

XXXX XXXX

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

\* \* \* \* \*

\* BEFORE A. MICHAEL NOLAN,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH #: MSDE-MONT-OT-200200195

**DECISION**

Statement of the Case  
Issue  
Summary of the Evidence  
Findings of Fact  
Discussion  
Conclusions of Law  
Recommended Order

**STATEMENT OF THE CASE**

This case arises from a request by XXXX XXXX (“father”) and XXXX XXXX (“Mother”)(collectively known as the “Parents”), on behalf of XXXX XXXX (“Child” or “Student”), for a hearing to review the Individualized Education Plan (“IEP”) developed by the Montgomery County Public Schools (“MCPS”) and the placement proposed therein. The request was filed with MCPS on May 21, 2002.

On Wednesday, June 26, 2002, A. Michael Nolan, Administrative Law Judge (“ALJ”) conducted a hearing at the MCPS offices located in Rockville, The hearing continued on Tuesday, July 2, 2002 as scheduled. Insufficient hearing days were originally scheduled for the hearing, which necessitated continuing the case, by agreement of the parties, to July 8, 2002. The record closed at the conclusion of testimony on July 8, 2002

The hearing was held pursuant to the following laws: Individuals With Disabilities Education Act ("IDEA") Reauthorization, Disabilities Education Act Amendments of 1997, 20

U.S.C.A. § 1415 (2000); 34 C.F.R. § 300.507 (2001); Md. Code Ann., Educ. § 8-413 (Supp. 2001); Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings. The Parents appeared for the hearing, and were represented by Brian K. Gruber, Esquire. 5454 Wisconsin Avenue, Suite 760, Chevy Chase, Maryland 20815. MCPS was represented by Allison B. Steinfels, Esquire, Staff Attorney.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2001); Code of Maryland Regulations ("COMAR") 28.02.01.

## **ISSUES**

The issues on appeal are:

- I Whether the school system's proposed placement and Individualized Education Plan for the 2001 - 2002 school year, placing the Student at the XXXX Program, a self contained Special Education program housed in a public high school operated by MCPS, were consistent with the Student's entitlement to a free, appropriate, public education; and, if not,
- II Whether the parent's proposed placement of the Student at SCHOOL 1, a privately operated school that is located in XXXX, Maryland, is an appropriate placement for the Student.

## **SUMMARY OF THE EVIDENCE**

### A. Exhibits<sup>1</sup>

The following exhibits were admitted into evidence on behalf of the Parents:

- XX # 2 : The Individualized Education Plan developed at the Central Individualized Education Program ("CIEP") meeting on November 5, 2001, calling for placement of the Student at the XXXX Program, located at SCHOOL 2;

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<sup>1</sup> The exhibits were pre-marked by both sides. Several documents were not introduced into evidence, and therefore there are gaps between the exhibit numbers.

- XX # 3 : A letter dated November 7, 2001 from MCPS to the Parents describing the recommended placement for the Student, and advising them of the right to appeal the decision;
- XX # 4 : The *Report of School Psychiatrist* dated September 4, 2001, prepared by XXXX XXXX, Ph.D.;
- XX # 5 : The *Report of School Psychiatrist* dated June 16, 2000, prepared by XXXX XXXX, Ph.D.;
- XX # 6 : A report dated April 28, 2000 prepared by XXXX XXXX, M.D. entitled *Developmental Cognitive Neurology Evaluation*;
- XX # 9 : A *Report of Psychological Evaluation* dated September 29, 1997 prepared by XXXX XXXX, Ph.D.;
- XX # 11 : The IEP developed at an IEP team meeting held on April 5, 2001 considering the Student's 11th grade placement, calling for the Student to be placed at the XXXX Center at SCHOOL 3 for the 2001 – 2002 school year;
- XX # 12 : The *Report to Parents on Student's Progress* for the Student's 10<sup>th</sup> grade (School year 2000 – 2001) listing his grades and credits as of that time;
- XX # 13 : The *Report to Parents on Student's Progress* for the Student's 9<sup>th</sup> grade (School year 1999 – 2000) listing his grades and credits as of that time;
- XX # 14 : The IEP developed at an IEP team meeting held on June 26, 2000 considering the Student's 10th grade placement, calling for the Student to be placed at the XXXX Center at SCHOOL 3 for the 2000 – 2001 school year;
- XX # 17 : A letter dated May 18, 2001 from Mr. Gruber, on behalf of the parents, to Dr. XXXX of MCPS stating the Parents' objections to his request for additional testing as of that time, and requesting further identification of the type of testing Dr. XXXX believed was necessary;
- XX # 19 : A letter dated June 25, 2001 from Mr. Gruber to Edmund Law, Esq of MCPS advising him that the Parents would consent to administration of the BASC as well as other testing identified in a letter dated June 1, 2001;
- XX # 21 : A letter dated August 14, 2001 from Mr. Gruber to Mr. Law advising him that all requested testing had been completed, and requesting times for the CIEP meeting, and advising MCPS that if no mutually agreeable placement was found that the Parents intended to enroll the Student in a non-public school for the upcoming school year;

- XX # 23 : A letter dated August 23, 2001 from Mr. Law to Mr. Gruber advising of delays in completing reports, and stating that they could not schedule a pre-school year CIEP meeting;
- XX # 26 : A photocopy of a Brochure explaining the XXXX Schools Program in MCPS;
- XX # 29 : A document entitled SCHOOL 1 *Admissions Criteria and Process*;
- XX # 30 : A report prepared by XXXX XXXX, M.D. dated June 24, 2002, diagnosing the Student as having Anxiety and Depression, and expressing his feelings regarding educational placement;
- XX # A : The IEP developed at an IEP team meeting held on September 6, 2001 considering the Student's 11th grade placement, calling for the Student to be referred for consideration by a CIEP team of his placement, but calling for an interim placement at the XXXX Center at SCHOOL 3 beginning September 4, 2001;
- XX # D : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in English class for the 10<sup>th</sup> grade;
- XX # E : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in NSL Government class for the 10<sup>th</sup> grade;
- XX # F : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in Algebra class for the 10<sup>th</sup> grade;
- XX # G : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in Related Math class for the 10<sup>th</sup> grade;
- XX # H : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in Biology class for the 10<sup>th</sup> grade;
- XX # I : A *Secondary Teacher Referral/Report* prepared by XXXX XXXX, regarding the Student's performances in his internship for the 10<sup>th</sup> grade;

The following exhibits were admitted into evidence on behalf of the MCPS:

- MCPS # 8 : The Student's 10<sup>th</sup> grade report card from SCHOOL 3 dated October 12, 2001;
- MCPS # 9 : A *Functional Behavior Assessment* dated September 10, 2001 prepared by XXXX XXXX, XXXX Center Coordinator;

- MCPS # 12 : *A Specific Learning Disability Evaluation Form* dated September 6, 2001;
- MCPS # 13 : *An Emotional Disturbance Evaluation Report* dated September 6, 2001, prepared by Dr. XXXX;
- MCPS # 16 : *A Speech/Language Re-Assessment Report* prepared by XXXX XXXX, SLP, dated August 7, 2001;
- MCPS # 17 : A note dated 7/12 to Ms. XXXX from the Student's mother advising that she was ill and requesting that she reschedule the testing session;
- MCPS # 18 : A letter from the Student's mother dated July 10, 2001 requesting that SCHOOL 3 send a transcript for the Student to the Admissions Director at SCHOOL 1;
- MCPS # 19 : *The Report of the School Psychologist* dated September 4, 2001, prepared by Dr. XXXX; (same as XX # 4)
- MCPS # 20 : A letter from the Student's parents to Dr. XXXX dated May 11, 2000, advising him that, since the testing results were less than one year old, they did not agree with the additional testing proposed by Dr. XXXX, and re-expressing their dissatisfaction with SCHOOL 3;
- MCPS # 21 : A letter dated May 1, 2001 from Dr. XXXX to the Student's mother, documenting a telephone conversation on May 1, 2001 during which the Student's mother withdrew the parent's consent for testing;
- MCPS # 22 : A document titled *Summary of Parent Conference* dated May 1, 2001 indicating that the Student's mother had requested that the schools stop any assessments planned for the Student for the annual review meeting;
- MCPS # 23 : *A Report of Educational Assessment* dated April 29, 2001 prepared by XXXX XXXX;
- MCPS # 26 : *An Authorization for Release for Confidential Information* signed by the Student's mother on April 5, 2001;
- MCPS # 27 : *An Authorization for Assessment* signed by the Mother on 04-04-01;
- MCPS # 32 : The IEP developed at an IEP team meeting held on June 26, 2000 considering the Student's 10th grade placement, calling for the Student's placement at the XXXX Center at SCHOOL 3 beginning September 15, 2000;

MCPS # 34 : *A Specific Learning Disability (SLD) Multidisciplinary (ARD) Evaluation Form prepared on June 16, 2000;*

MCPS # 37 : *An Educational Assessment Report dated March 1, 2000 prepared by XXXX XXXX;*

MCPS # 38 : *grades for an unidentified student from an unidentified class, prepared by XXXX XXXX, showing a grade of 94.6%;*

MCPS # 40 : *An unsigned handwritten Memo noting that the Student's mother was considering SCHOOL 1, and was encouraged to consider XXXX as well. The form appears to be dated 02-08-1999.*

B. Testimony

The following witnesses presented testimony on behalf of the Parents:

XXXX XXXX	Algebra Teacher at SCHOOL 3
XXXX XXXX	School Community Health Nurse
XXXX XXXX	XXXX Center Coordinator, SCHOOL 3 <i>(Qualified as an expert in Special Education)</i>
XXXX XXXX	Student's Mother <i>(Qualified as an expert in High School Guidance)</i>
XXXX XXXX	Director of Related Services – SCHOOL 1 <i>(Qualified as an expert in Special Education)</i>
XXXX XXXX, Ph.D.	English Department Chair – SCHOOL 1
XXXX XXXX, Ed.D.	Special Education Consultant <i>(Qualified as an expert in Special Education, Learning Disabilities and Emotional Disabilities)</i>
XXXX XXXX,, LCSW-C	Counselor, Social Worker, SCHOOL 1 <i>(Qualified as an expert in Clinical Social Work)</i>
XXXX XXXX	Student's Father

The following witnesses presented testimony on behalf of the MCPS:

XXXX XXXX	XXXX Center Coordinator, SCHOOL 3
XXXX XXXX, Ph.D.	School Psychologist, MCPS <i>(Qualified as an expert in School Psychology)</i>
XXXX XXXX	Resource Specialist XXXX Program <i>(Qualified as an expert in Special Education)</i>

## FINDINGS OF FACT

Based upon the evidence and testimony presented, and having observed the witnesses and evaluated them as to their credibility, I find by a preponderance of the evidence, the following to be fact:

- 1) The Student is X years of age (Date of Birth: XXXX, 19XX) and has been identified in his most recent IEP as a child with a Specific Learning Disability (Code 9), a Speech & Language Disability (Code 4), and Emotionally Disturbed (Code 6). (testimony of parents, XXXX)
- 2) The Student was enrolled in the XXXX Center at SCHOOL 3 for school year 1999 – 2000, his 9<sup>th</sup> grade year, and did reasonably well in his courses. (testimony of XXXX, XX # 13)
- 3) A complete assessment of the Student, including educational and psychological assessments, was completed at the end of the Student's 9<sup>th</sup> grade year, and the reports of that evaluation were made available for IEP team review. (testimony of parents, XXXX, XX # 5, MCPS 34, 37)
- 4) For School year 2000 – 2001, the Student's 10<sup>th</sup> grade year, the Student returned to SCHOOL 3. His performance deteriorated as the school year progressed. (testimony of Mother, XXXX, XX # 12)
- 5) To avoid participation in class, the Student frequently put his head down on his desk in the classroom, moved his chair into the hallway outside the classroom, or left the classroom entirely and went to see the school nurse alleging a variety of physical maladies. On several occasions, the Student reported to the nurse's office more than once in the same day. (testimony of XXXX, XXXX)

- 6) The Student is not a “behavioral problem,” and does not act out in such a manner as to disturb other students in his classes. (testimony of Mother, XXXX)
- 7) On April 5, 2001, the school IEP team met for an annual review meeting to discuss the upcoming school year. At that meeting, MCPS agreed to present the parents’ request for non-public school placement before a Central IEP team for consideration. (testimony of Mother, XX # 14)
- 8) A complete psychological evaluation had been prepared by XXXX XXXX, Ph.D. on June 16, 2000. The report of this evaluation was not presented to the IEP team at the April 5, 2001 meeting. (testimony of Mother, XX # 5)
- 9) The April 5, 2001, IEP team was presented with a psychiatric evaluation that had been done by Dr. XXXX XXXX in 1997. (testimony of Mother, XX # 5)
- 10) The IEP team decided that MCPS needed to conduct an additional educational evaluation, and also ordered a new psychological assessment, as the one presented was many years old, and agreed that the team would meet again to review the results of these assessments. (testimony of XXXX, Mother, XX # 14)
- 11) At this meeting, the Parents agreed to permit the additional assessments, and signed authorization for release of information and permission for MCPS personnel to perform the evaluations. (testimony of XXXX, MCPS # 26)
- 12) The IEP developed at the April 5, 2001 meeting called for the Student to remain at the [SCHOOL 3]XX, pending the further evaluations, and that the permanent placement would be determined by a CIEP team. (testimony of XXXX, XX # 14)
- 13) The April 5, 2001 IEP also removed the counseling component of the existing IEP, created at the previous annual review on June 26, 2000. (XX # 11)

- 14) The Student's disability codes on both the June 26, 2000 and April 5, 2001 IEPs were listed as 08 [other health impairment] 09 [specific learning disability] and 04 [speech- language impairment]. (testimony of XXXX, XX # 14, MCPS # 32)
- 15) On May 1, 2002, the Student's mother contacted Dr. XXXX and verbally withdrew their permission for the remaining MCPS assessments. This decision was confirmed in a letter dated May 11, 2001, which explained the parents' position that the most recent assessments were less than one year old, and that therefore new information was not necessary. (testimony of XXXX, MCPS # 20,21,22)
- 16) In the May 11, 2001 letter, the parents stated their belief that, although they agreed that the Child's IEP, as drafted, defined appropriate goals and objectives, they did not believe that the staff at SCHOOL 3 had implemented the social and emotional goals due to time and teaching constraints. They urged that a change in placement was necessary, and urged the MCPS to present the Student's information to a Central IEP team. (testimony of XXXX, MCPS # 20)
- 17) Dr. XXXX discontinued the Student's planned psychological assessment as a result of the Parents request.(testimony of XXXX, MCPS # 21)
- 18) Prior to the withdrawal of parental permission, on April 24, 2001, XXXX XXXX, a Special Education Resource teacher had already interviewed the Student and had completed the educational evaluation. Her report was issued on April 29, 2001. (testimony of XXXX, MCPS # 23)
- 19) The Student's performance was slightly below average in reading and written language skills, and was below average in mathematics skills. (MCPS # 23)

- 20) On June 1, 2001, Dr. XXXX sent a letter to the Parents requesting permission to perform some of the tests incorporated in a psychological assessment. (testimony of Mother, XXXX)
- 21) On June 25, 2001, Counsel for the Parents advised Dr. XXXX that the parents would consent to the administration of the psychological testing identified by Dr. XXXX in his letter. (testimony of XXXX, XX # 19)
- 22) On or before August 14, 2001, all of the scheduled testing had been completed. The Parents advised the MCPS in a letter dated August 14, 2001 that if no mutually agreeable public placement was identified through the IEP/CIEP process, that they intended to place the Student in a non-public placement for the upcoming 2001 –2002 school year. (testimony of Mother, XX # 21)
- 23) The August 14, 2001, letter also requested that MCPS provide possible dates for the presentation of the Student’s case before a CIEP team. (XX # 21)
- 24) On August 24, 2001, the MCPS advised the Parents that due to delays in Dr. XXXX’s being permitted to evaluate the Student and prepare the necessary reports, etc., attributed in part to Dr. XXXX’s inability to make contact with the Student’s private therapist, there was insufficient time to present the Student’s information to a CIEP team prior to the beginning of the school year. (XX # 23)
- 25) After being advised that the CIEP meeting would be delayed, the Parents formally enrolled the Student for his 11<sup>th</sup> grade year (School year 2001 – 2002) at SCHOOL 1, a non-public Special Education School, located in Montgomery County. (testimony of Mother, XXXX)

- 26) On September 6, 2001, approximately one week after the beginning of the 2001 – 2002 school year, the school IEP team met at SCHOOL 3 to consider the results of the newly completed testing, and to draft an appropriate IEP for the year.  
(testimony of XXXX, Parents, XXXX )
- 27) At the September 6, 2001 IEP meeting, the team recommended that the Student’s permanent placement should be considered by a Central IEP team, and identified [SCHOOL 3]XX as an interim placement until such time as that could be accomplished. None of the Student’s 10<sup>th</sup> grade teachers from [SCHOOL 3]XX participated in this IEP meeting. (testimony of XXXX, Parent, XX # A )
- 28) Although they participated in the September 6, 2001 IEP meeting, the parents did not sign, or agree with, the resulting IEP. (Testimony of Parents, XX # A)
- 29) On November 5, 2001, a CIEP team met to consider the Student’s placement. Again, none of the Student’s teachers from [SCHOOL 3]XX were present for the meeting nor was anyone present who had taught the Student at any time. The only team member who even knew the student was Ms. XXXX, the sole representative from [SCHOOL 3]XX. (testimony of XXXX)
- 30) The CIEP team reviewed the evaluations and reports presented at the meeting. The CIEP team placed the Student in the XXXX Program, a self-contained special education program designed for students whose primary disability involves their emotional disturbance. The program is operated by MCPS and housed at SCHOOL 2, which is a regular MCPS high school. (testimony of XXXX, XXXX)

- 31) There is also a Middle School XXXX Program that is housed in SCHOOL 4, which is located adjacent to SCHOOL 2. (XX # 26)
- 32) The XXXX Program for High School Students at SCHOOL 2 is small, with a total enrollment of 40 students. There is a waiting list for entry into the program. (testimony of XXXX)
- 33) Even though there was a waiting list, the Student would not have been required to wait for admission until a vacancy arose as the Student already had a place reserved for him at the beginning of the school year. (testimony of XXXX)
- 34) The focus in the XXXX Program is on emotionally disturbed students, rather than on Learning Disabled students. Approximately 70% of the enrolled students have been identified as having Asbergers, Autism, or other diagnoses in the Autism spectrum.(testimony of XXXX, XX # 26)
- 35) There is a fundamental difference in the approach to education taken by the XXXX program and the XXXX centers operated by the MCPS. Education in a XXXX Center environment is focused on a student's learning disabilities and how they impact education. The XXXX program, however, focuses on a student's emotional disturbance and how these social problems interfere with education. (testimony of XXXX, XX # 26)
- 36) The educational program at the XXXX Program is modeled on the regular course of instruction in MCPS high schools, and the ultimate goal for XXXX students is to obtain a high school diploma. (testimony of XXXX, XX # 26)
- 37) Some of the students who are enrolled in the XXXX Program are given the opportunity to participate in a work program, including jobs under a contract with

Montgomery County for grass cutting, etc., helping out at a nursing facility, etc.

The participating students are able to earn credits, community service time, and eventually monetary compensation. (testimony of XXXX)

- 38) The XXXX Program utilizes a behavioral modification system which is commonly called a “Point System” or “Level System” where the students are awarded points for positive behaviors, and where points are deducted for negative behaviors. When a student’s point total reaches a certain level, a reward is given to the Student. (testimony of XXXX, XX # 26)
- 39) Rewards in the point system included increased privileges, snacks, and increased inclusionary time with students who are enrolled in the regular high school classes at SCHOOL 2. (testimony of XXXX, XX # )
- 40) There is a school psychologist on duty every day who alternates between the High School and Middle School XXXX programs as necessary. The XXXX program provides on the spot counseling and crisis intervention by the classroom teachers and assistants, by the child development specialist and by Mr. XXXX and the school psychologist. (testimony of XXXX, XX # )
- 41) The psychologist can also meet with certain students for short-term counseling. The XXXX program does not routinely integrate a program of regularly scheduled therapy as part of its educational program. (testimony of XXXX, XX # 26)
- 42) The Student has never been diagnosed with Autism or a similar condition, and had never been identified as being emotionally disturbed prior to the current year’s IEP.

- 43) The Student is not Emotionally Disturbed for educational purposes.

## DISCUSSION

The Individuals with Disabilities Education Act (“IDEA”), requires, “that all children with disabilities have available to them...a free appropriate education that emphasizes special education and related services designed to meet their unique needs...” 20 U.S.C.A. § 1400(d) (2000). The Act provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the Act. 20 U.S.C.A. §§ 1412-1414, 34 C.F.R. § 300.2, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Maryland’s special education law is found at Md. Code Ann., Educ. § 8-101 *et. sec.* and the regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

A free appropriate education (“FAPE”) is defined in COMAR 13A.05.01.03 as follows:

- (24) “Free, appropriate public education” means special education and related services which:
- (a) Are provided at public expense, under public supervision and direction;
  - (b) Meet the standards of the Department, including the requirements of 34 CFR §§300.7, 300.121, and 300.122, and this chapter;
  - (c) Include preschool, elementary school, or secondary education; and
  - (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is, in part, furnished through the development and implementation of an IEP, for each disabled child. *Rowley* at 181-2. COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the Student and the special education and related services to be provided to meet those needs. The goals,

objectives, activities, and materials shall be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). It must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, at 182.

While FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds,” *Barnett v. Fairfax Co. School Bd.*, 927 F.2d 146 (4<sup>th</sup> Cir. 1991), it does require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. In turn, “educational benefit” has been construed to mean more than trivial or *de minimis* educational progress. *In Re Conklin*, 946 F.2d 306 (4<sup>th</sup> Cir. 1991). See also, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3<sup>rd</sup> Cir. 1988). The IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4<sup>th</sup> Cir. 1990). Nor is there a “requirement to guarantee any particular outcome for the child.” *King v. Bd. of Ed. of Allegany County*, 999 F. Supp. 750, 767 (4<sup>th</sup> Cir. 1998).

In *Rowley, supra*, the Court set forth a two-part analysis to determine whether a child is being accorded a free appropriate public education under the IDEA. First, a determination must be made whether there has been compliance with the procedures set forth in the IDEA and second, whether the IEP as developed through the required procedures is reasonably calculated to enable the child to receive educational benefits. Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child’s placement should be questioned only with great reluctance by the reviewing authority. *Tice, supra*. Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply

their professional judgment.” *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3<sup>rd</sup> 996, 1001 (4<sup>th</sup> Cir. 1997).

To the maximum extent possible, the IDEA seeks to mainstream the child into regular public schools, but in any case, to place the child in the “least restrictive environment” consistent with his or her educational needs. 20 U.S.C.A. § 1412(5). What constitutes the least restrictive environment differs for each child, but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10A.

### **Burden of Proof**

Before addressing the merits of the instant case, an initial question must be resolved, as to which party, the Parents or MCPS, should bear the burden of proof. This question was addressed at the hearing, but was left open to be discussed and determined in this opinion.

Unfortunately, there is no clear statutory authority for assigning the burden to one party or another, and the courts are split. For example, "In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area School v. Scott P.* 62 F.3d 520, 533 (3rd Cir. 1995) (quoting *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3rd Cir. 1993). "The School District had the burden of proving compliance with the IDEA at the administrative hearing, including the appropriateness of its evaluation." *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996). *But see: Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) (The burden of proof rests with the party attacking the student's IEP); and *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986) (The party attacking an IEP bears the burden of showing why the educational setting and IEP are not appropriate.)

In *Alamo Heights*, the U. S. Court of Appeals for the Fifth Circuit explained the rationale for its view on the assignment of the burden of proof:

**[The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each Student's parent." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities . . . [The IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."**

790 F.2d at 1158 (quoting *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983)).

The Court of Appeals for the Fourth Circuit addressed the question of which party bears the burden of proof in *Stemple v. Board of Educ. of Prince George's County*, 623 F.2d 893, 896 (4th Cir. 1980), but declined to decide the issue. The Fourth Circuit has stated that, "a reviewing [authority] should be reluctant indeed to second-guess the judgement of education professionals." *Rowley* at 207-208; *Tice*, 908 F.2d at 1207. Also, three recent decisions from the U.S. District Court for the District of Maryland have touched on the issue of burden of proof.

In *Fritschle v. Andes*, 45 F. Supp.2d 500, 508 n. 21 (D. Md. 1999), Judge Davis noted the split in authorities on the issue and comments, without taking a position, that: "a determination of who bears the burden of proof at the administrative hearing has significant ramifications, as the losing party will then bear the burden [on appeal]." In *Schmerling v. Anne Arundel County Board of Educ.*, Civil Action No. WMN-98-2283, slip op. at 5 (D. Md. May 18, 1999), Judge Nickerson addressed the issue, but declined to issue a "hard-and-fast rule for all IDEA cases." On the facts of that case, Judge Nickerson affirmed the decision of the Administrative Law Judge who had placed the burden of proof on the parents to establish that an initial IEP was inappropriate.

Most recently, in *Brian S. v. Vance*, 86 F. Supp.2d 538 (D. Md. 2000), *vacated and remanded*, 2001 WL 22920 (4<sup>th</sup> Cir. 2001) (Civil Action No. PJM 99-15)<sup>2</sup>, Judge Messitte disagreed with Judge Nickerson as to who has the burden of proof in the instance of a challenge to an initial IEP. In a well-reasoned opinion, Judge Messitte discussed the issue of which party should have the burden of proof under three scenarios:

- 1) There is the initial IEP, proposed by the school authorities the first time it is sought for a child, with which the parents do not agree and as to which they seek an administrative due process hearing;
- 2) There is the existing IEP, at one time agreed to by everyone, which either the parents or the school district seek to change against the wishes of the other, whereupon the matter goes to an administrative due process hearing; and
- 3) There is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.

After a thorough discussion of the congressional intent behind the IDEA, case law, journal articles and evidentiary treatises, Judge Messitte placed the burden in the first scenario on the school district, in the second scenario on the party seeking the change and in the third scenario on the party challenging the administrative decision.

Given the lack of definitive authority in this Circuit, the support in other Circuits for placing the burden of persuasion on the Parents, and in view of the reluctance expressed by the U. S. Court of Appeals for the Fourth Circuit in *Tice*, "to second-guess the judgement of education professionals," I conclude that the rationales expressed by the Court of Appeals for the Fifth Circuit in *Alamo Heights*, and the U.S. District Court for the District of Maryland in *Brian*

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<sup>2</sup> This ALJ is aware that the *Brian S.* decision was vacated and remanded on appeal. The Fourth Circuit expressed neither agreement nor disagreement with Judge Messitte's analysis of the burden of proof issue. Rather the appeal was vacated to allow the District Court to consider the merits as well as the issue of the allocation of the burden of proof. However, given the lack of decisive authority on the issue of burden of proof, and given the thoroughness of Judge Messitte's opinion, I find his rationale persuasive, and his analysis has been relied upon to some extent in this decision.

S. are most persuasive. Using the analyses in those cases, I place the burden of proof in this case on the Parents in this case as they seek a change in the MCPS IEP. To meet the burden, the Parents must demonstrate that the IEP offered by the MCPS was not reasonably calculated to enable the Student to receive educational benefits. I would note, however, that while the parties seemed to place great emphasis on the issue of burden of proof, my ultimate decision would remain unchanged even had I determined that the MCPS carried the burden.

#### **APPLICATION OF THE LEGAL STANDARDS TO THE INSTANT CASE**

In the instant case, there are many areas about which the parties agree. The Student is not ready to participate in classes in the mainstream, general education setting. Further, the proposed IEP as developed by the MCPS IEP team contains Goals and Objectives that both the Parents and MCPS consider appropriate for the Student. The basic question presented for consideration involves the determination of the appropriate setting wherein those goals and objectives should be implemented.

The Student has received Special Education services for several years, most recently through the MCPS at in the XXXX Center at SCHOOL 3. Until the 2001 – 2002 school year, and for that matter, until the September 6, 2001 IEP, the Student has been identified as having a Specific Learning Disability, a Speech/Language Disability, and being Other Health Impaired, as the result of an Attention Deficit Hyperactivity Disorder (“ADHD”).

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During his 9<sup>th</sup> grade year, the Student did reasonably well at SCHOOL 3 although his grades deteriorated slightly toward the end of the year. He returned for the 10<sup>th</sup> grade at SCHOOL 3 for the 2000 – 2001 school year, and the year began well. As the school year proceeded however, the Student’s performance, both educationally and emotionally, began to deteriorate. Throughout his school career, the Student has been considered to be a “loner”, and

did not have a large group of friends. He began to withdraw from the classroom environment, and avoid participation in classes by making himself unavailable for learning by putting his head down on his desk, or, occasionally, by placing his chair in the hallway instead of the classroom. On occasion, he left the classroom completely and went to the school health room alleging illness.

On April 5, 2001, the IEP team met to consider the Student's placement for the 2001-2002 school year when the Student would be in the 11<sup>th</sup> grade. The IEP developed at that meeting called for the Student to return to SCHOOL 3 for the upcoming school year. The Student was still identified with the same disability codes as he had been in previous years. Ironically, even with the increased concern expressed by the team regarding the Student's emotional status, the IEP team removed the individual counseling component of the existing IEP.

The Student had submitted to a complete educational and psychological evaluation in June 2000, at the end of his 9<sup>th</sup> grade year. For an unexplained reason, however, the reports of these evaluations, performed by MCPS staff, and presumably in the MCPS possession, were withheld from the IEP team during the April 5, 2001 IEP meeting to consider the Student's 11<sup>th</sup> grade year during 2000 - 2001. Instead, the IEP team was provided with old evaluation reports, including a middle school psychological report prepared in 1997. The outdated reports caused the IEP team to request new evaluations, in order to have a more current, and presumably more accurate, description of the Student and his situation. They determined that the Student should continue at SCHOOL 3, but that the case would be referred to a Central IEP team to consider the permanent placement question after the evaluations were completed.

The Parents authorized the additional assessments at the April 5, 2001 meeting, and the Educational Assessment was effected on April 24, 2001. The Mother called MCPS on May 1,

2001 and withdrew her permission for the remaining testing. This withdrawal was affirmed in writing on May 11, 2001, reminding MCPS that a complete psychological evaluation was just completed after the 1999 – 2000 school year.

After discussions between the parents, their attorney, and Dr. XXXX, the Parents relented and again granted permission for limited psychological assessments on June 25, 2001. The testing was completed on or before August 14, 2001. In a letter on that date, Counsel for the Parents requested proposed dates for the CIEP meeting, and advised MCPS that, if an appropriate placement was not identified, the Parents intended to enroll the Student in a non-public Special Education school. The Psychological report was not completed in sufficient time to schedule an IEP meeting prior to the beginning of the 2000 – 2001 school year, as Dr. XXXX was having difficulty contacting the Student's present therapist, Dr. XXXX. In a letter to the parents dated August 23, 2001, Edmund Law, an attorney for MCPS, stated that, due to the delays in completing the assessments, the MCPS would not be able to schedule the agreed upon CIEP team meeting for a date prior to the beginning of the school year, to consider the Student's placement question. At that point, the Parents formally enrolled the Student in SCHOOL 1.

A regular school IEP team meeting was conducted on September 6, 2001, after the school year had begun. Both parents, their attorney, the MCPS attorney, as well as the Special Education supervisor participated in the September 6, 2001 meeting. The Student was not present, nor surprisingly were any of the Student's teachers from the previous year. The team considered the evaluation reports, and elected to change the Student's coding from Other Health impaired ("08") to Emotionally Disturbed ("06"). They continued the LD and SL disability codes. The team drafted an IEP calling for the Student's interim placement to remain at

[SCHOOL 3]XX, pending referral to the CIEP team. The Parents did not agree with the coding change or placement, and did not sign this IEP.

On November 5, 2001, a CIEP team met to consider the Student's situation. The Mother and her attorney attended the meeting. None of the Student's MCPS teachers were present, but . XXXX XXXX, the Student's teacher and counselor at SCHOOL 1 was present, as was Ms. XXXX, the XXXX Center Coordinator from SCHOOL 3, Dr. XXXX, and the MCPS attorney. The team re-instated the Counseling provision to the IEP. The Counseling was to occur once a week with a psychologist. They also included continuing Speech and Language services

The CIEP team considered the evaluation reports and identified the Student's strengths as Attendance,. Cooperation, Motivation, Creative and Artistic skills, class participation, and friendly nature. As weaknesses, they noted lack of homework completion, written expression and spelling, as well as poor self advocacy skills and decoding skills. They concluded that the student's areas of need in "written expression, pragmatic lang.(sic) and peer interaction require specialized support." The team identified the XXXX Program located at SCHOOL 2 as the appropriate placement for the Student, and continued the Emotional Disturbed, Speech Language Impaired, and Learning disabled coding applied by the September 6, 2001 IEP team.

Much of the disagreement in this case rises from the change of the student's coding to reflect that he is Emotionally Disturbed. Both the Code of Federal Regulations<sup>3</sup> and the Code of Maryland Regulation define "emotional disturbance," in a similar fashion. COMAR 13A.05.01.03(2) reads as follows:

- (20)(a) "Emotional disturbance" means a condition exhibiting one or more if the following characteristics over a long period of time and to a marked degree, that adversely affects a student's educational performance:

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<sup>3</sup> See 34 C.F.R § 300.7(b)(4)

- (i) An inability to learn that cannot be satisfactorily explained by intellectual, sensory or health factors;
  - (ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
  - (iii) Inappropriate types of behavior or feelings under normal circumstances;
  - (iv) A general, pervasive mood of unhappiness or depression; or
  - (v) A tendency to develop physical symptoms or fears associated with personal or school problems.
- (b) “Emotional disturbance” includes schizophrenia.
- (c) “Emotional disturbance” does not include a student who is socially maladjusted, unless it is determined that the student has an emotional disturbance.

This regulation requires the IEP team to consider each of these specific criteria when evaluating whether a child is or is not to be identified as primarily ED. In *Springer v. Fairfax County Bd. of Education*, 134 F.3d 659, 663 (4<sup>th</sup> Cir. 1998), the 4<sup>th</sup> Circuit Court of Appeals considered in detail what is necessary to identify a child as ED. The facts in *Springer* are distinguishable from the instant case. In *Springer*, the parents were attempting to have their child identified as Seriously Emotionally Disturbed<sup>4</sup> (“SED”) to enable him to receive Special Education services. Here, MCPS is alleging that the Student is Emotionally Disturbed, in order to include him in a program specially designed to educate Emotionally Disturbed students. The considerations, however, remain the same. The *Springer* Court emphasized that there was a clear distinction between social maladjustment and ED. Writing for the Court, Chief Judge Wilkinson stated:

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<sup>4</sup> SED and ED are names for the same Special Education disability code. The nomenclature was changed during the time between *Springer* and the instant case.

**The regulatory definition delineates no fewer than that four specific conditions a student must satisfy in order to qualify for special education services as seriously emotionally disturbed: the student must demonstrate that he has (1) exhibited one of the five listed symptoms, (2) “over a long period of time,” and (3) “to a marked degree,” and (4) that this condition adversely affects his educational performance. Finally, the definition pointedly excludes students whose behavior is attributable to social maladjustment, unless they also suffer an independent serious emotional disturbance<sup>5</sup>.**

In the instant case, the Student has been evaluated many times, but was never identified as primarily ED. The identification of the Student by Dr. XXXX as being emotionally disturbed is, therefore, somewhat surprising. One of the requirements affirmed by the *Springer* Court was that the symptoms be displayed over “a long period of time”. Although there was no guidance provided by the Court to indicate what constitutes “a long period of time,” the period in consideration in the instant case is relatively brief.

Less than a year before the present assessment, the Student was evaluated by a Psychologist in the employ of MCPS and was not found to be ED. He was also evaluated at that time by a neurological specialist at the XXXX who concluded that the Student’s emotional problems grew out of his learning and language disabilities, and not the other way around. There was no evidence presented to suggest that the Student is disruptive in class, or is a behavioral concern in the classroom environment, and in fact, his cooperative nature was listed as a strength by his teachers and the members of the CIEP team. The evidence presented does establish that the Student has had social difficulties for many years, several of which have manifested themselves in the school environment. He has also exhibited signs of a life-long speech and language problem throughout his school career.

At the end of his 9<sup>th</sup> grade year, the Parents submitted the child to an outside evaluation performed by XXXX XXXX, M.D., Professor of Neurology and Director of Developmental

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<sup>5</sup> *Id.* At 663

Cognitive Neurology, Pediatrics, and Psychiatry at XXXX. In her report from an evaluation conducted on April 28, 2000, Dr. XXXX drew distinct, identifiable parallels between the Student's speech and language problem, and his apparent emotional status. She stated:

**[The Student] has a very important language disorder in the context of additional other brain dysfunctions in the motor and executive systems. . . .**

**I am absolutely opposed to reclassifying or reconceptualizing this young man as primarily emotionally disturbed. I am sure he suffers from anxiety and perhaps even some reactive type depression but I believe that he is incapable of being interpreted as being emotionally disturbed on the basis of anything he says to you about what he is experiencing internally or anything he says on a projective test. He has too profound a language disorder for this kind of inference to be made. He is basically a language-impaired youngster, for educational purposes . . .**

**The important thing at this time is to search for the appropriate kind of class/school placement. It is certainly not going to be one for the emotionally handicapped.**

Dr. XXXX's report seems to parallel Dr. XXXX's interpretation of the Student's situation. She summarized the Student's situation as follows:

**[The Student] was a tall, thin youth who was polite and cooperative throughout all interaction. He was motivated to perform well, tried hard, and produced test results which appear to be a valid indication of his intellectual ability. Her is a neurologically involved youth who is shy and has poor social skills. He is able to relate well to supportive adults but has difficulty relating to peers or in social situations which are unfamiliar to him. Although he is of average intelligence, he will not function within average limits in all areas because his intellectual development is inconsistent. The amount of variability between the SW-III subtest scores was extreme, yet consistent with neurologically impaired youngsters. [The Student] has strength in his ability to work with tangible materials but can be expected to continue to experience problems with written work. He is easily distracted and has considerable difficulty with math tasks. He will require an academic program which will accommodate his neurological problems and concomitant social and emotional issues. He is not emotionally impaired but has unmet social needs as a result of his neurological involvement.**

Dr. XXXX XXXX, Ph.D., a school psychologist for MCPS, indicated that as part of his 2001 evaluation, both parents and four classroom teachers completed the Behavioral Assessment

System for Children. He quoted an unidentified source stating that

**“Any score in the Clinically Significant range suggests a high level of maladjustment. Scores in the at-risk range identify a significant problem that may not be severe enough to require formal treatment, or a potential of developing a problem that needs careful monitoring.”**

The reported scores from the parents, teachers, and the Student’s self-assessment, showed a wide range of categories in the areas of concern. There was significant disparity between the conclusions drawn by the teachers, and also between the parents and the Student himself. One of the teachers found the Student to be average in all categories, except “leadership” where he was noted to be at risk. Another teacher found the Student to be average in all areas, including Leadership, except he was at-risk in “Internalizing Problems,” “Anxiety” and “Somatization.” A third teacher found the Student again primarily average, but Clinically Significant in Internalizing Problems, and Somatization, and At-Risk in Anxiety, Depression, and Atypicality. The final teacher found the student again, mostly average, with low hyperactivity, at risk for Internalizing Problems, Atypicality, Adaptive Scales, Social Skills, Leadership, and Study Skills. Of the four teachers, each considering 19 areas of difficulty, only one teacher found indication of “Clinically Significant” and that in only two areas: Internalizing Problems, and Somatization. All other ratings were average, with some at-risk findings.

The Parents, and the Student himself, also completed the analysis for the testing. The parents found the Student to be at-risk in more categories than did the teachers, but still more average than not, as did the student. The parents both indicated that the Student was Clinically significant in the area of Withdrawal, and one parent found him Clinically Significant in the area of Atypicality. The Student found no Clinically Significant areas.

Dr. XXXX’s report summarized the Student’s situation as follows:

**[The Student] is a X-year-old student enrolled in the 11<sup>th</sup> grade at SCHOOL**

**3 during the 2001-2002 school year. There is a significant history of special education needs. He has been identified in the past as having a learning disability, speech and language disorder and emotional disturbance<sup>6</sup>. The emotional disability disturbance code has been discontinued. He carries additional diagnoses of Generalize (sic) Anxiety Disorder and Major Depression. The most recent psychological evaluation completed by XXXX XXXX, Ph.D., supported the educational disability of Other Health Impaired – 08. Current psychoeducational (sic) testing continues to support ongoing needs in the area of learning disabilities. [The Student] was administered selected subtests/clusters from the WJ-III, which indicated ability as ranging from borderline to average, with underlying processing in the area of auditory working memory. In addition, attention and weak concept formation serve to impact on academic performance. It is plausible that social-emotional issues have been exacerbated by a history of learning difficulties, coupled with an especially experiences during the most recent school year. This examiner acknowledges neurological concerns, but these issues do not appear to provide a full and complete explanation of his current social-emotional involvement.**

Dr. XXXX then made a series of “Educational Recommendations,” including careful monitoring of the Student’s emotional adjustment and progress. None of these recommendations, however, included a change in the Student’s coding to indicate that he should be diagnosed as ED.

The conclusions found in Dr. XXXX’s report, as well as in Dr. XXXX’s and Dr. XXXX’s all seem to emphasize the Student’s substantial neurological difficulties, and indicate that the majority of his emotional and social difficulties spring from his neurological problems. Dr. XXXX and Dr. XXXX specifically stated that the Student was not “Emotionally Disturbed.” Dr. XXXX did not specifically reach this conclusion, but neither did he indicate that this was a proper diagnosis.

To explain the sudden shift in diagnosis, Ms. XXXX testified that the circumstances surrounding the psychological assessment prepared by Dr. XXXX in 2000 were somewhat irregular. The actual initial testing was completed by Dr. XXXX who knew the Student. She was

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<sup>6</sup> This coding apparently pre-dates his enrollment in MCPS as none of the documents presented into evidence

fully aware of the family's concerns, as well as those of the school staff. Prior to completing the evaluation report, however, Dr. XXXX died unexpectedly. Dr. XXXX was provided with the raw test results and the rest of the file and developed the evaluation report. She could not repeat the testing that quickly and did not have the Student's full background information available. It is clear, however, that although she did not personally perform the actual tests, Dr. XXXX had sufficient information available from which to make her determinations.

Ms. XXXX testified that she had never discussed the perceived problems with Dr. XXXX's report with the Student's parents, nor, to her knowledge, were the parents ever advised of any perceived "irregularities." She also admitted that the MCPS had never formally found Dr. XXXX's report to be inaccurate or flawed in any manner. The evaluation was used in preparing the Student's IEP for 2000-2001. Ms. XXXX stated that she personally had concerns about Dr. XXXX's conclusions, and that she had reported her concerns about this evaluation to her supervisor. No action was taken.

Later in the questioning, when asked why a new evaluation was ordered so shortly after a full evaluation less than a year before, Ms. XXXX testified that the IEP team disagreed with Dr. XXXX's evaluation. This is in direct conflict with her earlier testimony, and the documentary evidence, establishing that the April 5, 2001 IEP team was not presented with Dr. XXXX's report, but was given an earlier evaluation to review. It is clear that Ms. XXXX disagreed with Dr. XXXX's conclusions. It is not clear that there were any difficulties with those conclusions.

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XXXX XXXX, the Resource Specialist at the XXXX Program, testified that he attended the CIEP team meeting and agreed with the Student's placement at XXXX. He noted that the focus of the program is on emotional problems, including poor organization and self esteem.

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reflects a finding that the Student was Emotionally Disturbed.

There is a full-time school Psychologist who floats between the Middle School and the High School. The Psychologist provides crisis intervention, although he does not provide therapy. The student/teacher ratio when the program is fully staffed, is one teacher/assistant to 8 kids. The High School program has 40 students. Mr. XXXX testified that most of the XXXX students, approximately 70%, have been diagnosed with Autism, Asberger's syndrome, or other diagnoses in the autism spectrum.

He noted that the program implements a level system where the Students each have individual goals and are rewarded when they attain those goals. He added that they have a work program involving cutting grass, etc. to assist the students with earning credits, community service, and even monetary compensation.

Mr. XXXX explained that the High School XXXX program is located within the confines of SCHOOL 2, but that the classrooms are in an area secluded from the general education area. He added that many of the 11<sup>th</sup> and 12<sup>th</sup> grade students mainstream in a mix of academic and non-academic classes. He noted that special arrangements can be made for lunch, although most of the children eat in the cafeteria. The XXXX Program is a 100% self contained special education environment with no mainstream students, although the proximity to the general education classes permits mainstreaming, and some of the students have participated in mainstream classes. He testified that the XXXX Program can fully implement the Student's IEP as currently written.

Mr. XXXX contrasted the program in a XXXX Center with the XXXX Program.. He explained that at the XXXX program, the emphasis is on social elements which may interfere with the student's education. Most of the focus is placed on ED aspects. In a XXXX Center,

however, the focus is on addressing the student's Learning Disability, with less concern on how that disability impacts the student. ED concerns are secondary.

Mr. XXXX testified that the program was successful, and that there was a waiting list for admission. When asked about this on cross examination, Mr. XXXX responded that the Student would not be placed on a waiting list because a place had been reserved for him<sup>7</sup>.

Regarding the IEP, Mr. XXXX affirmed that they could implement all of the requirements. He admitted that the Psychologist did not actually provide therapy, as his primary role is crisis intervention. While he does some counseling, these sessions are subject to cancellation should a crisis arise. He noted that while the Student does not have autism, or a related condition, there are some similarities between his situation and that of the other students. He opined that the Student should be able to find other students in the program with similar situations, although he could not guarantee that a peer group would exist.

The Parents presented testimony from Dr. XXXX XXXX, who was qualified as an expert in the areas of Special Education, Learning Disabilities and Emotional Disturbance with an emphasis in Emotional Disturbance. Dr. XXXX testified that she had observed the classes at the XXXX program and did not believe that the program there was appropriate for the Student. Dr. XXXX stated that she had spoken with the Student on two separate occasions, and had observed him in a classroom session at SCHOOL 1 and noted that he seemed relaxed and attentive. She added that he had a group of friends in his classes and that he was comfortable with his peers. He also interacted with these friends at lunch, and in other non-classroom situations. She also noted that she had reviewed his grade reports, as well as the reports from Dr. XXXX and Dr. XXXX, and that she had also observed the Student outside the classroom environment.

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<sup>7</sup> This response prompted a vigorous reaction from Ms. Steinfelds, the MCPS attorney, indicating her belief that this was not correct.

Dr. XXXX noted that the Student is by nature highly anxious, and neurologically fragile. She opined that his emotional difficulties arise from this fragility. He has a documented and well-established speech and language weakness, which impacts upon his entire academic activity. Dr. XXXX stated that the Student needs a nurturing environment with someone there to re-direct him when necessary. She stated that she does not believe the XXXX program is an appropriate placement for the Student as the program places its emphasis on behavioral difficulties, and the educational difficulties arising therefrom. The Student's situation is just the opposite: his emotional difficulties arise from his learning difficulties. When she visited XXXX, Dr. XXXX observed that most of the students in the XXXX program did not have primary learning disabilities, and that most of them were on grade level for their subjects.

Dr. XXXX testified that the Student does not regularly exhibit behavioral problems in a classroom setting. He experiences significant difficulties in learning, but is cooperative with his teachers. She feels that placing the Student in an environment addressed to the needs of children with a primary emotional disturbance would have a negative impact, and that the Student would reduce his functioning to the level of his classmates.

Dr. XXXX stated that the XXXX program is a special education program which is housed in a general education high school. One of its stated goals is to incorporate its students into the general education program. Dr. XXXX stated that when she visited XXXX, the majority of the program's students ate lunch in a general lunchroom setting with the general education children, although they were at a separate table in the lunchroom with a teaching assistant.

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Dr. XXXX finally expressed her belief that SCHOOL 1 is an appropriate placement for the Student. SCHOOL 1 is a self-contained Special education school. Therefore, there is no interaction with general education students. The school program focuses entirely on children

who have trouble learning. She stated that the Student is doing well. He is prepared for class, and that he has benefited educationally and socially. He is building strong peer relationships and is involved in extracurricular activities. He is receiving counseling and therapy integrated into the school program.

The Parents argued that MCPS failed to provide the Student with FAPE. For several reasons, I agree with the Parent's argument, and cannot conclude that the MCPS placement at the XXXX Program is appropriate for the Student. First, and foremost, XXXX is designed to place primary emphasis on a student's emotional difficulties, and less on the student's learning disabilities, other than how they relate to his or her emotional situation. Approximately 70% of the student body in that program is comprised of students who are autistic, or are diagnosed with Asbergers or other conditions in the autism spectrum. The educational challenges faced by the Student differ significantly from the challenges faced by the student population at the XXXX Program.

Courts have frequently held that administrative bodies and courts should generally not interfere with the professional judgements of the educational professionals. In the instant case, however, there are a variety of professional opinions upon which one can rely, depending on the desired outcome.

I do not find that MCPS has established that the student meets the requirements to be considered as ED for educational purposes. While Dr. XXXX opined in his testimony that the Student is ED, **all** of the Student's prior testing that was introduced into evidence, some only a year old, indicates exactly the opposite. A complete evaluation performed by the MCPS staff 10 months before the April 5, 2001 IEP meeting stated explicitly that the student was not ED, and that his emotional difficulties rise from his learning disabilities. Even Dr. XXXX does not

diagnose the Student as ED in his report, although he did prepare an Emotional Disturbance Evaluation Report concluding that the Student does meet the criteria established for that diagnosis.

A school system cannot keep repeatedly evaluating a student until one of the evaluators reaches the desired conclusion, and then place the student accordingly. There is testimony from an MCPS witness, the XXXX Program director, that the Student already had a place reserved in that program at the beginning of the school year. This is interesting, and troubling, because the MCPS did not hold an IEP meeting until September, and the CIEP team did not consider the case and designate the XXXX program as an appropriate placement until November. MCPS has not established that the XXXX placement was appropriate for the Student.

**THE LEGAL STANDARD FOR REIMBURSEMENT FOR UNILATERAL PRIVATE PLACEMENT:**

Having concluded that the MCPS placement is inappropriate, I now turn to the question of the propriety of the Parents' private placement and the resulting availability of tuition reimbursement. Parents may only obtain tuition reimbursement for a child needing special education services in a private school setting when the school system's placement is inappropriate and the private placement is proper under the IDEA. After considering the evidence and testimony presented, I find that both criteria have been satisfied and that the Parents are entitled to tuition reimbursement.

In *School Comm. of Burlington v. Dep't of Educ. of Massachusetts*, 471 U.S. 359 (1985), the U.S. Supreme Court determined that the [IDEA] granted courts the power to order reimbursement of the costs of unilateral placement by the parents if the courts ultimately determined that the parents' placement, rather than the proposed IEP, was appropriate.

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The Court reasoned:

**A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. *Id.* at 370.**

Because such a result would be contrary to the IDEA's guarantee of FAPE, the Court held that "Congress meant to include retroactive reimbursement to parents as an available remedy in an appropriate case." *Id.*

In *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993), the Supreme Court reaffirmed its ruling in *Burlington* and explained that "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. 114 S.Ct. at 366.

The *Carter* Court noted that the same high, statutory standards imposed upon the school system could not be imposed on parents when they place their children in private schools after the failure of a school system to provide a FAPE under the IDEA "because § 1401(a)(18)'s requirements cannot be read as applying to parental placements." In seeking reimbursement for a unilateral placement, therefore, the parents are not required to prove that all public placements are inappropriate, just the one proposed by the school system. *see also Ridgewood Bd. of Ed. v. N.E.*, 30 IDELR 41 (3d Cir. 1999). In *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 951 (4<sup>th</sup> Cir. 1997), a Maryland case, the court noted, "reimbursement of [a child's] private school tuition is an appropriate remedy under IDEA" under certain circumstances.

Moreover, the following provision is contained in the IDEA at 20 U.S.C.A. §

1412(a)(1)(c)(ii):

**(ii) Reimbursement for private school placement**

**If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.**

Discussing reimbursement of private school tuition under the IDEA, the federal appeals court in *Carter v. Florence County School Dist.*, 950 F.2d 156, 163 (1991) aff'd 510 U.S. 7 (1993), wrote, “when a public school system has defaulted on its obligations under the [IDEA], a private school placement is ‘proper under the Act’ if the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits,’” *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3051. This *Carter* court further wrote:

**In sum, we do not believe that the Act as written forbids reimbursement when parents place their child in a private school that has not been approved by the state, and we join those courts that have so held. As interpreted by *Burlington*, the Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, i.e., an education that is reasonably calculated to enable the child to receive educational benefits. *Id.* 950 F.2d 156, 164.**

The test for whether a parental placement is “proper under the Act” then is whether “the education provided by the private school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Carter, supra* 950 F. 2d at 163 (quoting *Rowley*, 458 U.S. at 207). I have already determined that the MCPS placement is not reasonably calculated to provide the Child with FAPE.

The Student is doing well and gaining educational benefit at SCHOOL 1, and that the Parents have shown that it is an appropriate placement for the Child. Consequently, the Parents are entitled to be reimbursed for tuition paid to SCHOOL 1 on behalf of the Child for the school year 2001-2002.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the MCPS did not develop, for the 2000-2001 school year, an individualized education program which provided the Child with a free, appropriate public education in the least restrictive environment. IDEA, 20 U.S.C. § 1412; *Board of Education v. Rowley*, 458 U. S. 176 (1982). I further conclude that SCHOOL 1 is an appropriate placement for the Child and that MCPS is required to reimburse the Parents for funds that they expended to place the Child in SCHOOL 1 for the 2001-2002 school year. *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S. Ct. 1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993).

### **ORDER**

I **ORDER**, this 4<sup>th</sup> day of September, 2002, that the Parents' request for tuition reimbursement from MCPS for the Child at SCHOOL 1 for the 2001-2002 school year be and is hereby **GRANTED**.

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A. Michael Nolan,  
Administrative Law Judge  
Office of Administrative Hearings

## **REVIEW RIGHTS**

Within 180 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final review 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(h) (Supp. 2001).

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 OAH 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.