

XXXXX XXXXX

v.

MONTGOMERY COUNTY PUBLIC
SCHOOLS

* BEFORE HARRIET C. HELFAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-08-30197

* * * * *

DECISION

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ORDER

STATEMENT OF THE CASE

On August 11, 2008, XXXXX XXXXX (Father) and XXXXX XXXXX (Mother) (collectively, Parents), on behalf of their child, XXXXX XXXXX (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 Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (Supp. 2008).

I held a hearing on October 27, 28, 29, 30 and 31, 2008 at the MCPS office located on Hungerford Drive in Rockville, Maryland.¹ Jeffrey A. Krew, Esquire, 4785 Dorsey Hall Drive,

¹ The Parents requested that the hearing convene more than 45 days after the triggering events described in 34 C.F.R. § 300.515(c) (2008). See *Request for Mediation/Due Process*. Neither party requested mediation. A resolution session, originally scheduled for August 22, 2008 by MCPS, was rescheduled for August 28, 2008 because of the unavailability of the Parents' attorney. On that date, prior to the rescheduled resolution session, the parties agreed to waive the resolution session and proceed with scheduling a due process hearing. The parties agreed to participate in a pre-hearing conference on September 17, 2008 and, at that time, I conducted a telephonic pre-hearing conference with the parties, at which time the Parents' attorney stated that he would be filing a Motion for Partial Summary Decision. The parties agreed to a schedule in which the Parents' motion would be filed by September 26, 2008, with MCPS' response due by October 6, 2008. The parties also agreed to waive the time

Suite 120, Ellicott City, Maryland 21042, represented the MCPS. Mark B. Martin, Esquire, 1 N. Charles Street, Suite 1215, Baltimore, Maryland 21201, represented the Parents.

Insufficient hearing days were originally scheduled for the hearing, which necessitated continuing the case, by agreement of the parties, to December 3, 9, 10, and 11, 2008. The record closed on December 11, 2008.²

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2008); 34 C.F.R. § 300.511 (2008); Md. Code Ann., Educ. § 8-413(e)(1) (2008); Code of Maryland Regulations (COMAR) 13A.05.01.15C; and Maryland State Department of Education (MSDE) Guidelines for Maryland Special Education Mediation/Due Process Hearings.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; MSDE procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Was the May 25, 2007 Individualized Education Program (IEP) proposed by MCPS reasonably calculated to provide the Student with a free appropriate public education (FAPE) for her sixth-grade year, the 2007-2008 school year?
2. Was the April 28, 2008 IEP proposed by MCPS reasonably calculated to provide the Student with a FAPE for the remainder of the 2007-2008 school year?³

requirements set forth in 34 C.F.R. § 300.515 (2008). I issued a ruling denying the Parents' motion on October 17, 2008 and the hearing commenced on October 27, 2008.

² By agreement, the parties requested that this decision be issued within 30 days of the close of the record.

³ Near the conclusion of the hearing, MCPS asserted that the only IEP relevant to the 2007-2008 school year was the one finalized in May 2007. This characterization is incorrect, as the IEP finalized in April 2008 encompassed the last six weeks of the 2007-2008 school year. Not only did the Parents' request for due process include both the May 2007 and the April 2008 IEPs, MCPS' response to the hearing request specifically referenced both IEP processes. Moreover, testimony during the course of the hearing included significant comment as to MCPS' willingness to implement the April 2008 IEP for the remainder of the 2007-2008 school year and whether it would have been practicable or possible to do so.

3. Was [School 4] an appropriate educational placement for the Student, and if so, are the Parents entitled to reimbursement of tuition and expenses for their unilateral placement of the Student at [School 4] for the 2007-2008 school year?
4. Should MCPS be required to fund the independent evaluation of the Student by XXXXX?

SUMMARY OF THE EVIDENCE

A. Exhibits

I admitted the following exhibits on behalf of the Parents:

- | | |
|---------|--|
| XX # 1 | IEP, MCPS, dated March 29, 2000 |
| XX # 2 | IEP, MCPS, dated March 19, 2001 |
| XX # 3 | IEP, MCPS, dated March 11, 2002 |
| XX # 4 | IEP, MCPS, dated March 11, 2003 |
| XX # 5 | (Not offered) |
| XX # 6 | Educational Assessment, dated March 8, 2004 |
| XX # 7 | Speech/Language Re-Assessment, MCPS, dated March 15, 2004 |
| XX # 8 | (Not offered) |
| XX # 9 | IEP, MCPS, dated March 23, 2004 |
| XX # 10 | IEP, MCPS, dated April 6, 2005 |
| XX # 11 | Progress Report, MCPS, dated April 6, 2005 |
| XX # 12 | Letter from [School 2] to Parents, dated February 28, 2006 |
| XX # 13 | IEP, MCPS, dated February 28, 2006 |
| XX # 14 | Speech and Language Evaluation, [Hospital 1], dated April 14, 2006 |
| XX # 15 | Addendum, Speech and Language Evaluation, [Hospital 1], dated May 24, 2006 |
| XX # 16 | Motion Analysis, [Hospital 2], dated September 11, 2006 |

- XX # 17 (Not offered)
- XX # 18 Physical Therapy Re-evaluation, [School 2], dated March 1, 2007
- XX # 19 Physical Therapy Evaluation, [Hospital 2], dated March 16, 2007
- XX # 20 (Not offered)
- XX # 21 Report of Psychologist (XXXXXX), dated April 11, 2007
- XX # 22 Educational Assessment Report/Re-evaluation, dated April 13, 2007
- XX # 23 (Not offered)
- XX # 24 Mental Retardation Multidisciplinary Evaluation Form, MCPS, dated May 25, 2007
- XX # 25 IEP, MCPS, dated May 25, 2007
- XX # 26 Progress Report, MCPS, dated June 16, 2007
- XX # 27 Psychological Evaluation (XXXXXX), dated July 26, 2007
- XX # 28 Letter from Mark B. Martin, Esq., to [School 2] and [School 3], dated August 13, 2007
- XX # 29 Letter from [School 3] to Parents, dated August 16, 2007
- XX # 30 Review of XXXXXX's Psychological Assessment (XXXXXX), dated September 27, 2007
- XX # 31 (Not offered)
- XX # 32 IEP, MCPS, dated October 25, 2007
- XX # 33 Psychological Evaluation Report: Update/Addendum (XXXXXX), dated January 14, 2008
- XX # 34 Individual Education Plan, [School 4], October 1, 2007 to October 1, 2008
- XX # 35 IEP, MCPS, dated April 28, 2008
- XX # 36 IEP Notes, MCPS, dated April 25, 2008
- XX # 37 Progress Report, [School 4], dated June 12, 2008
- XX # 38 Request for Due Process Hearing, dated August 8, 2008

- XX # 39 Response to Hearing Request from MCPS, dated August 18, 2008
- XX # 40 Curriculum Vitae, XXXXX XXXXX.
- XX # 41 Curriculum Vitae, XXXXX XXXXX.
- XX # 42 Curriculum Vitae, XXXXX XXXXX
- XX # 43 (Not offered)
- XX # 44 Tuition Contract, [School 4], dated August 28, 2008
- XX # 45 Adaptive Behavior Assessment System-Second Edition (ABAS II) Parent Form, dated April 12, 2007

(No exhibits were offered as XX ## 46-61)

- XX # 62 ABAS II Teacher Form, dated May 24, 2007⁴

I admitted the following exhibits on behalf of MCPS:

- MCPS # 1 Psychological Evaluation, Preschool Education Program, February 2001
- MCPS # 2 Physical Therapy Reassessment, dated January 9 and 12, 2004
- MCPS # 3 Report of Psychologist (XXXXXX), dated March 22, 2004
- MCPS # 4 IEP, MCPS, dated February 28, 2006
- MCPS # 5 Speech and Language Evaluation, [Hospital 1], dated April 14, 2006
- MCPS # 6 Addendum, Speech and Language Evaluation, [Hospital 1], dated May 24, 2006
- MCPS # 7 Report Card, dated June 16, 2006
- MCPS # 8 Motion Analysis, [Hospital 2], dated September 11, 2006

⁴ MCPS raised an objection regarding the admission of XX # 62 based on submission outside of the five-day rule and copyright protection. I overruled MCPS' objection on the basis that the Parents' request for the document occurred within the appropriate five-day period and that the "fair-use" doctrine, as well as its probative value permitted the document to be admitted into evidence. As I treated MCPS' objection as a Motion to Exclude, I marked and included the following exhibits regarding the Motion as follows:

- Mot. Ex. I Letter from Mark B. Martin, Esq., to Jeffrey A. Krew, Esq., dated November 21, 2008
- Mot. Ex. II Letter from Jeffrey A. Krew, Esq., to Mark B. Martin, Esq., dated November 24, 2008
- Mot. Ex. III Letter from Mark B. Martin, Esq., to Jeffrey A. Krew, Esq., dated November 25, 2008
- Mot. Ex. IV Letter from Jeffrey A. Krew, Esq., to Mark B. Martin, Esq., dated November 25, 2008
- Mot. Ex. V Letter from Mark B. Martin, Esq., to Jeffrey A. Krew, Esq., dated November 26, 2008
- Mot. Ex. VI Letter from Jeffrey A. Krew, Esq., to Mark B. Martin, Esq., dated December 1, 2008.

- MCPS # 9 IEP, MCPS, dated January 26, 2007
- MCPS # 10 Physical Therapy Re-Evaluation Report, dated March 1, 2007
- MCPS # 11 Physical Therapy Evaluation Report, [Hospital 2], dated March 16, 2007
- MCPS # 12 Occupational Therapy Report, dated April 2007
- MCPS # 13 Report of Psychologist (XXXXXX), dated April 11, 2007
- MCPS # 14 Educational Assessment Report/Re-evaluation, dated April 13, 2007
- MCPS # 15 Consultation Note, XXXXXXXXXXXXX, dated May 1, 2007
- MCPS # 16 Teacher Evaluation Form, [School 5], undated
- MCPS # 17 Authorization for Release of Confidential Information, dated May 8, 2007
- MCPS # 18 XXXXXXXXXXXXX Team Consultation Note, dated May 25, 2007
- MCPS # 19 Speech/Language Re-assessment, dated May 25, 2007
- MCPS # 20 IEP, MCPS, dated May 25, 2007
- MCPS # 21 Report Card, dated June 16, 2007
- MCPS # 22 Letter from Mark B. Martin, Esq., to Principals of [School 2] and [School 3] dated August 13, 2007
- MCPS # 23 Psychological Evaluation from XXXXX XXXXX.
- MCPS # 24 (Not offered)
- MCPS # 25 Letter from [School 3] to the Parents, dated September 5, 2007
- MCPS # 26 (Not offered)
- MCPS # 27 IEP, [School 4], October 1, 2007 to October 1, 2008
- MCPS # 28 Review of Non-MCPS Educational Assessment Report, dated October 10, 2007
- MCPS # 29 IEP, MCPS, dated October 25, 2007
- MCPS # 30 Letter from MCPS to Mark B. Martin, Esq., dated November 15, 2007
- MCPS # 31 Letter from XXXXX XXXXX to the Parents, dated November 19, 2007

- MCPS # 32 Authorization for Assessment, dated November 30, 2007
- MCPS # 33 Letter from [School 3] to the Parents, dated December 20, 2007
- MCPS # 34 Letter from Mark B. Martin, Esq., to [School 3], dated December 20, 2007
- MCPS # 35 Psychological Evaluation Report: Update/Addendum, dated January 14, 2008
- MCPS # 36 IEP, MCPS, dated January 24, 2008
- MCPS # 37 Letter from Mark B. Martin, Esq., to [School 3], dated February 19, 2008
- MCPS # 37-A IEP, MCPS, goals and objectives, dated January 24, 2008
- MCPS # 38 (Not offered)
- MCPS # 39 Letter from [School 3] to the Parents, dated March 3, 2008
- MCPS # 40 IEP, [School 4], dated April 16, 2008
- MCPS # 41 IEP, MCPS, dated April 28, 2008
- MCPS # 42 (Not offered)
- MCPS # 43 Middle School Progress Report, [School 4], dated June 12, 2008
- MCPS # 44 Related Service Quarterly Progress Report, [School 4], 2007-2008
- MCPS # 45 [School 4] Service Record, Related Services, August 28, 2007 to September 25, 2008
- MCPS # 46-48 (Not offered)
- MCPS # 49 Résumé, XXXXX XXXXX
- MCPS # 50-53 (Not offered)
- MCPS # 54 Résumé, XXXXX XXXXX
- MCPS # 55 (Not offered)
- MCPS # 56 Résumé, XXXXX XXXXX
- MCPS # 57 Résumé, XXXXX XXXXX
- MCPS # 60 Curriculum Vitae, XXXXX XXXXX.

MCPS # 61 Developmental Assessment, [Hospital 3], dated April 21, 1999

MCPS # 62 Internet Printout-Admission Policy, [School 4]

MCPS # 63 Information Packet, [School 4]

MCPS # 64 Letter from XXXXX, with attachments, dated February 6, 2008

B. Testimony⁵

The Parents both testified and presented the following witnesses:

- XXXXX XXXXX, [Program 2] Coordinator, [School 2]
- XXXXX XXXXX, School Psychologist, [School 3]
- XXXXX XXXXX, Resource Teacher, Special Education, [School 3]⁶
- XXXXX XXXXX, Psychologist, accepted as an expert in psychology and school psychology
- XXXXX XXXXX, Curriculum Coordinator, [School 4], accepted as an expert in special education
- XXXXX XXXXX, Special Education Consultant, accepted as an expert in special education
- XXXXX XXXXX, Speech/Language Pathologist, accepted as an expert in speech/language pathology⁷

MCPS presented the following witnesses:

- XXXXX XXXXX, former School Psychologist, [School 2], accepted as an expert in school psychology
- XXXXX XXXXX, Teacher, [School 2] (currently general education, formerly special education), accepted as an expert in general and special education

⁵ On the last day of the hearing, the Student stopped by for a few minutes at the beginning of the hearing and introduced herself. No testimony was taken.

⁶ XXXXX also testified on behalf of MCPS.

⁷ XXXXX appeared solely as a rebuttal witness and her testimony was confined to rebuttal.

- XXXXX XXXXX, Physical Therapist, accepted as an expert in physical therapy, with an emphasis on educational physical therapy
- XXXXX XXXXX, Occupational Therapist, accepted as an expert in occupational therapy
- XXXXX XXXXX, Speech/Language Pathologist, accepted as an expert in speech/language pathology with an emphasis on students with cognitive impairments

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Student was born on XXXXXX, and was twelve years old at the time of the hearing.
2. Several hours after the Student's birth, she lapsed into a coma. She was diagnosed with a subdural hematoma and required surgery, after which she remained in intensive care for three weeks. During that period, the Student experienced seizures, and was ultimately diagnosed with XXXXXXXXXXXXX.
3. XXXXXXXXXXXXX affects the Student in a myriad of ways; her fine and gross motor skills, particularly on the left side and pertaining to her lower extremities, and her gait are weak and her motor deficits greatly affect her speech articulation. The Student's speech is often unintelligible to unfamiliar individuals. The Student wears Ankle Foot Orthotics (AFOs or braces) on her legs, which limits her ability to easily dress or undress herself. The Student has limited use of her left hand. The neurological and motor impairments of XXXXXXXXXXXXX also affect the Student's body awareness and language processing skills.
4. When the Student XXXXXXXXXXXXXXXXXXXX to compensate for weakness, resulting in a XXX, and making her prone to frequent falls. Despite her motor difficulties, the Student

is able to climb and descend steps and playground equipment and engage in supervised athletic activities, including dribbling a basketball.

5. The Student maintains a positive attitude in school and is willing to repeat herself many times in order to be understood. She tries to be helpful in her classes and is sociable and pleasant with her teachers and service providers.
6. Due to XXXXXXXXXXXX and its effect on muscle control, the Student has suffered from a condition called “XXXXXXXXXXXX,” in which stools accumulate in the colon, affecting the sensation, or lack thereof, of having to evacuate. Having this condition greatly delayed the Student’s ability to be toilet trained.
7. After moving with her family from [State], where she received some special education services, to Montgomery County, the Student spent two years in [Program 1] at [School 1].
8. In 2001, while at [School 1], the Student (at age four years and ten months) was evaluated using the Wechsler Preschool and Primary Scale of Intelligence (WPPSI). The Student’s performance on the WPPSI produced scores in the borderline to deficient range.
9. From Kindergarten through Grade 5, the Student attended [Program 2] at [School 2]. From Kindergarten through fifth grade, the Student’s coding of eligibility for special education in her IEP was 07 (orthopaedic impaired) and 04 (speech and language).
10. [Program 2] was a segregated, or self-contained, classroom within a school building where the students were taught by a special education teacher and paraeducator for most academic subjects and mainstreamed with nondisabled peers for subjects such as art, music, physical education, lunch, and recess.

11. Classes in [Program 2] were small, usually containing between eight and twelve students in the classroom. The curriculum in [Program 2] followed the Maryland voluntary general education curriculum for each particular grade level, but was modified to meet the needs of the students. Most students who participated in [Program 2] were at least two years below grade level.
12. In [Program 2], the Student was working toward acquiring the academic prerequisites in the general education curriculum as a diploma-bound student. The Student had been deemed a diploma-bound student since Kindergarten.
13. In March 2004, XXXXX XXXXX, the school psychologist at [School 2], conducted a re-evaluation psychological assessment of the Student, who was then in the second grade. XXXXX used the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) and the Adaptive Behavior Assessment System (ABAS) in her evaluation. Ordinarily, the ABAS is completed by both a parent and a teacher. At this time, only the Father filled out the ABAS.
14. The WISC-IV tests cognitive ability, with summary IQ scores compared to an average score of 100 (average range from 90 to 109). The Student's composite scores consisted of the following: Verbal Comprehension Index-67; Perceptual Reasoning Index-75; Working Memory Index-65; and Processing Speed Index-91, with a Full Scale IQ of 69.
15. Variability in the Student's scores (extremely low, borderline, and average) indicated that the Full Scale IQ score did not fully represent the Student's cognitive abilities. Because the scores were somewhat higher than those obtained in 2001, the Student demonstrated an upward trend in her level of intellectual functioning.
16. The ABAS consists of a questionnaire and the results are compared with an average score of 100 (average range from 90 to 110). The Student's general adaptive composite

score in the ABAS was 62. The Student's scores ranged from average in the area of social exchanges, to below average for self-care activities. Many of the Student's self-care difficulties, such as dressing, getting around independently and toileting, could be attributed to her physical limitations.

17. As a result of the assessment, XXXXX recommended that the Student not be identified or coded (01) as a student with Mental Retardation, although her cognitive and adaptive scores fell, overall, within the extremely low range. XXXXX based her recommendation on several factors, including the Student's scores within the low average to average range in some of the assessments, the upward trend in her cognitive scores, and the recognition that some of the Student's difficulties in speech/language could negatively affect her performance on the cognitive tests.
18. From Kindergarten to the fourth grade, the Student made progress in reading and math, yet remained at least two grade levels behind. Through the third grade, the Student was taught reading using the Wilson Reading System. Her strengths included literal comprehension, improved word attack, and spelling skills. The Student exhibited significant difficulty with math and writing skills. The Student's prominent weaknesses that interfered with progress in the general curriculum included abstract thinking, basic concepts, expressive vocabulary, and distractibility.
19. Going into the fourth grade, the Student's services included 22 hours per week of special education, with one-half hour per week of physical therapy, one and one-half hours per week of speech/language therapy, and one hour per week of occupational therapy.⁸ The Student was also eligible for and participated in Extended School Year (ESY) programming.

⁸ For a time, the Student also participated in private speech/language therapy at [Hospital 1] in XXXXX, as well as

20. During the fourth grade, the Student made progress toward her IEP goals, including in the areas of reading, math, and written expression, and was mainstreamed into a regular education class for social studies and science, with assistance from a paraprofessional. Her grades consisted of As and Bs for the below grade level at which she was taught. The Student was also mainstreamed with the general education students for art, physical education, and lunch. The Student's teacher in the fourth grade [Program 2] class was XXXXX XXXXX.
21. The Student's IEP dated February 28, 2006, indicated that for the fifth grade, she would be receiving 22 hours per week of special education with the same frequency of physical therapy, speech/language therapy, and occupational therapy that she received in the fourth grade.
22. [Program 2] in the Student's fifth grade year at [School 2] consisted of students from both the fourth and fifth grades. XXXXX XXXXX also taught the combined [Program 2] class, which consisted of eight to twelve students. All of the Student's academic classes were taught in [Program 2]; she was mainstreamed for special areas, such as art, physical education, and lunch. In both the fourth and fifth grades, the Student was taught from [Program 3]. These years were the first time XXXXX had used [Program 3] in her teaching career.
23. The Student's fourth/fifth grade [Program 2] class consisted of eleven students. Of those eleven students, two students, who suffered from autism, at times disrupted the class. On a number of occasions, these students required various levels of restraints. When such disruptions occurred, the other students would be removed from the classroom and trained staff would assist the disruptive student. Techniques for dealing with student

private physical therapy sessions from a physical therapist in XXXXXX. The Student also participated in studies

outbursts ranged from moving items away from a child to physically restraining a child out of control.

24. During the fifth grade at [School 2], the Student's grades consisted of As and Bs. The Student's grades were based on her performance in the levels of the subjects taught in [Program 2], not grade level expectancies.

25. In the fifth grade, the Student made progress in reading, written expression, and math, as well as making gains in all areas of her education at [School 2].

26. On January 26, 2007, [School 2] convened an IEP meeting to begin to develop the Student's IEP for the sixth grade, the 2007-2008 school year. Present at that meeting were XXXXX XXXXX, the Student's case manager and IEP chair, XXXXX XXXXX, general educator, XXXXX XXXXX, special educator, XXXXX XXXXX, school psychologist, XXXXX XXXXX, occupational therapist, XXXXX XXXXX, physical therapist, and the Father. At the meeting, the team authorized the following assessments: educational, speech/language, occupational therapy (formal and informal), physical therapy (informal), and psychological. These assessments were requested pursuant to the Student's triennial evaluation.

27. At this time, MCPS no longer offered [Program 2] in its middle schools. Settings available to special education students included [Program 4] and [Program 5]. In [Program 4], special education students receive special, separate instruction in reading and math, but are mainstreamed for other academic subjects, with supports. Students in [Program 4] are on a diploma track and are eligible to take the Modified Maryland State Assessments (Mod. MSA). Students in [Program 5] learn functional life skills in order to

and was evaluated by [Hospital 2]. Additionally, the Student has been treated by gastroenterologists at [Hospital 2].

prepare them for work following high school.⁹ A student who completes [Program 5] is eligible to take the Alternative Maryland State Assessment (Alt. MSA) and receives a Certificate of Completion, not a high school diploma.¹⁰

28. XXXXX performed her psychological assessment of the Student on March 30, April 9 and April 11, 2007 and used the following sources of data: WISC-IV; selected subtests of the Wide Range Assessment of Visual Motor Abilities (WRAVMA); selected subtests of the Kaufman Assessment Battery for Children, 2nd Edition (K-ABC-II); the Bender Gestalt, Written Paragraph, ABAS, 2nd Edition (ABAS-II), a clinical interview, and a review of records.
29. The WISC-IV revealed a Full Scale IQ of 71. The Composite score indices on the WISC-IV were: Verbal Comprehension Index-75; Perceptual Reasoning Index-69; Working Memory Index-74; and Processing Speed Index-88.
30. Composite scores on the WISC-IV are derived from scaled scores on the various subtests that make up the four indices. Subtest scaled scores can be compared to an average score of 10, with a range from 1 (low) to 19 (high).
31. The Student's scaled scores on the WISC-IV indicated some "scatter." "Scatter" describes variation in the scores of a performance subtest. A differential of more than five or six may produce a composite score that can mask highs or lows of the student's cognitive profile. In the WISC-IV subsets, the Student scored her highest levels in Similarities (9), Digit Span (8), and Coding (9). The Student's other subset scores ranged from 3 to 7.

⁹ Functional life skills would include planning meals, going shopping, cooking, budgeting, navigating public transportation, and other activities to teach job and life skills, as opposed to purely academic subjects such as algebra and foreign language.

¹⁰ Although the Mod. MSA was listed in the MCPS IEP forms, it had not yet been developed, nor was it available to MCPS students. The idea behind the Mod. MSA is that it would be used like the MSA, but would provide modifications and accommodations for students with an established need for them. The Alt. MSA encompasses mastery of skills, rather than a standardized test, and can be presented through a portfolio, providing videotaped tasks as well as anecdotal information.

32. The Student’s performance also indicated “splinter skills,” displaying a variance in ability in different areas.

33. The Student’s performance on the other tests administered by XXXXX included:

Bender-Gestalt: age equivalent 6-0 to 6-5 (years); K-ABC-III (selected subtests given):

Planning-77; and WRAVMA (one subtest): Matching-60.

34. The ABAS-II was completed by the Student’s father (parent version) and XXXXX

(teacher version).¹¹ The scaled and composite scores obtained consisted of the following:

<u>Skill Area</u>	<u>Scaled Score-Father</u>	<u>Scaled Score-Teacher</u>
Communication	6	1
Community Use	6	1
Functional Academics	7	1
Home/School Living	2	2
Health and Safety	6	2
Leisure	8	9
Self-Care	2	1
Self-Direction	4	4
Social	8	10
<u>General Adaptive Composite</u> ¹²	71	63
<u>Conceptual Composite</u>	78	59
<u>Social Composite</u>	87	95
<u>Practical Composite</u>	60	49

¹¹ The ABAS-II questionnaires include between 15 and 25 questions per category, with the answers divided between a frequency range of “Is Not Able” (0); “Never When Needed” (1); “Sometimes When Needed” (2); and “Always When Needed” (3). There is also a check-off area for “If You Guessed.” The questions encompass a myriad of activities requiring a subjective assessment. Both the Teacher and Parent Forms are comprised of questions directed toward children between the ages of 5 and 21.

¹² The Conceptual Composite includes Communication, Functional Academics, and Self-Direction; the Social Composite includes Leisure and Social; and the Practical Composite includes Community Use, Home Living, Health and Safety, and Self-Care.

35. XXXXX XXXXX performed a Physical Therapy Re-evaluation of the Student on March 1, 2007. XXXXX reported that the Student could perform many activities in the school setting well, such as ascending and descending stairs, jumping, climbing, walking up and down curbs and hills, and participating independently in Physical Education. XXXXX recommended that the Student receive one physical therapy session a month in the sixth grade.
36. XXXXX XXXXX performed an Occupational Therapy re-evaluation of the Student on March 23 and April 9, 2007. In her evaluation, XXXXX reviewed the Student's occupational therapy files, made clinical observations, reviewed the Student's work samples and conducted formal and informal assessments. The formal assessments conducted by XXXXX were the Motor Free Visual Perception Test [Third Edition] (MFVP) and the Developmental Test of Visual Motor Integration [Fifth Edition] (Beery).
37. The MFVP assesses visual and perceptual skills without a motor component. On this test, the Student scored in the adequate range.
38. The Beery consists of three components, Visual Motor Integration (VMI), Visual Perception [Motor Free] (VP) and Motor Coordination (MC). The VMI measures the degree to which visual perception and finger-hand movements are coordinated, the VP measures the degree to which one interprets visual stimuli, and the MC test measures the degree to which finger-hand movements are well-coordinated. The Student scored Very Low on both the VMI and the VP and Low on the MC. These scores indicated an age equivalency from five years to six years and six months.
39. XXXXX also assessed a number of the Student's functional skills. The Student's independent skills included tying her shoes, donning her braces (with adequate time),

doffing her shoes and braces, clothing management, self-feeding, managing her backpack, gluing, stapling, taping, manuscript and cursive handwriting, and copying into a planner. The Student was familiar with a keyboard and typed slowly, using her index and middle finger, with some letter omissions. XXXXX noted that the Student wore “pull-ups,” with occasional accidents, but could void independently with a verbal reminder. The Student was unable to change her “pull-up” independently.

40. XXXXX recommended that the Student continue with both direct and indirect Occupational Therapy in middle school.
41. XXXXX XXXXX conducted an Educational Assessment Re-evaluation on February 20 and March 28, 2008, and submitted her report on April 13, 2008.
42. XXXXX used the Woodcock-Johnson III-Revised Test of Achievement (WJ III) as a formal assessment tool. The WJ III measures a student’s academic performance in relation to a peer group based on age and/or grade. The WJ III comprises three clusters that include subtests that give insight into a student’s strengths and weaknesses in reading, mathematics, writing, and related skills.
43. XXXXX reported the following scores:¹³

<u>Broad Reading Cluster</u>	72	Low Range
Letter/Word Identification	72	Low Range
Passage Comprehension	72	Low Range
Reading Fluency	81	Low Average Range
<u>Broad Mathematics Cluster</u>	51	Very Low Range
Calculation	37	Very Low Range
Applied Problems	61	Very Low Range
Math Fluency	57	Very Low Range
<u>Broad Written Language Cluster</u>	61	Very Low Range
Writing Samples	83	Low Average Range

¹³ XXXXX was unable to explain how she derived a “Cluster” score from the subtest scores in the WJ III. The Cluster score does not appear to be an average of the subtests; e.g. the Broad Reading Cluster score of 72 is not the average of the subtest scores, which included an 81 in Reading Fluency. Similarly, XXXXX could not explain how the Cluster scores in Broad Mathematics and Broad Written Language were derived.

Writing Fluency ¹⁴	(No score)	
Spelling	70	Low Range

44. Although at the time of the Educational Assessment the Student was participating in the trial period of an assistive technology device, the Student chose not to use the device during the assessment.¹⁵
45. Pursuant to the Educational Assessment, XXXXX recommended that the Student be provided with extended response and processing time, be allowed to use a calculator for solving math problems, be provided opportunities for repetition and practice of basic skills, be frequently checked for understanding, be offered modified assignments, with tasks broken into smaller parts, and be encouraged to use a spelling dictionary for writing.
46. XXXXX performed the Student's Speech/Language Re-assessment Evaluation on February 9 and 12 and May 24, 2007.
47. XXXXX tested the Student with the following assessments: Clinical Evaluation of Language Fundamentals-4 (CELF-4), Expressive Vocabulary Test (EVT) and the Boehm Test of Basic Concepts-3 (Boehm). For these tests, there is a mean standard score of 100, with a standard deviation of 15, meaning that test scores from 85 to 115 are considered average. For scaled scores, there is a standard score of 10, with a standard deviation of 3, meaning scores from 7 to 13 are considered average.

¹⁴ XXXXX reported that the Student was unable to provide any correct answers in this timed subtest, in which students are shown a picture and given three words to use in a sentence based on the picture. The Student was given seven minutes in which to create the sentences, but XXXXX stopped the testing after the Student failed to give any correct responses after two minutes.

¹⁵ On or about April 1, 2007, the MCPS Interdisciplinary-Augmentative Communication and Technology Team (XXXXXXXXXXXX) placed the Student on a one-month trial of the use of an assistive technology device called the "XXXXXXXXXXXX" (mistakenly called the "XXXXXX" in XXXXX's report). The XXXXXXXXXXXXXXX is a voice output device that is individually programmed for a student and is considered a communicative "repair device" to assist individuals who want to talk but are not easily understood. The Student's XXXXXXXXXXXXXXX had a touch screen with picture-based icons.

48. The CELF-4 compares receptive and expressive language skills. Receptive Language subtests have a student point to pictures and give oral responses, as well as assessing following directions, recognizing categorized words, and identifying pictures based on grammatical structures. The Student's Receptive Language score was 61. Expressive Language subtests require students to repeat, formulate, and complete sentences. The Student scored a 51 in Expressive Language, with a Core Language Score of 46.
49. In the EVT, a student names a picture or provides a synonym for a stimulus word and picture. The Student scored a 76 on the EVT. In her March 2004 Speech/Language assessment, the Student scored a 69 on the EVT. The increase in the Student's score indicated improved expressive vocabulary.
50. The Boehm measures understanding of language concepts of quantity, time and space through pictures. At this time, the Student was able to identify 37 of 50 concepts. This score was an improvement over her March 2004 assessment in which she identified 26 of 50 concepts. The Student's special concepts increased from 70% to 87%, her quantitative concepts from 29% to 53%, her temporal concepts from 60% to 80%, with other concepts increasing from 40% to 80%.
51. As a result of her testing, XXXXX determined that the Student continued to demonstrate a speech/language impairment with severe weaknesses in expressive and receptive language and articulation, negatively impacting her educational progress in understanding verbal directions, expressing ideas verbally and written expression. XXXXX recommended that the Student continue with speech/language intervention.
52. On May 25, 2007, the IEP team met at [School 2] to review the re-evaluations and develop the Student's IEP for the 2007-2008 school year, when she would be entering middle school. The IEP team consisted of XXXXX XXXXX, XXXXX XXXXX

(regular education teacher), XXXXX XXXXX, XXXXX XXXXX, XXXXX XXXXX (from XXXXXXXXXXXXX), XXXXX XXXXX, XXXXX XXXXX, XXXXX, and the Father. One of the decisions the team had to make was how the Student was to be coded for eligibility for special education. Although in the past the IEP teams had identified the Student with two codes, at this time they were permitted to use only one.

53. The IEP team reviewed all of the presented re-evaluations, as well as the Student's scores on the MSA, taken in March 2006. All of the Student's scores were in the "Basic" range, well below the scores required to be "Proficient."

54. Concerns about the Student's toileting issues were expressed by a number of MCPS participants at the meeting and noted in the IEP, including her need for assistance and her use of "pull-ups."

55. During the course of the meeting, XXXXX advised that it was "time to bite the bullet and classify [the Student] as mentally retarded." XXXXX based her recommendation on the Student's 2007 psychological testing, where her general intellectual functioning and visual-motor and spatial skills fell in the well-below average range, her verbal and memory skills fell in the borderline range, her processing speed fell in the low average range, and her overall adaptive composite score fell below average. XXXXX emphasized that coding the Student "01" for mental retardation would give the Student the advantage of being able to access more services as an adult and would thus be in the Student's best interest.

56. In order to classify the Student as mentally retarded, the team had to submit the MCPS Mental Retardation Multidisciplinary Evaluation Form (MR Form). The MR Form, filled out by XXXXX, listed the Student's assessment and testing data and levels. Among the criteria required before designating a student as mentally retarded is the following item:

“[d]oes the student exhibit significantly sub-average adaptive functioning in areas not excluded by documented vision, hearing, medical or physical disability or cultural or religious factors? Two or more informants, who know the student well, including at least one who knows the student outside the school community, must confirm significant delays in the same two or more areas on standardized instruments.” (XX # 24, emphasis included). The MR Form then lists nine adaptive areas in which “Self-Care,” “Home Living,” “Community Use,” and “Other/Specify (handwritten-“self-direction”) are circled.

57. Where the MR Form asks evaluators to “note any special circumstances that may compromise the validity of accurate adaptive skill measurement (e.g. physical limitations),” XXXXX wrote “[h]as XXXXXXXXXXXXX, but many limitations are due to her diminished cognitive capacity.” (XX # 24)
58. All of the IEP team members, with the exception of the Father, signed the MR Form indicating their agreement.
59. The IEP also provided that the Student participate in the Alt. MSA and pursue a Maryland High School Certificate of Program Completion rather than a Maryland High School Diploma.
60. The IEP reduced the Student’s services for occupational therapy and physical therapy for the 2007-2008 school year, but added Assistive Technology and continuing XXXXXXXXXXXXX consultation with MCPS staff.
61. The completed IEP listed the Student’s primary disability as mental retardation and placed her in [Program 5] at [School 3] (the Student’s home school) for the 2007-2008 school year.

62. The Parents strongly disagreed with the determination of the IEP team and sought advice regarding their options and alternatives from XXXXX XXXXX, an educational consultant.
63. After meeting with the Parents and the Student and reviewing the Student's records, XXXXX suggested that they obtain another opinion regarding the Student's classification and placement and recommended they contact XXXXX XXXXX. Prior to entering private practice, XXXXX had worked as a school psychologist for MCPS for 31 years. XXXXX also referred the Parents to [School 4], which she thought might be a viable option for the Student's education.
64. The Parents contacted XXXXX, who met with the Student for evaluations on July 21 and 23, 2007. XXXXX also observed the Student when she met with the Father at Starbucks to go over the results of her testing. While at Starbucks, the Student cared for her younger brother and was permitted and able to pay at the counter with a debit card.
65. XXXXX administered the following tests and/or portions of tests to the Student in her office: Weschler Processing Instrument (WISC-III PI); Universal Nonverbal Intelligence Test-Standard Battery (UNIT); Developmental Neuropsychological Assessment Selected Test (NEPSY) and WJ III selected tests.¹⁶
66. On the WISC-III PI, the Student's scaled subtest scores ranged from 1 in Written Arithmetic to 14 in Coding-Incidental Learning Recall. The Student scored 10 in Block Design Multiple Choice, Vocabulary Multiple Choice, and Picture Vocabulary, and scored between 6 and 2 in other areas.

¹⁶ XXXXX scored the Student's tests using standard scores with a mean of 100 and a standard deviation of 15 and scaled scores with a mean of 10 and a standard deviation of 3. The relevant classification ranges used by XXXXX were Standard: 120-129 / Scaled: 14 & 15—Superior; Standard: 110-119 / Scaled : 12 & 13—High Average; Standard: 90-109 / Scaled: 8-11—Average; Standard: 80-89 / Scaled 6 & 7—Low Average; Standard: 70-79 / Scaled: 4& 5—Borderline Standard: Below 70 / Scaled: 1-3—Extremely Low (Deficient).

67. The descriptive classification of the Student's scales on the UNIT were mostly Very Delayed.
68. On the NEPSY, the Student's scaled subtest scores ranged from the extremely low to average range, ranging from 1 to 10.
69. The Student's proficiency ratings on the WJ III achievement tests ranged from negligible (Calculation and Applied Problems) to average (Story Recall-Delayed), with most of the other test results designated as very limited or limited.
70. XXXXX concluded, after reviewing the MCPS psychological assessments and her own testing, that the Student was not mentally retarded and although the Student's overall cognitive scores on the WISC-IV and UNIT fell in the Deficient range, other scores indicated strengths in higher-order thinking and reasoning. XXXXX found that the Student performed within the low average to average level on some of the tests she administered, as well as those conducted by XXXXX, including tests measuring verbal abstract reasoning and story completion. XXXXX noted other average and borderline scores on tests measuring planning skills, visual organization, and non-verbal analogic reasoning. XXXXX acknowledged the Student's extreme difficulty in tasks that require sequential memory, which impacted mathematical reasoning, understanding, and following directions.
71. XXXXX recommended that the educational coding that would more accurately reflect the Student's diagnostic profile would be 08/04/07, or Other Health Impaired for brain injury, Speech/Language Impairment and Orthopedic Impairment. XXXXX further recommended that speech/language services, as well as occupational, and physical therapy, be fully integrated in the Student's school day, and that she use augmentative

communication services and adaptive speech aids. XXXXX emphasized that the Student was not a candidate for [Program 5], based in part on her strong social adaptive skills.

72. The Parents paid XXXXX \$1,980.00 for her evaluation of the Student.

73. On August 13, 2008, the Parents, through their attorney, provided MCPS with written notice that they believed that the May 25, 2007 IEP and subsequent placement in [Program 5] did not meet the Student's educational needs, and were withdrawing her from MCPS and placing her at [School 4]. This letter included XXXXX's evaluation.

74. The Student began attending [School 4] at the end of August 2007.

75. MCPS continued the Student's IEP process and scheduled a meeting to continue discussing the 2007-2008 school year. In preparation for the upcoming October 25, 2007 IEP meeting, XXXXX XXXXX, school psychologist at [School 3], reviewed XXXXX's evaluation and recommended that the Student be observed at [School 4] prior to the meeting.¹⁷

76. The IEP team met at [School 3] on October 25, 2007. Present were: XXXXX, Case Manager from [Program 5] at [School 3]; XXXXX XXXXX, Principal, [School 3]; the Father; XXXXX, General Education (math) teacher; XXXXX; XXXXX, Speech/Language pathologist; XXXXX XXXXX from XXXXXXXXXXXXX; XXXXX, Special Education Supervisor; the Parents' attorney; E. Law, attorney for MCPS; XXXX, PPW; XXXXX;¹⁸ XXXXX, Physical Therapist; XXXXX, Occupational Therapist; XXXXX XXXXX, Special Education Resource Teacher from [School 3]; XXXXX XXXXX; XXXXX; and XXXX, representative from [School 4]. Other staff members from [School 4] participated via speakerphone.

¹⁷ XXXXX deemed XXXXX's report "acceptable for use in MCPS in that the assessment was done recently and test results are reported and discussed in detail." XXXXX, however, added the disclaimer that acceptance of the report did not necessarily indicate agreement with "all interpretations, impressions and recommendations."

¹⁸ XXXXX is listed in the IEP minutes as an "Advocate," as is XXXXX (otherwise unidentified).

77. At the meeting, the staff from [School 4] described the Student's current IEP as well as details about [School 4].
78. The [School 4] staff described [School 4] as a non-public school with special education students, where children are exposed to a regular education curriculum with modifications. The teacher:student ratio in middle school is 1:3.5 and 1:4 in the high school, and each classroom offers about four computers. [School 4] has speech therapists, psychologists, and occupational therapists on the premises and follows the Maryland Voluntary State Curriculum.
79. The [School 4] staff reported that the Student was adjusting well socially and making progress. The Student needed to use a pacing board; her written expression was on a first to second grade level and her math was on a first grade level.¹⁹ The Student was receiving one and one-half hour of speech/language and one hour of occupational therapy per week, and was currently being observed by a physical therapist to determine needed services. The [School 4] staff identified the Student's difficulty with inferential thinking and math concepts.
80. The team also discussed the Student's toileting issues and the progress she made at [School 2]. XXXXX presented her evaluation and the [School 3] staff expressed its desire to observe the Student at [School 4], and discussed how that might occur.
81. [School 4]'s policy permits only one observational visit per year for a student. At this time, the Parents wished to reserve that visit for themselves and not commit to sharing that visit with MCPS personnel.

¹⁹ The Student had also used a pacing board at [School 2]. A pacing board, considered a speech/language repair tool, is a strip of wood, with markings. In order to slow her speech for intelligibility, the Student would touch a mark for each word spoken.

82. Although XXXXX wanted to observe the Student at [School 4], she acknowledged [School 4]’s policy and obtained the Parents’ permission to conduct an individual testing session with the Student.
83. XXXXX met with the Student on December 21, 2007. After some initial difficulty understanding the Student’s speech, XXXXX became more accustomed to the Student’s speech patterns and articulation. The Student willingly rephrased or repeated herself and used hand gestures to facilitate XXXXX’s understanding. During the session with XXXXX, the Student demonstrated willingness to please and genuine effort in completing the requested tasks. Her attention fluctuated, and the Student required frequent redirection and prompting. The Student became happily excited at times, but easily calmed down and returned to task. The Student also engaged in appropriate and somewhat sophisticated humor with XXXXX.
84. XXXXX conducted the Reynolds Intellectual Assessment Scales (RIAS) testing with the Student. The RIAS is an intelligence test with a conformed, supplemental measure of memory. It includes a two-subtest Verbal Intelligence Index (VIX) and a two-subtest Nonverbal Intelligence Index (NIX). The four subtests combine to create a Composite Intelligence Index (CIX), a summary estimate of global intelligence. A Composite Memory Index (CMX) derives from two memory subtests, measuring auditory and visual memory. RIAS scores from 90 to 109 are average.
85. The summary of the Student’s scores on the RIAS is as follows:

<u>RIAS INDEX</u>	<u>SCORE</u>	<u>RANGE</u>
VIX	78	Borderline
NIX	88	Low Average
CIX	82	Low Average
CMX	---	---

86. The Student's performance on the RIAS indicated that her nonverbal reasoning abilities, which fell into the low average range, were better developed than her verbal reasoning abilities, which fell in the borderline range. The Student's performance on the verbal reasoning portion reflected some of her classroom difficulties. Verbal reasoning issues could impact receptive and expressive language abilities, as well as reading comprehension and written expression.
87. The Student's significant difficulty with short-term memory prevented XXXXX from obtaining a score in the CMX.
88. From her testing, XXXXX determined that the Student's cognitive potential fell in the low average range, particularly in regard to her nonverbal/visual skills. XXXXX acknowledged the Student's significant difficulties with communication, memory, and motor skills.
89. The IEP team reconvened at [School 3] on January 24, 2008. In addition to those present at the October 25, 2007 meeting were XXXXX XXXXX, MCPS Field Office Specialist, and XXXXX XXXXX, who had been the Student's Occupational Therapist at [School 2], and who replaced XXXXX.²⁰
90. XXXXX reported on the Student's progress at [School 4], where she was continuing with speech/language therapy for one and one-half hours per week and occupational therapy.
91. XXXXX presented her completed evaluation of the Student and recommended that the Student's code be changed to "Other Health Impaired." After some discussion regarding

²⁰ Another attorney for MCPS, S. Gooding, replaced Mr. Law at the meeting.

speech and motor issues, the team concurred with XXXXX and agreed to designate “Other Health Impaired” as the Student’s primary code.

92. The team also agreed that the Student met the criteria as a student eligible for the Mod. MSA and designated her as pursuing a Maryland High School Diploma.
93. After further discussing the Student’s needs, including Assistive Technology, the team agreed to meet at a later date to complete the IEP process.
94. On February 19, 2008, the Parents’ attorney sent XXXXX and XXXXX proposed modifications to the draft goals and objectives in the Student’s IEP.
95. Although the IEP team tried to arrange meetings in both February and March 2008, because of inclement weather and scheduling conflicts, the team did not reconvene until April 25, 2008.
96. The April 25, 2008 meeting convened with substantially the same participants as the two prior [School 3] meetings.²¹ The duration of the completed IEP was from April 28, 2008 through April 24, 2009.
97. The IEP listed the Student’s primary disability as “Other Health Impaired” and provided that the Student participate in the Mod. MSA and be on the track to pursue a Maryland High School Diploma. The IEP called for ten sessions of 85 minutes of special education in [Program 4] weekly and 30 sessions of 85 minutes of general education monthly.²² Under the IEP, the Student would participate in Reading Intervention ([Class]), Math and English classes with a special education classroom teacher, and supported Social Studies and Science classes in a general education classroom with a general education

²¹ At this meeting, XXXXX was present as Occupational Therapist (not XXXXX XXXXX) and Z. Greismann attended as the attorney for MCPS. Also, the IEP is dated April 28, 2008, because the meeting on April 25, 2008 concluded in the afternoon and the program for physically producing the IEP did not allow for backdating.

²² Out of 27 hours and 30 minutes of total time in a school week, this is equivalent to 16 hours and 23 minutes outside of general education and 11 hours and 7 minutes per week in general education, or an average of 40% special education placement per day. Rather than a designation for self-contained classes, [Program 4] currently

teacher and an instructional assistant (paraeducator). The IEP also specified that the Student participate in supported Physical Education classes with fading supports for transition. All services were to be provided at [School 3], the Student's home school.

98. Other services designated in the IEP included ESY services for Summer 2008, two 45-minute sessions of speech/language services weekly, 30 sessions of 60 minutes of occupational therapy yearly, and ten sessions of 30 minutes of physical therapy yearly. The IEP also called for Assistive Technology services of 120 minutes per year in the form of consultation to school staff by an XXXXXXXXXXXX consultant to address augmentative communication systems and strategies. In coordination with the consultation, the Student would have access to assistive technology in the form of the "XXXXXXXXXXXX."

99. During the 2007-2008 school year, [School 3] only had a self-contained class for [Class] for decoding, because it did not have any students who required self-contained classes for other subjects. Instead of a self-contained class for special education, [School 3] offered co-taught classes for Reading, English, and Math. Co-taught classes contain both general education and special education students, with two teachers. The teacher of record is the general education teacher, but of equal importance is a special education teacher. Each of the teachers meets the needs of all of the students in the class. The co-taught classes contain approximately 20 students.

100. In Social Studies and Science classes, general education teachers have paraeducators who support students with special needs. These classes at [School 3] contain approximately 26 students.

indicates students who need more than 15 hours of service per week.

101. Physical Education classes for sixth graders at [School 3] contain approximately 130 students.²³ These classes are broken up into approximately five squads, led by different instructors. The instructor for students with special needs would be the resource teacher for the Physical Education department.
102. All of the sixth-grade students at [School 3] eat lunch in the lunchroom at the same time. There are approximately 250 students in the sixth grade at [School 3]. Students who require specialized assistance are seated in one particular area and are usually brought to the lunchroom between lunch sessions to avoid long lines.
103. The Student's Parents declined to send the Student to [School 3] for the remainder of the 2007-2008 school year.
104. [School 4] operates on an 11-month schedule. [School 4] imbeds the Maryland Voluntary State Curriculum for all students and utilizes the Montgomery County curriculum for students who are funded by MCPS.
105. [School 4] has been certified as a non-public school by the Maryland State Department of Education. Students who are publically funded have the option of earning either a [School 4] Diploma or a Maryland State Diploma from their local school system. Students who are privately funded earn a [School 4] Diploma. A [School 4] Diploma is a Maryland State Board of Education approved diploma, in the same category as those granted by other private independent schools.
106. Students at [School 4] who are publically funded must take the MSA in order to earn a diploma. Students who are privately funded do not have to take the MSA to obtain a [School 4] Diploma.

²³ XXXXX testified that the estimate of 130 may be a little high, but would constitute about one-half of the class.

107. [School 4] does not require that a student be eligible for special education to be accepted; however, the curriculum is designed to serve children who have difficulty in a traditional classroom setting. Substantially all of the students at [School 4] have some type of disability.
108. On Fridays, [School 4] incorporates [Program 6], which integrates curriculum taught from Monday through Thursday with functional applications. In [Program 6], the Students use “[School 4] Dollars” and utilize the school bank, bookstore, newspaper, bakery, and other “real-life” activities.
109. [School 4] currently has two campuses: one in XXXXX and one in XXXXX in [County]. [School 4] in XXXXX currently has 97 students, who range from second grade through age 21. The Student has attended [School 4] in XXXXX since August 2007. The Student travels on a MCPS bus to [School 4] from XXXX in [County] as the “ride-along guest” of a [School 4] student who is currently funded by MCPS.
110. [School 4] presents curriculum as competency-based. Work is individualized to the student, who proceeds at the pace needed to understand information that is presented. Because of this method, some students may take longer to complete competencies in any given subject than other students.
111. During the 2007-2008 school year, the Student attended classes in Reading, Math, Writing, Literature, Science, Social Studies, Health, Recreational Education, Social Skills, Art, and Performing Arts at [School 4]. The Student also received related services of Speech/Language, Physical Therapy, and Occupational Therapy.²⁴
112. The Student made progress, to varying degrees, in all of her academic subjects. Her middle school progress report, dated June 12, 2008, reflected both her achievements and

²⁴ Although the Student’s IEP appears to provide that Physical Therapy would begin on October 28, 2008, this is an

known weaknesses. In Social Studies 6, Science 6, and Reading 2, the Student achieved six out of six competencies and attained a passing grade for the year. In Reading 2, the Student improved her reading comprehension by a grade level. In Writing 2, the Student completed five out of five competencies, with a passing grade for the year. In Literature 6, the Student completed four out of six competencies. Because her competencies are in progress, she received an incomplete grade.²⁵ In Math 2, the subject most difficult for the Student, the Student completed two out of five competencies, with a grade of incomplete, although by March 2008, she had already made progress and/or achieved a number of the short-term objectives on her [School 4] IEP. The Student has also achieved competencies in the non-academic subjects of Health 6, Performing Arts, Art, and Recreational Education. She has participated in an array of social activities, including performing in school plays.

113. The Student continues to make progress in her related services. In Speech/Language, the Student continues to use a pacing board, with increased intelligibility; she also has progressed toward her language goals. In Occupational Therapy, the Student has made progress in both manuscript legibility and self-paced keyboarding. In Physical Therapy, the Student has increased abilities on her left lower extremity (with efforts to ameliorate her gait), and improved body awareness and trunk control when descending steps and jumping. The Student is toilet trained and no longer wears “pull-ups.”

114. The Parents paid [School 4] tuition in the amount of \$30,186.00 for the 2007-2008 school year.

DISCUSSION

error. The Student has participated in Physical Therapy at [School 4] since at least September 2007.

²⁵ With a competency-based, 11-month program, even though a student may not attain all competencies, an incomplete does not mean that a student will not pass a course. For example, if the Student has an incomplete in June, she would continue in the course until the competencies were acquired before beginning the next level of the

Applicable Law

FAPE and Unilateral Placement

The identification, assessment, and placement of students in special education is governed by the Individuals With Disabilities Education Improvement Act (IDEA or Act), 20 U.S.C.A. §§ 1400-1482 (Supp. 2008); 34 C.F.R. Part 300; 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.A. §§ 1412-1414 (Supp. 2008), 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.A. § 1400(d)(1)(A); § 1412(a)(1)(A) (Supp. 2008). Maryland’s General Assembly and the State Board of Education have enacted statutes and 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.

course.

20 U.S.C.A. § 1401(9) (Supp. 2008).

Maryland law similarly defines a FAPE. Md. Code Ann., Educ. § 8-401(a)(3) (2008).

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) of 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.[A.] § 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 (4th 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 (4th 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 minimus*.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd 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;
- and

- (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.A. § 1414(d)(3) (Supp. 2008).

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 the 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.A. § 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.A. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114(a)(2)(i) and 300.117 (2008). 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. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

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. *Id.* at 370. 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.

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Shaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents bear the burden of proving here that (1) MCPS' proposed IEPs and placements for the 2007-2008 school year were not reasonably calculated to provide the Student with a FAPE and (2) that [School 4] was an appropriate placement for the Student in the 2007-2008 school year.

Independent Educational Evaluations

Pursuant to 34 C.F.R. § 300.304 (2008), each public agency must ensure that the following pertinent requirements are met in order to assess a child:

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

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

including information provided by the parent, that may assist in determining—

- (i) Whether the child is a child with a disability under § 330.8; and
- (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);

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

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

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

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

- (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- (ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
- (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
- (iv) Are administered by trained and knowledgeable personnel; and
- (v) Are administered in accordance with any instructions provided by the producer of the assessments.

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

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

measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

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

....

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

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

Maryland's General Assembly and the State Board of Education have enacted laws and regulations implementing the IDEA for Maryland's students. Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008); COMAR 13A.05.01. The Maryland regulations essentially mirror the federal regulations. COMAR 13A.05.01.05 governs the identification and assessment of disabled students. A student identified as potentially in need of special education and related services is to be appropriately assessed in all areas related to the suspected disability, including academic performance; communication; general intelligence; health; hearing; motor abilities; social, emotional, and behavioral status; and vision. COMAR 13A.05.01.05B(1). Assessment information is used by the IEP team to determine eligibility and, if appropriate, to develop an IEP. A variety of assessment tools are required to be used to assist the IEP team in gathering relevant functional, cognitive, developmental, behavioral, academic, and physical information. COMAR 13A.05.01.05B(2). The schools are required, therefore, to make both an educational and cognitive analysis.

Maryland law specifically requires that testing and assessment materials and procedures used to assess a student's need for special education and related services be technically sound, and that any standardized test administered to a student be valid for the specific purpose for which it is used and administered by trained and knowledgeable personnel in conformance with instructions provided by the producer of the test. COMAR 13A.05.01.05C(1) and (2). A report of each assessment procedure administered must be written as well as dated and signed by the individual who conducted the assessment it must include "(a) [a] description of the student's performance in each area of suspected disability; (b) [r]elevant information in accordance with §B(2) of this regulation, [and] (c) [i]nstructional implications for the student's participation in the general curriculum." COMAR 13A.05.01.05D(2) and (3).

COMAR 13A.05.01.14 addresses the procedural safeguards involved when parents wish to seek an independent educational evaluation (IEE). A parent of a student with a disability may obtain an IEE. COMAR 13A.01.01.14A(1), 14B(1). Parents who disagree with the evaluation of a public agency may obtain their own IEE or request an IEE at public expense. 13A.05.14B(1). When a parent requests an IEE at public expense, the public agency is required to either provide an IEE or file a due process hearing request to demonstrate that the public agency's evaluation is appropriate. COMAR 13A.05.01.14B(2). Upon the filing of a due process complaint to adjudicate the funding of an IEE, an impartial hearing officer can decide the appropriateness of the public agency's evaluation and which party would bear the expense of an IEE. COMAR 13A.05.01.14B(3). When an IEE is provided at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria used by the public agency when it initiates an assessment, consistent with the parent's right to an IEE. COMAR 13A.05.01.14B(4). Whether an IEE is publically or privately funded, it shall be considered by the IEP team in making any

decision regarding the provision of FAPE and may be presented as evidence at a due process hearing regarding the provision of FAPE. COMAR 13A.05.01.14B(5).

Did MCPS Offer the Student a FAPE for the 2007-2008 School Year?

The May 25, 2007 IEP

On May 25, 2007, after holding a number of IEP meetings, engaging in informal conversation, conducting assessments, and analyzing data, MCPS gathered the Student's IEP team and made a recommendation that startled and greatly disturbed the one person on the team who knew the Student differently than any of the other participants—her father. This decision, to code the Student, age 11, as mentally retarded, certify her for the Alt. MSA, remove her from the diploma track to a Certificate of Completion, and place her in a functional life skills program, precipitated a series of events that resulted in three psychological evaluations, numerous assessments, two IEPs for the same school year, created by two separate IEP teams at two different schools, and this due process hearing.

By everyone's account, the Student, who was stricken with XXXXXXXXXXXXX at birth, is a delightful, determined, and effervescent child. Despite her physical and learning limitations, the Student never succumbs to frustration or defeat, and is always striving to overcome her deficits and achieve. Because her needs and abilities are so complex, she is often underestimated or misunderstood.

From Kindergarten through the end of the 2006-2007 school year, the Student obtained her elementary school education through MCPS at [School 2]. She had been deemed eligible for special education services since pre-school. Throughout the years, the Student made discernable progress, sometimes more significant than others. Previous testing revealed a number of limitations, both physical and cognitive. Consistently, the Student's scores in psychological evaluations ranged from low average to borderline to deficient. Upward trends, along with her

continuing participation in the self-contained [Program 2] at [School 2], maintained her in the placement status quo. She had been coded for speech/language and orthopedic disability since early childhood, and with no imperative to change, remained so designated through the fifth grade.

When it came time to transition to middle school, personnel at [School 2] became concerned about the Student's future. [Program 2], her familiar educational environment, had been phased out; [it] no longer existed in middle schools.²⁶ In the staff's estimation, only two viable options remained for the Student—[Program 4] or [Program 5]. In preparation for making this consequential decision, the team began its work in January 2007, arranging for the mandated triennial evaluations and assessments and gathering information. XXXXX XXXXX, the Student's teacher for fourth and fifth grades,²⁷ conducted an educational assessment, and XXXXX XXXXX, the Student's physical therapist since the Student began at [School 2], re-evaluated her progress in Physical Therapy. XXXXX XXXXX, the Speech/Language pathologist who had taken over the Student's case that fall, conducted the Student's Speech/Language evaluation and XXXXX XXXXX, the occupational therapist who had worked with the Student for a year, assessed the Student's progress in Occupational Therapy. Most critically, XXXXX XXXXX, the school psychologist who had conducted the Student's last psychological evaluation in 2004, performed testing with the Student, using a variety of testing materials and assessments.

²⁶ During that year, the Student's father attended an MCPS meeting for parents regarding the discontinuation of [Program 2] in the middle schools. As a result of their concern over this development, the Parents investigated [School 5], a private school, for the Student. As a result of this inquiry, XXXXX was asked to complete and return a Teacher Evaluation Form about the Student for [School 5], which she did.

²⁷ Although the Student was mainstreamed in regular education classes with support for the fourth grade, all of her academic classes in the fifth grade were taught in [Program 2]. XXXXX, the [Program 2] coordinator half-time at [School 2] and at another MCPS elementary school, testified that she believed that the Student could probably be accommodated in regular education Science and Social Studies classes in the fifth grade, but that the combined fourth-fifth [Program 2] class may not have aligned with the regular Science and Social Studies classes. XXXXX also noted that another reason the Student was not included in regular Science and Social Studies classes was that she would have needed an adult to accompany her and no other adult was available at [School 2].

Additionally, XXXXX asked XXXXX and the Father to complete the ABAS-II, the tool that measures adaptive behavior and skills in both the school and home environments.

XXXXX had last evaluated the Student in 2004, when the Student was in second grade. XXXXX's contact with the Student, outside of her 2004 and 2007 evaluations, was sporadic. XXXXX worked half-time between the [Program 2] at [School 2] and at [School 6], another MCPS school. Other than conducting periodic evaluations, XXXXX did not offer direct services to children, but primarily consulted with teachers, coordinators, and administrators. Occasionally, XXXXX would see the Student in her classroom while attending to another student or in the hallway during the school day.

In 2004, XXXXX noted variability in the Student's test profile, with scores ranging from the Extremely Low category to Borderline to Average, and offered that the Student's Full Scale IQ score of 69 "does not fully represent [the Student's] cognitive abilities." (MCPS # 3) XXXXX also noted that the Student's scores were "somewhat higher" than those obtained three years before and "suggest that she currently is on an upward trend of intellectual functioning." She additionally noted that the Student's speech/language skills continued to affect her performance on cognitive tests. XXXXX testified that for the 2004 evaluation, since the team was not considering coding the Student as mentally retarded at that time, she either did not ask for the teacher's ABAS or may have received it after having written her report.

By 2007, XXXXX had changed her mind. After completing the Student's re-evaluation, XXXXX noted that the Student's test profile was "quite consistent" with the 2004 results, adding that the Student did have some areas of functioning that extended into the "borderline or even the average range, suggesting that she does have splinter skills that should serve her well in the future." (MCPS # 13) This time, however, XXXXX concluded that the upward trend in the Student's scores noted in 2004 reached a plateau and determining that the Student's cognitive

limitations were the major impediment to her academic progress, recommended that the Student be considered mentally retarded, albeit mildly so. This analysis formed the basis for the recommendation of the IEP team that the Student be placed in a functional life skills program and taken off the diploma track.²⁸

Two issues in particular suggest that this decision was based on less definitive information than simple test scores. One was the overreliance on the ABAS II in making her determination. Unlike in 2004, in 2007 XXXXX obtained ABAS II forms from both the Father and XXXXX.²⁹ The ABAS II is a test that relies on highly subjective answers to questions that can be vague, inapplicable, or outdated.

The ABAS II used by MCPS measures behaviors displayed at home, school and other settings for individuals between the ages of 5 and 21. Raw scores on the various skill areas are converted into scaled scores, which, when added into composite categories, are converted into composite scores. The scores obtained in the ABAS II from the Father and XXXXX varied significantly in several areas. Where all but two of XXXXX's scaled scores fell below 4, the Father scored all but three of the skill areas above 4. These results created notable disparity in two of the Composite categories, as well as the General Adaptive Composite.

Moreover, reading the ABAS II items reveals many activities that are either irrelevant to the life of an 11 year-old student or anachronistic. For example, items answered by the Student's father with a 0 ("Is Not Able") score included "[c]alls a repair person if, for example, the air conditioner or heater is not working," and "[p]erforms minor household repairs, for example, a

²⁸ A functional life skills program includes planning meals, going shopping, cooking, budgeting, navigating public transportation, and other activities to teach job and life skills, as opposed to purely academic subjects such as algebra and foreign language.

²⁹ The Mother testified that at some time during this process, XXXXX asked her a number of adaptive behavior-type questions over the phone. Although she could not say for certain that these were pursuant to the ABAS II, notations on the father's form in what appear to be XXXXX's handwriting, as well as some of the comments in XXXXX's evaluation, suggest that XXXXX did solicit some responses from the mother in her assessment of the Student's adaptive skills.

clogged drain or leaky faucet.” XXXXX marked a 0 for the item “[r]elies on himself/herself for travel in the community, for example walks or uses public transportation, a bicycle, or a car.”

(XX # 62) A number of the items on XXXXX’s form are not answered at all. There is no accounting as to how many activities were restricted or impossible due to the Student’s physical disabilities. Nonetheless, all of the items appear to have been factored into the composite scores.

When asked about the discrepancy between the Father’s and XXXXX’s adaptive assessments of the Student, XXXXX commented that she believed the Father may have “interpreted some of the questions with rose-colored glasses,” indicating that she chose to discount some of the Father’s observations because she believed they were too optimistic. XXXXX, however, never questioned the validity or reliability of the answers provided by XXXXX.

The reason that the ABAS II scores were so important is because adaptive scores play a significant role in determining whether a child can be deemed mentally retarded. One of the four questions asked in the MR Form to determine characteristics of Mental Retardation is “[d]oes the student exhibit significant sub-average adaptive functioning in areas not excluded by documented vision, hearing, medical, or physical disability, or cultural or religious factors?”³⁰ (XX # 24) Not only did the IEP team rely heavily on the ABAS II scores in answering this question in the affirmative, it disregarded, or at least significantly diminished, the Student’s physical and medical disabilities and their effect on her adaptive functioning.

The other issue that pervaded the IEP team’s assessment of the Student was toileting. It became obvious throughout the hearing that the [School 2] staff fixated on this area. No one appeared to significantly accept any medical or physical explanation for the Student’s difficulties in eliminating, despite the Parents’ mentioning over time that the Student had medically-based

³⁰ This question required an answer by two or more informants confirming delays in the same two or more areas.

reasons for having to wear a “pull-up” to school.³¹ Although XXXXX acknowledged that the Student’s toileting troubles were affected by her difficulty in pulling her clothing over her AFOs, it was clear that XXXXX considered this to be a huge social problem for the Student as she entered middle school. Although I understand why assisting the Student with toileting may have been distasteful for the [School 2] staff, I believe their collective emphasis on this particular aspect of the Student’s condition unduly colored their estimation of the Student’s abilities.

Even XXXXX admitted that the scores obtained by the Student on various testing instruments required judgment calls in their interpretation. A number of scores fell on the borderline between deficient and low average. XXXXX chose to skew these downward. XXXXX, while knowledgeable and experienced, approached the process with an agenda. This agenda was expressed by her comments regarding the advantages to being diagnosed with Mental Retardation. XXXXX stated:

...there are parents that are happy to have it when their child reaches adulthood because it’s a diagnosis that has to be made before the age of 18 so that child can—the young adult, at that point, can receive and be eligible for a lot of community services that are out there. There aren’t a lot of services available for someone who just has a health code for whatever reason. And, but if you can get in touch with the community agencies that support the young adults, there is a plethora of—of programs and training and guided kinds of things. You know, and I have seen that in action in people in my extended family, and in others, and with friends, and so forth that have people that have cognitive limitations. And to the point of having supportive living circumstances and all. (TR. 1075)

While she remained good natured throughout her testimony, it was clear that XXXXX was highly opinionated. She did not hesitate to offer her views on a variety of topics, including her belief that the MSA was an improper test for any [Program 2] student. XXXXX was equally emphatic in her view that that having the Student pursue a Certificate of Completion would be in

³¹ Notes from the March 2004 IEP (for third grade) indicate that XXXXX knew the Student was being treated by a gastroenterologist for her bowel problems, but believed it was a “timing” problem, and asserted it was “most important thing we can help her with.” (XX # 9) MCPS seemed to suggest that the lack of medical documentation in the record indicated that the medical issue was untrue. I found the Father’s detailed testimony about the condition of XXXXXXXXXXXXX credible and convincing, along with corroboration that the Student’s visits to a

her best interests, because she did not believe that “kids that have IQs in the seventies, even if you’ve got some splinter skills somewhere, are going to be able to do the array of skills that are needed for a high school diploma.” (TR. 1124) XXXXX strongly believed that placing the Student in a functional life skills program for vocational training would be “the best use of her time...to be able to move ahead with being a productive adult.” (TR. 1120)

I believe XXXXX’s robustly asserted opinions held great sway over the [School 2] IEP team. To a member, (with the exception of the Father) each parroted XXXXX’s view of the Student as less influenced by XXXXXXXXXXXX than cognitively impaired. The collective testimony of the team reflected groupthink—and almost a concerted, orchestrated effort to support a position that was later reversed.

XXXXX XXXXX, who split her time between [School 2] and [School 7] during the 2006-2007 school year, participated in writing both IEPs produced for the Student for the 2007-2008 school year. XXXXX had a sullen demeanor and often gave guarded and terse testimony, particularly regarding her participation in developing the April 2008 IEP. Although XXXXX claimed that she did not agree with the decision to place the Student back on a diploma track, she was vague about voicing her disagreement with the team at that time.

XXXXX XXXXX, who, along with XXXXX, also participated, to a lesser extent, in the development of the April 2008 IEP. XXXXX, who had only worked with the Student for the 2006-2007 school year, claimed that the Student’s cognitive issues impacted her limitations more than her physical disability. She appeared to partially base her opinion on the Student’s IQ score, although she acknowledged that the Father informed her about the Student’s medical issues. XXXXX, who had high regard for XXXXX, visited [Program 5] at [School 3] and believed it was well-designed for students with mild mental retardation and physical disabilities. XXXXX

gastroenterologist were reported to [School 2] staff.

was particularly evasive when trying to remember whether she was present when the [School 3] IEP team changed the Student's code. However, XXXXX did describe the Student as "dogged and determined" in her attempt to improve her fine motor skills.

XXXXX XXXXX had worked with the Student since Kindergarten. XXXXX was genuinely fond of the Student and her parents, deeming the Student "the happiest child I ever met" who "never had a bad day." She characterized the Student as a "people person" who, although she walked differently and was difficult to understand, loved to be around others and had found acceptance at [School 2]. XXXXX testified that it took longer to teach the Student than a child in regular education due to her cognitive limitations, but she was impressed by the Student's ability to navigate stairs and climb playground equipment. She believed XXXXX to be competent, thoughtful, and even conservative, as reflected in her decision not to recode the Student in 2004. XXXXX was particularly concerned about the Student's toileting issues and worried that the Student would be embarrassed if other children saw her "pull-ups" beneath her pants. XXXXX claimed she was unaware of any medical issues associated with the Student's toileting difficulties, but stated that she believed the issue to be of "massive importance." XXXXX testified that the Student having XXXXXXXXXXXXX "broke her heart" because had the Student not been so affected, she would have been a fine athlete.

XXXXX XXXXX worked with the Student for one year as her Speech/Language pathologist. XXXXX distinguished the Student's problems between articulation and language, separating language into two areas: receptive, or the ability to understand, and expressive, the ability to use. XXXXX believed that the Student had basic vocabulary knowledge, but was significantly below average. She also worked with XXXXX from XXXXXXXXXXXXX to find an appropriate augmentative device for the Student. XXXXX, who asserted that the Student's primary problem was one of cognition—not being able to understand—stated placing the Student

in [Program 5] would be in her best interest, because some subjects in the general educational curriculum, such as Spanish, would be of no benefit to her. XXXXX, however, did not know whether a student could graduate from High School without taking Spanish or whether there were other programs, outside of [Program 5], where a student could obtain a diploma under different standards. XXXXX announced with certitude that the [School 2] IEP team made the correct decision coding the Student, who needed a small academic environment that was highly structured, with a small teacher:student ratio and exposure to non-disabled peers.

XXXXX XXXXX taught the Student her academic subjects in the [Program 2] and administered the educational assessment for the triennial evaluation. XXXXX admitted that it was often difficult for her to decipher the Student's speech, but that she was able to understand her 50 to 75 % of the time. Frequently, she would have the other children in the class, who had known the Student longer, "translate" what the Student was saying. XXXXX, flustered at times, though cooperative, appeared to be unable to answer a number of questions, including those pertaining to different reading programs, familiarity with requirements for graduation, or scoring methodology on the WJ III, which she administered to the Student. After teaching in [Program 2] since 2004, XXXXX remains at [School 2], but no longer teaches special education.³²

In addition to these observations, another factor impaired the credibility of these witnesses. Threads of recurrent expressions ran through the testimony of the [School 2] team. While it would not be unexpected for them to agree with the IEP they created, I found it notable that they employed similar phrases or themes when describing the process, such as "based on the information at the time," or that they would have recommended the LFI program even if [Program 2] had existed in the middle schools. While I am not questioning their sincerity, I note

³² Distractibility was described as one of the Student's difficulties during the hearing. During the 2006-2007 school year, XXXXX's class contained two autistic children who, on several occasions, significantly disrupted the small class, necessitating removal of the other children. Even to a less distractible child, these events could have easily interrupted the flow of learning.

that the statements of some members of the [School 2] team were striking in their similarity, raising the suspicion that the team chose to sing in chorus from XXXXX's hymnal.

There is no doubt that the [School 2] staff cared deeply about the Student. All spoke of her endearing and unfailing persistence and sweet temperament. [Program 2] at [School 2] had been a protective cocoon for the Student, where she was surrounded by professionals who believed they knew her strengths and weaknesses and classmates who understood her needs. However, in their zeal to shield the Student from a more exposed environment, the IEP team imposed (to borrow a now well-used contemporary phrase) the "soft bigotry of low expectations"³³ on her future. There was a misplaced benevolence, guided more by their fears for the Student than her capabilities.

Although so much of the testimony revolved around whether it was proper to recode the Student as mentally retarded, this designation is not the essential issue in this case. The critical issue is whether the proposed placement of the Student in [Program 5] at [School 3] provided FAPE. Coding is merely a vehicle, or another piece of information. The process leading up to the recoding, however, does bear on whether the placement was appropriate.

Additionally, the argument that the [School 2] 2007-2008 IEP offered FAPE because it was developed based on the information known by the team at the time is unavailing. Other information was not unknowable-XXXXX's and XXXXX's assessments attest to that. The proposed placement was either appropriate or not appropriate, not based not on whatever information the team chose to elicit at the time. Nothing limited or prevented the IEP team from obtaining or considering other information that may have been available at the time. For example, the IEP team did have information from the Father about the Student's expanded adaptive skills, yet chose to diminish its significance.

³³ This phrase originated in a speech entitled "Education-No Child Left Behind" given by (then) Governor George

After disagreeing with the [School 2] IEP, the Parents engaged XXXXX, who referred the Student to XXXXX for additional testing. In many ways, XXXXX's Yin was to XXXXX's Yang. Where XXXXX was loquacious, XXXXX was succinct and blunt. XXXXX had worked for MCPS for many years and was well acquainted with the IEP process. Although XXXXX's conclusions were contrary to those of the [School 2] team, I do not believe she arrived at them cavalierly, or simply because she had been engaged by the Parents. XXXXX spoke frankly when she said that when she arranged to evaluate the Student she didn't know whether she would have to confirm the findings of the [School 2] team or not. XXXXX understood that, depending on the Student's scores, she might have to agree with XXXXX and inform the Parents that despite their disappointment, the [School 2] team was correct. I have no doubt that, had she needed to, XXXXX would have informed the Parents, in typically taciturn fashion, that the Student met the criteria for Mental Retardation and should be placed in [Program 5].³⁴

XXXXX tested the Student with a variety of instruments. Some of these, as well as other aspects of XXXXX's methodology, were questioned by MCPS. XXXXX chose to use tests that she believed had not been recently used by MCPS or those that she believed would elicit valuable information. A number of MCPS' witnesses testified about the "practice" or "test/retest" effect, which can occur when a student is given a test too proximate in time to the same or similar test previously taken. When a student takes the same test within too close a time period, it is assumed that some of the test is remembered, which could give a student a higher score on the test than originally attained. Different protocols recommend different periods of

W. Bush at the Latin Business Association Luncheon in Los Angeles, California on September 2, 1999 and has since been associated with the No Child Left Behind Act.

³⁴ As a means to attempt to impeach XXXXX's testimony, MCPS raised the issue (and submitted documents) regarding XXXXX's use of ABAS forms in another student's case, allegedly in violation of copyright laws. In addition to considering this gratuitously embarrassing to XXXXX, I found that the allegation that XXXXX may have improperly copied a document for use in an entirely different case irrelevant to XXXXX's ability to testify credibly in this matter. In fact, when confronted by MCPS with this material, XXXXX honestly admitted both her use and her error. I found XXXXX's unhesitating answers regarding this material, without excuse or rationalization, more, rather than less, convincing of her credibility.

time between tests. Most of the MCPS protocols specify that same or similar tests should not be administered within the same year. Other protocols call for a six-month or other waiting period. MCPS questioned XXXXX's use of the WISC III PI and WJ III in July 2007, when XXXXX administered the WISC IV in March and April 2007 and XXXXX gave the Student the WJ III in February and March 2007. XXXXX explained that she made a concerted effort to give tests that had not recently been given and described the WISC III PI as a processing instrument that is an adjunct to the WISC IV, not the same test. XXXXX offered that she did not realize that XXXXX had administered the WJ III earlier and acknowledged that the more recent scores may have been overestimates. XXXXX did not think it impacted her evaluation, since she gave some different subtests than XXXXX, which would not show a practice effect.

MCPS also implied that XXXXX erroneously used test results from another student in her report because on two occasions, another child's name was mentioned. XXXXX explained that she does use a template form for her reports and sometimes uses the opening sentence of a paragraph, which might contain a first name, as a prompt. While this practice may have been a little sloppy, I did not find that it rendered the testing faulty. In this vein, MCPS also questioned a result in which XXXXX found that the Student understood words that MCPS believed were beyond her capability to understand. XXXXX offered that, given the Student's home environment and her outside experiences, it was not beyond belief that she would understand the meaning of more complex words. I did not find this explanation implausible, nor did I find that it disproportionately impacted XXXXX's ultimate conclusions.

XXXXX met with the Student on two separate days for testing and also observed her informally when she met the Father, who was accompanied by the Student and her younger brother, at a Starbucks to review her results. MCPS criticized XXXXX for not having observed the Student in a classroom environment. XXXXX credibly explained that 1) she observed the

Student during the summer when classes were not in session and 2) that as a private evaluator, she was not subject to the MCPS requirement that psychological evaluations performed by their employees contain a student classroom observation component.

With not dissimilar data, XXXXX arrived at a conclusion at odds with [School 2]. XXXXX found that despite some very low scores, the Student's more elevated scores revealed low average to average higher-order thinking skills. XXXXX ruled out Mental Retardation and believed, unlike the [School 2] team, that a number of the Student's low scores were influenced by her XXXXXXXXXXXX. XXXXX noted the Student's marked difficulty with sequential memory and the effect it has on her mathematical reasoning and ability to respond to directions. XXXXX also believed that the Student's severe problems with articulation impeded her performance on some of the tests.

Primarily, XXXXX questioned XXXXX's interpretation of data in coding the Student mentally retarded. She believed that XXXXX ignored subtest scores that were not in the mentally retarded range, as well as scores on some of the adaptive tests that would have been negatively affected by the Student's XXXXXXXXXXXX. XXXXX singled out the Student's score on the "Similarities" subtest, which was in the average range. XXXXX characterized this as the most important test in the whole protocol, measuring verbal abstract reasoning. As such, she described "Similarities" as the test most correlated with general intelligence and the purest measure of intellect on the whole protocol.³⁵ XXXXX noted that if a student has "interfering factors," such as XXXXXXXXXXXX, but scores higher on "Similarities," it reveals that general intellect was likely good, but other causes related to the "interfering factors" could obscure interpretation of the tests.

³⁵ MCPS asserted that the Student's higher score in "Similarities" was influenced by the emphasis on that area of learning in speech/language therapy, and was therefore not reflective of higher intellect. This line of reasoning, however, seems to contend that scoring well on something one has learned somehow debases the result. If one of the Student's problems is poor memory and retention of material learned, then it would appear that having learned

Unlike XXXXX, who believed that labeling the student as mentally retarded would enhance her opportunities as an adult, XXXXX was emphatic that this characterization would be improper. XXXXX strongly disagreed with the recommendation of the [School 2] team and believed their proposed placement would inappropriately limit the Student's access to an academic program by placing her in [Program 5] teaching functional life skills.

Though obviously not entirely privy to the Student's daily academic environment, the Parents presented a different, yet wholly credible, picture of the Student at home, as well as her exposure to an array of cultural experiences. The Student is privileged to come from a family that has the wherewithal and interest to pursue a variety of activities, particularly travel and theater. Her Mother noted that the student often asks many questions and makes astute observations, and is not just captivated by the spectacle of the performance, but understands the dynamics and motivation of the themes and characters. The Mother strongly disagreed with XXXXX, who did not believe the Student understood much of what she saw. The Mother explained that when the Student becomes excited, as she often does when discussing the family's activities, her articulation suffers and it becomes harder to understand her accelerated speech. The Student's difficulty with intelligibility can be a severe impediment to understanding her verbal expression, potentially leading to a misperception of her skills.

The Mother also graphically described the Student's physical challenges. The Student's weakness on her left side affects her balance; she limps and frequently falls. The Student's legs are not symmetrical and her feet are slightly deformed. Her leg braces are fitted for inside her shoes, requiring larger shoes and contributing further to some instability. The Mother noted that when the family travels by air, the Student must use a wheelchair to navigate the long distances

and retained a skill would inure to her benefit, not devalue her score.

in an airport. Because of her left-side limitations, the Student sometimes has problems with gloves and other activities that involve two-handed facility.

The Mother also confirmed the Student's struggles with toileting and their consultations with medical professionals at [Hospital 2]. She related that it was explained to the Parents that the brains of children with XXXXXXXXXXXX can have difficulty with "feeling things" and processing messages involving muscular issues. The Mother testified that, although it took time, the family followed all of the doctors' recommendations and that the Student has finally achieved her goal of being free of "pull-ups" and fully toilet trained.

Although MCPS was appropriately deferential to the Father, who suffers from some memory and word-retrieval difficulties due to a past injury, much mention was made of his alleged "surprise" when the [School 2] team coded the Student mentally retarded. I found this line of inquiry to be unproductive for MCPS; it was obvious that from the time of the Student's birth, the Parents had concerns about her cognitive capacity. However, throughout the years, the designation of Mental Retardation had always been rejected by MCPS. What likely "surprised" the Father was that the [School 2] team, after designating the Student as speech/language and orthopedically impaired and keeping her on the diploma track for her entire [School 2] career, abruptly pivoted, with the looming specter of a middle school without a [Program 2] environment, and deemed the Student incapable of participating in traditional, albeit modified, academics and appropriate only for life skills training.

Although MCPS argued that certain deference must be paid to the opinions of their professionals, I find that any special deference due the [School 2] team was forfeited by their failure to properly take into account the Student's strengths, as well as any other options that may have existed in the MCPS universe, and to focus, magnify, and even distort her challenges

in an effort to, in their judgment, protect her from ridicule and hurt.³⁶ In *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002), the Fourth Circuit set forth standards of an IEP, stating 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.” The [School 2] team effectively lowered the basic floor of opportunity, and assigned the Student to a placement so lacking in meaningful educational benefit for the Student as to render it essentially subterranean. Accordingly, I find that the placement recommended by the [School 2] team on May 25, 2007 severely undercut the Student’s abilities and deliberately ignored her strengths and as such, did not offer her a FAPE in the LRE.

The April 28, 2008 IEP

After the Parents placed the Student at [School 4], MCPS retained an obligation to proceed with the IEP process. The process recommenced at [School 3] on October 25, 2007. The IEP team consisted of [School 3] staff representing MCPS and XXXXX, XXXXX, XXXXX from [School 4] (with others available by phone), and the Father on behalf of the Student. The team considered XXXXX’s report and discussed arrangements for XXXXX to evaluate the Student for MCPS.³⁷

XXXXX’s report corroborated XXXXX’s analysis. XXXXX found the Student to “demonstrate a rather unique cognitive profile with a wide variety of strengths and needs.” (XX

³⁶ The Parents’ attorney argued that, pursuant to COMAR 13A.03.02.09, alternatives other than assigning the Student to the Alt. MSA and removing her from the diploma track existed, including both [Program 7] and the Mod. MSA. Other than mentioning that the Mod. MSA, although indicated on the IEP forms as an option, did not yet exist, the [School 2] IEP team did not appear to have even considered other options for the Student than the Alt. MSA and Certificate of Completion.

³⁷ Although much ado arose at the hearing regarding XXXXX’s inability to observe the Student at [School 4], I do not find that the Parents acted obstructively. They decided to reserve the one permitted visit for themselves, a right they legitimately possessed. Whether or not they exercised that right, or to whom they assigned that right, neither demonstrated bad faith nor a desire to withhold information. It is noted that XXXXX accepted this limitation, recognizing [School 4]’s strict rule, and was willing to meet with the Student at an alternate location. (See MCPS # 30)

33) Results from her interview with the Student and testing on the RIAS³⁸ led XXXXX to believe that the Student's potential fell in the low average range, with significant difficulties with communication, memory, and motor skills, but with strengths in nonverbal/visual skills, diverse background knowledge, social skills, and a strong sense of humor.

XXXXX, who was a very straightforward witness, explained that she used the RIAS based on its advantage in working with students with communication and speech/language difficulties. XXXXX, in a very polite, yet professional manner, declined to criticize the [School 2] team, but strongly set forth her determination, based on her evaluation, that the Student did not meet the criteria for Mental Retardation.

When the IEP team came back to [School 3] on January 24, 2008, it considered XXXXX's evaluation, XXXXX's opinions, input from the Parents and [School 4] representatives, as well as other members of its team, which included XXXXX of XXXXXXXXXXXXX, XXXXX from [School 3], and XXXXX and XXXXX from [School 2]. At that time, the team determined that the Student's disability was best described under the code of "Other Health Impairment." On that date, the team also deemed the Student eligible to take the Mod. MSA and restored her to the diploma track. Also, the team completed the same MR Form that had been used by the [School 2] team. This time, however, the [School 3] team did not confirm Mental Retardation and concluded that the Student met "the criteria for a student with another health impairment and continues to qualify for special education services." (MCPS # 36) Because the meeting ran late, the team agreed to reconvene and complete the IEP at a later date that could accommodate everyone's schedules.

³⁸ Not surprisingly, XXXXX and XXXXX expressed divergent opinions on the reliability of the RIAS. XXXXX, who did some investigation of the RIAS pending the hearing, believed that the RIAS did not require lengthy verbal responses and that scores obtained on the RIAS were typically higher than those on other tests. XXXXX felt that XXXXX's use of the RIAS was appropriate, especially in light of the Student's XXXXXXXXXXXXX, because it minimized fine motor skills and sequencing and provided a purer estimate of intelligence.

Because of various scheduling conflicts, the team did not meet to finalize the IEP until April 25, 2008. The IEP ran from April 28, 2008 through April 24, 2009, and encompassed the remainder of the 2007-2008 school year and a substantial portion of the 2008-2009 school year. In addition to including the Student's coding of "Other Health Impaired" and the designation of eligibility for the Mod. MSA and the diploma track from January 24, 2008, the team recommended placement in [Program 4] at [School 3] in self-contained classes for Reading Intervention, Math, and English and general education classes with support in Social Studies and Science, as well as Physical Education. In addition, the team offered ESY services and use of assistive technology, presumably in the form of the "XXXXXXXXXXXX." At this time, however, the Student's father expressed his satisfaction with the Student's performance at [School 4] and his belief that the Student needed 100% special education support and that access to typical peers was not worth the trade for being in a setting where she was making progress.

This proposed placement was, in effect, an almost complete reversal from that offered by the [School 2] team. While it may have better conformed to the Student's abilities than [Program 5], the [School 3] placement erred too far in the other direction, offering the Student more opportunity, but in an environment that was far too inclusive in general education to meet her needs. The [School 3] team was proposing the best public alternative it could; [Program 2] no longer existed in the middle schools and [Program 4] was the last, best option for someone with the Student's needs. This, however, could not render it appropriate or even sufficient. What the Student needed was an educational program and setting that MCPS no longer offered.

The Student earned relative success in [Program 2] at [School 2]. Throughout her elementary school years she made slow, but steady, progress. The secure environment of [Program 2], filled with peers who understood, sometimes better than the adults, what the Student wanted to say, was wholly appropriate and suited to the Student's needs. Sometimes she

had been mainstreamed into general education classes, with support, but, as in her last year at [School 2], sometimes not. The Student, with the assistance of XXXXX, had learned to navigate the smaller building and playground equipment. She was able to access her academic subjects in an environment that both cushioned and supported her.

[Program 4] at [School 3], although more appropriate programmatically than [Program 5], was equally unsuitable for the Student. As XXXXX testified, only one self-contained [Program 4] class, [Class], was available during the 2007-2008 school year. At the time, no other students required self-contained classes for other subjects. The [Program 4] students for that year attended co-taught classes in English and Math, a general education class with both a general and special education teacher. [School 3] also offered supported classes, in which special education students attended general education classes in Social Studies and Science, with the assistance of paraeducators. XXXXX estimated that these classes contained 20 to 26 students respectively. Additionally, the Physical Education class, although divided, was very large, as was the entire school population, especially compared to the group experienced by the Student at [School 2].

XXXXX testified that it would be inappropriate for the Student to be in general education for subjects such as Science and Social Studies despite her average ability, due to her many neuropsychological processing issues. XXXXX believed that the Student required a comprehensive setting, with programming integrated with speech, language and augmentative communication, as well as occupational and physical therapy. XXXXX feared that, although the Student might appear attentive in a general education class, she would not be able to adequately access the material or derive benefit from it. Although being in a LRE has value, that value cannot transcend the inappropriateness of an academic setting that precludes educational benefit.

The environment at [School 3] also presented genuine physical challenges to the Student. Although XXXXX remarked on the Student's ability to negotiate the halls and steps at [School 2], [School 3] is a larger institution, with a significantly larger population. A gym class of almost 130 students, even if separated into several groups, could be overwhelming. The Student, who limped and swayed as she walked, was subject to frequent falls. Larger crowds, whether in the halls, on the steps, in the cafeteria, or in a gym class, would present significant physical challenges to a child who wears braces on both legs and may not have the stamina to walk distances.

Because the IEP was finalized at the end of April 2008, leaving only six weeks, at best, until the end of the school year,³⁹ the Parents rejected the placement of the Student at [School 3] for the remainder of the 2007-2008 school year. The Student had spent the bulk of the year at [School 4], had become acclimated, and was making progress. Moreover, at the time, [School 3] did not even offer all of the self-contained classes spelled out in the Student's IEP.⁴⁰

Although MCPS' proposed placement in the April 28, 2008 IEP was more suitable than the [School 2] IEP, it still fell short of the mark for FAPE. It placed the Student in classes that didn't even exist at the time, in addition to those that would have overwhelmed her both physically and academically, depriving her of meaningful educational benefit. While the coding and reassignment to the diploma track pointed in the right direction, the methodology and setting were inappropriate. Had MCPS retained [Program 2], perhaps an appropriate public placement for the Student would have been available. As then constituted, the appropriate public placement for the Student, to be provided by MCPS, did not exist. Accordingly, I find that the proposed

³⁹ The delay was neither the fault of MCPS nor the Parents; it was the unfortunate result of trying to set a number of meetings with a large number of participants with busy schedules.

⁴⁰ Although XXXXX testified that [School 3] would have provided the Student with the appropriate classes had she enrolled at [School 3] for the remainder of the 2007-2008 school year (for a class of one?) and mentioned at the April 25, 2008 meeting that [School 3] could program her for the rest of the year, since I do not find that the [School 3] placement would have offered FAPE, the availability of programming, even at that late date, is essentially moot.

placement in the April 28, 2008 IEP did not offer FAPE in the LRE for the 2007-2008 school year.

Was Placement at [School 4] for the 2007-2008 School Year Appropriate?

The Parents placed the Student at [School 4] after disagreeing with the proposed placement in the [School 2] IEP.⁴¹ Unlike [Program 5], [School 4] offers academic subjects and a resultant diploma, classes tailored to the students' academic abilities, and integrated supports, including speech/language, occupational, and physical therapy. Unlike [Program 4] at [School 3], [School 4] provides exclusively small classes with special education structure and supports, including those for Science and Social Studies, as well as a functional component. In a sense, the [School 4] curriculum and environment filled the gaps left by discontinuation of [Program 2], a program for the Student that MCPS could no longer provide.

While school systems are required to provide a FAPE in the LRE, private placements only have to be proven appropriate. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). MCPS frequently raised the issue of LRE, offering that even if the Student did not share classes with non-disabled students, simply being in the same location would be of benefit. If either [Program 4] or [Program 5] had been appropriate, this may have been significant; however, deficits in both programs and their inappropriateness for the Student rendered that possible advantage unavailing. Although there was some dispute as to whether [School 4]'s population included non-disabled students (XXXXXX indicated that some non-disabled students attend [School 4]; [School 4]'s promotional literature describes it as a school designed for special education, naming a variety of divergent conditions), this may have been a distinction as to

⁴¹ Unlike the scenario suggested by MCPS, the Parents were open and honest about their seeking information about educational alternatives throughout the process. Even prior to the [School 2] IEP, the Parents investigated [School 5] and asked XXXXX to fill out a recommendation. When the Parents settled on [School 4] for the 2007-2008 school year, they timely informed MCPS of their intent to withdraw the Student from MCPS and place her in private school.

whether a student had been previously identified as disabled or placed on an IEP. In any event, LRE is not a requirement for private schools.

XXXXX, who oversees curriculum coordination at [School 4], testified extensively about [School 4]'s program. XXXXX, who spends the majority of her time in the classroom, was quite familiar with the Student, having observed her two to three times per week in her classes throughout the year, in addition to speaking daily with her teachers about the Student's performance. XXXXX was frank about the Student's academic growth, noting her slow, but steady progress, particularly in Reading. While she remains significantly below grade level, the Student continues to make progress in the smaller class setting with integrated services. The competency-based structure of the curriculum allows the Student to accomplish skills at her own pace, without the pressure of having to fear failing. This arrangement, as well as the 11-month school year, permits the Student to continue to pursue a subject over time, with mastery of a subject separated into achievable chunks.

Although Math remains a substantial challenge, the Student has made appreciable progress in Reading, Writing, Science and Social Studies. Her handwriting, as well as her keyboarding, has improved, despite the physical challenge of having limited use of her left hand. The Student continues to use a pacing board to improve the intelligibility of her speech.

MCPS emphasized throughout the hearing the vast superiority of the augmentative technology offered by MCPS, in contrast to the more primitive pacing board used by the Student at [School 4]. While it is probably likely that the "XXXXXXXXXXXX" or a similar device that could "speak" for the Student might enable others to understand her more easily, its use may not be uniformly positive. XXXXX credibly described a situation in which a student may receive the benefit of an assistive technology device and become dependent on it, only to later be subject to defunding of the service, or some other loss of the use of the device. While speculative, this view

is not entirely unreasonable. However, even if the availability of the “XXXXXXXXXXXX” at [School 3] constituted a substantial enhancement of the proposed IEPs, it could not, in itself, render the MCPS proposed programs, deficient on their face, appropriate.

Additionally, the Student’s social integration into the fabric of life at [School 4] has been extremely successful. She has participated in a number of school activities, including performing in school dramatic and musical productions. The Student has also joined in the functional [Program 6] activities at the school. This component combines the life skills that every student needs with individualized academic programming. Unlike [Program 5] offered by MCPS, the learning environment at [School 4] encompasses all of the elements, including the opportunity to obtain a high school diploma, which would not have been made available by the [School 2] IEP. Unlike [Program 4], [School 4] has provided the Student with a smaller, more accessible environment that facilitates academic achievement without compromising the Student’s physical safety. For the Student, [School 4] has combined the substantive elements proposed by MCPS, without the limitations or impediments that either the [School 2] or [School 3] IEPs contained, with academic opportunities in which the Student can obtain meaningful educational benefit and succeed. Accordingly, I find that the Student’s placement at [School 4] was appropriate and that the Parents should be reimbursed for the \$30,186.00 they paid in tuition for the 2007-2008 school year.⁴²

Is MCPS Required to Fund the IEE performed by Dr. Meek?

In addition to a request for tuition reimbursement, the Parents have also asked that MCPS pay for XXXXX’s evaluation of the Student. Maryland law is clear on the parameters of public funding of IEEs. COMAR 13A.05.01.14B provides that parents who disagree with the evaluation obtained by a public agency may request an IEE at public expense. This action described in the

⁴² Since the Parents timely notified MCPS of their intention to withdraw the Student from MCPS and enroll her in

regulation, however, is prospective, rather than retroactive, as is the case in this matter. As set forth in COMAR 13A.05.01.14B(2), if a parent requests an IEE at public expense, the public agency has two choices: either provide an IEE or request a due process hearing to demonstrate that their evaluation is appropriate.

In this case, while the Parents strongly disagreed with XXXXX's evaluation, they did not offer evidence to show that they requested that MCPS fund an IEE, performed by XXXXX or another professional, at any time before XXXXX's evaluation was performed. The Parents engaged XXXXX privately, and after receiving her report, presented it to MCPS. While this action, in itself, was not unreasonable, it does not conform to the requirements of COMAR 13A.05.01.14B. Had the Parents requested an IEE from MCPS prior to hiring XXXXX, MCPS would have had the option of either providing the IEE or requesting a due process hearing. As the Parents did not request funding for the IEE in advance, MCPS did not have the opportunity to either agree or seek to adjudicate the funding. Accordingly, I find that the Parents are not entitled to reimbursement for the cost of XXXXX's evaluation.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the two IEPs drafted by MCPS for the 2007-2008 school year were not reasonably calculated to provide the Student with a FAPE. I also conclude that [School 4] is an appropriate educational placement for the Student, and that the Parents are entitled to reimbursement of tuition and expenses for their unilateral placement of the Student at [School 4] for the 2007-2008 school year. I further conclude that the Parents are not entitled to reimbursement for the IEE performed by XXXXX in July 2007. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v.*

private school, whether they gave the school system proper notice is not an issue in this case.

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 and educational expenses at [School 4] for the 2007-2008 school year be, and is hereby,

GRANTED; and I further

ORDER that the Parents' request for reimbursement for the Independent Educational Evaluation performed by XXXXX in July 2007 is **DENIED**.

If corrective action is required by this decision, the local education agency shall, within 30 days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

December 31, 2008
Date Decision Mailed

Harriet C. Helfand
Administrative Law Judge

#101981

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.