

XXXX XXXX,

STUDENT

v.

PRINCE GEORGE’S COUNTY

PUBLIC SCHOOLS

\* BEFORE BRIAN ZLOTNICK,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-PGEO-OT-16-37653

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**DECISION**

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

**STATEMENT OF THE CASE**

On December 14, 2016, XXXX XXXX, legal guardian and grandmother (Grandmother, Parent or Ms. XXXX) of XXXX XXXX (Student), filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Prince George’s County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).<sup>1</sup>

I held a telephone prehearing conference on January 20, 2017. Marlon S. Charles, Esquire, represented the Student. Gail B. Viens, Deputy General Counsel, represented the PGCPS. By agreement of the parties, the hearing was scheduled for February 13 and February 14, 2017.

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

I held the hearing on February 13 and 14, 2017, at the RMS Building, 1400 McCormick Drive, Largo, Maryland. Mr. Charles represented the Student. Ms. Viens represented the PGCPs.

The December 14, 2016 Complaint marks the start of the thirty-day resolution period. 34 C.F.R.<sup>2</sup> § 300.510(b) (2016).<sup>3</sup> At the January 20, 2017 telephone conference, the parties indicated that they continued to work on a resolution after participating in a resolution conference on December 22, 2016. On January 11, 2017, the parties notified the OAH in writing that they were unable to resolve their dispute. During the January 20, 2017 telephone conference I informed the parties that January 11, 2017 is the triggering event of the forty-five day timeframe for a decision. 34 C.F.R. § 300.510(c)(2). This is because after the December 22, 2016 resolution conference, but prior to the expiration of the thirty-day period, the parties provided the OAH with written documentation on January 11, 2017 that no agreement was possible.

The hearing dates requested by the parties fell within forty-five days after the triggering events described in the federal regulations. My decision is therefore due on or before the forty-fifth day. In this case, the forty-fifth day is Saturday, February 25, 2017. My decision is therefore due by the last preceding business day, Friday, February 24, 2017. 34 C.F.R. § 300.510(a) and (c); 34 C.F.R. § 300.515(a).

The Grandparent asserted in her complaint that an issue in this matter was PGCPs' failure to amend the Student's educational records and its failure to provide her with access to the Student's educational records, resulting in a denial of a free and appropriate public education

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

<sup>3</sup> All references to the C.F.R. are to the 2016 version.

(FAPE) for the Student. At the prehearing conference, PGCPS argued that this issue is not a proper issue under IDEA and thus should not be heard. I informed the parties that I would allow them an opportunity to offer a brief argument at the outset of the hearing regarding the appropriateness of this issue. After hearing initial arguments from both sides, I indicated that access to educational records is an IDEA issue under 34 C.F.R. 300.613, however, I asked Mr. Charles for further clarification of his client's claim regarding educational records as I found that he did not assert that their issue pertained to the denial of access to educational records prior to an individualized education program (IEP) meeting or prior to this hearing. Mr. Charles responded by indicating that he did not want to complicate this hearing and thus he decided to withdraw this issue. Accordingly, the hearing proceeded on the remaining issues outlined during the prehearing conference.

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; Maryland State Department of Education 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.

### **ISSUES**

The issues are:

- (1) Did PGCPS fail to evaluate the Student in all areas of suspected disabilities and, as a result, cause the Student to be denied a FAPE;
- (2) Did PGCPS fail to respond to the Parent's request for an independent educational evaluation (IEE) and, as a result, cause the Student to be denied a FAPE;

(3) Was the Student's 2016-2017 IEP appropriately designed to provide him with a FAPE; and

(4) Is the Parent entitled to the relief sought in the Complaint or other appropriate relief?

### **SUMMARY OF THE EVIDENCE**

#### Exhibits

Unless otherwise noted, I admitted the following exhibits on behalf of the Parent:

Parent<sup>4</sup> Ex. 1 - Neuropsychological Evaluation performed by XXXX XXXX, Ph.D., dated August 14, 2015

Parent Ex. 2 - NOT OFFERED INTO EVIDENCE

Parent Ex. 3 - NOT OFFERED INTO EVIDENCE

Parent Ex. 4-12 - Letter from Parent to Dr. XXXX XXXX, Principal of [School], dated November 10, 2016<sup>5</sup>

Parent Ex. 5-1 through 5-2<sup>6</sup> - I-Station Report, dated June 3, 2016, offered but not admitted into evidence after I sustained PGCPs' objection<sup>7</sup>

Parent Ex. 6 - NOT OFFERED INTO EVIDENCE

Parent Ex. 7 - NOT OFFERED INTO EVIDENCE

Parent Ex. 8 - NOT OFFERED INTO EVIDENCE

Parent Ex. 9 - Article titled, *Language Problems in Children with ADHD*, offered but not admitted into evidence after I sustained PGCPs' objection<sup>8</sup>

Parent Ex. 10 - NOT OFFERED INTO EVIDENCE

Parent Ex. 11 - NOT OFFERED INTO EVIDENCE

Parent Ex. 12 - Curriculum Vitae of Dr. XXXX

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<sup>4</sup> Parent exhibits were pre-marked by counsel as "P."

<sup>5</sup> Parent Exhibit 4 consists of various emails and letters and was numbered Parent Ex. 4-1 through Parent Ex. 4-48. Only Parent Exhibit 4-12 was offered into evidence, all of the other exhibits in Parent Ex. 4-1 through Parent Ex. 4-48 were not offered into evidence.

<sup>6</sup> Parent Exhibit 5 consists of various school-based assessments and was numbered Parent Ex. 5-1 through 5-31. Only Parent Exhibit 5-1 and 5-2 was offered into evidence, all of the other exhibits in Parent Ex. 5-1 through 5-31 were not offered into evidence.

<sup>7</sup> Not admitted due to Ms. XXXX's lack of expertise and training with the I-Station intervention program.

<sup>8</sup> Not admitted due to lack of foundation.

- Parent Ex. 13 - NOT OFFERED INTO EVIDENCE
- Parent Ex. 14 - Curriculum Vitae of XXXX XXXX
- Parent Ex. 15 - NOT OFFERED INTO EVIDENCE
- Parent Ex. 16 - NOT OFFERED INTO EVIDENCE – there is no exhibit attached to tab #16 in the Parent’s exhibit binder
- Parent Ex. 17 - IEP, dated November 2, 2016

Unless otherwise noted, I admitted the following exhibits on behalf of PGCPS:

- PGCPS Ex. 1 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 2 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 3 - Occupational Therapy (OT) assessment performed by XXXX XXXX, M.D., dated January 7, 2016
- PGCPS Ex. 4 - IEP, dated January 4, 2017
- PGCPS Ex. 5 - IEP, dated October 14, 2015
- PGCPS Ex. 6 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 7 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 8 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 9 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 10 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 11 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 12 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 13 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 14 - NOT OFFERED INTO EVIDENCE
- PGCPS Ex. 15<sup>9</sup> - Curriculum Vitae of XXXX XXXX, OTD, OTR/L and Curriculum Vitae of XXXX XXXX

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<sup>9</sup> PGCPS Exhibit 15 is numbered 155-168 as it contains curricula vitae of various individuals. The curricula vitae of Dr. XXXX and Ms. XXXX were not offered into evidence.

PGCPS Ex. 16 - Occupational therapy logs from January 19, 2016 to January 4, 2017

PGCPS Ex. 17 - NOT OFFERED INTO EVIDENCE – NOT CONTAINED IN THE PGCPS' BINDER OF EXHIBITS

PGCPS Ex. 18 - Student's report cards for 2015-2016 school year and first quarter of 2016-2017 school year

PGCPS Ex. 19 - NOT OFFERED INTO EVIDENCE – NOT CONTAINED IN THE PGCPS BINDER OF EXHIBITS

PGCPS Ex. 20 - NOT OFFERED INTO EVIDENCE – NOT CONTAINED IN THE PGCPS BINDER OF EXHIBITS

PGCPS Ex. 21 - Assistive Technology Consult, dated December 6, 2016

### Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Ph.D., accepted as an expert in neuropsychology
- XXXX XXXX, Educational Advocate
- XXXX XXXX, Special Education Consultant, accepted as an expert in special education programming

The PGCPS presented the following witnesses:

- XXXX XXXX, School Psychologist, accepted as an expert in school neuropsychology
- XXXX XXXX, OT Instructional Specialist, accepted as an expert in OT
- XXXX XXXX, Special Education Teacher, accepted as an expert in special education
- XXXX XXXX, Special Education Instructional Specialist, accepted as an expert in special education
- XXXX XXXX, Instructional Supervisor

## **FINDINGS OF FACT**

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

### **BACKGROUND**

1. During the 2014-2015 school year, the Student attended XXXX School, a private school, for the first three quarters of the year. The Student finished his first grade year by being home schooled by Ms. XXXX for the fourth quarter of the year. (Testimony of Dr. XXXX).

2. The Student has congenital heart disease, which requires treatment with a cardiologist. (Testimony of Ms. XXXX).

3. In the summer of 2015, Ms. XXXX had concerns regarding the Student's attention, learning, fatigue, and level of alertness. The Student's cardiologist referred the Student to XXXX XXXX, Ph.D., ABPP-CN,<sup>10</sup> for an evaluation. (PGCPS Ex. 2; Parent Ex. 1).

4. On July 30, 2015, August 7, 2015 and August 14, 2015, Dr. XXXX conducted a neuropsychological assessment (Dr. XXXX's Report) of the Student. Dr. XXXX is not an educator and never observed the Student in a classroom setting. Her only interaction with the Student was during her July and August 2015 neuropsychological assessments. Dr. XXXX's Report indicated a provisional diagnosis of Attention Deficit Hyperactive Disorder (ADHD) for the Student. Dr. XXXX recommended a sleep study and a neurological evaluation to rule out lapses in her assessment regarding her ADHD diagnosis. She ultimately received those evaluations and modified her provisional diagnosis to a confirmed diagnosis of ADHD. Dr. XXXX did not notify PGCPS that her provisional diagnosis of ADHD for the Student was modified to a confirmed diagnosis. (Testimony of Dr. XXXX).

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<sup>10</sup> American Board of Professional Psychology – Clinical Neuropsychologist.

5. Dr. XXXX's Report indicated that language-based skills were a strength for the Student. The Student presented in the average range on measures of verbal reasoning and verbal fluency. The Student presented weaknesses in phonological processing which contribute to specific learning disabilities in reading and writing. He also presented significant weaknesses with attention and executive skills that involve working memory, planning and organization. The Student demonstrated substantial difficulty on tasks requiring sustained attention and also had significant difficulty when attempting to consider more than one idea at a time. The Student also has significant weaknesses with respect to visual-spatial, visual motor, and fine motor skills. (Testimony of Dr. XXXX; Parent Ex. 1; PGCPS Ex. 2).

6. Dr. XXXX made the following recommendations for the Student's school instruction:

- Small group setting of five to seven students for any academic instruction
- Research based specialized instruction for his core academic subjects such as reading, written language and mathematics
- Occupational therapy for a minimum of thirty minutes per week
- Receive a Functional Behavioral Assessment (FBA) and Behavioral Intervention Plan (BIP) to develop strategies to increase the Student's on task behavior
- Positive reinforcement, use of visual cues, proximity control in relation to where the Student is seated in class, providing breaks during instruction to deal with fatigue, and using graphic organizers

(Testimony of Dr. XXXX; Parent Ex. 1; PGCPS Ex. 2).

7. In August 2015, the Student enrolled in the second grade at [School] (School), a Prince George's County public school. Ms. XXXX provided the School with a copy of Dr. XXXX's Report and an IEP meeting was held in September 2015 to review Dr. XXXX's Report. The Student's teachers, Dr. XXXX XXXX, School Psychologist, XXXX XXXX, Special Education Teacher, and Ms. XXXX participated in the September 2015 IEP meeting. The IEP team reviewed Dr. XXXX's Report, the Student's educational records, teacher input, and



parental input before identifying the Student with a specific learning disability. (Testimony of Dr. XXXX and Ms. XXXX).

8. Dr. XXXX's Report provided sufficient evaluative data to determine the Student's learning disability. Dr. XXXX administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) which indicated a processing speed score of 77, which is in the low range and is indicative of the Student's need for support in reading fluency. Dr. XXXX also administered the Woodcock-Johnson Test of Achievement, Fourth Edition (WJ-IV) which indicated broad reading and math scores in the kindergarten range for the Student. Dr. XXXX found that the Student demonstrated attention problems when she applied a Child Behavioral Checklist. The Student requires supports and accommodations to reduce distractions in the classroom and to extend time limits for assignments and tests if he is distracted. (Testimony of Dr. XXXX and Ms. XXXX; PGCPs Ex. 2; Parent Ex. 1).

### **IEP AND STUDENT'S PERFORMANCE**

9. A draft IEP was written on October 14, 2015<sup>11</sup> and it was amended on November 2, 2016. The October 14, 2015 IEP contained the following accommodations and supplemental aids to address the Student's attention issues:

- Human reader to assist the Student in accessing curriculum
- Small group instruction within the classroom setting
- Use of a timer to assist Student in staying on task
- Frequent feedback to assist Student to stay on task and finish assignments
- Use of organizational aids – graphic organizers

(Testimony of Ms. XXXX; PGCPs Ex. 5).

10. The October 14, 2015 IEP was not implemented until Ms. XXXX signed it on January 8, 2016. (Testimony of Ms. XXXX).

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<sup>11</sup> This was the IEP that was utilized for the Student from January 2016 to January 2017.

11. The October 2015 IEP contained academic goals and objectives in math calculation; math problem solving; written language expression; and reading. The IEP also contained a behavioral goal in Self Management. The October 2015 IEP specified thirty minutes per day of classroom special education services for reading and thirty minutes per day of pull out (outside the classroom) special education services in reading. It also specified thirty minutes of special education services for math per day in the classroom. The Student would be in the general classroom setting at the School. The IEP also specified that the Student would receive OT one hour per month in related services. The Student started receiving services under the IEP on January 9, 2016, which continued for one year until January 8, 2017. (PGCPS Ex. 5). The October 2015 IEP and the January 2017 IEP both specified placement in the general education setting with services outside of the general education setting for 2.5 hours per week. (PGCPS Exs. 4, 5).

12. The Student's math calculation goal specified that by January 2017 he will develop functional math skills 80% correctly as measured by a classroom based assessment. The Student made sufficient progress to meet his math calculation goal during each of his progress reports on February 11, 2016, April 12, 2016, June 3, 2016, and November 2, 2016. As of November 2, 2016, when given a classroom-based assessment, the Student can add and subtract two-digit numbers without regrouping using his fingers as manipulative tools with 80% accuracy. (PGCPS Ex. 5).

13. The Student's math problem solving goal specified that by January 2017, while using supplementary aids and services, he will solve one and two-step word problems while using addition and subtraction within 100, 75% correctly as measured by teacher made assessments. The Student made sufficient progress toward meeting this goal during each of his progress reports on February 11, 2016, April 12, 2016, and June 3, 2016. In his April 12, 2016

progress report, it was noted that the Student was given a math numbers and operations and algebra curriculum-based assessment where he mastered his second grade goal with a score of 81% with no scribe or human reader accommodations. (PGCPS Ex. 5).

14. The Student's written language expression goal specified that by January 2017, he will write sentence/paragraphs by recalling information from experiences or gathering information from provided sources to answer 80% of the multiple and constructed response questions correctly. The Student made sufficient progress to meet this goal during each of his progress reports on February 11, 2016, April 12, 2016, June 3, 2016, and November 2, 2016. As of November 2016, when the Student was asked to recall information from text and video presented to him he was able to write the main idea and give at least two supporting details with 80% accuracy. (PGCPS Ex. 5).

15. The Student's reading goal specified that by January 2017 he will read grade level texts with 90% accuracy as measured by teacher assessments over two out of four trials. The Student made sufficient progress to meet this goal during each of his progress reports on February 11, 2016, April 12, 2016, June 16, 2016, and November 2, 2016. As of November 2016, the Student was able to read 38 out of 42 sight words for third grade with automaticity. (PGCPS Ex. 5).

16. The Student's behavioral-self management goal specified that by January 2017, when given supplementary aids and services, he will complete and submit his homework/classwork in a timely manner. The Student made sufficient progress to meet this goal during each of his progress reports on February 11, 2016, April 12, 2016, June 3, 2016, and November 2, 2016. As of November 2016, the Student still needed adult support in order to complete his work. (PGCPS Ex. 5).

17. During the 2015-2016 school year, the Student received the following grades in reading:

- 1<sup>st</sup> quarter – Reading – “C”
- 2<sup>nd</sup> quarter – Reading – “C”
- 3<sup>rd</sup> quarter – Reading – “A”
- 4<sup>th</sup> quarter – Reading – “B”

(PGCPS Ex. 18).

18. During the 2015-2016 school year, the Student received the following grades in math:

- 1<sup>st</sup> quarter – math – “C”
- 2<sup>nd</sup> quarter – math – “B”
- 3<sup>rd</sup> quarter – math – “C”
- 4<sup>th</sup> quarter – math – “B”

(PGCPS Ex. 18).

19. The Student received “B”s and “A”s in the fourth quarter of the 2015-2016 school year in all of his non reading and math classes. In the first quarter for the 2016-2017 school year, the Student received an “A” in math, a “B” in reading, and “A”s and “B”s in all of his other subjects. (PGCPS Ex. 18).

20. The Student was identified as being below grade level in reading during all four quarters of the 2015-2016 school year and the first quarter of the 2016-2017 school year.

(PGCPS Ex. 18).

21. The Developmental Reading Assessment (DRA) was administered to the Student throughout the 2015-2016 and the 2016-2017 school years to measure his reading grade level. In September 2015, the Student’s DRA level was 6, which placed him at a beginning of first grade level. On January 11, 2016, the Student’s DRA level increased to a level of 10. His DRA level increased to a level of 20 by April 18, 2016 and was at a second grade level of reading by the end of the 2015-2016 school year. By December 1, 2016, the Student tested at a level of 30 on the

DRA which placed him in a middle of third grade level for reading. (Testimony of Dr. XXXX and Ms. XXXX).

22. During the 2015-2016 school year, the Student's reading intervention program was the I-Station program. The Student demonstrated a decline from a 2.3 grade equivalency on the I-Station program in April 2016 to a 1.6 grade equivalency when tested on I-Station on June 7, 2016. During the June 7, 2016 I-Station test, the Student took the test in the classroom without any assistance to reduce distractions. The Student was re-administered the I-Station test on June 16, 2106 under teacher controlled protocols that assisted his ability to focus and slow down while taking the test and his result was a 2.3 grade equivalency. (Testimony of Ms. XXXX).

23. The I-Station data indicated that the Student made progress in all areas of reading during the 2015-2016 school year except in the area of fluency. The IEP team determined in June of 2016 to move the Student from the I-Station reading intervention program to the SPIRE reading intervention program, which addresses fluency in a different manner. The Student began the 2016-2017 school year at level one in the SPIRE program and progressed to a level three by January 2017, which reflects progress. (Testimony of Ms. XXXX).

24. In September 2015, the Student did not present any external behavioral issues in which his behaviors disrupted his and other students' ability to learn in the classroom setting. The Student has an inattentive presentation and not a hyperactive presentation. The IEP team in September 2015 determined that an FBA was not necessary because there was no need to address any consequences of the Student's behavior. The Student's IEP addressed his focus and attention issues. (Testimony of Dr. XXXX).

25. The IEP also specified Extended School Year (ESY) services for the Student in the areas of written language expression and reading for five hours per week for a total of four weeks of services. (PGCPS Ex. 5).

26. The Student benefited from his placement in a least restrictive environment (LRE). His inclusion in the general education setting allowed him to peer model non-disabled students in his classes. (Testimony of Dr. XXXX and Ms. XXXX).

### **REQUEST FOR EVALUATIONS AND INDEPENDENT EDUCATIONAL EVALUATIONS**

27. Dr. XXXX's Report made no recommendations for any additional educational or related services testing of the Student. (PGCPS Ex. 2; Parent Ex. 1).

28. During a November 24, 2015 IEP meeting, the IEP team determined that an OT assessment would be ordered. On December 8, 2015, December 15, 2015, and January 7, 2016, Dr. XXXX XXXX, OT.D, OTR/L, Occupational Therapist, conducted an OT assessment of the Student. Dr. XXXX followed established protocol for best practices during her assessment by following the following steps:

- Began the assessment with a record review
- Performed several observations of the Student in the natural learning environment (classroom)
- Observed the Student's motor skills – how he physically manipulates objects in his environment
- Examined the Student's processing skills – quality of the output of his performance of tasks
- Analyzed the Student's social interaction skills and how it relates to his role as a student in the context of his classroom
- Analyzed how the Student performed routines and roles in the classroom setting
- Selected standardized testing tools to test his visual motor integration and to gauge his fine motor skills

(Testimony of Ms. XXXX; PGCPS Ex. 3).

29. OT strategies that are implemented in the Student's IEP to address his attention and focus issues include movement breaks, use of visual cues, use of a timer, and positioning the

Student in close proximity to the instructor. (Testimony of Ms. XXXX; PGCPS Ex. 16, pages 1-14).

30. On February 5, 2016, Ms. XXXX filed a request for an IEE in the area of OT. PGCPS determined that Dr. XXXX's January 2016 OT assessment was adequate so it filed a due process hearing request to dispute Ms. XXXX's request for an IEE in OT. A mediation of the dispute was held on March 30, 2016 which resulted in an agreement and the due process complaint filed by PGCPS was withdrawn. (Testimony of Ms. XXXX).

31. During a September 13, 2016 IEP meeting, Ms. XXXX and Ms. XXXX made a request to PGCPS to conduct an educational assessment, neuropsychological assessment, and a speech/language assessment. The IEP team agreed to conduct these assessments but Ms. XXXX and Ms. XXXX expressed to Ms. XXXX that they did not want PGCPS staff to conduct the evaluations. Ms. XXXX and PGCPS agreed to move forward to a county IEP (CIEP) meeting. (Testimony of Dr. XXXX, Ms. XXXX, and Ms. XXXX).

32. On November 10, 2016, Ms. XXXX sent a letter to Dr. XXXX XXXX, Principal at the School, requesting an evaluation in the areas of speech and language, assistive technology, and education. Ms. XXXX also requested in this letter an IEE in the area of OT. (Testimony of Ms. XXXX; Parent Ex. 4-21).

33. PGCPS conducted an assistive technology consultation on or about December 6, 2016. (Testimony of Ms. XXXX; PGCPS Ex. 21).

34. PGCPS notified Ms. XXXX in December 2016 that it intended to defend its assessments as appropriate and a speech and language assessment was not considered. Ms. XXXX filed a due process hearing request on December 14, 2016 before PGCPS could file its due process hearing complaint. (Testimony of Ms. XXXX).

35. An IEP meeting was held on January 4, 2017, where an approved IEP was drafted. Many of the goals and objectives from the October 2015 IEP remained on this IEP. Ms. XXXX did not sign this IEP. (PGCPS Ex. 4).

## **DISCUSSION**

### **Motion for Judgement**

Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.12E:

#### E. Motion for Judgment.

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

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:

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

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

COMAR 28.02.01.12E is patterned after Maryland Rule 2-519, Motion for Judgment, and is the OAH equivalent. Rule 2-519 allows the court to proceed "as the trier of fact to determine the facts and to render judgment" at the end of the opposing party's case. In deciding a motion for judgment, the fact finder is not required to view the evidence in a light most favorable to the non-moving party. Md. Rule 2-519.

PGCPS moved for judgment as to the issues at the close of the Student's evidence stating the grounds for its Motion. The Student's attorney was given an opportunity to respond. PGCPS argued that since the Student has the burden of proof in challenging whether he was provided FAPE as set forth in *Schaffer v. Weast*, 546 U.S. 49 (2005), the Student failed to prove that the IEP was inadequate or that it failed to provide the Student with FAPE; that PGCPS failed to



evaluate the Student; and that it failed to properly address the Student's IEE request. The Student's attorney argued that Ms. XXXX testified that the Student is making little progress in his IEP goals and objectives; PGCPS failed to evaluate the Student in the area of math; and that PGCPS failed to file a due process complaint to dispute Ms. XXXX's November 2016 request for an IEE. I denied the PGCPS Motion for Judgment on all three issues of this case because the Student provided testimony and arguments regarding these issues in their case.

### **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 PGCPS failed to provide the Student a 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 PGCPS.

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 a 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 a FAPE.

### **FAILURE TO EVALUATE**

The Student argued that PGCPS failed to evaluate<sup>12</sup> him in all areas of suspected disabilities and as a result denied him FAPE. COMAR 13A.05.01.06E does state the following:

#### E. Reevaluation.

- (1) A public agency shall ensure that a reevaluation of each student with a disability is conducted in accordance with 34 CFR §§300.303 and 300.305 and Regulation .05 of this chapter:

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<sup>12</sup> Although the issue was listed as "failure to evaluate" in accordance with my prehearing conference order, Ms. XXXX's request for evaluations in this case is actually a request for re-evaluations as she provided Dr. XXXX's Report at the initial September 2015 IEP meeting and that report was considered the initial evaluation.

- (a) If the public agency determines that the educational and related services needs, including improved academic achievement and functional performance of the student, warrant reevaluation;
- (b) If the student's parent or teacher requests a reevaluation; or
- (c) Before determining a student is no longer a student with a disability.

Ms. XXXX argued that at the September 2016 IEP meeting, she made a request for an educational assessment, neuropsychological assessment, and a speech and language assessment and the IEP team agreed to conduct those assessments. Ms. XXXX, however, did not provide consent for those assessments. Therefore, I find that without parental consent, PGCPs was unable to perform the assessments that Ms. XXXX requested.

However, Ms. XXXX also argued that PGCPs failed to respond to her November 10, 2016 request to evaluate the Student in education, speech and language, and assistive technology. Ms. XXXX, Instructional Supervisor, PGCPs, testified that PGCPs notified Ms. XXXX in December 2016 that it intended to defend its assessments as appropriate but that Ms. XXXX filed a due process hearing request on December 14, 2016 before PGCPs could file its complaint in defense of its actions. First, regarding the request for an assistive technology assessment, an assistive technology consult was performed in December 2016; therefore, I find that PGCPs met the Parent's request for an assistive technology evaluation. Yet, regarding Ms. XXXX's renewed November 10, 2016 request for a reevaluation of the Student's disabilities through educational, speech and language, and neuropsychological assessments, I find that PGCPs erred in failing to reevaluate the Student in the areas of education, neuropsychology, and speech and language in accordance with COMAR 13A.05.01.06E(1)(b). However, not every procedural violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002). "[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to

provide [FAPE].” *Id.*, (quoting *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997)); *see also MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery Cty.*, 340 F. Supp. 2d 603, 617 (D. Md. 2004).

I conclude that PGCPS’ failure to reevaluate the Student in the areas of education, neuropsychology, and speech and language did not establish a failure to provide FAPE. Neither of the Student’s expert witnesses, Dr. XXXX nor Ms. XXXX, discussed any need to perform further evaluations for any suspected disabilities presented by the Student. Dr. XXXX’s Report was a complete educational and behavioral assessment of the Student in which his issues regarding reading, written expression, math, attention, visual, and motor skills were addressed. Also, Dr. XXXX’s Report was performed in August of 2015, thus a reevaluation is not required due to staleness as three years have not elapsed since the issuance of her report. COMAR 13A.05.01.06E(2)(b). Further, Dr. XXXX, PGCPS psychologist, who reviewed Dr. XXXX’s Report and the Student’s educational records, participated in the Student’s IEP meetings and consulted with the Student’s general education teachers and special education teachers, testified that Dr. XXXX’s report provided sufficient evaluative data to determine the Student’s learning disabilities. Ms. XXXX, who was the Student’s special education teacher during the 2015-2016 school year and serves as his chairperson for the 2016-2017 school year with intimate knowledge of the Student’s educational strengths and weaknesses, also found that Dr. XXXX’s Report provided sufficient data to identify the Student’s learning disability. Ms. XXXX further asserted that PGCPS would have conducted the same educational evaluations performed by Dr. XXXX and that to repeat those tests months after they were performed would negatively impact its results. I placed greater weight with the expert testimony provided by Ms. XXXX considering her working relationship with the Student in the classroom and in his educational programing. Dr. XXXX and Ms. XXXX never observed the Student in the classroom setting. Further, Dr.

XXXX did not recommend any further diagnostic testing of the Student in her report.

The Parent presented an extensive argument regarding the failure by PGCPs to perform an FBA. The Parent asserted that Dr. XXXX recommended an FBA to address the impact of his attention issues in the classroom. Dr. XXXX testified that a lack of an FBA was impacting the Student's educational performance. She also asserted that the Student's primary weaknesses in the areas of attention and executive control could be addressed through an FBA.

Ms. XXXX testified that there is no need for an FBA because the Student does not exhibit any behaviors that interfere with his learning or other students' ability to learn in the classroom. Ms. XXXX went on to state that at the September 2015 IEP meeting she reviewed the Student's educational records and his teachers' observations and found no evidence of externalized behavior. She noted that the Student's attention issues could be addressed through the goals and objectives of his IEP and that an FBA would not be necessary.

Dr. XXXX also testified that the Student's attention issues were addressed in his IEP through accommodations and supplemental services that assist his ability to focus, such as extending time limits to complete tasks. Dr. XXXX also stated that the IEP team reviewed Dr. XXXX's request for an FBA but found no evidence of any behavioral issues exhibited by the Student in the classroom setting. Dr. XXXX explained that an FBA is ordered to address a student who has external behavioral problems such as aggressive behaviors, getting out of one's seat, and disrupting other students. Dr. XXXX further pointed out that generally an FBA addresses antecedents to behavior and consequences of behavior and since Dr. XXXX never identified an external behavior problem with the Student, there was no need for an FBA. Dr. XXXX also stated he examined the Student's inability to focus and his attention issues and found that those concerns were addressed in the Student's IEP without an FBA. Finally, Dr. XXXX noted that the Student has an inattentive presentation and not a hyperactive presentation. Dr.

XXXX stated that those students with a hyperactive presentation are more suited for an FBA. I placed more weight on Dr. XXXX's and Ms. XXXX's opinions regarding the need for an FBA than I did with Dr. XXXX's opinion as Dr. XXXX has no educational experience and thus lacks insight into how an IEP could still address the Student's underlying attention issues without the need for an FBA.

Regarding the request for a speech and language assessment, Dr. XXXX's Report noted that speech and language were clear strengths for the Student and therefore there was no evidence presented by the Student of a need for such testing. Further, I find that a full educational assessment was performed by Dr. XXXX and that her report was found to provide sufficient data to determine the Student's educational disabilities. The Student has made sufficient progress in his IEP goals of math, reading, written expression, and behavioral self-management, from the implementation of his IEP in January 2016 through December 2016. The Parent has not provided convincing evidence of any denial of the Student's receipt of a FAPE as a result of PGCPS' failure to reevaluate the Student in response to her November 2016 request.

#### **DID PGCPS FAIL TO RESPOND TO STUDENT'S REQUEST FOR AN IEE?**

On November 24, 2015, the IEP team determined that an OT assessment of the Student would be ordered. On December 8, 2015, December 15, 2015, and January 7, 2016, Dr. XXXX XXXX, Occupational Therapist, PGCPS, performed an OT assessment of the Student. On February 5, 2016, Ms. XXXX filed a request for an IEE in the area of OT. PGCPS determined that Dr. XXXX's January 2016 OT assessment was adequate so it filed a due process hearing/mediation request to dispute Ms. XXXX's request for an IEE in OT. A mediation was held on March 30, 2016 which resulted in an agreement and subsequent withdrawal of PGCPS' due process complaint. On November 10, 2016, Ms. XXXX sent a letter to Dr. XXXX XXXX, Principal at the School, requesting an IEE in the area of OT. PGCPS notified Ms. XXXX in

December 2016 that it intended to defend its January 2016 OT assessment but it failed to file a due process complaint before Ms. XXXX filed her due process complaint on December 14, 2016.

When a local education agency performs an evaluation of a student, the student's parents have the right to seek an IEE as a procedural safeguard. 20 U.S.C. § 1415(b)(1) (2010). However, the right to obtain an IEE at public expense is qualified. The federal regulations provide the following, in pertinent part:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

34 C.F.R. § 300.502(b).

The appropriateness of an evaluation, however, is not determined by the progress, or lack thereof, that a student experiences after being evaluated, or whether all parties agree with the findings and recommendations of the evaluation. The determination of the appropriateness of a student assessment consists of a review of the procedures, methodology, and assessment tools that are employed, and the qualifications of the evaluator, in accordance with the requirements of



the IDEA and its accompanying regulations. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 (3rd. Cir. 2012). While an evaluation should be tailored to the specific problems a potentially disabled student is experiencing, it need not be designed to identify and diagnose every possible educational disability. *Id.* at 250.

The regulations provide guidance in determining whether an assessment is appropriate. The regulations, at 34 C.F.R. § 300.304, require that certain standards be met when evaluating a child:

(b) Conduct of evaluation. In conducting the evaluation, the public agency must –

(1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child . . .

(2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and

(3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(c) Other evaluation procedures. Each public agency must ensure that –

(1) Assessments and other evaluation materials used to assess a child under this part—

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(5) Assessments of children with disabilities who transfer from one public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations.

(6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

(7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

Similarly, COMAR 13A.05.01.05C provides:

#### C. Assessment Materials.

(1) A public agency shall ensure that testing and assessment materials and procedures used to assess a student's need for special education and related services are:

- (a) Technically sound; and
- (b) Provided and administered in the student's native language or other mode of communication, in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to provide or administer.

PGCPS maintains that the issue here is very narrow – whether the OT assessment administered by PGCPS in December 2015 and January 2016 with a report completed in January

2016, meets the IDEA requirements outlined above. PGCPs contends that there are few requirements that must be met under the law, specifically: that the tests were administered by someone who is trained, qualified and experienced and that the test, itself, is an appropriate test, the instruments used to conduct the test were appropriate and were done in accordance with established testing protocols. PGCPs called XXXX XXXX, OT Instructional Specialist, to testify that all of the requirements under the law were met.

None of the Student's witnesses provided any testimony regarding the appropriateness of Dr. XXXX's January 2016 OT assessment.

Ms. XXXX testified that she manages over 50 OT therapists and that she occasionally conducts OT assessments as well. Ms. XXXX indicated that she has over 33 years of experience in OT. Her educational background includes a Bachelor of Science degree in OT and Psychology and a Clinical Doctorate in OT (Pediatric Focus). Ms. XXXX also has a Certificate in Special Education Administration and Supervision. PGCPs offered, and I accepted, Ms. XXXX as an expert in the field of OT.

According to Ms. XXXX, in her expert opinion: (1) the January 2016 OT report was appropriately used in the Student's IEP to develop goals and objectives to address his attention needs through the use of accommodations such as movement breaks, changing position data, close proximity to source of instruction; and (2) Dr. XXXX's assessment used a variety of assessment tools and followed industry standards for best practices. In particular, Ms. XXXX noted the following practices utilized by Dr. XXXX in her OT assessment of the Student:

- Began with a record review to help guide the assessment
- Performed several observations of the Student in his natural learning environment – the classroom
- Viewed the Student's motor skills – how he physically manipulated objects in his environment
- Observed the Student's processing skills – how he completes tasks
- Analyzed his social integration skills
- Analyzed the Student's performance of routines and roles in the classroom setting

- Selected standardized testing tools such as the Developmental Test of Visual-Motor Integration (VMI) and the Bruininks-Oseretsky Test of Motor Proficiency – 2<sup>nd</sup> Ed.
- Completed observations of his writing skills
- Made interpretations of what supports the Student’s participation and what barriers to participation exist
- Reviewed Dr. XXXX’s Report and assessed the Student in the areas of concern noted in the report, namely motor coordination skills

Ms. XXXX testified in her expert opinion that Dr. XXXX was licensed to administer the OT assessment and it was administered correctly and in standard conditions. Finally, Ms. XXXX testified that in her expert opinion, Dr. XXXX’s January 2016 OT assessment of the Student was appropriate.

The Student did not challenge the appropriateness of the OT assessment, *i.e.* the procedures, methodology, and assessment tools, employed by Dr. XXXX. The Student also did not object to the admission of Dr. XXXX’s OT assessment (PGCPS Ex. 3) into evidence. Accordingly, I find that PGCPS has proven that the OT assessment administered and prepared by Dr. XXXX in December 2015 and January 2016 was appropriate in accordance with the requirements of the IDEA and federal and State regulations. Therefore, I conclude that Ms. XXXX is not entitled to obtain an OT IEE at public expense. The Parent had an opportunity to call her own expert to refute the appropriateness of Dr. XXXX’s OT assessment, but declined to do so. As a result, the testimony of PGCPS’ expert witness, Ms. XXXX, stands unrebutted by any other expert testimony on this issue. I conclude that the testing and evaluation provided by PGCPS complied with the requirements of 20 U.S.C.A. §1415(b)(1); 34 C.F.R. §300.502; 34 C.F.R. §300.304; and COMAR 13A.05.01.05C.

**DID THE 2016-2017 IEP PROVIDE THE STUDENT WITH FAPE?**

Ms. XXXX and her witnesses raised several issues with regard to why they believed the Student’s IEP failed to provide him with a FAPE for the 2015-2016 and 2016-2017 school years: PGCPS failed to offer a smaller classroom setting for the Student; PGCPS failed to conduct an

FBA for the Student; the Student did not make educational progress in reading, written expression, and math; and PGCPs did not address the Student's attention issues.

Dr. XXXX, accepted as an expert in neuropsychology, testified that the IEP's placement of the Student in the general education setting for the majority of his school day would not be effective because his attention issues would limit his ability to learn. Dr. XXXX asserted that the Student should receive small group instruction with research-based intervention programs. She also noted that an FBA focusing on the Student's on task behaviors should be administered. Dr. XXXX further argued that the Student's primary weaknesses in attention and executive control should be addressed through the use of visual cues, proximity control, and breaks.

The Student's IEP, however, addressed all of Dr. XXXX's concerns. It provided accommodations and supplemental aids such as the use of a timer to assist the Student in staying on task, use of a graphic organizer, and frequent feedback to assist the Student with his assignments. The IEP also implemented small group instruction within the classroom setting. The IEP utilized the I-Station reading intervention plan during the 2015-2016 school year and the SPIRE reading intervention plan during the 2016-2017 school year. Further, the IEP team determined that an FBA was not necessary because the Student never presented any external behavioral issues that impacted his ability to learn. Dr. XXXX, accepted as an expert in school neuropsychology, asserted that FBAs are used to address antecedents to external behaviors so that those behaviors can be controlled. Dr. XXXX reiterated that there was no evidence from the Student's records or from his teachers' input that he displayed any external behaviors, thus an FBA was not necessary. Further, Dr. XXXX explained that the Student's attention and focus issues were addressed through the IEP programming. As Dr. XXXX has no educational experience and never observed the Student in a classroom setting, I place more weight on Dr. XXXX's assertions that an FBA was not necessary.

The Student next presented XXXX XXXX, Educational Advocate, who testified that in her opinion the Student was making little progress on the I-Station intervention program. Ms. XXXX was not qualified as an expert in the area of special education, in fact she was not offered as an expert in any field of study, as such, I placed little weight on her opinion of the sufficiency of the Student's progress.

XXXX XXXX, who was accepted as an expert in Special Education Programming, testified next on behalf of the Student. She contended that after reviewing the Student's I-Station report, he did not achieve grade level reading. Ms. XXXX also reviewed the Student's progress on the DRA and found that while he made some progress on accuracy, his comprehension scores regressed. Ms. XXXX also asserted that the Student presented at a kindergarten/1<sup>st</sup> grade level in the SPIRE program in September 2016 because he was at level one of that program.

Regarding the Student's regression on his I-Station score, this discrepancy was credibly explained by his 2015-2016 special education provider, Ms. XXXX, who testified that the Student's decline from a 2.3 grade equivalency (GE) in April 2016 to a 1.6 GE on June 7, 2016, was due to him taking the I-Station test without any aids to reduce distractions. When the Student was re-administered the test on June 16, 2016, under teacher controlled protocols to reduce distractions, he tested a 2.3 GE. Ms. XXXX further indicated that the Student made progress in all areas of reading during the 2015-2016 school year except in the area of fluency. The IEP team then decided to change the Student's intervention program to the SPIRE program, which addresses fluency in a different manner. Finally, according to Ms. XXXX, the Student made progress in the SPIRE program advancing from level one in September 2016 to level three by January 2017.

I also found Dr. XXXX's testimony regarding the Student's progress on the DRA compelling. The Student began his 2<sup>nd</sup> grade year in September 2015 at level 6 on the DRA, which placed him at the kindergarten/beginning 1<sup>st</sup> grade level. His DRA level only improved to level 10 by January 11, 2016. However, after his IEP services started on January 8, 2016, the Student demonstrated marked progress by increasing to level 20 on the DRA on April 18, 2016. By the end of the 2015-2016 school year, the Student was on a second grade level according to his DRA score. Further, by December 1, 2016, the Student tested at level 30 on the DRA, which placed him in a middle of third grade level. I found Dr. XXXX's and Ms. XXXX's testimony regarding the progress made by the Student under his IEP to be more convincing than Ms. XXXX' assertions. Additionally, I placed less weight on Ms. XXXX' interpretation of the Student's I-Station and SPIRE programs as she admitted during cross examination that she was never trained in those programs.

Ms. XXXX testified that she became the Student's legal guardian in 2009. She also stated that the Student has suffered from heart problems since birth and that his cardiologist indicated that there is a relation between his heart problems and developmental delay issues.

Regarding the IEP, Ms. XXXX indicated that she was familiar with its goals and believed that the Student was making little to no progress. She testified that she works closely with the Student on his school work and she believes that he does not know how to decode words. She also asserted that the Student is doing better with adding simple numbers but still struggles with word problems. She went on to state that the Student has not mastered his IEP goals.

Although I appreciate the commitment Ms. XXXX is making toward the Student's educational progress, she has no expertise in special education programing and therefore her assertions regarding the appropriateness of the Student's IEP carry less weight than the opinions expressed by Dr. XXXX, accepted as an expert in school neuropsychology, and Ms. XXXX,

who was accepted as an expert in special education. Dr. XXXX opined that the IEP was appropriate and that the Student is making meaningful educational progress. Ms. XXXX opined that the October 2015 IEP, which was implemented between January 8, 2016 and January 8, 2017, and the January 4, 2017 IEP were reasonably calculated to provide meaningful educational benefit to the Student. Dr. XXXX also testified that the January 4, 2017 IEP addressed the Student's areas of need.

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. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 533 (4<sup>th</sup> Cir. 2002) (internal quotation marks omitted). I find that PGCPS offered a FAPE to the Student in this case.

I understand and am sympathetic to Ms. XXXX's desire to do what she believes is in the best interest of her grandson. I also considered and am sympathetic to the Student's disabilities. Nonetheless, on the record before me, I am unpersuaded that the Student was denied a FAPE by PGCPS. As aptly described by the Fourth Circuit in *A.B. ex rel. D.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, PGCPS offered a FAPE to the Student in the least restrictive environment 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.



**IS THE PARENT ENTITLED TO RELIEF SOUGHT IN HER COMPLAINT OR OTHER APPROPRIATE RELIEF?**

The Parent failed to meet her burden to show that PGCPs denied the Student a FAPE through its programming and implementation of the IEP; by its failure to address her request for an IEE; and through any alleged failures to conduct evaluations to determine the Student's disability. Accordingly, the Parent is not entitled to the relief she sought in her complaint.

**CONCLUSIONS OF LAW**

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

(1) PGCPs was not entitled to judgment at the close of the Parent's case, COMAR 28.02.01.12E;

(2) PGCPs erred in failing to reevaluate the Student in the areas of education, neuropsychology and speech and language in accordance with COMAR 13A.05.01.06E(1)(b), but the Parent failed to meet her burden to show that this procedural error resulted in a denial of a FAPE for the Student, *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester Cty.*, 309 F.3d 184, 190 (4th Cir. 2002);

(3) The Parent is not entitled to an IEE in the area of OT, 20 U.S.C.A. § 1415(b)(1), 34 C.F.R. § 300.502, 34 C.F.R. § 300.304, and COMAR 13A.05.01.05C;

(4) PGCPs offered the Student a FAPE in the LRE during the 2015-16 and 2016-2017 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 (2015), *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); and

(5) The Parent is not entitled to any relief.

**ORDER**

I **ORDER** that PGCPS's Motion is **DENIED**; and

I further **ORDER** that the December 14, 2016 Due Process Complaint filed on behalf of the Student by the Parent is **DENIED** and **DISMISSED**.

February 24, 2017  
Date Decision Issued

\_\_\_\_\_  
Brian Zlotnick  
Administrative Law Judge

BMZ/emh

**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.