

XXXX XXXX,  
STUDENT

v.

FREDERICK COUNTY PUBLIC  
SCHOOLS

\* BEFORE DENISE OAKES SHAFFER,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH CASE NO.: MSDE-FRED-OT-11-14997

\* \* \* \* \*

**DECISION**

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

**STATEMENT OF THE CASE**

On April 18, 2011, XXXX and XXXX XXXX ([Father] and [Mother] individually, or Parents collectively), on behalf of their son, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH), requesting a hearing to review the identification, evaluation, or placement of the Student by Frederick County Public Schools (FCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1415(f)(1)(A) (2010). As relief, the Parents sought compensatory education in the form of reimbursement for tuition and costs for their unilateral placement of the Student at the [School 1] ([School 1]), reimbursement for transportation as a related service and continued placement at [School 1].

A Resolution Meeting was held on April 29, 2011, but the parties were not able to resolve the dispute. FCPS sent the OAH a Notice of Outcome of Resolution Meeting by facsimile on April 29, 2011.

Administrative Law Judge (ALJ) XXXX XXXX held a telephone prehearing conference on May 12, 2011. The Parents were represented by Mark B. Martin, Esquire. Jeffrey Krew,

Esquire, represented FCPS. Based on the availability of the parties, ALJ XXXX conducted a hearing on May 31, 2011, June 2, 6, 7, 9, 13, 14, 27, 28, and 29, 2011 and July 6, 2011. The record closed on July 6, 2011. The hearing dates requested by the parties fell more than 45 days after the April 29, 2011 Notice of Outcome of Resolution Meeting. As such, a decision could not be issued within 45 days pursuant to 34 C.F.R. §§ 300.510(b)-(c), 300.515(a) (2010).<sup>1</sup> The parties waived the 45-day requirement and agreed that ALJ XXXX would issue her decision within 30 days from the close of the record, or August 5, 2011. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2008).

On August 11, 2011 counsel for the Parents and FCPS participated in a telephone conference with Executive ALJ XXXX XXXX, Director of XXXX, and me. During that conference call, ALJ XXXX informed counsel that, as a result of a personnel matter, ALJ XXXX was unable to complete the decision in this case. ALJ XXXX proposed to counsel that (1) the case could be retried in front of another ALJ or (2) I would review the record, including the transcript and all exhibits, pleadings, motions and orders and issue a decision on the record. I represented to counsel that I would issue a decision on or before August 24, 2011. Both counsel expressed the need to confer with their clients before making an election and the conference call was reconvened on August 12, 2011, at which time counsel agreed that I should review the record and issue a decision. Mr. Martin stated that he was considering filing a motion to reopen the record to introduce certain documents that were offered at the hearing but excluded by ALJ XXXX. Mr. Krew objected. Mr. Martin filed such a Motion on August 19, 2011. On that same day, Mr. Krew opposed the Motion. For the reasons set forth in this decision, the request to reopen the record is denied. Consequently, my decision is based solely on the review of the evidence, testimony, pleadings and argument presented while the case was pending before ALJ XXXX.

---

<sup>1</sup> Based on the timeframes, the due date would have been June 13, 2011, Day 6 of the scheduled eleven-day hearing.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. § 1415(f); 34 C.F.R. § 300.511; Md. Code Ann., Educ. § 8-413(e)(1); 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 OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2010); COMAR 13A.05.01.15C, 28.02.01.

### **ISSUES**

1. Should FCPS' Motion for Judgment be granted?
2. Should the Parents' Motion to reopen the record be granted?
3. Was the Individualized Education Program (IEP) as implemented by FCPS in the spring of the 2008-2009 school year reasonably calculated to provide the Student with a free appropriate public education (FAPE)?
4. Was the IEP, as implemented by FCPS in the 2009-2010 school year reasonably calculated to provide the Student with a FAPE for his fourth grade year?
5. Was [School 1] an appropriate educational placement for the Student and, if so, are the Parents entitled to reimbursement of tuition and expenses, including transportation as a related expense, for their unilateral placement at [School 1] from March of 2010 through the 2010-2011 school year?
6. If FCPS failed to provide a FAPE for the school years in question, and if [School 1] is an appropriate educational placement for the Student, should continued placement at [School 1] for the 2011-2012 school year be ordered?

### **SUMMARY OF THE EVIDENCE**

#### A. Exhibits<sup>2</sup>

---

<sup>2</sup> Many exhibits that were listed in numerical order by the parties were either not offered or were excluded by ALJ XXXX. I reviewed only admitted exhibits. In this list I preserve the numbering system used during the hearing. Attached to this decision as App. A is the complete exhibit list, including those exhibits that were not admitted, as submitted by the parties.

The following Student exhibits were admitted:

- Student # 5 March 20, 2008 Hearing Assessment with Recommendations by XXXX XXXX
- Student # 6 Stanford Achievement Test, Tenth Edition (SAT-10) Results, April 2008
- Student # 7 Individualized Education Program (IEP) Team Meeting Notes, April 4, 2008
- Student # 8 Functional Behavioral Assessment, April 22, 2008
- Student # 9 IEP Team Meeting Notes, April 30, 2008
- Student # 10 Informal Observation by XXXX XXXX, May 14, 2008
- Student # 11 IEP Team Meeting Notes, June 12, 2008
- Student # 12 IEP – (Amended from 4-8-04 IEP), June 13, 2008
- Student # 13 IEP Amendment without IEP Meeting, September 4, 2008
- Student # 14 IEP – (Amended from 4-8-04 IEP), September 4, 2008
- Student # 15 IEP Amendment without IEP meeting, September 12, 2008
- Student # 16 Parents’ Concerns with Educational Program, October 28, 2008
- Student # 18 Neuropsychological Evaluation by XXXX XXXX, December 11, 2008
- Student # 19 Daily Schedule, 2008-2009 school year
- Student # 20 Tiered Reading Interventions, 2008-2009 school year
- Student # 21 IEP Goals – Quarterly Report, January 20, 2009
- Student # 22 Language Processing Evaluation by XXXX XXXX, January 28, 2009
- Student # 24 Mod-MSA – Appendix A, February 27, 2009
- Student # 25 Parent notes re: February 27, 2009 IEP Team Meeting, March 8, 2009
- Student # 26 Classroom Observation – Language Arts by XXXX XXXX, March 20, 2009
- Student # 27 Parental Input re: concerns with progress, March 23, 2009
- Student # 29 IEP Team Meeting Notes, March 24, 2009
- Student # 30 Parent notes re: March 24, 2009 IEP Team Meeting, May 15, 2009
- Student # 31 IEP Progress Report, March 25, 2009

- Student # 32 IEP Team Meeting Notes, April 28, 2009
- Student # 33 E-mail to XXXX XXXX from [Mother] re: sending additional information to be included in the IEP, May 8, 2009
- Student # 34 IEP, May 15, 2009
- Student # 35 IEP Team Meeting Notes, May 15, 2009
- Student # 36 Comprehension Strategy Assessment Results, June 10, 2009
- Student # 37 IEP Goals – Quarterly Report, June 12, 2009
- Student # 39 IEP (Amended from May 15, 2009 IEP), June 16, 2009
- Student # 40 Classroom Observation by [Mother], October 21, 2009
- Student # 41 Classroom Observation by [Mother], October 28, 2009
- Student # 42 Classroom Observation by XXXX XXXX, November 9, 2009
- Student # 43 Classroom Observation by [Mother], November 16, 2009
- Student # 44 Observation Report by XXXX XXXX, Ph.D., December 8, 2009
- Student # 45 Daily Schedule, 2009-2010 school year
- Student # 47 Observation Report by XXXX XXXX, January 13, 2010
- Student # 48 Reading Goals by XXXX XXXX, January 15, 2010
- Student # 49 IEP Team Meeting Notes, January 15, 2010
- Student # 51 IEP Team Meeting Notes, March 2, 2010
- Student # 52 IEP Team Meeting Notes, March 9, 2010
- Student # 53 Letter to Andrew Nussbaum, Esquire, from Mark Martin, Esquire, re: follow up on transportation services, March 29, 2010
- Student # 55 Observation Report – [School 1], by XXXX XXXX, May 27, 2010
- Student # 56 Classroom Observation – [School 1], by XXXX XXXX, May 27, 2010
- Student # 57 Progress Report – [School 1], June 15, 2010
- Student # 58 Progress Report – [School 1], October 5, 2010
- Student # 59 Classroom Observation – [School 1], by XXXX XXXX, November 9, 2010

- Student # 60 Observation Report – [School 1], by XXXX XXXX, November 19, 2010
- Student # 62 Progress Report – [School 1], January 6, 2011
- Student # 63 IEP Progress Report – [School 1], March 23, 2011
- Student # 65 Progress Report – [School 1], March 23, 2011
- Student # 66 Curriculum Vitae – [Mother]
- Student # 67 Curriculum Vitae – XXXX XXXX
- Student # 68 Curriculum Vitae – XXXX XXXX
- Student # 69 Curriculum Vitae – XXXX XXXX
- Student # 70 Curriculum Vitae – XXXX XXXX
- Student # 71 Curriculum Vitae – XXXX XXXX
- Student # 72 Letter from XXXX XXXX to Jeffrey Krew, Esquire,
- Student # 77 [School 1] Costs - Tuition and mileage
- Student # 78 AimsWebb Progress Monitoring Improvement Report, April 25, 2008
- Student # 79 IEP Team Meeting Minutes, April 15, 2008

The following FCPS exhibits were admitted:

- FCPS #1 Psychological Evaluation by XXXX XXXX, Ed.M., October 8, 2003
- FCPS #2 Initial Evaluation by XXXX XXXX, M.D., Center for XXXX, XXXX Institute, October 29, 2003
- FCPS #3 Follow-up Note by XXXX XXXX, M.D., Center for XXXX, XXXX Institute, July 14, 2004
- FCPS # 3-A Speech-Language Assessment by XXXX XXXX, MA, CCC-SLP, January 2005 through February 2005
- FCPS #4 Follow-up Note by XXXX XXXX, M.D., Center for XXXX, XXXX Institute, February 18, 2005
- FCPS #5 Psychological Evaluation by XXXX XXXX, Ed.M., March 14, 15, 16 and April 1, 2005
- FCPS #6 Speech/Language Re-Assessment by XXXX XXXX, MA, CCC-SLP, March 21, 2007

- FCPS #7 IEP Quarterly IEP Goal(s) Report, November 2, 2007
- FCPS #8 IEP Meeting Notes, January 25, 2008
- FCPS #9 Letter to XXXX XXXX from [Father], February 13, 2008
- FCPS #10 Educational Assessment Report by XXXX XXXX, Special Education Teacher, February 8 and 14, 2008
- FCPS #11 Occupational Therapy (OT) Assessment by XXXX XXXX, MS, OTR/L, February 26, March 18 and 28, 2008
- FCPS # 19 Letter to XXXX XXXX from [Mother], September 12, 2008
- FCPS # 20 E-mail between XXXX XXXX and XXXX XXXX, September 16, 2008
- FCPS # 23 IEP Team Meeting Notes, October 28, 2008
- FCPS # 25 Neuropsychological Evaluation by XXXX XXXX, Psy.D., XXXX Associates, December 3, 9 and 11, 2008
- FCPS # 26 Student Classroom Performance, November 20, 2008 through December 17, 2008
- FCPS # 30 IEP Quarterly IEP Goal(s) Report, January 20, 2009
- FCPS # 31 Letter from [Mother], January 21, 2009
- FCPS # 31A Contract between XXXX XXXX, Ph.D., and the Parents, undated
- FCPS # 33 IEP Meeting Notes, February 27, 2009
- FCPS # 38 Observation Notes by XXXX XXXX, March 20, 2009
- FCPS # 39 IEP Meeting Notes, March 24, 2009
- FCPS # 40 IEP Meeting Notes, March 31, 2009
- FCPS # 41 Second Quarter TeacherEase Grade Charts for 2008-2009 school year, undated
- FCPS # 43 Consultation Record with XXXX XXXX, July 22, 2008 through April 27, 2009
- FCPS # 45 AimsWebb Report for Comprehension and Standard Progress Monitor Passages, May 15, 2009
- FCPS # 49 E-mail to Parents from XXXX XXXX, June 10, 2009
- FCPS # 53 Third Grade Report Card, June 16, 2009
- FCPS # 57 Letter to [Mother] from Ms. XXXX XXXX, August 24, 2009

- FCPS # 59 E-mail to [Mother] from Karen XXXX, September 1, 2009
- FCPS # 61 E-mail to XXXX XXXX from XXXX XXXX, September 3, 2009
- FCPS # 62 E-mail to XXXX XXXX from XXXX XXXX, September 11, 2009
- FCPS # 77 IEP, January 15, 2010
- FCPS # 82 AimsWebb Report for Comprehension and Standard Progress Monitor Passages, March 5, 2010
- FCPS # 83 Fourth Grade Report Card for 2009-2010 school year, undated
- FCPS # 88 Communications with Parents Notebook for 2008-2009 and 2009-2010 school years, undated
- FCPS # 89 Data Binder for 2008-2009 and 2009-2010 school years containing data from XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX, undated
- FCPS # 97 Curriculum Vitae – XXXX XXXX
- FCPS # 98 Curriculum Vitae – XXXX XXXX
- FCPS # 99 Curriculum Vitae – XXXX XXXX
- FCPS # 100 Curriculum Vitae – XXXX XXXX
- FCPS # 101 Curriculum Vitae – XXXX XXXX
- FCPS # 106 Curriculum Vitae – XXXX XXXX
- FCPS # 107 Curriculum Vitae – XXXX XXXX
- FCPS # 110 Curriculum Vitae – XXXX XXXX
- FCPS # 111 Curriculum Vitae – XXXX XXXX
- FCPS # 117 Curriculum Vitae – XXXX XXXX
- FCPS # 118 Curriculum Vitae – XXXX XXXX
- FCPS # 121 E-mail between XXXX XXXX and Parents, February 25, 2011
- FCPS # 122 [School 1] Personnel Curricula Vitae for XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX
- FCPS # 123 FCPS Memorandum regarding Delivery and Documentation of Specialized Instruction for IEP Students, September 29, 2008, with Opinion of the Office of



the Attorney General, Maryland State Department of Education regarding Delivery of Instruction to Students with Disabilities, November 9, 1998

FCPS # 124 Curriculum Vitae for XXXX XXXX

FCPS # 125 Prompt Cards, undated

B. Testimony

The following witnesses testified on behalf of the Student:

- XXXX XXXX, Educational Specialist, accepted as an expert in special education
- [Mother], Parent, accepted as an expert in general education
- XXXX XXXX, Third Grade General Educator, FCPS
- XXXX XXXX, [School 1] Curriculum Coordinator, accepted as an expert in special education
- XXXX XXXX, Reading Specialist, accepted as an expert in reading
- XXXX XXXX, Ph.D., Speech and Language Pathologist, accepted as an expert in speech pathology
- XXXX XXXX, Special Education Teacher, FCPS
- XXXX XXXX, Psy.D., Psychologist, accepted as an expert in psychology

FCPS presented the following witnesses:

- XXXX XXXX, Reading Specialist, FCPS, accepted as an expert in reading instruction
- XXXX XXXX, Fourth Grade Language Arts Teacher, FCPS, accepted as an expert in elementary education
- XXXX XXXX, Special Education Instructional Assistant, FCPS
- XXXX XXXX, Teacher Specialist for Response to Intervention, Expert in Reading Instruction at the Elementary and Secondary School Level
- XXXX XXXX, Special Education Teacher, FCPS, accepted as an expert in special education and inclusion of children with autism in the general education setting
- XXXX XXXX, Third Grade General Educator, FCPS, accepted as an expert in elementary education

- XXXX XXXX, Special Education Instructional Assistant, FCPS, accepted as an expert in elementary education
- XXXX XXXX, Autism Cadre member, FCPS, accepted as an expert in special education with an emphasis in teaching students with autism
- XXXX XXXX, School Psychologist, FCPS, accepted as an expert in the field of school psychology
- XXXX XXXX, Special Education Coordinator, FCPS, accepted as an expert in special education
- XXXX XXXX, Special Education Teacher, FCPS, accepted as an expert in special education
- XXXX XXXX, Special Education Instructional Assistant, FCPS
- XXXX XXXX, Speech and Language Pathologist, FCPS, accepted as an expert in speech/language pathology

### **FINDINGS OF FACT**

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

1. The Student is currently eleven years old (born: XXXX, 1999) and has Pervasive Developmental Disorder (PDD), not otherwise specified, Attention-Deficit/Hyperactivity Disorder (ADHD) and mixed receptive/expressive active language disorder, reading disorder, math disorder, disorder of written expression and a developmental coordination disorder. (Student # 18; T. 6/22/11, XXXX, p. 417.)

2. The Student has deficits in processing speed, word retrieval, working memory, vocabulary knowledge, memory skills, oral comprehension and reading comprehension and has difficulty reading facial expressions. The Student is sensitive to noise and has difficulty making eye contact. The Student has difficulty maintaining his attention in the classroom.

#### **Educational background through second grade**

3. On March 25, 2002, the Student qualified for early intervention services based on a delay in the area of speech and language development.

4. The Student began attending school at [School 2] ([School 2]) in pre-kindergarten and remained at [School 2] through the fourth grade.

5. On October 8, 2003, XXXX XXXX conducted a psychological evaluation. The Student demonstrated difficulties in the areas of language and communication, reciprocal social interaction and play. The Student “demonstrate[d] symptoms associated with a pervasive development disorder.” (FCPS # 1, p. 8.) Ms. XXXX suggested that the Student would qualify for services as a student with autism.

6. At the time of this evaluation, the Student was receiving services through an IEP as a student with a speech/language impairment. The Parents did not want the Student’s disability coding changed to autism. After reviewing Ms. XXXX’s report and considering the input from the Parents, the IEP team did not change the coding to autism. The IEP continued to provide services for the Student according to his needs. The Student’s disability coding did not limit the services available for consideration.

7. On March 14 -16, 2005 and on April 1, 2005, Ms. XXXX conducted a second psychological evaluation. She administered the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III). The Student scored far below average, in the deficit range, on select measures of general intelligence. This finding is not indicative of the Student’s overall intelligence as the “*index scores are misleading given behavioral observations reflecting concerns with understanding of directions and concepts and the significant and unusual discrepancy noted within his performance abilities.*” (FCPS # 5, p. 5, emphasis in original)

8. On March 21, 2007, XXXX XXXX conducted a speech/language assessment over the course of five, 30-minute sessions. The Student has a language impairment with moderate weaknesses in receptive vocabulary and pragmatics. He demonstrates severe weaknesses in expressive vocabulary, syntax/morphology, the ability to follow oral directions with concepts and the ability to respond to questions with auditory information. (FCPS # 6.) This language

impairment impedes the Student’s ability to make educational progress in a general education setting, without interventions. His challenges include understanding verbal directions, expressing ideas verbally in class, reading comprehension, and interacting socially. (FCPS # 6 p. 6.)

9. On February 8, 2008 and February 14, 2008, XXXX XXXX, a special education teacher, administered the Woodcock-Johnson III, Tests of Achievement to the Student. The Student demonstrated a range of ability from average to very low, depending on the skill assessed as follows:

<b>Test</b>	<b>Description</b>	<b>Range/Score</b>
Letter-Word Identification	Measures the student’s word identification skill. The initial items require the student to identify letters that appear in large type. The remaining items require the student to pronounce words correctly. The student is not required to know the meaning of any word.	Average/94
Reading Fluency	Measures the student’s ability to quickly read simple sentences, decide if the statement is true and then circle Yes or No. The student attempts to complete as many items as possible within a 3-minute time limit.	Low Average/82
Passage Comprehension	Measures the student’s ability to match a pictograph representation of a word with the actual picture of the object, match a picture to a phrase or read a short passage and identify a missing key word.	Low Average/83
Word Attack	Measures skill in applying phonic and structural analysis skills to the pronunciation of unfamiliar printed words. The student is asked to produce the sounds for single letters or read aloud letter combinations that are phonetically consistent or regular patterns in English but are nonwords or low frequency words.	Very Low/69
Calculation	Measures the ability to perform mathematical computations. . . Calculations are presented in traditional problem format and the student is not required to make any decisions about what operation to use or what data to include.	Average/90
Math Fluency	Measures the ability to solve simple addition, subtraction and multiplication facts quickly. The student attempts to complete as many items as possible within a 3-minute time limit.	Low Average/85

Applied Problems	Requires the student to analyze and solve math problems. The student must listen to the problem, recognize the procedure to be followed and then perform relatively simple calculations.	Low/70
Quantitative Concepts	Measures knowledge of mathematical concepts, symbols and vocabulary. The test consists of two subtests: Concepts and Number Series.	Low Average/82
Spelling	Measures the ability to write orally presented words correctly.	Low/76
Writing Fluency	Measures skill in formulating and writing simple sentences quickly. Each sentence must relate to a given stimulus picture. The student attempts to complete as many items as possible within a 7-minute time limit.	Low/70
Writing Samples	Measures skill in writing responses to a variety of demands. Responses are evaluated with respect to the quality of expression. Errors in spelling, grammar and punctuation are not penalized.	Very Low/66

(FCPS # 10.)

10. At an April 4, 2008 IEP meeting, the team discussed concerns about the Student's slow rate of progress and the fact that the Student was not meeting fluency standards. (Student # 7.) On April 30, 2008, the Parents expressed concern that the Student was not making sufficient progress in the area of reading and that the gap between him and his peers was growing.

(Student # 9.)

11. On May 14, 2008, XXXX XXXX conducted an informal observation of XXXX XXXX, the Student's second grade general education teacher, during self-selected reading, whole class instruction and small group instruction. Ms. XXXX also observed the Student's one-on-one follow-up instruction with XXXX XXXX, the Student's second grade general education teacher, and part of an intervention class using a modified Soar to Success

intervention<sup>3</sup> by XXXX XXXX (previously known as XXXX XXXX), a special education teacher.

12. Throughout the observation, the Student had to be refocused and redirected by his teacher. Even after efforts were made to redirect him, he had a difficult time grasping the concepts. (Student # 10.) The Soar to Success program was too difficult for the Student. He needed many more prompts and redirection in the general education setting as opposed to the small group and special education classroom settings. He was not engaged in the lesson in the general education setting. (Student # 10; T. 5/31/11, XXXX, p. 274-276, 283.)

13. Ms. XXXX made several suggestions for the development of an instructional plan that would better meet the Student's needs. (Student # 10.) The June 12, 2008 IEP team discussed the recommendations. (T. 6/14/11, XXXX, p. 1999.)

14. During the June 12, 2008 IEP Team Meeting, the team agreed to incorporate Ms. XXXX's May 15, 2008 recommendation that the Student's reading intervention, Soar to Success, be replaced by a different intervention, Corrective Reading.<sup>4</sup> The Corrective Reading

---

<sup>3</sup> Soar to Success is a reading intervention for students in grades three to eight who are reading below grade level. With the use of a reciprocal teaching strategy, students are taught to use four cognitive strategies: summarizing, clarifying, questioning and predicting. (Student #20)

<sup>4</sup> Corrective Reading Decoding is designed to help a wide range of students in grades three through twelve who are performing below grade-level expectations in Reading, including students who are identified as educationally disabled. It was developed for students who frequently have difficulty with word identification, word omissions, additions and who misunderstand the relationship between the arrangement of letters in a word and the word's pronunciation. (Student #20)

program implemented as a result of the June 12, 2008 meeting primarily addressed decoding.

15. The team also decided to implement the Student's progress monitoring using AIMSWeb and MAZE, an assessment of comprehension. (T. 6/14/11, XXXX, p. 2006.) The Student made progress with his decoding skills as a result of the interventions implemented by the FCPS as well as structured private Orton-Gilliam tutoring provided by his Parents outside of the school setting. (T. 6/13/11, XXXX, p. 1739-1740.) His comprehension skills remained weak.

**The Student's third grade year: September 2008 through June 2009**

16. The Student's third grade weekly schedule included both general education and special education in the subject areas of reading fluency, art, science, social studies, language arts, Corrective Reading, math, vocabulary, music, and physical education. (Student # 19.)

17. The Student spent twenty-three hours and thirty minutes a week in the general education setting with the support of a one-on-one instructional assistant (IA). In the morning, the IA worked with the Student using research-based interventions for reading. In the afternoon, she worked with the Student on his language arts instruction.

18. The Student received daily Corrective Reading instruction from an IA. According to both the FCPS Tiered Reading Interventions as well as the Student's IEP, the Corrective Reading Program should have been administered primarily by the special educator, not the IA. (T. 6/14/11, XXXX, p. 2039.) It should have been implemented in a small group that meets daily for 45 minutes. (Student # 12, 20.) Nevertheless, the Student's decoding skills continued to slowly improve through third grade.

19. Beginning August 25, 2008, Ms. XXXX, Ms. XXXX and the IAs began maintaining a daily communication log to the Parents to track the Student's progress and need for prompting. By June 16, 2009, there were 211 entries in the communication log between the Parents and [School 2] staff documenting the Student's progress and the level of prompting required to perform the tasks during the 2008-2009 school year. The Student continued to need

assistance but was independent in some areas. The Student's need for prompting and adult assistance varied greatly from day to day and while he was independent on some days, he required a good deal of assistance on others. There is no indication of linear or cumulative progress in terms of lessening his dependence on adults. (FCPS # 88; T. 5/31/11, XXXX, p. 307-308.)

20. The Student made some progress in the third grade. Most notable, his decoding skills improved from first grade to end of second grade/beginning of third grade levels. (T. 6/14/11, XXXX, p. 2011, 2021.) The Student was able to read words at that level, but not able to comprehend what he was reading. (T. 6/9/11, XXXX, p. 1366.) In an assessment of comprehension, the Student scored 41% in November of the third grade school year and only 31% in April of third grade. (Student # 36; T. 5/31/11, XXXX, p. 211.)

21. In February of his third grade year, the IEP team determined that the Student would need to take the Modified Maryland State Assessment in the area of reading. (Student # 23, 24; T. 5/31/11, XXXX, p. 147-148, XXXX, p. 2794.)

22. The Student's IEP goals in the third grade year were achievable for the Student. The IEP team considered his ability as measured by his various assessments and his performance in the classroom when designing those goals. The goals did not seek to have him catch up to his grade level. They were commensurate with his cognitive functions. The IEP team reasonably calculated that the Student would be able to achieve these goals within the time period prescribed. (T. 6/9/11, XXXX, p. 1375.)

23. The Student did not make sufficient progress on 10 out of 15 of his IEP goals as follows:

GOAL 1: Given an instructional level text, [Student] will use his knowledge of letter/sound relationships and word structure to decode the word with 80% accuracy by 4/8/09.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 2: Given an on grade level test,	3/25/09 PROGRESS REPORT:



[Student] will read with 95% accuracy at a rate of 80-100 words correct per minute by 4/8/09.	Achieved
GOAL 3: Given an instructional level text, [Student] will answer a comprehension question orally and in written form with 80% accuracy or a score of 1-2 on a rubric by 4/8/09.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 4: [Student] will determine a strategy to use and solve a mathematical word problem in 4 out of 5 trials.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 5: Given a written assignment and a graphic organizer, [Student] will score 3 out of 4 on a writing rubric constructing a paragraph including a main idea with 3-5 supporting details by 04/08/09.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 6: [Student] will control language by applying the conventions of Standard English by 4/8/09.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 7: Given a sentence, [Student] will explain figurative language during a structured activity with visual and verbal prompts over three sessions by 4/8/09.	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal. Note: This goal was discussed at a progress meeting held on 2/27/09. At that time the team acknowledged that this goal was too difficult for [Student] to achieve.
GOAL 8: Given a story, event or task, [Student] will verbally respond to various question types using a complete sentence with visual and verbal prompting during a structured activity over three sessions by 4/8/09.	3/25/09 PROGRESS REPORT: Achieved
GOAL 9: Given a novel three-step oral direction, [Student] will sequentially follow it with verbal and visual prompts across various school settings by 4/8/09.	3/20/09 PROGRESS REPORT: Achieved
GOAL 10: Given a sentence with key words, [Student] will give a verbal response that shows comprehension of the key words across various school settings by 4/8/09.	3/20/09 PROGRESS REPORT: Achieved
GOAL 11: [Student] will independently formulate complete sentences or questions to respond to questions or share or request information during spontaneous speech over three sessions with 80% accuracy by 4/8/09.	3/20/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 12: Given a sentence, [Student] will identify unfamiliar words and verbalize novel sentences that show comprehension of word	3/25/09 PROGRESS REPORT: Not making sufficient progress to meet goal.

meaning during a structured activity over three sessions by 4/8/09.	
GOAL 13: [Student] will initiate interactions with peers and adults during casual activities with minimal prompting in 3 of 5 opportunities over a week by 4/8/09.	3/20/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 14: Upon being given a classroom activity to complete, [Student] will request repetition or rephrasing of directions when necessary to begin work during structured activities two times per week by 4/8/09.	3/20/09 PROGRESS REPORT: Not making sufficient progress to meet goal.
GOAL 14: Given fading verbal prompts and with adaptations (pencil grip, slant board and adapted software), [Student] will demonstrate the written communication skills needed when using written implements or the computer by 4/8/09.	3/27/09 PROGRESS REPORT: Achieved

(Student # 31.)

24. The Student's inability to achieve two thirds of these reasonable goals means that the Student did not make meaningful progress during his third grade year. In fact, his inability to achieve these goals, despite intervention, required the IEP team to reconvene to determine how they could address the Student's needs to ensure the Student received educational benefit in the future. (Student's # 31.)

25. Due to concerns that the Student was not making progress and was falling further behind his peers, the Parents engaged outside experts to evaluate the Student. FCPS considered the evaluations and opinions of the Parents' experts when developing an IEP for the end of third grade and for the fourth grade school year.

26. On December 3, 9, and 13, 2008, XXXX XXXX, Psy.D., interviewed the Student and [Mother] and directed XXXX XXXX, Psychologist Associate, to administer the portions or full batteries of the following tests:

- Australian Scale for Aspergers' Syndrome
- Achenback Child Behavior Checklist (parent and teacher forms)
- Behavioral Rating Inventory of Executive Functions (BRIEF) (parent and teacher forms)
- Category Fluency Test (CFT)

- Comprehensive Test of Phonological Processing (CTOPP)
- Controlled Oral Word Association Test
- Differential Ability Scales (DAS)
- Sentence Completion Test; Gilliam Autism Rating Scale – Second Edition (GARS-2)
- Gilliam Aspergers’ Disorder Scale (GABDS)
- Grooved Pegboard Test
- Lateral Dominance Examination
- Portions of the Developmental Neuropsychological Assessment – Second Edition (NEPSY-II)
- Rapid Automatized Naming Test (RAN)
- Rapid Alternating Stimulus Test (RAS)
- Rey Complex Figure Test (RCFT)
- Beery Developmental Test of Visual-Motor Integration (VMI)
- selected subtests of the Wide Range Assessment of Memory and Learning – Second Edition (WRAML-2)
- Woodcock-Johnson III (WJ-III)

(Student # 18.)

27. During the first day of testing, the Student frequently complained he was tired. By the end of the first day, the Student was crying and he was cranky. On the remaining two days of testing, the Student was frustrated and irritable.

28. The Student’s verbal composite score on the DAS was in the limited range and in the average range on the nonverbal components of the test. Ms. XXXX also administered the WJ-III. The Student demonstrated a range of ability from average to limited, depending on the skill assessed as follows:

<b>Test</b>	<b>Description</b>	<b>Score</b>
Letter-Word Identification	Measures the student’s word identification skill. The initial items require the student to identify letters that appear in large type. The remaining items require the student to pronounce words correctly. The student is not required to know the meaning of any word.	85
Reading Fluency	Measures the student’s ability to quickly read simple sentences, decide if the statement is true and then circle Yes or No. The student attempts to complete as many items as possible within a 3-minute time limit.	86
Passage	Measures the student’s ability to match a	75

Comprehension	pictograph representation of a word with the actual picture of the object, match a picture to a phrase or read a short passage and identify a missing key word.	
Word Attack	Measures skill in applying phonic and structural analysis skills to the pronunciation of unfamiliar printed words. The student is asked to produce the sounds for single letters or read aloud letter combinations that are phonetically consistent or regular patterns in English but are nonwords or low frequency words.	89
Calculation	Measures the ability to perform mathematical computations. . .Calculations are presented in traditional problem format and the student is not required to make any decisions about what operation to use or what data to include.	71
Math Fluency	Measures the ability to solve simple addition, subtraction and multiplication facts quickly. The student attempts to complete as many items as possible within a 3-minute time limit.	83
Applied Problems	Requires the student to analyze and solve math problems. The student must listen to the problem, recognize the procedure to be followed and then perform relatively simple calculations.	48
Spelling	Measures the ability to write orally presented words correctly.	81
Writing Fluency	Measures skill in formulating and writing simple sentences quickly. Each sentence must relate to a given stimulus picture. The student attempts to complete as many items as possible within a 7-minute time limit.	83
Writing Samples	Measures skill in writing responses to a variety of demands. Responses are evaluated with respect to the quality of expression. Errors in spelling, grammar and punctuation are not penalized.	71

(Student # 18.)

29. The changes in the WJ-III administered by Ms. XXXX and the WJ-III test administered in February 2008 by XXXX XXXX indicated that the Student's decoding skills had improved. This was consistent with the improvement seen in decoding by the Parents and FCPS staff during the third grade year. The Student declined, however, in letter-word identification

skills, calculation skills, spelling skills, writing fluency skills, reading comprehension skills and in applying mathematical concepts. (Student # 18, at p. 19; T. 6/2/11, XXXX, p. 470-480.)

30. On January 28, 2009, XXXX XXXX, Ph.D., completed a Language Processing Evaluation to assess the Student's communication and reading comprehension. The Student's overall verbal cognitive abilities fell in the limited range, while his nonverbal cognitive capabilities fell in the average range. (Student's # 22; T. 6/2/11, XXXX, p. 486, 498, 501.)

31. On March 20, 2009, XXXX XXXX, an educational consultant, observed the Student for three hours in a general education setting in Ms. XXXX's classroom. The instruction and the Student's interaction with the instruction that Ms. XXXX observed was strikingly similar to the instruction and interaction that Ms. XXXX observed almost a full year earlier. The Student did not engage in the material presented by the general education teacher because that material was too difficult. He did not read along with the story on Ben Franklin and he did not participate with his classmates in developing a timeline. The Student then began working in a small group with Mrs. XXXX in the back of the classroom. He did not interact with a partner and did not participate despite repeated prompting from the IA. When the Student moved to the special education classroom with one other student, he appropriately responded to the Corrective Reading lesson. As was the case during Ms. XXXX's observation in second grade, the Student was unengaged in the general education setting and the general education curriculum was not modified sufficiently to allow him to access it. (Student # 26; T. 6/9/11, XXXX, p. 1338-1340, 1344, 1351, 1358.)

32. The Student's evaluations, coupled with the fact that he had been receiving targeted intervention for several years without meaningful progress in any area other than decoding, suggested that he would need a highly structured, small group environment for his academic subjects. (Student # 18, 22; T. 6/2/11, XXXX, p. 499-501; T. 6/9/11, XXXX, p. 1354.) He also required direct instruction in social skills and social communication. (T. 6/9/11, XXXX,

p. 1362.) The IEP team considered the reports of the Parents' experts in March through June of 2009. The team relied on the reports and on the input of the authors of these reports when constructing an IEP for the Student.

33. Beginning with the March 24, 2009 IEP team meeting where the Student's disability code was changed from speech-language disability to multiple disabilities, a code that encompassed both a speech language disability and PDD/autism, through amendments made on June 16, 2009, the IEP team worked collaboratively and constructively to design an IEP that could address the Student's needs going forward at FCPS. The Parents, their experts and school personnel had lengthy and productive meetings. (T. 6/6/11, XXXX, p. 777, 806; T. 6/9/11, XXXX, p. 1380-1381.) An IEP with appropriate goals was developed. (Student # 39; T. 6/6/11, XXXX, p. 808, 945; T. 6/9/11, XXXX, p. 1381.)

**The Student's fourth grade year: September 2009 through March 2010**

34. The Student's fourth grade weekly schedule included both general education and special education in the subject areas of language arts, math, Corrective Reading, speech, social/emotional/behavior and specials, presumably art, music and physical education. The Student did not receive regular instruction in social studies or science. The Student's daily schedule was fractured and illogical. His instruction was divided up as follows:

<b>Times</b>	<b>Monday</b>	<b>Tuesday</b>	<b>Wednesday</b>	<b>Thursday</b>	<b>Friday</b>
9:00-9:30	Special Ed Speech Language Arts (LA) (Language for Learning) Outside – 1 on 1	Special Ed Speech LA (Language for Learning) Outside – 1 on 1	Special Ed Speech LA (Language for Learning) Outside – 1 on 1	Special Ed Speech LA (Language for Learning) Outside – 1 on 1	Special Ed Speech LA (Language for Learning) Outside – 1 on 1
9:30-9:45	Special Ed LA Outside 1 on 1	Special Ed LA Outside 1 on 1	Special Ed LA Outside 1 on 1	Special Ed LA Outside 1 on 1	Special Ed LA Outside 1 on 1
9:45-10:30	9:45-10:10 LA Inside General	Specials	Specials	Specials	Specials

	ed.				
10:00-11:20	10:10-10:30 Special ed. Math inside General ed. class  10:30-11:00 LA General ed.  11:00-11:20 Math General ed.	10:30-10:50 LA General ed.  10:50-11:20 LA Special ed. Outside	10:30-10:50 LA General ed.  10:50-11:20 LA Special ed. Outside	10:30-10:50 LA General ed.  10:50-11:20 LA Special ed. Outside	10:30-10:50 LA General ed.  10:50-11:20 LA Special ed. Outside
11:20-12:05	LA- Special ed. Corrective Reading Outside	LA- Special ed. Corrective Reading Outside	LA- Special ed. Corrective Reading Outside	LA- Special ed. Corrective Reading Outside	LA- Special ed. Corrective Reading Outside
12:10-1:00	Recess/Lunch	Recess/Lunch	Recess/Lunch	Recess/Lunch	Recess/Lunch
1:00-1:30	Math –General ed.	Math – General ed.	Math – General ed.	Math – General ed.	Math – General ed.
1:30-2:00	Science/Social Studies General ed.	Math – General ed.	Math – General ed.	Math – General ed.	Math – General ed.
2:00-2:30	Specials	2:10-2:30 Math- Special Ed. Inside	2:10-2:30 Math- Special Ed. Inside	2:10-2:30 Math- Special Ed. Inside	2:10-2:30 Math- Special Ed. Inside
2:30-3:20	Specials	Speech Outside	2:30-2:45 LA Special ed. Outside  2:45-3:15 Social/ Emotional/ Behavioral Outside	2:30-2:45 LA Special ed. Outside  2:45-3:15 Social/ Emotional/ Behavioral Outside	2:25-3:20 Speech Outside

(Student # 45.)

35. With the exception of recess, lunch and specials, the Student’s participation in the general education setting was minimal. He was transitioned from one service and activity to another. He had seven transitions per day and as many as 12 different instructional segments

per day. (Student # 45, 51.) The Student has difficulty with transitions and changes. (T. 6/2/11, XXXX, p. 451.) He only received academic instruction in language arts and math.

36. The Student's IEP was not implemented in such a way as to permit him to make meaningful progress on his IEP goals or to obtain educational benefit. The IEP called for five 30-minute sessions of speech and special education services to be delivered in tandem by the speech pathologist and the special educator. (T. 6/27/11, XXXX, p. 2431-2432.) The special educator/IA and the speech therapist did not co-teach the Language for Learning Program as anticipated. Rather, they merely took turns reading the script provided by the program. (T. 6/29/11, XXXX, p. 3072.) Neither teacher brought her particular expertise to bear in the Language for Learning unit; the program required high fidelity to a script. (T. 6/6/11, XXXX, p. 811-815; T. 6/9/11, XXXX, p. 1384-1387.) During the Student's one-on-one LA program, he continued to require many prompts to engage in the lesson. (Student # 42.)

37. The Student left some general education lessons in mid-stream and joined other lessons in progress. (T. 5/31/11. XXXX, p. 219-223; T. 6/29/11, XXXX, p. 2995-3001; T. 6/9/11, XXXX, p. 1389-1402.) He was not able to access or even be exposed to the general education curriculum in language arts because of the timing of his receipt of other services. (Student # 40, 41, 42, 43.) While some of his math instruction was fractured, he was regularly exposed to a full general education math lesson. (Student # 41.)

38. The Student went to science and social studies on Monday but missed the other days of the week that the general education students were engaged in those lessons because he was receiving other services. (T. 5/31/11, XXXX, p. 228.) Because the Student was only present for one out of five lessons, he could not receive a grade for those classes and likewise, he did not participate in or have access to the general education curriculum in these subjects. (Student # 45, FCPS # 83.) Consequently, he did not realize any educational benefit in the areas



of science and social studies in his fourth grade year.<sup>5</sup>

39. Because of the fractured nature of the Student's schedule and the frequency with which he was required to move from place to place and from lesson to lesson, the Student was not exposed to a clear sequential lesson plans in any of his general education classes. (Student # 42, 45.)

40. The Student received the allocated number of service hours indicated on his IEP. None of the Student's interventions involved small group instruction by a special educator. The Student was either in a general education class assisted by an IA and not engaged in the grade level lesson, in a small group session within a general education class taught by a general educator, or by himself, receiving targeted services. (T. 6/9/11, XXXX, p. 1387, 1409-1412.)

41. On some days, the Student appeared to make some progress with independently interacting with other peers during lunch and recess. However, the progress was inconsistent. (FCPS # 88.)

42. At the January 15, 2010 IEP meeting, the Student's teachers reported that he was making progress based on AIMSWeb assessment charts. The assessment did demonstrate that the Student was making progress in decoding and that he had improved to the third grade level for decoding. The Student was being assessed on the second grade level for comprehension. (Student # 49; T. 6/14/11, XXXX, p. 1988-1989, 2096.) While the Student was on target to meet his goals, based on averages, the Student's progress in comprehension was inconsistent and irregular as is illustrated by the following chart:

(FCPS # 82; *see also* T. 6/29/11, XXXX, p. 2387-88.)

43. At the January 15, 2010 IEP meeting, the Parents expressed concern about the fractured nature of the Student's day and the lack of coordination in the delivery of his services.

---

<sup>5</sup> This is particularly unfortunate as the communications binder for the third grade year documented the Student's enjoyment of and engagement in the hands-on activities provided in his science class. He is also described as being engaged and active during curriculum-related field trips to museums as well as to the science center. (FCPS # 88) *See also* (T. 5/31/11, XXXX, p. 281.)

The Parents also expressed concern that the way that services were being implemented left the Student without a peer group. (Student # 49.) Finally, the Parents expressed concern at the pace of progress.

44. The team discussed whether the placement was appropriate. Given the manner in which the IEP was being implemented, it was clear that the team's goal of inclusion in the general education classroom for academic subjects, other than math, was not being effectuated. The team did not discuss the next level of restriction in the continuum of placement at this meeting and did not address whether the Student's needs could be met in a self-contained classroom for academics with inclusion for recess/lunch and specials. Rather, the team decided to adjourn to convene a County IEP meeting to discuss whether [School 2] was an appropriate placement. (Student # 49.)

45. At an IEP meeting on March 2, 2010, the team reviewed the issues of progress and the delivery of services as follows: The Student made inconsistent progress in the area of reading comprehension. Reading comprehension was being assessed at the second grade level. The Student was close to being proficient in decoding and fluency on third grade material. (Student's # 51.) He was not meeting any standards on fourth grade level texts. The Student made some progress on social interactions on the playground, but that progress was inconsistent from day to day. The Student was not able to build on previous interactions and demonstrate progressive improvement. Some days he did well, other days he did not. (Student # 51.)

46. The Student required a small group setting for academic subjects where language could be consistently modified. He required instruction in language arts, math, social studies and science in a setting that would allow delivery of language and social skill services in context. (T. 6/27/11, XXXX, p. 2482.) The Student did not require segregation from his peers for nonacademic subjects such as art, gym, music, lunch and recess. (T. 6/6/11, XXXX, p. 947.) No such placement was considered by the March 2, 2010 IEP team.

47. The Parents informed FCPS that they were enrolling the Student in the [School 1]. They requested that FCPS fund the placement. The County IEP team met on March 9, 2010 and determined that the Student was receiving the appropriate level of services and that [School 2] was an appropriate placement. No other options on the continuum of placements were discussed.

48. On March 9, 2010, the Student was enrolled at [School 1].

49. On March 29, 2010, the Parents requested that the Student be allowed to ride a FCPS bus that transported another FCPS child to [School 1]. The Parents stated that they would transport the Student to the bus stop used by the other child and pick him up there as well. FCPS refused to allow the Student to access the FCPS transportation to [School 1]. (Student #53.)

50. [School 1] is a MSDE approved nonpublic school that provides instruction for students with disabilities including speech and language impairment and autism. Autism is the disability that affects the largest number of students at [School 1].

51. [School 1] offers a small class setting for all academic subjects, including science and social studies. Its curriculum is “wedded to the State curriculum in all areas.” (T. 6/7/11, XXXX, p. 1078.) The classes are tailored to the Student’s academic abilities and the speech and social skills training and support are embedded in the day-to-day learning. The Student is engaged in a small group setting and does not spend time by himself with a one-on-one aide. (Student # 55, 56, 59, 60.)

52. The Student’s social integration at [School 1] has been successful. He has participated in school activities, including performing in school productions.

53. The Student participates in “XXXX” activities at the school. The XXXX focuses on real world skills and translates what students are learning through the week in reading, writing and math into a real world experience. The Student is also able to practice the social skills training that is embedded in all of the instruction at [School 1] in this real world setting.

54. The Student has an IEP at [School 1] that meets his needs. [School 1] is an

approved nonpublic school that serves children with PDD/autism and speech language impairment.

55. The Student is a child with PDD and speech language impairment.

## DISCUSSION

### **I. FCPS Motion for Judgment is denied.**

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 the 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 Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Md. Rule 2-519 "allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact." *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). In deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

When a state receiving IDEA funding fails to provide a FAPE, the child's parent may remove the child to a private school and then seek tuition reimbursement from the state. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). Under the IDEA, parents who

unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington* at 373-374). A parent may recover only if (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs.

FCPS argued that the Motion should be granted because the Parents failed to prove that the Student was making progress at [School 1] and that [School 1] was an appropriate placement. Given the position of FCPS, solely for purposes of the Motion, I will assume that the Parents have met their burden of proving that FCPS denied their child a FAPE.

The Parents placed the Student at [School 1] after disagreeing with the implementation of the IEP in place during the Student's fourth grade year. [School 1] offers a small class setting for all academic subjects, including science and social studies. Its curriculum is "wedded to the State curriculum in all areas." (T. 6/7/11, XXXX, p. 1078.) The classes are tailored to the Student's academic abilities and the speech and social skills training and support needed by the Student are embedded in the day-to-day learning. The Student is engaged in a small group setting and does not spend time by himself with a one-on-one aide.

While school systems are required to provide a FAPE in the least restrictive environment (LRE), private placements only have to be proven appropriate. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). FCPS repeatedly raised the issue of LRE in this context. Each witness for FCPS opined that [School 1] was not appropriate because the Student could benefit from conversation and social interaction with non-disabled peers. Each FCPS witness offered the opinion that [School 1] was not appropriate because it was not the LRE in which the Student could obtain educational benefit. A good deal of time was spent on whether it is better for the Student's language and social skills development for the Student to be exposed to the language of typically-developing peers as opposed to the language of peers with the similar language

abilities as the Student. FCPS argued extensively that the Student would benefit from being exposed to the language of typically-developing peers. While I agree that the Student could have been educated in a LRE than [School 1], that inquiry is irrelevant to this Motion. Once the Parents meet their burden of proving that FCPS denied a FAPE to their child, LRE is not a requirement for private placement.

Ms. XXXX, who oversees curriculum coordination at [School 1], testified about [School 1]'s program. [School 1] is a MSDE approved nonpublic school<sup>6</sup> that provides instruction for students with disabilities including speech and language impairment and autism. PDD/autism is the disability that affects the largest number of students at [School 1]. The Student has an IEP at [School 1] that meets his needs. [School 1] is a nonpublic school that served children with PDD/autism and speech language impairment. The Student is a child with PDD and speech language impairment. [School 1] is an appropriate placement for the Student.

While the inquiry could end there, FCPS spent a considerable amount of time arguing that the Parent failed to prove that the Student was making progress at [School 1]. The Parent does not have this burden.<sup>7</sup> A decision on the appropriateness of a unilateral placement can be made on the first day that a student matriculates at the placement. Parents are not required to wait to file a due process hearing complaint seeking reimbursement until the student has succeeded in the new school. The Parents could have filed the request immediately.

Nevertheless, the Parents have demonstrated that the Student is making progress at [School 1]. The Student's progress reports clearly show that progress. (Student ## 57, 58, 62, 65.) Ms. XXXX, who spends the majority of her time in the classroom, has a good working knowledge of the Student's abilities and progress as she observes him regularly in his academic

---

<sup>6</sup> There was extensive argument concerning the qualifications of the teachers at [School 1]. Whether the teachers at [School 1] would be qualified to teach in a public school special education setting is not relevant to this inquiry. [School 1] is a nonpublic school approved by MSDE to provide instruction to students with disabilities.

<sup>7</sup> Because they are not necessary to render a decision in this case, I have not included the facts on the Student's progress at [School 1] in the findings of fact. I will set them forth here to illustrate the progress the Student has made as it certainly reaffirms that the placement was appropriate from the moment he arrived at [School 1].

classes as well as at lunchtime. Ms. XXXX also meets directly and regularly with the Student's teachers to discuss his program and his progress.

Ms. XXXX's observation confirmed that the Student relied on fewer teacher prompts as time went on and that the Student became more outgoing and engaged in his relationships with his peers. He has learned to see his role in social communication as reciprocal. (T. 6/7/11, XXXX, p. 1125.) His fluency and comprehension are steadily improving as well. This progress was confirmed by his mother as well as by Dr. XXXX and Ms. XXXX in their observation on May 27, 2010. (Student # 55, 56; T. 6/6/11, XXXX, p. 842-843.)

Dr. XXXX's observation confirmed the progress being made and supports the conclusion that the placement was appropriate:

[The Student] appears to be appropriately placed at the [School 1]. Important elements of this placement that meet [the Student's] needs include inclusion with appropriate peers in a small educational group; embedded/integrated speech-language and social skills training; highly structured management of learning segments, featuring visuals and print supports, modified language and shortened instructional periods. [The Student] required no additional adult support or additional prompting other than general oral instructions. He appeared quite competent and independent as he executed various tasks. Many of the supplementary aids that were featured in his [School 2] IEP do not appear to be needed in this environment.

(Student # 55 at p. 7.) Dr. XXXX's observation with regard to the Student's social use of language confirmed this progress:

**Social –Pragmatic:** [The Student]'s voice was loud enough to be heard by others. He communicated using complete sentences to state a need, make a request, and state a solution. [The Student] readily approached peers at appropriate times. He initiated and responded during brief conversations on topics related to the ongoing classroom work. He asked questions, offered encouragement and made suggestions to peers. He participated in a problem-solving discussion with a peer over at least three exchanges; He used appropriate proximity and body orientation. [The Student] interrupted one teacher to convey a question from another teacher. He twice needed to be reminded not to interrupt.

\* \* \*

**Receptive Language:** [The Student] raised his hand and answered teacher questions related to curriculum. He listened to a question from one adult and immediately knew that he needed information from the teacher in order to answer the questions, so he turned to that person with an appropriate question. He followed all oral directions without additional prompting. He identified a problem another student was experiencing and offered appropriate solutions for solving the problem. He executed tasks in sequential order, using self-talk but no adult support, to identify the required materials, locate and arrange them, and begin the task.

**Expressive Language:** [The Student] answered questions related to curriculum using complete sentences. He used short but complete sentences to give directions to another student. He constructed questions and directed them to the correct person. He asked a *wh*-question as he looked for materials. He asked *yes/no* questions.

(Student # 55 at p. 6.)

The observation conducted at [School 1] on November 9, 2010 reaffirmed that progress as well as the appropriateness of [School 1] as a placement for this Student, as the Student “continue[d] to show growth in his independent skills while maintaining academic rigor and social interaction.” (Student’s # 59 p. 6.) Additionally, the Student’s social integration at [School 1] has been successful. He has participated in school activities, including performing in school productions. The Student participates in “XXXX” activities at the school. The XXXX focuses on real world skills and translates what students are learning through the week in reading, writing and math into a real world experience. The Student is also able to practice the social skills training that is embedded in all of the instruction at [School 1] in this real world setting.

Because I find that the Parents have met their burden of proving that [School 1] is an appropriate placement, FCPS Motion for Judgment is denied.

## **II. The Parents’ Motion to Reopen the Record is denied.**

On August 19, 2011, the Parents filed a Motion to Reopen the Record for the limited purpose of admitting four reading assessments administered at [School 1] purporting to show the Student’s progress in reading comprehension while at [School 1] as well as updated resumes for



teachers at [School 1]. The Parents assert that this evidence is relevant to their contention that [School 1] is an appropriate placement for their son. FCPS opposed this Motion on the same day. In light of the decision on the Motion for Judgment, this Motion is moot. I express no opinion concerning whether the evidence is relevant or whether it was erroneously excluded.<sup>8</sup> The Parents have met their burden of proving that [School 1] was an appropriate placement without these documents.

**III. FCPS did not deny the Student a FAPE after March 24, 2009 of third grade, and;**

**IV. The IEP implemented during the Student's fourth grade year at [School 2] was not reasonably calculated to provide him with educational benefit and therefore FCPS denied the Student a FAPE in fourth grade.**

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C. §§ 1400-1482 (2010); 34 C.F.R. Part 300 (2010); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008) and COMAR 13A.05.01. Under both federal and state law, students with disabilities have the right to a FAPE. The IDEA provides federal assistance to state and local education agencies for the education of disabled students, provided that states comply with the extensive goals and procedures of the Act. 20 U.S.C. §§ 1412-1414; 34 C.F.R. § 300.2; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

As a condition of this assistance, the respective state and local public educational agencies must have in effect policies and procedures which assure that children with disabilities residing in the State have access to a FAPE “that emphasizes special education and related services designed to meet their unique needs....” 20 U.S.C. § 1400(d)(1)(A); § 1412(a)(1)(A). Maryland’s General Assembly and the State Board of Education have enacted statutes and

---

<sup>8</sup> Contrary to the Parents’ assertion in the Motion, I am not in the position of a reviewing agency as contemplated by the two-tier hearing system set forth in 20 U.S.C. §1415(g) and I will not and did not review any decisions on objections made in this case by ALJ XXXX. Nor did I consider any evidence excluded by ALJ XXXX in reaching this decision.

regulations, respectively, implementing the IDEA for Maryland's students. Maryland's special education law is found at sections 8-401 through 8-417 of the Education Article of the Annotated Code of Maryland. COMAR 13A.05.01 contains the Maryland regulations governing the provision of special education to children with disabilities.

Under both federal and State law, children with disabilities have the right to a FAPE. In pertinent part, the IDEA defines a FAPE as:

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

20 U.S.C. § 1401(9).

Maryland law similarly defines a FAPE. Md. Code Ann., Educ. § 8-401(a)(3). FAPE is also defined at COMAR 13A.05.01.03B(27) as special education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the [MSDE], including the requirements of 34 C.F.R. § 300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

In *Rowley*, the Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child....We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

*Id.* at 200-201. *See also In re Conklin*, 946 F.2d 306, 313 (4<sup>th</sup> Cir. 1991). A student is not entitled to "the best education, public or nonpublic, that money can buy" to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4<sup>th</sup> Cir. 1983), citing *Rowley*. Instead, FAPE is satisfied when a child's IEP is designed to allow the child to receive educational benefit. *Rowley*, 458 U.S. at 203. However, the benefit conferred by an IEP and

placement must be “meaningful” and not merely “trivial” or “*de minimis*.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3<sup>rd</sup> Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

To provide a FAPE, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the Parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C. § 1414(d)(3).

The IDEA specifically charges the states to deliver special education designed with the unique needs of a particular student in mind, along with sufficient related services to permit the student to benefit educationally from instruction. The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services for the child to benefit educationally from that instruction.

The chief mechanism for accomplishing this purpose is the IEP. The IEP depicts a student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C. § 1414(d)(1)(A); *see also* COMAR 13A.05.01.09A.

The Supreme Court has set out a two-part inquiry to determine whether a local education agency has satisfied its obligation to provide a FAPE to a student with disabilities. A determination first must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, as to whether an IEP developed through the required

procedures is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 206-207; *Hessler*, 700 F.2d at 139.

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to acquire a FAPE. This means that, ordinarily, disabled and non-disabled students should be educated in the same class. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117. Mainstreaming disabled children into regular school programs may not be appropriate for every disabled child, however. 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. In such a case, FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district. *Burlington*, 471 U.S. at 369.

There is no dispute in this case that the FCPS complied with the procedures set forth in the IDEA. The Parents asserted that the FCPS failed to provide the Student with FAPE for the latter part of the 2008-2009 school year (third grade) and for the 2009-2010 school year (fourth grade) as it relates to: (a) the Student's academic progress and development of social skills; (b) the sufficiency of the services provided in the general education and special education setting; and (c) the appropriateness of the educational environments in which the Student was placed.

Specifically, the Parents contend that: the Student did not make meaningful academic progress in reading, writing and social communication skills; the Student did not develop the necessary social skills to gain independence; and the educational environments in which he was placed, in the general education and special education setting, did not sufficiently address his deficits in comprehension and his need for curriculum-based instruction, nor allow for the development of his social skills. The Parents argued that the Student made minimal progress in his fourth grade year because he was shuffled between the large group classroom, the small

group sessions, pull-out sessions and one-on-one sessions, limiting his ability to have access to the full general education curriculum.

The Parents elaborated further that despite the various programs tried at [School 2] and data collected in the third and fourth grades, the Student did not make appropriate educational progress. The Parents suggested that, after enduring multiple IEP meetings between preschool and the fourth grade, the Student was lagging further and further behind. The Parents described the Student as prompt dependent and heavily reliant on his one-on-one IAs to maneuver through his school day.

### **Third Grade**

As is set forth in the findings of fact, the Student did not make meaningful progress on the IEP that was in place prior to March 24, 2009. Beginning on March 24 and continuing on March 31, April 28 and May 15, 2009, the IEP team worked collaboratively and productively on developing an IEP with appropriate goals and levels of service. In fact, Ms. XXXX described the IEP as:

It was a very comprehensive IEP. It was a well-written, well thought out document that fully captured [the Student's] needs, his present levels of performance, his strengths, needs, goals and objectives and modifications that the team felt that he would need in order to make meaningful progress for the 2009-2010 school year.

(T. 6/9/11, XXXX, p. 1381.)

During that time the IEP team was appropriately engaged in reviewing extensive new assessments and opinions and developing a workable plan. The IEP team did not delay or stall the implementation of a new plan and the team needed the time it took to develop appropriate goals for the Student.

Given the IEP team's good faith engagement in the process of developing a new IEP for the Student after receiving new evaluations and after it became clear that he would not meet two thirds of his IEP goals, I do not find that FCPS denied the Student a FAPE from April 18, 2009

through May 15, 2009 when the new IEP was implemented.<sup>9</sup> April 18, 2011, the date the due process hearing request was filed in this case, is an appropriate date to begin this inquiry as the Parents' claim for relief based upon the failure to make progress on the IEP in place prior to March 24, 2009 is barred by the applicable two-year statute of limitations. 20 U.S.C. § 1415(f)(3)(C)-(D).<sup>10</sup>

The Parents have the burden of proving that a FAPE was denied for the remainder of the third grade school year, *i.e.*, May 15, 2009 through mid-June when school ended for the summer. Understandably, there is little evidence in the record concerning the Student's receipt of services and/or progress during that short time period. There is very little evidence in the record detailing how the IEP was implemented at the end of third grade. What was clear, however, is that the IEP team, including the Parents and their experts, believed that the IEP contained appropriate goals and objectives for the Student. Given this fact, I find that the Parents have not met their burden of proving that the Student was denied FAPE during the last five or six weeks of his third grade year.

#### **Fourth Grade**

While the goals in the IEP for fourth grade were reasonable and appropriate, the manner in which FCPS implemented the IEP prevented the Student from receiving a FAPE. During

---

<sup>9</sup> This determination stems primarily from the fact that the team was actively engaged in reviewing reports and developing an IEP during this time period. However, I have also considered the fact that prior to March 24, 2009, the Parents did not want the Autism Cadre to be involved in the Student's IEP. I express no opinion as to whether the Parents' actions in this regard would have impacted a decision on whether FCPS had offered the Student a FAPE based on the IEP that was implemented prior to March 24, 2009, but rather point out that it is equitable to allow the team a reasonable amount of time to fully consider the extensive new evaluations and resources available through the Autism Cadre while the Student continued to receive services under the old, ineffective IEP.

<sup>10</sup> When the IDEA was amended extensively in 2004, a statutory limitation was added for the first time. The relevant provisions currently are codified as follows:

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

20 U.S.C.A. § 1415(f)(3)(C)-(D)(2010). Along with the other 2004 amendments, this limitations provision became effective on July 1, 2005.

closing argument, counsel for FCPS suggested that if the Student received all of the services called for in the IEP, FCPS has complied with the obligation to provide FAPE:

The point is that 15.5 hours of special education was being provided. There's no dispute on that. It's not a question of whether you think it's too fragmented or you don't like it. It's math, Your Honor. It's very simple. It's a matter of math and it was being implemented.

(T. 7/6/11, p. 3573.) This sentiment pervaded the testimony of the FCPS witnesses as well and undermined the credibility of their assessment of the Student's engagement in learning and ability to achieve educational benefit under the IEP.<sup>11</sup> The argument lacks merit. It implies that the FCPS had no obligation to coordinate the instruction called for in the IEP in a way that made sense for the Student. In fact, the Student's schedule in fourth grade was not designed to allow him to reap the benefits of the 15.5 hours of services that were being provided by FCPS. The haphazard and uncoordinated delivery of the IEP services impeded his ability to make progress.

I find that the testimony of [Mother], Ms. XXXX and Dr. XXXX concerning their observations of the Student's daily interaction with services at [School 2] and the inability of the Student to achieve meaningful academic benefit from this placement to be credible. Their observations are corroborated by the daily schedule as well as the testimony of Ms. XXXX. (Student # 45.) [Mother], Ms. XXXX and Dr. XXXX did not have limited exposure to this Student and his needs. Nor did they limit their observation to a one-time encounter. Both Ms. XXXX and Dr. XXXX spent time assessing the Student, observing him in on various days and in various settings, and working collaboratively with the IEP team over numerous meetings to construct appropriate goals. (T. 6/6/11, XXXX, p. 777, 806.)

In *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523 (4<sup>th</sup> Cir. 2002), the

---

<sup>11</sup> In reaching these conclusions with regard to the credibility of the witnesses, it is unnecessary for me to make any demeanor-based credibility determinations. With the exception of the two IAs, each witness who testified was qualified as an expert in her field. My assessments of credibility are based on the existence or dearth of corroborating evidence, the experience and expertise of the witnesses and the logic and persuasiveness of their testimony. See *Consumer Protection Division v. Morgan*, 387 Md. 125, 202 (2005) (citing *Millar v. Fed. Communications Comm'n*, 707 F.2d 1530, 1539 (D.C.Cir. 1983) (expert testimony is a category of evidence in which "credibility may play a role, but demeanor may not."). See also *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 761 (2006) (credibility assessment of experts based on bias, interest, credentials of expert witnesses, the logic and persuasiveness of their testimony, and the weight to be given their opinions can be done on a cold record)

Fourth Circuit expressed a reluctance to second-guess professional educators. The Court, however, acknowledged that this deference only exists “as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.” *Id.* at 532. FCPS failed to provide the basic floor of opportunity, and assigned the Student to a placement where the delivery of services was so illogical that there was no meaningful educational benefit for the Student. Thus, while it is true that the FCPS personnel who worked with the Student everyday had more frequent interaction with the Student and his day-to-day experience in FCPS, their assessment that he was able to participate in the general curriculum is not entitled to deference and is not credible because it is not consistent with the documentary evidence, including the Student’s schedule and the data and communication binders. (Student # 45, FCPS ## 88, 89.)

The Student did not participate in any meaningful way in the general education curriculum except for during lunch, recess and specials. He only received academic instruction in language arts and math. He was pulled out of lessons in language arts and math to engage in his special education and speech programs.

Several examples illustrate the chaos that characterized the delivery of the Student’s IEP services and the pervasive sentiment among FCPS personnel that if they delivered the minute-by-minute services called for in the IEP, they had provided a FAPE. One day a week, the Student was engaged in a pull-out language arts session and then returned to the end of a general education math class. He was exposed to the end of the math lesson. Later, the Student was placed back in a math class for the beginning of that same lesson. Similarly, the Student was in general education science/social studies classes for a half hour every Monday. The other students had science/social studies on Tuesday, Wednesday, Thursday and Friday as well. The teachers did not try to assess the Student on his progress in science/social studies since he regularly did not attend four fifths of the instruction in those classes. I question what the benefit



was of having the Student sit through the science/social studies class for a half hour every Monday. It is unlikely that an attentive, non-disabled student would be able to glean educational benefit in the area of science or social studies under this scenario. In addition, the Student transitioned back and forth from the general education setting to the special education classroom at least seven times every day. For at least a portion of the fourth grade year, every time the Student changed settings, he and the IA would have to transport his XXXX, the base and his slant board, along with his usual supplies, to the different classroom.<sup>12</sup>

A final example of the disconnect between the appropriate services outlined in the IEP and the provision of these services in manner that would allow the Student to achieve educational benefit is found in the delivery of the Language for Learning Program. The IEP called for five 30-minute sessions a week of the Student's special education and speech services to be delivered in tandem by a special educator and a speech language pathologist. This co-teaching model was supposed to allow each of the instructors to bring her expertise to bear in the delivery of a lesson to the Student. That is not what happened. This co-instruction was delivered during the Student's participation in the Language for Learning Program. The Language for Learning Program requires high fidelity to a script. It does not allow for input or modification from the instructor. Therefore, the "co-teaching" involved the special educator (sometimes replaced by the IA) and the speech language pathologist taking turns reading the script to the Student and prompting his engagement in the lesson. Neither teacher brought her particular expertise to bear in the session, yet the witnesses testified that this unit covered the allotted time for speech and special education called for in the IEP.

Despite the fractured and illogical nature of the delivery of services under the IEP, FCPS continued to maintain that the Student was making progress and therefore achieving educational benefit. I find, however, that the progress relied upon by FCPS was not meaningful and only

---

<sup>12</sup> There is an indication that prior to January 15, 2010, FCPS purchased an additional XXXX so that the Student did not have to carry one around with him all the time.

represented “some minimal academic advancement.” *Hall ex. rel Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In this case, there is no real factual dispute as to what progress was made during fourth grade. FCPS measured the Student’s progress in reading, including decoding and comprehension, through the AIMSWeb. Similarly, FCPS provided work samples as well as observation and communication logs showing the Student’s interaction with peers and reliance on adult prompts. The dispute was whether the progress was meaningful.

In addressing the rate and consistency of progress, every FCPS witness was prompted to opine that the Student’s verbal cognitive ability prevented him from making consistent meaningful progress. The responses were disturbingly scripted. Most telling were the responses of the FCPS witnesses that undermined this unified chorus asserting that the Student was not capable of better progress. For example, Ms. XXXX waffled considerably on her description of the Student’s cognitive abilities. She first asserted that he had very limited cognitive ability, that did not “bode well for his academic success” and that she would not expect him to make consistent progress. (T. 6/14/11, XXXX, p. 2133-5.) Then she stated that the Student has made significant progress despite his alleged cognitive limitations, a pleasant turn of events that she attributed to good instruction. (T. 6/13/11, XXXX, p. 1927.) She later admitted that she was not able to assess the Student’s overall cognitive ability because of the significant variation in his verbal and non-verbal abilities. (T. 6/14/11, XXXX, p. 2174-2180.) Mrs. XXXX, his third grade teacher, described the Student as “a bright boy.” (T. 6/28/11, XXXX, p. 2756.) Ms. XXXX repeatedly stated that the Student’s progress was consistent with his cognitive abilities but then opined that his progress was even better than what could be expected given his deficits. (T. 6/27/11, XXXX, p. 2409.) I do not find that the Student’s impairments made it impossible for him to achieve educational benefit or make meaningful progress on his IEP goals. As such, I

reject the opinions of the FCPS experts that the Student's limited and inconsistent progress was commensurate with his cognitive abilities and therefore meaningful.

The next step then is to return to the progress that was made and to determine whether that progress was meaningful for the Student. I find that it was not. The MAZE assessment in comprehension, the daily prompt logs and the communication book all clearly convey one thing: the Student did not build on the skills learned in the past to make progressive gains. The only consistent thing about the Student's assessments, work samples and observation logs is that they were inconsistent. Some days, he required extensive prompting to engage in his educational setting. Some days he did not. On some days he was able to articulate correct answers to reading comprehension questions; on other days he was not. Similarly, the Student engaged classmates on the playground sporadically. I am mindful of the fact that all students have good days and bad days. But this Student's progress was measured over the course of six months in the fourth grade year. Progress as it is ordinarily defined means "gradual betterment."<sup>13</sup> With the exception of decoding, his "progress" was like a yo-yo rather than a slightly sloped upward line. The AIMSWeb comprehension assessment illustrates the point the best. (FCPS # 82.) When the decoding chart is compared to the comprehension chart, it is apparent that the Student made consistent, albeit slow, upward progress on his decoding skills. The reading comprehension chart shows significant highs and lows throughout the six-month assessment period. (FCPS # 82.)

While the Student's IEP contained appropriate goals and objectives, it was not implemented in such a way as to allow the Student to make meaningful progress, to allow him to access the general curriculum or to obtain any meaning academic benefit. I find that the FCPS failed to provide the Student a FAPE in fourth grade.

V. **The Parents are entitled to tuition reimbursement for placement in the [School 1] from March 9, 2010 through the 2010-2011 school year.**

---

<sup>13</sup> See <http://www.merriam-webster.com/dictionary/net> (last visited August 20, 2011).

reject the opinions of the FCPS experts that the Student's limited and inconsistent progress was commensurate with his cognitive abilities and therefore meaningful.

The next step then is to return to the progress that was made and to determine whether that progress was meaningful for the Student. I find that it was not. The MAZE assessment in comprehension, the daily prompt logs and the communication book all clearly convey one thing: the Student did not build on the skills learned in the past to make progressive gains. The only consistent thing about the Student's assessments, work samples and observation logs is that they were inconsistent. Some days, he required extensive prompting to engage in his educational setting. Some days he did not. On some days he was able to articulate correct answers to reading comprehension questions; on other days he was not. Similarly, the Student engaged classmates on the playground sporadically. I am mindful of the fact that all students have good days and bad days. But this Student's progress was measured over the course of six months in the fourth grade year. Progress as it is ordinarily defined means "gradual betterment."<sup>13</sup> With the exception of decoding, his "progress" was like a yo-yo rather than a slightly sloped upward line. The AIMSWeb comprehension assessment illustrates the point the best. (FCPS # 82.) When the decoding chart is compared to the comprehension chart, it is apparent that the Student made consistent, albeit slow, upward progress on his decoding skills. The reading comprehension chart shows significant highs and lows throughout the six-month assessment period. (FCPS # 82.)

While the Student's IEP contained appropriate goals and objectives, it was not implemented in such a way as to allow the Student to make meaningful progress, to allow him to access the general curriculum or to obtain any meaning academic benefit. I find that the FCPS failed to provide the Student a FAPE in fourth grade.

V. **The Parents are entitled to tuition reimbursement for placement in the [School 1] from March 9, 2010 through the 2010-2011 school year.**

---

<sup>13</sup> See <http://www.merriam-webster.com/dictionary/net> (last visited August 20, 2011).

As was previously discussed in the ruling on the Motion for Judgment, the Parents have sustained their burden of proving that [School 1] was an appropriate placement. The Parents couched their request for tuition reimbursement as a request for compensatory education. When fashioning equitable relief for a denial of FAPE, the hearing examiner has broad discretion. *Burlington*, 471 U.S. at 370-371; *see also* 20 U.S.C. §1415(i)(2)(C)(iii); 300 C.F.R. §300.516(c)(3). Compensatory education is an equitable remedy that the court may award in crafting appropriate relief. *See Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994); *Reid v. District of Columbia*, 401 F.3d 516, 523-524 (D.C. Cir. 2005). It is available to remedy an educational deficit created by a school system's failure to provide a student with a FAPE over a given period of time. *G v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003).

I have already discussed that the Parents have not proven that the FCPS denied the Student a FAPE for the actionable portion of the third grade year. The Student was denied FAPE during fourth grade. [School 1] is an appropriate placement. Therefore, the Parents are entitled to tuition reimbursement from March of 2010 through the conclusion of the 2010-2011 school year.

I decline to order reimbursement for the Parents' transportation expenses. Given the pending litigation, the fact that the denial of FAPE was for a six-month period, and the hard work of the IEP team to develop an appropriate IEP at the end of third grade, I find that it would not be equitable to reimburse the Parents for their mileage. The Parents made a choice to place the Student in a private school. The Student matriculated at that private school for over a year before the Parents filed a due process hearing request for reimbursement. Had the Parents filed an immediate request for reimbursement that was successful, the FCPS would have provided transportation as a related service to the Student without the Parents' incurring any out of pocket expenses. Under these circumstances, reimbursement of transportation expenses is denied.

**VI. The Parents' request for compensatory education in the form of prospective placement at [School 1] for the 2011-2012 school year is denied. Unless and until FCPS develops an IEP that is reasonably calculated to provide the Student a FAPE in the LRE, the Student will remain at [School 1] at public expense.**

The Parents requested that I order placement at [School 1] prospectively. It is not clear whether the Parents seek prospective placement as compensatory education or whether they believe that they have proven that [School 1] is the LRE in which the Student can achieve educational benefit and, therefore, that I should order prospective placement for the 2011-2012 school year. The case is not in a procedural posture that would allow me to determine whether [School 1] is the LRE in which the Student can achieve educational benefit for the upcoming school year. Based on the evidence of record, the flawed fourth grade IEP remains the FCPS' IEP. I have determined that the IEP did not provide FAPE, that [School 1] is an appropriate placement and that the Parents are entitled to tuition reimbursement for [School 1]. Unless and until the FCPS IEP team develops an appropriate 2011-2012 IEP that can be implemented in the LRE, [School 1] will remain the Student's placement and the FCPS will be required to fund the placement. *See* 20 U.S.C. § 1415(j); Md. Code Ann., Educ. § 8-413(d)(6); *Houston Indep. Sch. Dist. v. VP*, 582 F.3d 576 (5th Cir. 2009). Therefore, I will address the relief as a request for compensatory education only.

The Parents received tuition reimbursement for their unilateral placement at [School 1] for the remainder of fourth grade and all of fifth grade. Compensatory education can take the form of an award of prospective tuition. *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275 (11<sup>th</sup> Cir. 2008). Generally the starting point in calculating a compensatory education award is when the Parent knew or should have known of the denial of a FAPE. The duration, or end point, is the period of denial. 20 U.S.C. § 1415(f)(3)(C); 20 U.S.C. § 1415(b)(6)(B); *see also G v. Fort Bragg Independent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003).

In this case, the denial of FAPE began in the beginning of fourth grade and continued through March 9, 2010 when the Student was removed from the FCPS. According to the evidence in this case, the denial persists as FCPS has not developed an IEP that is reasonably calculated to meet the Student's needs in the LRE. When the FCPS IEP team develops such an IEP, the denial of FAPE will end. When the FCPS IEP team develops such an IEP, the FCPS' obligation to continue to fund the Parents unilateral placement will end. I decline to order prospective placement of the Student at [School 1] for the 2011-2012 school year as I find that as a practical matter, the posture of this case provides the compensatory education required. Placing the Student in [School 1] for the entire 2011-2012 school year would be inequitable given the facts of this case.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was not denied FAPE during the 2008-2009 school year and that the IEP implemented by FCPS for the 2009-2010 school year did not provide the Student with a FAPE. I also conclude that the [School 1] is an appropriate educational placement for the Student, and that the Parents are entitled to reimbursement of tuition for their unilateral placement of the Student at the [School 1] for a portion of the 2009-2010 school year beginning on March 9, 2010 and for the 2010-2011 school year. I further conclude that the Parents are not entitled to reimbursement for the travel expenses they incurred in transporting the Student to [School 1]. I further find that the Parents are not entitled to prospective placement of the Student at [School 1] for the 2011-2012 school year. *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); COMAR 13A.05.01.14.

### **ORDER**

I **ORDER** that the Parents' request for reimbursement of the Student's tuition at [School 1] for the portion of the 2009-2010 school year beginning on March 9, 2010 and for the 2010-2011 school year be, and is hereby, **GRANTED**; and I further

**ORDER** that the Parents' request for reimbursement for transportation expenses associated with transporting the Student to [School 1] is **DENIED**.

August 23, 2011  
Date Decision Mailed

---

Denise Oakes Shaffer  
Administrative Law Judge

DOS/sh



## **REVIEW RIGHTS**

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413 (j) (2008).

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.