address the Student’s “attention needs, and fluency difficulties in math, reading, and writing.” *Id.*, Bates 020.
74. The Instruction and testing accommodations in the IEP also addressed the Student’s need for setting accommodations:

[The Student’s] attention needs require testing in a small group setting, where he can receive adult support to help him sustain attention and cue him for breaks when needed for [the Student] to refocus. [The Student] may relocate within the school building to have access to a computer/word processor when necessary.

Id., Bates 021.
75. Instructional supports under the IEP include the following: allow use of manipulatives; check for understanding; monitor independent work; provide alternate ways for the student to demonstrate learning; provide proofreading checklist; use a word bank to reinforce

vocabulary and/or when extended writing is required; and modify visual cues to support color blindness. *Id.*, Bates 022-023.

76. Program modifications under the IEP “chunk longer assignments with interim due dates to help [the Student] meet deadlines.” *Id.*, Bates 024. More specifically, such program modifications include the following: breaking down assignments into smaller units; modifying workload to focus on mastery; and breaking down novel motor tasks into smaller units. *Id.*, Bates 024.

77. The social/behavioral supports under the IEP “cue for attention and breaks” and provide “frequent changes in activities or opportunities for movement,” “strategies to initiate and sustain attention,” and “sensory strategies to promote attention: gum, water bottle, fidgets, movement breaks, body sock, etc.” *Id.*, Bates 025.

78. For purposes of the Student’s physical and environmental support, the IEP also provides an instructional assistant to be assigned to the Student to provide “direct adult safety and support supervision related to medical conditions.” *Id.*, Bates 026. This meant that one person would be paid a full-time salary to do nothing but watch the Student for the purposes of his well-being and safety from the time he arrived to [School 3] until the time he left. XXXX Tr. 497-99; *see also* XXXX Tr. 1271-72.

79. The IEP also provides the Student with preferential seating close to the point of instruction and/or adult. *Id.*, Bates 026.

80. The Student was also permitted to bring his service dog to school, as the Parents requested. *Id.*, Bates 051.

81. At the IEP team meeting, Nurse XXXX brought a more updated health care plan and tried to elicit information from the Parents so that it could be completed. XXXX Tr. 1347; MCPS Ex. 16.
82. The updated health care plan was not at all commented on by the Parents and they did not even look at the plan. They did not seem interested because they were only interested in getting the services of a nurse. By so doing, the Parents created a barrier to the IEP process. XXXX Tr. 1345-46.
83. The Student's medical needs could have been met at the [School 3] Middle School for the 2014-15 and 2015-16 school years. XXXX Tr. 1348.
84. On March 20, 2015, the Parents stated disagreement with the IEP team decisions and requested placement and funding of the Student at [School 1]. Joint Stipulation, ¶ 18.
85. On August 22, 2015, the Parents filed a mediation/due process hearing request. Joint Stipulation, ¶ 19.
86. The Parents and MCPS were unable to resolve the matter. Joint Stipulation, ¶ 20.
87. On October 23, 2015, the Parents filed a mediation/due process hearing request. Joint Stipulation, ¶ 21.
88. During the 2014-15 school year, the Student had a total of four seizures at school, all of which lasted between thirty seconds and two to three minutes. MCPS Ex. 2A.
89. The seizure that the Student had on November 10, 2014 occurred while the Student was at XXXX. *Id.* at 3. As the Student was not being specifically watched, the Student's mother sent an e-mail to XXXX XXXX of [School 1] requesting that the Student be watched by someone during these less-structured times. MCPS 3-B. The e-mail states in pertinent part:

[The Student's] seizures can be subtle unless one is watching him specifically or knows him very well. Sometimes while seizing [the Student] seems confused or

is standing with a funny look on his face. Or, he may be walking around but seem off balanced or confused.

Or, on days like today, he may be walking in circles or in the wrong direction. This can easily be confused with [the Student] being silly, but if you try to talk to him or ask him if he's ok he is unable to answer.

Therefore, until we are able to get [the Student's] seizures under better control, would it be at all possible for one teacher to be assigned to watch just him during these less-structured times such as recess and lunch?

90. The seizure that the Student had on January 8, 2015 occurred while he was playing on the XXXX team. *Id.* at 4. The on-site nurse had already left for the evening and the XXXX was successfully administered rectally by the XXXX coach. *Id.*; XXXX Tr. 1393.
91. The Parents entered into a contract for the Student to be enrolled at [School 1] for the 2015-16 school year effective March 26, 2015. MCPS Ex. 17A.
92. [School 3] Middle School is approximately one mile or a mile and a half at most from the fire department. XXXX Tr. 241.
93. MCPS has approximately ten to fifteen students in every school on average that have seizures. XXXX Tr. 1320-21.
94. There is rectal administration of XXXX in children having seizures in MCPS approximately once a week to once every other week. *Id.* at 1392.
95. Although Nurse XXXX understood the Parents' concern about a personal area such as a rectum being exposed, the nurses/medical technicians at MCPS do it in a way that "preserve[s] the dignity of the student." *Id.* at 1366.
96. Typically, when XXXX needs to be administered rectally, the other students are removed from the area and taken to a neighboring classroom. The XXXX is then quickly administered. *Id.* at 1393.
97. This administration of XXXX is delegated to medical health room technicians in MCPS. *Id.*

98. Once a nurse delegates responsibility to a medical technician, the nurse is obligated to continue assessments after a task is delegated. *Id.* at 1392.
99. The nurses and technicians that work in the health rooms at MCPS are employed by the Montgomery County Health Department. *Id.* at 52-53.
100. Nurse XXXX is the nurse assigned to [School 3] three days per week. A medical health room technician is there on a daily basis. At the time of the IEP the health technician was XXXX XXXX. She is a certified medication technician (CMT) and a certified nursing assistant (CNA) through the Board of Nursing. She is also certified in American Heart CPR and first aid. *Id.* at 1316-17.
101. The Student's mother had no intention of taking the Student out of [School 1] in the 2014-15 school year and sending him to [School 3] Middle School, regardless of what MCPS recommended. XXXX Tr. 475. Further, the mother believed that the March 20, 2015 IEP being developed for her son only applied to the 2015-16 school year. *Id.* at 476.

DISCUSSION

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2015), 34 C.F.R. Part 300 (2015), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2015), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010).

In *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child. . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to

specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 200-01 (emphasis added and footnote omitted); *see also In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991). The IDEA contains the following, similar definition of FAPE:

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

20 U.S.C.A. § 1401(9) (2010); *see also* Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or all the services necessary to maximize educational benefits. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. at 176). Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207. “Educational benefit” requires that “the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added); *see also MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 526 (4th Cir. 2002) (citing *Rowley*, 458 U.S. at 192); *see A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt Cty Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 201). The Fourth Circuit Court of Appeals recently reiterated that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir.

2015).

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2014). Indeed, mainstreaming children with disabilities with nondisabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. Nonetheless, the issue is not whether another school is better or even as appropriate as the school offered by the school district but whether the school district has offered a FAPE.

The Supreme Court has articulated the requirements for reimbursement when the private placement desired by a child's parents is proper, but the one recommended by the school system is inappropriate. The Court has upheld the right of the parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency (LEA) when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985). Parents who unilaterally remove a child from a public school system placement, however, without the consent of school officials, and who place their child at a private school, "do so at their own financial risk." *Burlington*, 471 U.S. at 374. Before they can expect to recoup their expenses for the private placement they must meet a two-pronged test under those cases: (i) the placement proposed by

the school system is not reasonably calculated to provide a child with FAPE, and (ii) the private unilateral placement is appropriate. 471 U.S. at 370.

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). Accordingly, as the Parents are seeking relief on behalf of the Student, they bear the burden to prove by a preponderance of the evidence that MCPS failed to provide the Student with a FAPE in the least restrictive environment (LRE) for a portion of the 2014–2015 and 2015–2016 school years. For the reasons that follow, the Student has failed to meet that burden.

The Student Was Offered a FAPE by MCPS

The Parents raised four issues with regard to why they believed that the Student had not been offered a FAPE in the LRE for portions of the 2014-2015 and for the 2015-2016 school years: (1) MCPS failed to offer and develop an appropriate IEP, including a failure to offer related services; (2) MCPS failed to provide a full continuum of appropriate educational services, which would offer an appropriate program; (3) MCPS failed to properly consider all of the information provided by the private evaluators; and (4) MCPS failed to offer a proposed placement calculated to offer educational benefit. Tr. 8-9. I will address these issues in turn.

MCPS offered and developed an appropriate IEP, including related services and a full continuum of appropriate educational services and a proposed placement calculated to offer educational benefit (issues 1, 2 and 4 above).

There was a dearth of evidence presented by the Parents at the hearing regarding why MCPS did not adequately address the Student’s educational needs. The Student’s mother testified that she believed the IEP simply placed her son in a general education classroom with a paraeducator to keep an eye on him and that he was only getting one resource class with other children who may not be in his classes to help him with his “homework and things like that.”

XXXX Tr. 417-19. She compared the program at [School 3] to the program at [School 2] in terms of size and educational benefit despite the fact that the Student was not in a special education program at [School 2]. *Id.* at 436. The mother also testified that upon exiting the IEP meeting in February 2015, she looked into a classroom at [School 3] Middle School. *Id.* at 448. She noted that the classroom had many students and was chaotic and disorganized. She was concerned that her son would not be able to focus on things given his ADHD and that his seizures might go unnoticed by the teacher given the chaos. *Id.* at 425. She admitted, however, that she had no idea what class she was observing from outside the doorway for more than a minute but less than fifteen minutes, and never thought her son would be assigned to that classroom in any event. *Id.* at 451. This was not a formal observation at [School 3], and the mother never requested to observe the type of classroom to which the Student would be assigned. *Id.* at 449. The mother further lamented the fact that the school was far bigger than [School 1], the Student was not getting special education teachers for each class, and other supports such as “small environment, chunking . . . [and] delayed start time.” *Id.* at 419.

In reality, however, the March 20, 2015 IEP provided for the Student to receive as follows: one self-contained resource class per day; four supported classes in math, science, social studies and English; a “pull-out” session for counseling thirty minutes weekly by a mental health provider; fifteen minutes monthly of consultation by a psychologist; forty-five minutes per week for speech/language therapy outside of the general education classroom; and sixty minutes per month of occupational therapy outside of the general education classroom. MCPS Ex. 17, Bates 41. Ms. XXXX XXXX, who was the resource teacher at [School 3] at the time the Student’s IEP was being developed, was called to testify on direct in both the Parents’ and MCPS’ case, the latter in which she was qualified as an expert in special education, about the FAPE offered to the

Student. Specifically, Ms. XXXX testified that the self-contained resource class would be a small class, between four to twelve special education students, with a specified curriculum in which the student works on their IEP goals and on organizational skills. XXXX Tr. 141. The students in that class are also taught how to set priorities, to check their grades electronically on Edline, and to be familiar enough with and able to “look at their IEP at a glance” so they “know what they need to be advocating for during the day.” *Id.*

With regard to the four supported classes, there would be two educators in the room, a content person in that area for that particular subject and a second person in the room - either a special educator or paraeducator, in a general education classroom of approximately twenty five students, although such co-taught classes often tend to be smaller at sixteen to eighteen students. *Id. at 142, 770.* The special educators at [School 3] are all dual certified in special education and the content area to which they are assigned. XXXX Tr. 773-74. The paraeducator always works under the direction and control of the special educator and works very specifically in implementing the IEP with the students.

As further explained by Ms. XXXX, this co-taught curriculum is part of the XXXX program at [School 3]. Under the XXXX program, there are students who are below, on or above grade level. While the program is not designed for students with severe cognitive difficulties, conversely, there are some very gifted children in the program. *Id. at 764.* In the XXXX program, the content teacher is given copies of “what needs to happen with the IEP . . . the goals, the accommodations and . . . what is going on with the student.” *Id. at 769.* The special education teacher also plans lessons with the content teacher. The special education teacher looks at the accommodations that the student has or modifications he might need so that

the special educator can be ready to implement accommodations and/or modifications for the student in the class. *Id.* at 773.

Further, there is a meeting at the beginning of the year and several planning meetings during the year to plan for these students, as well as weekly team meetings among the content teacher and the special educator or paraeducator to discuss everything with regard to the children in that program to ensure that all of the teachers communicate and that “everything is on track” with regard to the student. *Id.* at 769. In addition to ten pages of IEP goals, which the mother did not specifically address, the Student would receive numerous instructional and testing accommodations as well as program modifications such as “chunking” of longer assignments with interim due dates to help the Student to meet deadlines. MCPS Ex. 17, Bates 24. The Student will effectively have a later start time at [School 3] as he will not have to travel approximately one hour to [School 1], but would be attending his home school in Montgomery County instead.

There was much testimony from the Parents’ witnesses regarding the fact that the Student needed a small class size but no acknowledgement as to why the XXXX program that effectively gave the Student the benefits of a small resource class to focus on organization and the specific substance of his IEP as well as the benefits of a small class within a co-taught general education classroom of non-disabled peers with multiple accommodations was inadequate. Indeed, Dr. XXXX, a former MCPS school psychologist who was admitted as an expert in psychology, admitted that in the twelve years that she has been absent from MCPS, she was unaware if there have been massive changes to the nature and extent of co-taught classes and could not speak to it.⁷ XXXX Tr. 283-84. Dr. XXXX opined that a class of twenty-five students “would not work for the Student,” on the basis that he needs “an expert in gifted complicated learning disabilities

⁷ The parties actually stipulated to this fact during Mr. Krew’s cross examination of Dr. XXXX.

and medical issues in order to be served . . . [as] he is more complicated than kids in that kind of setting typically are.” XXXX Tr. 280. However, her response did not address why the Student could not be educated in the XXXX program, which accommodates children with all kinds of medical conditions (other health impaired) and is structured to implement the MCPS curriculum for students who are below, on or above grade level, as well as for the very gifted children. XXXX Tr. 764. Additionally, Dr. XXXX used an admittedly discredited “discrepancy model” in calculating the Student’s IQ and determining his recommended placement. She also failed to adhere to testing protocols when calculating his RIAS scores, administering the RIAS twice in two weeks (as opposed to the recommended six months to a year) and potentially inflating the second score due to a “practice effect.” Accordingly, while Dr. XXXX testified that she was simply trying to get the best out of the Student to determine his underlying issues, her manipulation of the test data to support her theories calls into question the validity of her outcomes in any event. XXXX Tr. 303-322; XXXX Tr. 1237-41. Finally, Dr. XXXX was not familiar with the MCPS IEP in this case, never attended an IEP meeting, did not speak with any of the Student’s teachers at [School 1] and never observed him there. *Id.* at 298-99, 324.

In contrast to the testimony of Dr. XXXX, XXXX XXXX, a school psychologist at [School 3] Middle School who was qualified as an expert in school psychology, specifically testified regarding the adequacy of the IEP and the XXXX program at [School 3]. She opined that the XXXX program at [School 3] was an appropriate place to implement the Student’s IEP. XXXX Tr. 1278. She described the fact that the XXXX program serves students who may have special education needs but those needs can be met in a general education setting so it is typically implemented in a student’s home school with their neighboring peers. *Id.* at 1276. Within that setting she described the students as receiving varying levels of support based on

identified areas of need, such as co-taught classes and targeted special education classes. *Id.* She then described how the Student's academic and behavioral needs related to needing additional prompting, reduced distractions, and a variety of accommodations or modifications, all of which were addressed in the IEP. *Id.* at 1278. Given that there was no indication that the Student needed to be segregated from his peers and that the additional skills he needed to be working on are "best served by having typically developing peers as models," Ms. XXXX opined that the Student "would have been expected to make meaningful educational process through the implementation" of the IEP at [School 3]. *Id.* at 1278-79. She further opined that [School 3]'s XXXX program is the LRE for the Student given that it is his home school with his neighboring peers and provides him a variety of academic and behavioral supports, as needed, without being too restrictive. *Id.* Given her actual working knowledge of the XXXX program at [School 3] and her evaluation of the Student at [School 1] and knowledge of the documents and testimony provided by the Parents, I found her testimony very persuasive on the issue of the adequacy of the IEP in the XXXX program at [School 3] and the provision of FAPE to the Student. Additionally, but not insignificantly, the law requires that I give deference to school board experts as "the task of education belongs to the educators who have been charged by society with that critical task." *MM ex rel. DM v. School Dist. of Greenville Cty*, 303 F.3d 523, 533 (4th Cir. 2002) (internal quotation marks omitted).

There was very little evidence presented by the Parents at the hearing regarding the alleged inadequacy of the related services offered to the Student in the IEP. In contrast, MCPS provided four expert witnesses to testify, each of whom provided observations and/or assessments of the Student in order to address the adequacy of related services included on the Student's IEP. I found their testimony as to the developed services persuasive.

In addition to the specific accommodations provided to the Student through the XXXX program at [School 3] and related services, the IEP provides for an adult who would be assigned only to the Student to follow him throughout the day “across environments to look for any seizure activities and provide any needed interventions due to the family’s concerns about the severity of his seizures.” XXXX Tr. 1271; MCPS Ex. 17, Bates 26. This means that one person would be paid a full-time salary to do nothing but watch the Student for the purposes of his well-being and safety from the time he arrived to [School 3] until the time he left, as acknowledged by the mother. XXXX Tr. 497-99.

Despite the fact that MCPS was offering a comprehensive way to measure and respond to the Parents’ concerns about the Student’s needs in case of a seizure emergency, the Parents still indicated that only a nurse was acceptable. MCPS has a full-time nurse at [School 3] three days per week, and a medical health room technician every day. XXXX Tr. 1316-17. In support of their position that only a full-time nurse was acceptable, the Parents pointed to a December 18, 2014 letter signed by Dr. XXXX that indicates that the Student “requires an on-site nurse to provide emergency medication and emergency medical care as needed.” Parents’ Ex. 26B. A similar letter signed by Dr. XXXX on January 28, 2015 reiterates this position. Parents Ex. 30. The Parents argument that the IEP is substantively flawed because it does not provide for a full-time nurse is incorrect for several reasons.

First, Dr. XXXX’s requirement that a full-time nurse be on-site at all times to administer medication and emergency medical care when needed when the Student is in school is belied by Dr. XXXX’s testimony on this point. On cross-examination, Dr. XXXX clarified that a nurse is needed to recognize a seizure event but not to administer medication. XXXX Tr. 631-32. She further clarified, however, that she would “endorse a technician as an appropriate individual at

[the Student's] school so long as the technician was trained in recognizing seizures, administering XXXX, identifying evidence of seizure activity after administration of XXXX, and giving life support if necessary . . . if there is such a technician." XXXX Tr. 635. Dr. XXXX further indicated that if 911 help is essentially two minutes away with trained EMT personnel then that would be acceptable to Dr. XXXX. XXXX Tr. 633. This is significant given that the firehouse and EMTs are approximately one mile from [School 3] Middle School. XXXX Tr. 241.

Second, Dr. XXXX's requirement that an on-site nurse be available in the Student's school is further belied by Dr. XXXX's discussion with Nurse XXXX and the contemporaneous notes of the conversation. In their phone conversation on February 24, 2015, which occurred after a number of attempts on the part of Nurse XXXX, Dr. XXXX began the conversation saying that a nurse would be necessary but indicated that a nurse would be "good" in case the Student had difficulty breathing or a life threatening event. Dr. XXXX also indicated that such an event had not happened in a long time. XXXX Tr. 1336-37. Dr. XXXX further stated to Nurse XXXX, as reflected in the contemporaneous notes of Nurse XXXX, that the Student had improved because of the changed meds "but could still be a problem – so should have RN@school." Parents Ex. 64. While Dr. XXXX admitted that she said that having a nurse would be "good" in her conversation with Nurse XXXX, Dr. XXXX testified that she also said "necessary." In Dr. XXXX's contemporaneous recollection of the conversation with Nurse XXXX that she sent in an e-mail to the mother in this case she states, "I also recommended an on-site nursing staff." Parents Ex. 67. There was no mention of it being a requirement.

Finally, Dr. XXXX admitted that the mother wrote a draft of the December 18, 2014 letter that Dr. XXXX ultimately signed, and Dr. XXXX does not recall what she changed from that draft. XXXX Tr. 591. Further, Dr. XXXX, a colleague of the mother at XXXX, testified

that the December 18, 2014 letter is the first time that she had put something in writing to indicate that the Student needed a nurse at school. XXXX Tr. 588.

Any one of these issues alone may not have called into question whether Dr. XXXX's testimony was reliable as to the true necessity of a nurse on-site at [School 3]. Taken together, however, they call into question the reliability of the witness on this issue and indicate that the testimony was more in the nature of a colleague furthering the desire of the Parents to have their son in school with a full-time nurse. Indeed, the stated criterion for the mother in determining to which schools the Student should apply when [School 2] stated in October 2013 that the Student would not be invited back for the 2014-15 school year was whether the school to which he would apply had a full-time nurse. XXXX Tr. 387. While I am certain it is well-meaning as the mother wants what she perceives is best for her son, the singular focus of a school with a full-time nurse has not changed, regardless of the reasonable efforts of MCPS to provide the Student with a FAPE in this case. Indeed, "the IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent." *A.B. v. Lawson*, 354 F.3d at 328.

MCPS properly considered all of the information provided by the private evaluators (issue 3).

The Parents essentially argued at the hearing that somehow MCPS failed to properly consider Dr. XXXX's requirement of a full-time nurse and appreciate/consider the severity of the Student's medical condition given that MCPS did not provide an on-site, full-time nurse every day of the school week. I find, however, that MCPS considered the arguments and information regarding the need for a full-time, on-site nurse and appropriately rejected them.

The Parents were duplicitous and inconsistent in their purported need to have an on-site nurse to administer medication and emergency medical care, as first described in the December 18, 2014 letter written by the mother and signed by Dr. XXXX. Indeed, on January 8, 2015,

when the Student was at an after school XXXX practice at the [School 1] and after the on-site nurse had left for the day, the Student had a seizure. MCPS 2A, at 4. Accordingly, the basketball coach rectally administered the XXXX medication to the Student. *Id.* The EMS was not called, and the Student suffered no injuries. *Id.* Despite the fact that the December 18, 2014 letter by Dr. XXXX requires the on-site nurse to both administer the medication to the Student and emergency care as needed, clearly, the [School 1], the placement that the Parents request in the instant case, did not adhere to that requirement. Dr. XXXX did testify that persons other than the nurse can administer the drug and the emergency medical care and that it all is a matter of appropriate training. XXXX Tr. 631-32. In the case of the XXXX coach, however, he was not a nurse or any manner of health professional, but he had been trained by Nurse XXXX XXXX, the Nurse at the [School 1] at the beginning of the year along with the fifty to seventy five other [School 1] employees on the administration of seizure medications to [School 1] students, including the Student. XXXX Tr. 1076-1083. Although the protocol set up with the Student's Parents is that one of the Parents is there after school when the Student has afternoon activities when Nurse XXXX leaves the school at 3:30 or 4 p.m., on this day, that was not the case. While the Student's mother is a doctor, the Student's father is not; the father is well-trained, however, and is very in-tuned to the Student's specific seizures. XXXX Tr. 1083.

As Nurse XXXX testified, MCPS has approximately ten to fifteen students in every school on average that have seizures of some sort or another. XXXX Tr. 1320. Further, MCPS administers XXXX in these children having seizures approximately once a week to once every other week. *Id.* at 1392. Although Nurse XXXX understood the Parents' concern about a personal area such as a rectum being exposed, the nurses/medical technicians at MCPS handle the situation in a way that "preserve[s] the dignity of the student." *Id.* at 1366.

She also testified that typically, when XXXX needs to be administered rectally, the other students are removed from the area and taken to a neighboring classroom. The XXXX is quickly administered. *Id.* at 1393. This administration of XXXX is delegated to medical health room technicians in MCPS. *Id.* Once a nurse delegates responsibility to a medical technician, the nurse is obligated to continue assessments after a task is delegated. *Id.* at 1392. The nurses and technicians that work in the health rooms at MCPS are employed by the Montgomery County Health Department. *Id.* at 52-53.

The evidence is uncontroverted that MCPS is well aware of how to deal with students who have all forms of epilepsy and deals with them frequently. MCPS considered the information and medical records provided by the Parents. Nurse XXXX made the attempt to develop a health care plan with the Parents, and even brought a more updated health care plan and tried to elicit information from the Parents at the March 20, 2015 IEP meeting so that it could be completed. *Id.* at 1347; MCPS Ex. 16. The updated health care plan was not at all commented on by the Parents and they did not even really look at the plan. They did not seem interested because all they were only interested in getting the services of a nurse at [School 1]. By so doing, the Parents created a barrier to the IEP process. *Id.* at 1345-46. MCPS even offered in its IEP to have one person paid a full-time salary to do nothing but watch the Student for the purposes of his well-being and safety from the time he arrived to [School 3] until the time he left, which the mother acknowledged. XXXX Tr. 497-99. This would have been in addition to the nurse on-site three times per week and the medical health room technician on-site every day. While the Student's medical needs could have been met at [School 3] Middle School for the 2014-15 and 2015-16 school years, the Parents were disinterested in that option. XXXX Tr. 1348.

MCPS did not neglect to consider the information of private evaluators as it reviewed the information that was selectively given to them by the Parents and was repeatedly denied information that they had asked for in any event. Indeed, the Parents put up barriers to the process from the very outset by failing to fill out the requested forms giving specific parental input, to delaying authorization for MCPS to speak to Nurse XXXX, which as a result could not occur until January 2015. Similarly, Nurse XXXX made repeated calls and requests for Dr. XXXX to clarify her letter and was only given a call back on February 24, 2015. One the most blatantly telling facts, however, is that the Student's mother admitted that she had no intention of taking the Student out of the [School 1] in the 2014-15 school year and sending him to [School 3] Middle School, regardless of what MCPS offered.. XXXX Tr. 475. Further, the mother was so disinterested in the IEP process and so fixed on issue of the nurse and getting reimbursement for the [School 1] that she believed that the March 20, 2015 IEP being developed for her son only applied to the 2015-16 school year. *Id.* at 476.

When there is no evidence that a parent would have accepted any FAPE offered by the local school district, as in the present case, any request for reimbursement for private educational costs must be denied in any event. *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 534-35 (4th Cir) (finding that the Student suffered no prejudice because the defect did not result in any lost educational opportunity); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 382 (8th Cir. 1998). Accordingly, not only do I find that MCPS appropriately considered information provided to it, but through their actions and words, the Parents showed that they would not have accepted any FAPE offered by MCPS unless it involved the payment of the Student's tuition at [School 1]. In addition to finding that MCPS offered a FAPE to the Student in this case, I find

that the Parents are precluded from recovery in any event because it was evident that they would have not accepted such FAPE. *MM ex rel. DM*, 303 F.3d at 534-35.

Further, to the extent that the Parents are attempting to argue that MCPS is somehow required by law to provide the Parents with a full-time on-site nurse because the doctor “required it” in the December 18, 2014 and January 28, 2015 letters or because the Student’s medical issues are nondelegable duties, such issues are not appropriately before me. Under *John A. v. Bd of Educ. for Howard Cty*, 400 Md. 363, 372-73 (2007),⁸ the Maryland Court of Appeals recognized the following:

Either a disabled child’s parents or a school board may file a complaint with the appropriate educational agency “with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. §1415(b)(6); *accord* COMAR 13A.05.01.15(c)(1) In such a complaint, a party may request an “impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.” 20 U.S.C. §1415(f); *accord* Education § 8-413(d).

In the *John A.* case, the Howard County Public Schools (HCPS) refused to administer A.A.’s medications “in the absence of the ability to consult directly and freely with A.A.’s treating/prescribing psychiatrist where the school nursing staff observed what they believed were potentially harmful side effects of the medications or contraindications to the continued administration of the drugs.” 400 Md. at 391. The Court went on to draw the distinction that if HCPS had flatly refused “to administer the medications under any circumstances, and A.A. needed the medications to benefit from her special education, subject matter jurisdiction over such a dispute would likely exist.” *Id.* When the issue deals “principally with medical and

⁸ On the last day of hearing and in the context of closing argument, MCPS raised the argument that the *John A.* case precluded me from determining the legality of delegation of duties from a nurse to a medical health room technician. At the suggestion of the Parents, I allowed each of the parties to simultaneously submit a brief memorandum on the applicability of the *John A* case to that issue in this case. I received each memo on January 20, 2016, as requested, and considered them.

ethical concerns” rather than those touching on special education, however, there is no jurisdiction under the IDEA and the due process complaint process. *Id.* Accordingly, in the instant case, as in *John A.*, the issue of whether MCPS should be compelled to use an on-site nurse to administer medication and emergency medical care as needed simply because it was *required* by the Student’s doctor or otherwise simply nondelegable, despite the fact that MCPS routinely delegates such duties, raises “questions of what constitutes reasonable medical practice, not the provision of ‘related services’ to a child receiving special education.” *Id.* at 392.

I understand and am sympathetic to the Parents’ desire to do what they believe is in the best interest of their son. I also considered and am sympathetic to the medical concerns raised about the Student in this case. Nonetheless, in the record before me, I am unpersuaded that the Student was denied a FAPE by MCPS. As aptly described by the Fourth Circuit in *A.B. v.*

Lawson,

IDEA’s FAPE standards are far more modest than to require that a child excel or thrive. The requirement is satisfied when the state provides the disabled child with “personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.” *Rowley* 458 U.S.at 203; *accord MM*, 303 F.3d at 526-27; *Hartmann*, 118 F.3d at 1001.

354 F.3d at 330. Here, MCPS offered a FAPE to the Student in the LRE by providing him with an IEP designed to provide personalized instruction with sufficient support services such that the Student would benefit educationally among non-disabled peers. Indeed, the IEP was reasonably calculated to confer some educational benefit. *Id.* at 330-31.

As I have already found that MCPS has proposed a placement reasonably calculated to provide the Student with FAPE, I need not address the issue of whether the private unilateral placement is appropriate. Accordingly, I find that MCPS provided the Student with a FAPE in the LRE for the relevant portions of the 2014-15 and 2015-16 school years, and neither

reimbursement for nor placement at [School 1] is appropriate in this case.

The Parents in this case also sought “compensatory services.” Compensatory services are “educational services ordered ... to be provided prospectively to compensate for a past deficient program.” *G ex rel. RG v. Ft. Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003). Based on my findings that the Student was not denied FAPE in the 2014-15 and 2015-16 school years, I find that the Parents are not entitled to an award of compensatory education.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that MCPS offered the Student a free appropriate public education in the LRE during the relevant portions of the 2014-15 and 2015-16 school years. 20 U.S.C.A. §§ 1401(9), 1412(a)(1)(A) (2010); Md. Code Ann., Educ. § 8-401(a)(3) (2014); 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117 (2014); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Therefore, the Student is not entitled to a placement and funding at [School 1] for the remainder of the 2015-16 school year, is not entitled reimbursement for tuition already paid by the Parents to [School 1] for the 2014-15 and 2015-16 school years, and is not entitled to any compensatory services for the 2014-15 and 2015-16 school years. *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985); *G ex rel. RG v. Ft. Bragg Dependent Sch.*, 343 F.3d 295, 308 (4th Cir. 2003).

ORDER

I **ORDER** that the October 23, 2015 Due Process Complaint filed by the Parents on behalf of the Student is hereby **DISMISSED**.

February 12, 2016
Date Decision Issued

Marina Lolley Sabett
Administrative Law Judge

MLS/kc

REVIEW RIGHTS

Any party aggrieved by this decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2014). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.