

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE TAMEIKA LUNN-EXINOR**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-MONT-OT-16-03297**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On February 3, 2016, Dr. XXXX XXXX (Parent), 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 (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). The Parent requested a due process hearing only. A resolution meeting was held on February 16, 2016. On February 16, 2016, 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).

On February 25, 2016, MCPS filed a Motion to Dismiss or, in the alternative, Motion for Summary Decision. The Parent did not file a response to the MCPS Motion. I heard brief argument on the Motion during the telephone pre-hearing conference on February 25, 2016 and

also at the hearing in this matter on March 14, 2016. The ruling on the Motion will be addressed in this decision.

I held a telephone pre-hearing conference on February 25, 2016. The Parent represented herself. Zvi Greisman, Esquire, represented MCPS. During the pre-hearing conference, the parties 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 April 1, 2016, which is forty-five days after both parties executed the February 16, 2016 Notice of Outcome of Resolution Meeting indicating that no agreement was possible. 34 C.F.R. § 300.515(a) (2015). The parties agreed, on the record, to waive the time limits set forth in 34 C.F.R. § 300.515 and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Further, the parties mutually agreed that the decision be issued within thirty days of the close of the record. The agreed upon due date for a decision in this matter is April 13, 2016.¹ Based upon the Parent and Mr. Greisman'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 March 14, 2016. The Parent represented herself and Mr. Greisman 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.

¹ The record in this case closed on March 14, 2016.

ISSUES

1. Should MCPS's Motion be granted because the Parent seeks relief which cannot be granted or because there is no genuine dispute of material fact and the MCPS is entitled to judgment as a matter of law?

If MCPS's Motion is denied:

2. Is the Parent's request that the MCPS remove the January 29, 2016 letter, written to her counsel, from the Student file a viable issue under the IDEA?

3. Is the Parent's request that the Student continue to receive out-of-boundary transportation moot?

4. Did MCPS offer the Student a free appropriate education (FAPE) in the least restrictive environment (LRE) for the 2015-16 school year?

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

RULING ON MCPS'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY DECISION

In the Complaint filed by the Parent on February 3, 2016, she requested: (1) that the January 29, 2016 letter from MCPS to her former attorney, Diana Savit, be removed from the Student's MCPS file; and (2) that the Student continue to receive transportation to and from her daycare provider's home. The Parent also raised an issue indicating that the Student's IEP was not providing FAPE. MCPS's Motion addressed the first two requests only: removal of the letter from the Student's file and transportation. The Parent did not file a response to MCPS's Motion. In its Motion, MCPS argued (1) that the Parent's request to remove the January 29, 2016 letter written by MCPS counsel to the Parent's counsel from the Student's file is not a proper claim under the IDEA; and, (2) that the Parent's request for transportation is moot because MCPS has

agreed to provide the requested transportation for the remainder of the 2015-2016 school year. For these reasons, the MCPS requested that its Motion for Summary Decision be granted.²

Standards for Motion to Dismiss and Summary Decision

The OAH's Rules of Procedure provide for consideration of a motion to dismiss under COMAR 28.02.01.12C and a motion for summary decision under COMAR 28.02.01.12D.

Those regulations provide as follows:

- C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.
- D. Motion for Summary Decision.
 - (1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavit.
 - (2) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit.
 - (3) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

In contrast to a motion to dismiss, where an administrative law judge (ALJ) may only consider the “initial pleading³,” when ruling on a motion for summary decision, an ALJ may also consider admissions, exhibits, affidavits, and sworn testimony for the purpose of determining whether a hearing on the merits is necessary. *See Davis v. DiPino*, 337 Md. 642, 648 (1995)

² During the pre-hearing conference in this matter, this Motion was discussed and counsel for MCPS agreed that even if I granted the Motion, the ruling would not dispose of this matter because the Parent also claimed that the Student was denied a free appropriate public education because she was placed in a class size that was too large.

³ An initial pleading is defined by COMAR 28.02.01.02B(7) as “a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person.”

(comparison of motions to dismiss and for summary judgment), *vacated in part on other grounds*, 354 Md. 18 (1999).

In this case, MCPS's Motion was supported by the following exhibits:

1. Parent's Request for Mediation and Due Process Complaint with the following attachments:
 - a. the Parent's description of the Complaint
 - b. the January 29, 2016 letter from MCPS to Parent's counsel, Diana Savit
 - c. the January 15, 2016 letter from Diana Savit to MCPS
 - d. the January 8, 2016 letter from MCPS to Diana Savit
2. XXXX Status form dated December 18, 2015;
3. Student Transportation Action Request form dated December 23, 2015 with the MCPS Student Record Report;
4. Letter from Diana Savit to MCPS, dated December 23, 2015;
5. Letter from MCPS to Diana Savit, dated January 8, 2016;
6. Letter from Diana Savit to MCPS, dated January 15, 2016;
7. Letter from MCPS to Diana Savit, dated January 29, 2016; and
8. MCPS Policy, Student and Community Service: Enrollment of XXXX Student.

Since MCPS's Motion included documents beyond the initial pleading, the Motion is being treated as one for summary decision. Unfortunately, the MCPS Motion for Summary Decision was not supported by an affidavit which is required under COMAR 28.02.01.12D. COMAR 28.02.01.12D states that a "motion for summary decision shall be supported by affidavit." For this reason, MCPS's Motion must be denied.

SUMMARY OF THE EVIDENCE

Exhibits

The Parent presented an exhibit for admission but its admission was declined based on the fact that the document was presented to the IEP team on March 8, 2016, after the Parent filed her Due Process Complaint. The IEP Team has not had an opportunity to review and assess this exhibit and my consideration is based on MCPS's evaluations and assessments as of the date of the due process hearing request, which was February 3, 2016. The exhibit was marked as Parent Ex. 1 and contained a Neuropsychological Evaluation of the Student from the XXXX dated

March 8, 2016.

I admitted the following exhibits on behalf of MCPS:

MCPS Ex. 1	12/28/14, 12/29/14	Focused Educational Evaluation conducted by XXXX XXXX, Psy.D., Clinical Psychologist
MCPS Ex. 2	1/3/15	Individualized Education Program (IEP) for Student
MCPS Ex. 3	1/12/16	IEP for Student
MCPS Ex. 4	2015-2016 School Year	Work samples from the 2015-16 school year, packet one
MCPS Ex. 5	2015-2016 School Year	Work samples, packet two
MCPS Ex. 6	2015-2016 School Year	Work samples, packet three
MCPS Ex. 7	No Date	Résumé for XXXX XXXX, 5 th grade teacher at [School 1] ([SCHOOL 1])
MCPS Ex. 8	No Date	Résumé for XXXX XXXX, Special Education [PROGRAM] teacher at [SCHOOL 1]
MCPS Ex. 9	No Date	Résumé for XXXX XXXX, Reading Specialist at [SCHOOL 1]

FINDINGS OF FACT

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

Background Information

1. The Student was born on XXXX, 2004.
2. In 2009, the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The student suffers from lack of concentration, low frustration tolerance and poor academic performance. (MCPS Ex. 1, pg. 2)
3. The Student attended [School 2] from Kindergarten through the second week of third grade. In third grade, the Student was transferred to [School 3]. (Id.)

4. In February 2013, the Student received a psychoeducational evaluation.⁴ (Id. at 9)
5. In December 2014, the Student was in the fourth grade at [School 3] where she had an IEP.
6. On December 28 and 29, 2014, the Student underwent a Focused Educational Evaluation with Dr. XXXX XXXX. (MCPS Ex. 1)

FAPE Issue

7. The Student has average abilities in the areas of verbal comprehension (39th percentile) and perceptual reasoning (30th percentile). The Student's working memory and processing speeds are in the borderline range (6th percentile). Academic testing yielded low average scores: broad reading (11th percentile), broad math (23rd percentile), oral language (17th percentile) and broad written language fell to the low range (2nd percentile). (Id.)
8. The Student had no signs of anxiety or depression but she did have elevated levels of sadness and internalization of negative feelings. (Id.)
9. During testing, the Student became frustrated. When faced with a task that required a verbal response, the Student would sigh or verbalize a negative comment. If the evaluator validated her feelings and made a stern statement to continue with the test, the Student was able to comply; under these conditions she gave strong effort and persistence. (Id.)
10. In evaluations, the Student displays moderate signs of inattentiveness. However, when tasks become more difficult and require deliberation, she tends to focus and does not require much redirection. (Id.)
11. In the 2014 evaluation, the Student had a high level of frustration tolerance.

⁴ This evaluation was referenced by Dr. XXXX in his evaluation in December 2015, and was referred to by the Parent during her testimony; however, it was not offered or admitted into evidence.

12. In the 2014 evaluation, the Student performed somewhat below her grade level (fourth grade) in reading, math and writing. The Student was strong in verbal expression and weak in written expression. (Id. at 3)

13. In the fourth grade, the Student had significant difficulty with her executive functioning, including her ability to inhibit her behavior, shift flexibly from one task to another, and modulate her emotions when frustrated. She also had difficulty with her ability to plan, organize, utilize working memory and self-monitor her behavior. (Id.)

14. In February 2013, the Student was weak in the area of written language. Between the February 2013 and December 2014 evaluations, the Student showed improvement in phonetic awareness, decoding and writing fluency.

15. The Student struggles to formulate consistently coherent and grammatically appropriate sentences unless explicit structure is provided and necessary accommodations are granted. For example, the Student's writing is improved with the use of a Chromebook. (Id. at 8)

16. Between the February 2013 and December 2014 evaluations, the Student's reading comprehension and fluency in mathematics improved. (Id. at 9)

17. In December 2014, the Student was found eligible for special education services because of a specific learning disability; she is impaired in reading and written expression. The Student has dyslexia; she experiences consistent learning difficulties in the areas of accurate and fluent word recognition, decoding and spelling. (Id. at 9)

18. In the December 2014 evaluation, the following recommendations were made for the Student's school:

- 150% total time for all examinations, quizzes and other times reading, writing and mathematics tasks
- Access to a laptop or Alphasmart during all classes and for all written homework

- The Parent should be provided copies of textbooks and worksheets to maximize practice at home
- The Student's teachers should continue to gain her attention before delivering instruction or directions; present information using precise and concise language; minimize auditory distractions; check on the Student regularly to ensure she is keeping up; ensure multi-sensory instructions and directions; and grant preferential seating to reduce distractions
- Daily intensive reading and writing instruction in small group format
- Specific interventions in reading, including programs that stress phonics and multi-sensory instruction

(Id. at 12)

19. The Student completed her fourth grade year at [School 3].

20. In the fall of 2015, the beginning of fifth grade, the Student was enrolled in [School 4], a private independent school in Montgomery County. The Student was at [School 4] until the middle of October 2015.

21. In mid-October 2015, the Student was asked to leave the [School 4] due to her emotional dysregulation and [School 4]'s lack of resources to assist the Student. (Tr. 31)

22. In mid-October 2015, the Student enrolled in [SCHOOL 1] as a fifth-grader.

23. On November 3, 2015, an IEP meeting was conducted at [SCHOOL 1]. The following people participated in the IEP meeting: MCPS Staff – XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX and XXXX XXXX; the Parent and her attorney, Diana Savit; and XXXX XXXX from [School 4].

24. At the time of the IEP meeting, the Student was enrolled at [SCHOOL 1] for fifteen days.

25. The November 3, 2015 IEP Team found that the LRE for the Student was for the Student to participate fully with non-disabled peers in all academic, non-academic and extracurricular activities. The Student received academic intervention in math and reading. (MCPS Ex. 2, pp. 28-29)

26. The Student received small group instruction outside the classroom for math, grade level reading, and reading intervention. The Student received in-classroom support with a para-educator for a minimum of five, 45-minute sessions per week. Also, occupational therapy was provided to the Student both in and outside the classroom. (Id. at pg. 27)

27. The Parent agreed with the goals and objectives contained in the November 3, 2015 proposed IEP. The Parent requested that the Student's IEP be implemented in a small, self-contained class for the entire day. (Id. at 33)

28. An IEP interim meeting was held on January 12, 2016 after the Student was enrolled at [SCHOOL 1] for two months.

29. In January 2016, the Student had progressed in written language, her oral expression was meeting age expectation, her reading level increased significantly from a Level M to a Level Q, she was working on grade level math, her social emotional development had progressed with her calming herself and returning to instruction and occupational therapy helped the Student have more consistent written output during class assignments. (MCPS Ex. 3, pp. 3-6)

30. In January 2016, the Parent agreed with the goals and objectives contained in the January 12, 2016 IEP. The Parent once again requested that the Student's IEP be implemented in a small, self-contained class for the entire day. (Id. at 7)

31. In January 2016, the Student was functioning one grade level below where she should be functioning given her chronological age.

32. The Student is making progress on her IEP goals during the 2015-2016 school year.

Removal of the January 29, 2016 Letter and Transportation Issue

33. The Parent resides at [address]. (MCPS Motion Ex. 1)

34. The Parent is a single mother of the Student and her fraternal twin brother. (Tr. 85)

35. The Parent works as a physician for XXXX Medical Center. Both of the children attend the same daycare for before-and-after-school but attend different schools as they have different special needs. (MCPS Motion Ex. 4)
36. On December 18, 2015, the Parent signed a MCPS XXXX Status form representing that the Student was XXXX. (MCPS Motion Ex. 2, Tr. 76-77)
37. The form was submitted to the MCPS Transportation Office in support of the Parent's request for out-of-boundary transportation for the Student.
38. The Parent's prior request for out-of-boundary transportation had been denied.
39. On December 23, 2015, MCPS granted the Parent's request for transportation based on XXXX status, and transportation services began for the Student. (MCPS Motion Ex. 3)
40. On December 23, 2015, Parent's counsel sent a letter to MCPS requesting out-of-boundary transportation based on the Parent's hardship. The Parent's purported hardship was that her work schedule did not allow for her to transport the Student to school every day and get to the hospital on time. (MCPS Motion Ex. 4)
41. On January 8, 2016, counsel for MCPS responded to Parent's counsel and expressed concern about the Parent's representation that the Student was XXXX. MCPS continued to provide transportation services for the Student. (MCPS Motion Ex. 5)
42. On January 15, 2016, Parents' counsel responded to MCPS's letter indicating that "if [Parent] loses her job, she will not be able to provide basic necessities for her family-including housing." (MCPS Motion Ex. 6)
43. On January 29, 2016, MCPS sent a letter to the Parent's attorney stating that under ordinary circumstances, they would be required to stop the out-of-boundary transportation because the Student is not XXXX. However, MCPS agreed to continue the transportation for the

Student for the remainder of the school year for the safety and general welfare of the Student.

(MCPS Motion Ex. 7)

44. A XXXX student is defined XXXX. (MCPS Motion Ex. 8)

45. On February 3, 2016, the Parent filed a Due Process Complaint.

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* Md. Code Ann., 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.

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 Parent is seeking relief on behalf of the Student, she bears the burden to prove by a preponderance of the evidence that MCPS failed to provide the Student with a FAPE in the LRE for the 2015-2016 school year. For the reasons that follow, the Parent has failed to meet that burden.

The Parent's Request that the January 29, 2016 letter be removed from the Student's file is not a proper request under the IDEA

The IDEA provides that a parent or public agency may initiate a hearing regarding the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education for such child. 20 U.S.C. § 1415(b)(6)(A). It is unrefuted that the Parent's request to remove the January 29, 2016 letter is not an issue regarding the identification, evaluation or placement of a student under the IDEA. In its Motion, MCPS noted that the Parent may ask an educational agency to amend the record through the Family Education Rights and Privacy Act (FERPA), but not in an IDEA proceeding. The Parent's request does not fall within the framework of the IDEA and therefore must be dismissed pursuant to Md. Ann., Code, Educ. § 8-413(e)(1)(i). Section 8-413(e)(1)(i) states that an administrative law judge may "dismiss any request for review which does not relate to a matter described . . ." This particular request raised by the Parent does not relate to an IDEA matter.

The Parent's Request for continued out-of-boundary transportation services for the Student is moot

Turning now to the transportation issue, the Parent requested that out-of-boundary transportation be provided for her daughter for the 2015-2016 school year. However, the record is clear that, despite MCPS's concerns about the Parent's representation that the Student was XXXX, MCPS agreed to continue the Student's out-of-boundary transportation through the end of the 2015-2016 school year. During testimony, the Parent stated that the Student was still receiving out-of-boundary transportation services. (Tr. 144) The Parent is receiving what she requested in her Complaint; therefore, this issue must be dismissed as moot.

The Student was offered FAPE by MCPS

The Parent raised one issue with regard to why she believed the Student had not been offered a FAPE in the LRE for the 2015-2016 school year: MCPS failed to properly implement the IEP by failing to offer a smaller classroom setting for the Student.

The Parent presented very limited evidence regarding why MCPS did not adequately address the Student's educational needs. The Parent presented the testimony of XXXX XXXX, an administrator at the [School 4] where the Student attended fifth grade from September, 2015 through mid-October, 2015. Ms. XXXX was offered as an expert in special education but was not accepted due to the Parent's failure to timely identify her as an expert witness and provide her curriculum vitae and opinions to MCPS. (Tr. 22-27) Ms. XXXX testified that the Student's dysregulation is preventing her from accessing the tools that are necessary to help the Student be successful with the curriculum. (Tr. 29) She stated that at [School 4], the Student participated in a 10 to 1 student/teacher ratio in a structured classroom designed for students with language-based learning difficulties. The Student responded well to graphic organizers and frequent breaks; however, the staff was only able to give her instructions when a teacher was working

directly with her. (Tr. 28) She testified that the Student was challenged by small group work and would become frustrated and refuse to participate in class activities. She stated that when the Student became frustrated, the behavioral strategies they employed were unsuccessful. Ms. XXXX testified that the [School 4] determined that their 10 to 1 ratio was too large for what the Student needed. She testified that the Student is a very capable young woman who successfully expressed herself verbally. However, she needed extensive supports in reading and written expression. (Tr. 30-31) Ms. XXXX testified that the Student's behavioral presentation and emotional dysregulation were beyond the abilities of [School 4]. (Tr. 31) On cross-examination, Ms. XXXX testified that she has not observed the Student at [SCHOOL 1] and that she was not aware of what was being provided by [SCHOOL 1]'s staff. (Tr. 35)

The Parent also presented the testimony of the Student's daycare provider, Ms. XXXX XXXX. Ms. XXXX testified that she has been the Student's daycare provider since 2012. She cares for the Student before school, after school and when school is on breaks. (Tr. 44) Ms. XXXX testified that she has eight children after school and they all sit and start their homework; however, the Student will start her homework but become frustrated and stop. She testified that the Student would rather sit and draw dragons. (Tr. 45-46) She stated that the Student interacts with the other children at the daycare but prefers the younger children. Ms. XXXX testified that she has not seen any progress academically for the Student since 2012. (Tr. 48) On cross examination, Ms. XXXX testified that she has never observed the Student at [SCHOOL 1] and that she has not attended any of the Student's IEP meetings at [SCHOOL 1]. (Tr. 56)

The Parent testified that she is a member of the IEP team and that she is the only person who has seen her daughter's progress from kindergarten to the present. She stated that the teachers in the IEP meetings say that the Student is making progress but she has noticed that the

degree of progress incrementally decreases every year because the Student is unable to access the curriculum. (Tr. 67) She testified that at the IEP meetings, the school staff indicates that they are looking at progress one year at a time and she feels that all of the years should be considered in determining progress but her suggestions are not considered by the IEP team. The Parent testified that the Student is not making sufficient progress, she is not functioning at grade level, her behavioral accommodations are insufficient and the classroom size is too big. (Tr. 68) The Parent relied on the Focused Education Evaluation (MCPS Ex. 1) as well as studies she reviewed about class size and argued that students learn better in a classroom size of seventeen students or smaller and that the Student would benefit from a smaller class setting. A smaller class setting would benefit her in the areas of behavior, attention, and transition. (Tr. 70)

The Parent testified that the Student is failing in the MCPS system because she is not on grade level and cannot function without one-to-one support. She stated that she has asked the teachers not to give the Student a calculator to solve math problems; however, they continue to let her use a calculator. She wants them to encourage the Student to learn her multiplication tables. (Id.) The Parent testified that the Student does have moments when she is on target, quick, bright, astute and takes initiative, but that is not the majority of the time. (Tr. 71) The Parent testified that the Student needs to learn to multitask and to organize, which is not a priority in her IEP. On cross-examination, when asked about the benefits the Student received from being in the general education setting, such as the friendships and modeling, the Parent testified that she feels that a smaller group setting would build the Student's confidence and help her graduate to a larger group with a sense of belonging. (Tr. 81)

The January 12, 2016 IEP provided for the Student to receive as follows: general education curriculum with assistive technology such as calculators and computers; small group

instruction with four to six students outside of the classroom for math, grade level reading and reading intervention; support within the classroom with a para educator for a minimum of five, 45-minute sessions per week; and occupational therapy that will be provided both inside and outside of the classroom. (MCPS Ex. 3).

Ms. XXXX XXXX was called to testify by MCPS and she was admitted as an expert in general education and special education. She testified that she is the Student's case manager and direct service provider. She also works with the other educators to make sure that they are supporting the Student and meeting her IEP requirements. (Tr. 90) She stated that she also presents the Student's information before the IEP team. Ms. XXXX testified that the November 3, 2015 IEP was the same IEP prepared by [School 3], where the Student was enrolled for fourth grade. She stated that on November 3, 2015, they used the IEP prepared by [School 3] and updated it with the limited information they were able to glean regarding the Student in the two weeks they had worked with her prior to the IEP meeting. Ms. XXXX testified that two representatives from the [School 4] were present for the November 3, 2015 IEP meeting. She stated that their focus was on the Student's behavior and her lack of performance due to her behavior. She testified that the Student was placed in the [Program] Program ([PROGRAM]) which provides services to students who require fifteen or more hours of special education or related services per week. She stated that after hearing about the Student's behavioral concerns from the [School 4] representatives, she was concerned that the Student would not be a good fit for the [PROGRAM] program. The IEP team developed behavioral, social and emotional goals in the IEP based on the input from [School 4]s' staff. (Tr. 95-96)

Ms. XXXX further testified that the IEP team determined that it did not need to conduct a Functional Behavioral Assessment (FBA) as they had anticipated because, although the Student

has low self-confidence about her abilities to do academic tasks when she perceives them to be difficult, and she becomes frustrated, the behaviors were manageable with best teaching practices. Ms. XXXX testified that after getting to know the Student, building rapport and a trusting relationship with the Student, [SCHOOL 1] did not need to keep behavioral data for the Student. She testified that over the last few months, the Student's frustration has decreased with planned ignoring⁵, time alone and dragon incentive charts. (Tr. 96)

Ms. XXXX testified that academically, the Student has made a lot of progress. Her IEP has been updated and adjusted to meet her needs. They are aware that the Student will have some impulsivity, but her behaviors are not outside of what they deal with in the [PROGRAM] program. She testified that [SCHOOL 1] is equipped to handle the Student's impulsivity and assist her with reaching her IEP goals. (Tr. 98) Ms. XXXX testified that the Student had IEP goals for reading, writing and math. She stated that the Parent told the school that the student could not read and her academic level was that of a first or second grader. (Tr. 100) Ms. XXXX testified that in reading, the Student progressed from a Level O (3rd Grade, 3rd Quarter) in November 2015 to a Level Q (4th Grade, end of 1st Quarter) by January 2016. In March 2016, the Student was assessed as a Level S (4th Grade, 3rd Quarter). (Tr. 101) The results showed that the Student made a year's progress in reading in four months. Ms. XXXX testified that the Student is still below grade level, but is on target for her needs and her IEP, making great progress. In math, Mr. XXXX testified that the Student has many gaps in her math learning but is working on grade level math with testing accommodations. (Tr. 102) She testified that she has retained a lot of math information and that she is proud of how the Student is progressing in math. She stated that all fifth graders are working on their math facts whether they have an IEP or not. The Student has perfected about 50% of her math facts. As for writing, Ms. XXXX

⁵ Planned ignoring is when the teacher purposefully ignores the Student's verbalized frustration.

testified that the Student was hesitant to write when she first arrived at [SCHOOL 1]. The Student prefers to draw and meets with an occupational therapist to work on her fine motor skills. (Tr. 103) Ms. XXXX stated that with the use of a Chromebook, the Student has had progression in her writing.

Ms. XXXX testified that the Student has preferred peers and non-preferred peers. The Student prefers to socialize and work with non-disabled peers in her classroom. The Student has friends and requests lunch bunches so that she and her friends can eat with a teacher. (Tr. 112) Ms. XXXX opined that the Student is accessing the curriculum at [SCHOOL 1] and progressing towards her goals. She stated that the March 8, 2016 IEP team recommended that the Student remain in the [PROGRAM] Program despite the Parent requesting a smaller class size. (Tr. 116) Ms. XXXX proceeded to go through the Student's work samples which showed that the Student was grasping major concepts in math and reading. The Student began writing opinion pieces with the use of a Chromebook and showed great improvement in math and reading comprehension. (Tr. 125-139) Ms. XXXX opined that the Student being in a smaller class setting would be a disservice to her because she enjoys working with her non-disabled peers as she learns socially and academically from her non-disabled peers. (Tr. 142) The Student has surprised her teachers by volunteering to work on the board in front of her class which is something she would not do in October 2015. Ms. XXXX is very proud of her work and is making positive gains academically. (Tr. 143)

Ms. XXXX XXXX, a reading specialist at [SCHOOL 1], was called as a witness and accepted as an expert in reading and general education. Ms. XXXX corroborated the testimony of Ms. XXXX. Ms. XXXX testified that the Student has made tremendous progress on her IEP goals during the 2015-2016 school year. (Tr. 185-186) She testified that her reading level has

increased substantially in four months. She stated that she had observed the Student interact with her peers throughout her school day and she has observed the Student transition from class to class with no problems. In her opinion, the Student benefits from the small group for the reading intervention and for the extra fifth grade guided reading group. She states that seeing the Student socialize with her non-disabled peers and becoming friends is critical to her progression. In her opinion, placement in a smaller class with all disabled peers and not giving her access to the other students would have a negative impact on the Student. (Tr. 187-188)

Ms. XXXX XXXX, the Student's homeroom teacher at [SCHOOL 1], was called to testify and was accepted as an expert in general education. Ms. XXXX testified that the Student is in her homeroom with twenty-six other students. She testified that the Student started out in her classroom slowly but the moments when she shuts down are less frequent and they don't last as long. (Tr. 202) She stated that the Student has become a self-starter in the classroom and works on the Padlet and the Chromebook along with the class during classwork. Ms. XXXX testified that the Student's writing has improved. When she started the year she did not like to write. The Student would tell Ms. XXXX that she did not want to write and crumple up her paper. Now, the Student will use the Chrome book to get ideas down on the paper and brainstorm. She testified that they are working on punctuation and the work is not always at a fifth grade level but the Student is doing fifth grade writing assignments which is progress from the beginning of the school year. (Tr. 206-207). Ms. XXXX opined that the Student benefits from the [PROGRAM] program and learning in the general population. She stated that the Student is usually working in groups of three or four and is able to get individual assistance when needed. She opined that the general education setting helps her self-esteem and she is happy. (Tr. 210)

The Parent has the burden in this matter and there was very little evidence presented by the Parent at the hearing regarding the alleged inadequacy of the services offered to the Student in the IEP and the need for a smaller class setting. The Parent had no expert opinions or documents to present at the hearing in this matter. The Parent's witnesses were able to provide some insight into their observations of the Student at [School 4] and in her daycare setting but neither of them was aware of the Student's IEP goals and objectives at [SCHOOL 1] or any of the significant progress the Student has made at [SCHOOL 1]. The testimony they provided did not support the Parent's argument that the Student was not showing progress at [SCHOOL 1] and therefore needed her IEP implemented in a smaller class setting.

MCPS presented the testimony of three experts in various educational fields who presented work samples, data and assessments to show that the Student is progressing in her IEP goals and receiving FAPE in the LRE. I find the testimony of Ms. XXXX, Ms. XXXX and Ms. XXXX to be very persuasive as to the significant progress the Student has made academically, socially and emotionally during the 2015-2016 school year. All of the education experts for the MCPS testified about how proud they were of the Student and how her confidence level has increased since October 2015 when she arrived at [SCHOOL 1]. The teachers admitted that not all of the Student's school work is at grade level but that she is working very hard towards accomplishing her IEP goals. 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). I find that MCPS offered a FAPE to the Student in this case.

I understand and am sympathetic to the Parent's desire to do what she believes is in the

best interest of her daughter. I also considered and am sympathetic to the Student's disabilities and the single mother's struggles raising two kids with disabilities alone. Nonetheless, on 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 her 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.

CONCLUSIONS OF LAW

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

- (1) MCPS is not entitled to summary judgment. COMAR 28.02.01.12; and
- (2) The Parent's request that the January 29, 2016 letter be removed from the Student's file does not fall within the framework of the IDEA. Md. Ann., Code, Educ. § 8-413(e)(1)(i); and
- (3) The Parent's request that MCPS continue to provide the Student with transportation is moot; and
- (4) MCPS offered the Student a FAPE in the LRE during the 2015-16 school year. 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 (2015); *Board of Educ. of*

the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

ORDER

I **ORDER** that MCPS's Motion is **DENIED**; and I further

ORDER that the February 3, 2016 Due Process Complaint filed on behalf of the Student by the Parent requesting that the January 29, 2016 letter be removed from the Student's file, that the Student receive continued out-of-boundary transportation and the issue of whether MCPS provided FAPE in the LRE is hereby **DISMISSED**.

April 13, 2016

Date Decision Issued

Tameika Lunn-Exinor

Administrative Law Judge

TLE/kkc

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.