

**XXXX XXXX,**

**STUDENT**

**v.**

**MONTGOMERY COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE LORRAINE E. FRASER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-MONT-OT-16-29351**

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**DECISION**

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

**STATEMENT OF THE CASE**

On September 23, 2016, XXXX XXXX (Parent) on behalf of his son, XXXX XXXX (Student), mailed a Due Process Complaint (Complaint) to the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).<sup>1</sup> The request for hearing was received by the OAH and MCPS on September 26, 2016. The Parent waived the resolution session and mediation. The Parent had previously filed a complaint related to this case with the Maryland State Department of Education (MSDE) on May 5, 2016. On July 1, 2016, MSDE found that MCPS acknowledged that the Student did not receive special education instruction in math in a separate special education classroom. MSDE further found that the Student received special education instruction in reading in a separate special education classroom.

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<sup>1</sup> U.S.C.A. is an abbreviation for United States Code Annotated.

In the Complaint, the Parent alleges that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student's Individualized Education Program (IEP). The Parent's requested remedy is compensatory services of 270 hours of outside math tutoring and reimbursement for neuropsychological/achievement testing.

I held a telephone prehearing conference on October 13, 2016. The Parent represented himself. Zvi Greismann, Esquire, represented MCPS. By agreement of the parties, the hearing was scheduled for November 2 and 3, 2016.

I held the hearing on November 2 and 3, 2016. The Parent represented himself. Mr. Greismann represented MCPS. The hearing dates requested by the parties were within the forty-five day period after the triggering events described in the federal regulations, making my decision due on the forty-fifth day: November 10, 2016. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2016).<sup>2</sup>

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) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; MSDE procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

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<sup>2</sup> C.F.R. is an abbreviation for Code of Federal Regulations.

## ISSUES

The issues are whether the Student was denied free appropriate public education (FAPE) requiring compensatory services in math, and if so, how many hours; and whether MCPS is required to reimburse the Parent for the cost of the neuropsychological/achievement testing.

## SUMMARY OF THE EVIDENCE

### Exhibits<sup>3</sup>

I admitted the following exhibits on behalf of the Parent, except as noted:

- Parent 1      Résumé for XXXX XXXX, PsyD., Center for XXXX
- Parent 2      Special Education State Complaint Form, 5/1/16
- Parent 3      Letter to the Parent from XXXX XXXX, Acting Supervisor, Resolution and Compliance Unit, MCPS, 5/10/16
- Parent 4      Letter to the Parent from XXXX XXXX, Chief, Family Support and Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 5/17/16
- Parent 5      Neuropsychological Evaluation, Dr. XXXX, 4/28/16-6/2/16
- Parent 6      Letter to Ms. XXXX, MSDE, from XXXX XXXX, Associate Superintendent, MCPS, 6/23/16
- Parent 7      MSDE investigation results, 7/1/16
- Parent 8      Letter to the Parent from XXXX XXXX, Supervisor, Resolution and Compliance Unit, MCPS, 7/29/16
- Parent 9      Email to XXXX XXXX, Administrative Legal Assistant, Michael J. Eig and Associates, P.C., from XXXX XXXX, Principal, [School 1] ([School 1]), 8/12/16; with attached letter to Ms. XXXX from Mr. Eig, 8/12/16
- Parent 10     Letter to Mr. Greismann from Mr. Eig, 8/24/16
- Parent 11     Letter to Mr. Eig from Mr. Greismann, 8/31/16
- Parent 12     Not admitted

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<sup>3</sup> The Parent and MCPS prenumbered their exhibits; I have retained their numbering. Some exhibits are duplicative of the other party's exhibits. Please note, not all exhibits were offered and/or admitted into evidence.

- Parent 13 Due Process Complaint, 9/22/16
- Parent 14 Email to the Parent and his wife from Ms. XXXX, 9/27/16
- Parent 15 Letter to the Parent from Ms. XXXX, 9/27/16
- Parent 16 Letter to OAH from Mr. Greismann, 9/28/16
- Parent 17 Letter to the Parent and his wife from Ms. XXXX, 9/30/16
- Parent 18 Not admitted
- Parent 19 Not admitted
- Parent 20 Not admitted
- Parent 21 The Student's weekly class schedule, 2016-2017 school year
- Parent 22 The Student's weekly class schedule, 2015-2016 school year
- Parent 23 IEP, 3/24/15
- Parent 24 Notice of IEP meeting, 12/15/15
- Parent 25 Letter to the Parent and his wife from Ms. XXXX, 2/26/16; IEP, 3/22/16
- Parent 26 Mathematics Assessment Report, 2015-2016
- Parent 27 Measures of Academic Progress in Reading (MAP-R) results, 6/9/16
- Parent 28 Measures of Academic Progress in Primary Math (MAP-P) results, Winter 2014-2015
- Parent 29 Instructional recommendations for math and reading, 6/1/15
- Parent 30 The Student's report cards, 2014-2015 school year, 2015-2016 school year, 1<sup>st</sup> quarter 2016-2017 school year

I admitted the following exhibits on behalf of MCPS:

- MCPS 2 IEP, 3/24/15
- MCPS 4 IEP, 3/22/16
- MCPS 6 MAP Data for the Student 2012-2016; MAP Normative Data 2011; MAP Normative Data 2015

- MCPS 7 The Student's third grade Report Card, 6/16; Academic Student Profile, 10/25/16; A Parent's Guide to the Curriculum for Kindergarten, First Grade, Second Grade, Third Grade, Fourth Grade
- MCPS 8 The Student's weekly class schedule, 2015-2016 school year
- MCPS 13 MSDE investigation results, 7/1/16
- MCPS 14 Letter to Ms. XXXX, MSDE, from Ms. XXXX, MCPS, 9/1/16
- MCPS 15 Email to Ms. XXXX, XXXX XXXX, and XXXX XXXX from XXXX XXXX, Compliance Specialist, Dispute Resolution Branch, Division of Special Education/Early Intervention Services, MSDE, 9/2/16
- MCPS 17 Résumé for XXXX XXXX
- MCPS 20 Résumé for XXXX XXXX
- MCPS 23 Résumé for XXXX XXXX

Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Principal, [School 2] (formerly Assistant Principal at [School 1] during the 2014-2015 school year)
- XXXX XXXX, Principal, [School 3] (formerly Principal Intern at [School 1] during the 2015-2016 school year)
- XXXX XXXX, Third Grade Teacher, [School 1], accepted as an expert in elementary school instruction
- XXXX XXXX, PsyD., Center for XXXX, accepted as an expert in developmental neuropsychology with a specialization in autism
- XXXX XXXX, Special Education Teacher, [School 1], accepted as an expert in special education

MCPS presented the following witnesses:

- XXXX XXXX, Third Grade Teacher, [School 1], accepted as an expert in elementary school instruction
- XXXX XXXX, Special Education Teacher, [School 1], accepted as an expert in special education
- XXXX XXXX, Instructional Specialist, MCPS, accepted as an expert in special education with an emphasis in instructional math and reading

### **FINDINGS OF FACT**

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

1. The Student is a nine year old boy with autism, attention deficit hyperactivity disorder (ADHD), and anxiety. He is high functioning and capable of learning on grade level. His disabilities affect his communication, social skills, organization, attention, self-help skills, and reading, math, and writing skills. His anxiety increases during testing and with changes in routine.
2. During the 2014-2015 school year, the Student was in the second grade at [School 1]. During the 2015-2016 school year, he was in the third grade at [School 1]. He is currently in the fourth grade at [School 1].
3. Throughout the Student's education in MCPS he has had an IEP.
4. As of March 2015, the Student was performing on the first/second grade level in math, which was below grade level.
5. The Student's March 24, 2015 IEP contained the following goal and objectives in math. Goal: the Student "will analyze number relations, compute, and apply knowledge to whole numbers and place value using a variety of strategies." MCPS 2. Objective 1:

“Recognize when it is necessary to compose or decompose a ten or hundred in an addition or subtraction problem.” *Id.* Objective 2: “Add and subtract three digit whole numbers using a variety of strategies.” *Id.* Objective 3: “Identify the place value of a digit in whole numbers to 999, and apply knowledge of place value to compare numbers to 999 using  $<$ ,  $>$ , and  $=$ .” *Id.* Objective 4: “Solve addition and subtraction word problems.” *Id.*

6. The Student’s March 24, 2015 IEP provided that the Student would receive ten hours per week of special education instruction outside the general education classroom in reading and math. The IEP did not specify how many hours were to be in reading and how many hours were to be in math.

7. From the end of March 2015 through the 2015-2016 school year, the Student received six and one half hours per week of special education instruction outside the general education classroom in reading (known as pull out services).

8. From March 2015 through the 2015-2016 school year, the Student received special education instruction in the general education classroom in math (known as plug in services). He did not receive the three and one half hours per week in special education instruction in math outside the general education classroom as required by his IEP.

9. During third grade (2015-2016 school year), the Student received math instruction on grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. He received additional support and practice to develop his understanding of math concepts. The small groups generally had two to three students but never more than six students.

10. The Student had a 1:1 paraeducator, XXXX XXXX, who assisted him in math. Ms. XXXX was a student in the process of getting her degree in special education. Her

assistance included helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud.

11. During third grade, the Student's general education teacher, Ms. XXXX, consulted regularly with his special education teacher, Ms. XXXX. Ms. XXXX also observed the Student's math instruction in the classroom.

12. During a December 2015 IEP meeting, the IEP team, including the Parent, discussed the Student's math instruction in the general education classroom and the progress he was making.

13. During the third grade, the Student made progress on his math goal. He met objectives one, two, and three. The Student needed additional support in the area of word problems (objective four). Sometimes the Student could solve the word problems on his own; other times he would need support from Ms. XXXX or Ms. XXXX. He performed on grade level on many assessments throughout the year.

14. The Student benefited from participating with typically developing peers during math instruction. The Student was exposed to the reasoning language the other students used. Also, the Student had socialization goals on his IEP and he had developed friendships in his class.

15. As of March 22, 2016, the Student was performing on grade level in math with support, based on testing, assessments, and teacher observations. His March 22, 2016 IEP had two new math goals, one for word problems and one for fractions. The IEP provided that he would receive math instruction in the general education classroom with the ability to pull him out for additional reteaching of math concepts if needed.



16. At the end of third grade, the Student was rated proficient overall in math. He was rated proficient in measurement and data, number and operations in base ten, and number and operations – fractions. He was rated in progress in geometry and operations and algebraic thinking.

17. Standardized testing alone shows the Student has consistently progressed each year; however, he has consistently performed below grade level on such tests.

18. From the fall of 2014 to the spring of 2015, during second grade, the Student's overall score on the MAP-P (primary math) increased fourteen points. The growth norm for second grade children was an increase of 13.1 points. Thus, the Student's growth was .9 points more than the norm. In the fall, he was performing on the kindergarten/first grade level. In the spring, he was performing on the first to second grade level.

19. From the fall of 2015 to the spring of 2016, during third grade, the Student's overall score on the MAP-M<sup>4</sup> increased fourteen points. The growth norm for third grade children was an increase of thirteen points. Thus, the Student's growth was one point more than the norm. In the fall, he was performing on the first grade level. In the spring, he was performing on the first to second grade level.

20. Dr. XXXX assessed the Student's intellect, achievement, memory function, language ability, visual-motor skills, social/adaptive functioning, and emotional/behavioral functioning on the following dates: April 28, 2016, May 5, 17, 19, and 20, 2016, and June 2, 2016.

21. On the Wechsler Intelligence Test for Children – Fifth Edition (WISC-V), an intellectual assessment, the Student's standard score in arithmetic was seven, placing him in the sixteenth percentile. His full scale IQ was ninety-two, placing him in the thirtieth percentile.

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<sup>4</sup> Measures of Academic Progress in Math.

22. On the Wechsler Individual Achievement Test – III (WIAT-III), an achievement assessment, the Student’s standard score in math problem solving was eighty-one, placing him in the tenth percentile at a 2.2 grade equivalent.

## **DISCUSSION**

### **The Parties’ Arguments**

The Parent alleges that the Student did not receive special education instruction in math in a separate special education classroom from May 5, 2015 through May 5, 2016, as stated in the Student’s IEP. The Parent’s requested remedy is compensatory services of 270 hours of outside math tutoring and reimbursement for neuropsychological/achievement testing. The Parent argues that the Student did not receive pull out instruction in math for 3.75 hours per week. The Parent asserts that the Student’s general education teacher was unaware that the Student was supposed to be pulled out for math and that his special education teacher was aware but chose not to do so. The Parent contends that the neuropsychological testing showed the Student was performing on a 2.2 grade level at the end of third grade, 1.8 grade levels behind. The Parent maintains that the Student needs thirty minutes of outside math tutoring per day in addition to daily small group instruction and one hour of 1:1 check in a week. The Parent maintains further that Dr. XXXX should reevaluate the Student in six months and twelve months. The Parent argues that MCPS’s failure to implement the Student’s IEP was a “concealed” violation and denial of FAPE. The Parent asserts that MCPS has an obligation to implement the IEP as written.

MCPS admits that it did not provide the Student with three and one half hours per week in special education instruction in math outside the general education classroom as required by his March 24, 2015 IEP. Rather, MCPS asserts that it provided the Student with special

education instruction in the general education classroom in math which appropriately addressed his needs. MCPS notes that this same issue was the subject of a complaint the Parent filed with MSDE, that MCPS admitted its error and offered thirty-six hours of tutoring in math as compensation, and that MSDE found the error caused minimal educational impact and was resolved by the offered thirty-six hours of tutoring. MCPS contends that the issue before me is whether it provided the Student with FAPE when it provided him with special education instruction in the general education classroom. MCPS maintains that the Student received educational benefit and made significant growth in math. MCPS notes that the Student received what Dr. XXXX recommended in her report – small group instruction with 1:1 support – and that Dr. XXXX did not recommend pull out instruction for math. MCPS notes further that Dr. XXXX stressed the importance of the Student receiving instruction with typically developing peers. MCPS maintains that Dr. XXXX’s recommendation at the hearing that the Student should be pulled out for so many hours was unsupported by the evidence. MCPS argues that the Student was not denied FAPE, did not lose educational opportunity, and is not entitled to compensatory services.

### **Legal Framework**

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217 (2014). Accordingly, the Parent has the burden of proving it is more likely than not that MCPS failed to provide the Student FAPE when it provided the Student’s specialized instruction in the general education classroom rather than a separate classroom. For the reasons discussed below, I find in favor of MCPS.

The identification, assessment and placement of students in special education are governed by IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2016); and COMAR 13A.05.01. IDEA provides that all children with disabilities have the right to FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined FAPE as follows:

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

*Rowley*, 458 U.S. at 200-201 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. *See also A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the 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.*, 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 that student to receive some educational benefit. Recently, the United States Court of Appeals for the Fourth Circuit declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating 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).

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. *Rowley*, 458 U.S. at 202.

In addition to IDEA’s requirement that a child with a disability receive some educational benefit, the child must be placed in the “least restrictive environment” to the maximum extent appropriate, 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) (2014). Indeed, instructing children with disabilities with non-disabled peers is generally preferred, if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities

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 placement is better for the student but whether the school district has offered FAPE.

### **MCPS Provided the Student FAPE**

The issue in this case is limited to whether MCPS's failure to instruct the Student in math outside the general education classroom denied him FAPE. The evidence before me shows that the Student was provided FAPE.

Ms. XXXX was the Student's third grade general education teacher. Ms. XXXX XXXX was the Student's special education teacher during third grade. Ms. XXXX said that she consulted regularly with Ms. XXXX regarding the Student's math instruction. Ms. XXXX testified that she instructed the Student in math on grade level in small groups with preferential seating, extended time, hands on manipulatives, and the math vocabulary posted on the wall. She stated he needed a lot of support and additional practice and repetition to develop his understanding of math concepts. She noted that at the end of his second grade year he was performing some skills on the first grade level and some skills on the second grade level. She said that he performed on grade level on many assessments throughout the third grade year. She testified that during math the class was broken into four groups and that the Student worked in small groups that generally had two to three students but never more than six students. She stated the Student had a 1:1 paraeducator, XXXX XXXX, who assisted him in math, including helping the Student with self-regulation, anxiety, controlling the volume of his voice, and listening to him read word problems aloud. She said Ms. XXXX was a student in the process of

getting her degree in special education. She testified that the Student met three of his four math objectives. She explained that he needed additional support to solve word problems (the fourth objective); sometimes he could do them on his own but other times he needed support from her or Ms. XXXX. She testified that the Student definitely made progress on his math goal and objectives. She stated that she used strategies for the Student and other students during his math instruction. She identified the various tools she used to assess the Student's progress, including the MAP-M, exit cards, and in-class assessments and observations.

Ms. XXXX testified further that the Student benefited from being in the math class with his peers. She explained that he was exposed to reasoning language the other students were using and there were many strong students who consistently modeled appropriate skills. She noted the Student had socialization goals on his IEP. She described the students in the class as very compassionate toward the Student and said he developed friendships in class.

Ms. XXXX explained that before the Student started third grade, she discussed the Student's needs and the services he was receiving with his second grade teacher. She said the March 24, 2015 IEP was developed before he was her student. In the second grade, the Student was instructed in math in the general education classroom with a 1:1 aide. She stated the Student was meeting his goals and objectives in third grade math so she did not pull him out of the general classroom because it would not have been appropriate. She testified that she did pull out the Student daily for reading instruction for a total of six and one half hours per week. She said the Student was instructed in small groups with a 1:1 aide and follow up with Ms. XXXX. She stated the Student responded well to structure, enjoyed being part of the classroom, and wanted to do well. She testified that during the December 2015 IEP meeting the IEP team discussed that the Student was not being pulled out of the general classroom for math. She offered to pull the

Student out, evaluate him, and see if he qualified for pull out services. She apologized for the paperwork error, explaining that it was a “carry over mistake” from the second grade. She stated that she did not know why the Student’s IEP was not updated earlier to show that he did not need pull out services for math. She testified that she collaborated frequently with Ms. XXXX and Ms. XXXX. She said that small groups were the optimal setting for the Student and he did very well in math, including proficient and in progress ratings, that his MAP-M scores increased, and that he met his goals and objectives. She stated that Ms. XXXX is one of the best teachers she has worked with, she has great classroom management skills, runs her class smoothly and efficiently, and she has a lot of experience. She described Ms. XXXX’ class as very quiet, not loud and chaotic. She stated that Dr. XXXX observed the Student during his pull out reading instruction with her but did not observe him in his math class. She said that Dr. XXXX also observed the Student when he returned to his general classroom for the last ten minutes of the Literacy Reading and Writing Workshop before lunch and recess. She stated that the Student missed work during the pull out sessions and liked to use that time to complete his assignments.

Ms. XXXX XXXX testified that testing is anxiety provoking for the Student. She stated that his MAP-P and MAP-M scores show the Student’s growth from year to year. She said that the Student made progress during third grade and that he was instructed and assessed on grade level. She stated that it was beneficial for the Student to be in the general education classroom interacting with his peers and that he demonstrated progress in this setting. She testified that “rehab,” as suggested by Dr. XXXX, is not an educational term and that MCPS is charged with instructing students in the least restrictive environment. She said the Student received specialized instruction and support, which ensured he understood what he read and the math concepts. She stated MCPS tries to close achievement gaps but that there is no guarantee. She



agreed what is written on the IEP should be implemented. She stated that the Student does not need compensatory services. She explained that his in-class performance is higher than testing alone shows because he becomes very anxious during testing.

Dr. XXXX testified that the Student has autism and is high functioning. She stated his ADHD is really an inability to regulate himself and his attention. She said executive functioning is a weak area for him. She said that he is capable of learning on grade level but needs significant support. She stated that his cognitive scores have a lot of variability but are all within the average range. She said the Student mastered the 2.2 grade level in math on the WIAT - III. She noted the MAP-M is academically based and agreed that the Student made progress on the Common Core curriculum. She described the Student as happy, immature, enthusiastic, earnest, and wanting to please. She said he has difficulty sustaining conversation and following social cues. She described him as extremely anxious and said that his anxiety feeds his dysregulation, which then increases his anxiety. She said he thrives with structure and routine and is more comfortable when he knows what is going to happen. She stated during testing the Student was interested, willing, and in constant motion. She said as the work became more challenging he became more anxious and dysregulated and that she had to use all of her “tricks” to get him to complete the assessments. She testified that she observed the Student in the resource room and that he was on task ninety percent of the time but as the tasks got harder he became more unsettled, getting up, tapping on the desk, and dropping things on the floor. She said she also observed the Student in his general education class working on his animal habitat project. She said the teacher gave the Student 1:1 assistance with the computer and that it took him a long time to get on task; he was more interested in going to lunch and recess. In her report and at the hearing, she recommended a supportive environment, that all of the Student’s academic

instruction be in small groups of six to eight students, and that he be reevaluated in six months. At the hearing, she testified that the Student had an educational gap in math and recommended that he receive intense compensatory services in math for a year to see how quickly he can close the gap. She recommended four thirty minute individual or small group sessions a week and an additional one hour small group session per week for one year as “rehab.” This recommendation was not in her report. She said the goal would be for the Student to be in the regular education classroom and work in a small group setting.

On cross examination, Dr. XXXX said that she looked at the Student’s IEP but did not know which one. She stated that she did not recall if math was an area of need. She admitted that she did not observe the Student in his math class. She said that she was not aware that the Student had a 1:1 paraeducator and did not see the aide with him during the general education class, lunch, or recess. She agreed that he benefited from exposure to typically developing peers. She said instructing the Student in small groups of six to eight students was appropriate if the environment was calm and quiet and his dysregulation was managed. She stated that in a chaotic, loud environment, six to eight students would be challenging and the teacher should follow up with episodes of 1:1 support.

I find Dr. XXXX’s recommendation for one year of compensatory services is unsupported by the evidence before me. Ms. XXXX and Ms. XXXX XXXX testified that the Student made progress on his goals and objectives in math in the general education setting. Ms. XXXX said the Student was performing on grade level with support and was proficient in third grade math. Dr. XXXX agreed the Student made progress in the curriculum. Dr. XXXX acknowledged that the Student was anxious during her testing. Ms. XXXX XXXX explained that the Student’s anxiety during testing would cause his test scores to be lower than his actual

classroom performance. The Student received small group instruction in math with supports, which is what Dr. XXXX recommended in her report. Based on the Student's progress in math, I conclude that the Student received some educational benefit from the specialized instruction he received in the general education classroom. In addition, I find that math instruction in the general education classroom was the least restrictive environment for the Student.

The error in this case was with the IEP written while the Student was in the second grade, which stated that he should be pulled out for math instruction three and one half hours per week. A child should be educated in the least restrictive environment. In this case, pulling the Student out of the general education classroom for math instruction would have been too restrictive. The Student was able to make academic progress in the general education classroom with specialized instruction and supports.

I am sympathetic to the Parent's concerns. The Student's IEP said that he should be pulled out for math instruction three and one half hours per week. Thus, it is understandable that the Parent is upset that the Student did not receive the instruction that the Parent thought he would receive. The Parent appropriately addressed his concerns to MSDE and he received a response in his favor. While the Parent is dissatisfied with that response, MSDE's complaint resolution is not before me.

I also understand the Parent's concern that the Student tests below grade level. However, the evidence shows that the Student's testing performance does not fully and accurately describe his academic ability. The Student's anxiety during testing impacts his performance on tests. According to teacher observations and in-class assessments, the Student was able to perform on grade level with specialized instruction and supports; thus, he received educational benefit. IDEA is designed to offer children with disabilities some educational benefit. IDEA does not

guarantee that a child's education will be maximized or that a child will perform or test on grade level.

The standard I must apply in this case is whether the Student was provided FAPE. The evidence before me shows that the Student made academic progress and received some educational benefit. I find that the Student was provided FAPE; therefore, he does not require compensatory services. Thus, MCPS is not required to provide the Student with 270 hours of outside math tutoring and is not required to reimburse the Parent for neuropsychological/achievement testing.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was provided FAPE; therefore, he does not require compensatory services in math. 20 U.S.C.A. § 1412(a)(1)(A), (a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i) (2014). *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015); *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004); *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983).

### **ORDER**

I **ORDER** that that the September 26, 2016 Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED**.

November 10, 2016  
Date Decision Mailed

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Lorraine E. Fraser  
Administrative Law Judge

LEF/sm

## **REVIEW RIGHTS**

Any party aggrieved by this Final 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) (Supp. 2016). 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.