XXXX XXXX	*	**BEFORE A. J. NOVOTNY, JR.,**
	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
QUEEN ANNE'S COUNTY	*	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	*	**OAH NO.: MSDE-QANN-OT-04-45772**

* * * * * * * * * * * * *

DECISION

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STATEMENT OF THE CASE

This case arises from a request by XXXX XXXX ("Parent"), on behalf of XXXX XXXX ("Child"), for a hearing to review[1] the identification, evaluation or placement of the Child, and private school tuition reimbursement for two school years. The request was filed with the Queen Anne Public Schools ("School District") on September 1, 2004, and identified October 19, 2004 through October 22, 2004, as the dates that the Parent was available for two days of hearing. The School District transmitted the request to the Office of Administrative hearings ("OAH") on September 7, 2004.

A hearing was initially scheduled to commence on October 19, 2004, and continue on October 22, 2004, before A. J. Novotny, Jr., Administrative Law Judge ("ALJ"). Thereafter, the

[1] The Parent had also requested to be heard on a Family Educational Rights and Privacy Act ("FERPA") issue. Based upon a discussion among the parties, the parent withdrew the request to be heard on that issue at this hearing.

hearing was to continue to November 30, 2004, and conclude on December 2, 2004. The hearing took place at the Queen Anne's County Board of Education, 202 Chesterfield Ave., Centreville, Md. The actual hearing dates were October 19, October 22 and December 2, 2004, and by telephone conference[2] on December 7, 2004 and January 5, 2005.

P. Tyson Bennett, Esquire, Reese & Carney, LLP, 170 Jennifer Road, Annapolis, Maryland 21401, represented the School District. Brian K. Gruber, P.C., 5454 Wisconsin Ave., Chevy Chase, Maryland 20815, represented the Parent.

At the request of the School District, because of the unexpected unavailability of a witness for medical reasons, the November 30, 2004, hearing date was postponed to December 7, 2004, in the expectation that the witness would then be available to testify. Due to the continued medical unavailability of the witness, on December 6, 2004, the School District requested a continuance into mid or late January 2005. A telephone conference was held on December 7, 2004, in lieu of the last scheduled day of hearing. I denied the School District's request for continuation dependent upon the witness's availability, to a date in mid-January 2005.

During the December 7, 2004, telephone conference, the parties ultimately agreed that the School District's unavailable (and final) witness would present his evidence by affidavit. Initially, the School District opposed presenting its witness's evidence by affidavit. The Parent did not oppose the affidavit and suggested that due to the familiarity that the parties had with each other in these proceedings over the past three years, there was would be nothing in the witness's affidavit which would be a surprise. I specified that, if the Parent found any part of the witness's affidavit objectionable, the Parent could object "line by line" and fully explain the objection(s). I would then rule on the objection(s) accordingly.

[2] The telephone conference on December 7, 2004 was not recorded due to unexpected equipment failure at the time of the telephone call. The parties agreed to proceed without having the conference recorded. On January 5, 2005, the parties waived the opportunity to have the conference recorded.

At the parties' request, since the last scheduled day of hearing did not convene and instead resulted in the telephone conference, and because of the holidays, the record remained open until January 7, 2005, for the simultaneous filing of the parties' exhibit lists, closing arguments and briefs. The parties agreed that I would render my decision within thirty days of the close of the record. At this point, all dates had been determined at the request of, and by agreement of the parties to accommodate their busy schedules.

Thereafter, on January 5, 2005, another telephone conference call convened at the request of the parties because they had not received the transcript of the last day of hearing and, thus, could not properly prepare their closings. Additionally, at that time, the School District again requested another day of hearing in lieu of the affidavit from its last witness, in the hope that the witness's doctor would soon release him. Because the transcript was inexplicably delayed[3] by the reporting service, and not received by the parties until January 6, 2005, or later, I agreed to extend the due date for the simultaneous filing of the parties' exhibit lists, closing arguments and briefs until January 18, 2005. I denied the School District's request to schedule another hearing day for sometime in the future to allow its last witness to testify in person in lieu of the affidavit, as previously agreed.

Along with timely filing its closing arguments and brief, the School District requested reconsideration of my ruling to deny its request for another day of hearing for its last witness, who still had been not released by his doctor. In her closing, the Parent did not object to the School District's witness's affidavit, and in rebuttal, submitted a brief affidavit by the Parent. I declined to reconsider my ruling, and, thus, continued the denial of the School District's request to continue to another hearing day. I closed the record on January 18, 2005.

[3] According to the arrangement that OAH has with the reporting service, a transcript of the proceedings would be available within ten days of the date recorded. For reasons unknown, the transcript of the December 2, 2004 hearing day was not mailed to the parties until January 5, 2005.

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 (2002); Md. Code Ann., Educ. § 8-413 (2001); Maryland State Department of Education 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, and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004); Code of Maryland Regulations ("COMAR") 28.02.01.

ISSUES

The issues on appeal are:

(1) Whether the School District's Motion to Reconsider should be granted;

(2) Whether the School District provided the Child with a free appropriate public education (" FAPE") for either or both the 2003/2004 and 2004/2005 school years; and, if not

(3) Whether the Parent's unilateral placement of the Child at [School 1] ("[School 1]") for either or both the 2003/2004 and 2004/2005 school years provided an appropriate education; and, if so

(4) Whether the Parent should be reimbursed for private placement at [School 1] for the either or both the 2003/2004 and 2004/2005 school years.

SUMMARY OF THE EVIDENCE

Exhibits

The Parent submitted forty-three exhibits into the record.

The School District submitted seventeen exhibits into the record.

An exhibit list, identifying the documents as submitted by the parties, is appended to the end of this decision.

Testimony

The following witnesses presented testimony on behalf of the Parents: XXXX XXXX, Ph.D., Supervisor of Special Education for Queen Anne's County Public Schools, accepted as an expert in Special Education; XXXX XXXX, Speech Pathologist, [School 1], accepted as an expert in Speech/Language Pathology and XXXX XXXX, Learning Specialist, [School 1], accepted as an expert in Special Education.

The following witnesses presented testimony on behalf of the School District: XXXX XXXX, the mother; XXXX XXXX, Business Manager for [School 1]; XXXX XXXX, Speech/Language Pathologist, Queen Anne's County Board of Education, accepted as an Expert in Speech/Language Pathology; XXXX XXXX, School Psychologist, [School 2], accepted as an expert in School Psychology; XXXX XXXX, Ph.D., Supervisor of Special Education for Queen Anne's County Public Schools, accepted as an expert in Special Education; and by affidavit, XXXX XXXX, Special Educator at [School 2], Chair of Special Education Department and Individualized Educational Program ("IEP") team Chair.

FINDINGS OF FACT

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

(1) The Child, born XXXX, 1991, has Specific Learning Disabilities and Speech or Language Impairments. He is in need of special educational services.

(2) The Child has received special educational services as learning disabled since the first grade in 1997. He attended [School 3], a public school, for his fourth and fifth grade years.

(3) The Child made little progress receiving special education services in public school. He met none of the goals and objectives on his IEP for the 2002/2003 school year at [School 3].

(4) The Child's IEP for the 2002/2003 school year did not provide FAPE.

(5) The Child's placement at [School 1] for the 2002/2003 was not an appropriate educational placement.

(6) By decision number [number] dated August 8, 2003, ALJ Guy Avery directed the School District to prepare an IEP for the Child, and gave specific instructions as to some areas that it should address.

(7) The School District scheduled numerous IEP Team meetings. The Child has not had an IEP completed for either the 2003/2004 or 2004/2005 school years.

(8) Cancellations and postponements of various IEP team meetings are attributable to both the Parent and the School District.

(9) The Parent did not act in bad faith concerning the IEP process.

(10) The Child's placement at [School 1] for both the 2003/2004 and 2004/2005 school years is an appropriate educational placement.

DISCUSSION

Motion to Reconsider

Along with closing arguments, on January 14, 2005, the School District filed a Motion to Reconsider my ruling to deny the School District's request for an additional day of hearing in lieu of accepting an affidavit from XXXX XXXX, a special educator. The School District alleged that it would be prejudiced by a failure to allow another day of testimony for this last witness. The School District also alleged "Counsel for the Queen Anne's County Public Schools made diligent and proper efforts to secure the evidence through an affidavit, *but was blocked in these efforts by the objections of counsel for the parent*." (Emphasis added).

The Parent filed the "Parent's Objection to QACPS' Motion to Reconsider" on January 19, 2005. Counsel for the Parent disputed the School District's allegations in its Motion to Reconsider and alleged that "the School District distorts the truth in reciting efforts made by counsel to enable Mr. XXXX's testimony to become part of the administrative record."

I find the Parent's opposition to the School District's Motion meritorious and most

persuasive. However, regardless of the Parent's response to the School District's Motion, my oral instructions, followed by my letter of confirmation, dated December 8, 2004, were clear and specific that if the Parent disputed any part of the affidavit of Mr. XXXX, I would consider those objections "line by line." The Parent did not object to any part of Mr. XXXX's affidavit.

I further conclude that if anyone would be subject to "prejudice" by my allowing Mr. XXXX's evidence by affidavit, it would be the opposing party, the Parent, who was denied the right of cross examination and limited to a rebuttal affidavit, at best.

Nonetheless, in reviewing Mr. XXXX's affidavit, I found little evidence that was new to the record. It is primarily corroborative of the School District's argument that the "fault" for the lack of an IEP for two years should be attributable to the Parent. As of the last contact that I had with Counsel for the School District, the doctor still had not released Mr. XXXX. Therefore, nothing has changed since I denied the original request for postponement to some as yet unspecified date when, or if, Mr. XXXX would be released by his doctor to participate in a hearing. As such, the School District's Motion for me to reconsider my ruling to close the record without another day of hearing has been denied.

Merits

The IDEA provides federal assistance to state and local agencies for the education of children with disabilities. 20 U.S.C. § 1400-87 (2000). To receive this federal assistance, a state must provide special education services that are designed to meet the unique and individual needs of a particular child. A state is also required to provide related services as needed to allow a child to obtain educational benefit from the special education services. *See* 20 U.S.C. §§ 1412-14 (2000), 34 C.F.R. § 300.2. *See also, Board of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L. Ed. 2nd 690 (1982). Maryland's special education law is set forth at Md. Code Ann., Educ. §§ 8-401 - 413 (2004).

The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

Under both federal and state law, students with disabilities have the right to a FAPE. The IDEA defines FAPE as follows:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414 (d) of this title.

20 U.S.C. § 1401(8) (2000).

Maryland law defines FAPE similarly. *See* Md. Code Ann., Educ. § 8-401(a)(3)(2004); COMAR 13A.05.01.03(B)(24).

The question of whether a student is receiving a FAPE has a procedural and a substantive component. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in IDEA and second, whether the IEP as developed through the required procedures is reasonably calculated to enable the child to receive educational benefit. *Rowley,* 458 U.S. at 206-07.

This broad mandate is satisfied when a school system provides a student with "personalized instruction with sufficient support services to permit the handicapped child to benefit educationally." *Rowley*, 458 U.S. at 177. The school system is not obligated to provide

the best possible educational services for a disabled child, or to maximize the potential for the child's educational opportunities. *Rowley*, 458 U.S. at 186. 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 School Bd.,* 908 F.2d 1200, 1207 (4th Cir. 1990) (quoting *Rowley* at 201). Subsequent to its decision in *Rowley*, in addressing the IEP, the Supreme Court in *Honig v. Doe*, 484 U.S. 305, 311 (1988) goes on to consider the IEP as the "centerpiece of the statute's education delivery system for disabled children. . ."

State and local educational agencies are generally not required to pay for private school placement of a disabled child. However, if the local school district fails to offer FAPE to a child through the formulation and implementation of an IEP that is reasonably calculated to provide educational benefit, the parents may unilaterally place their child in private school and pursue the question of financial responsibility through the due process procedures provided by IDEA. 34 C.F.R. § 300.403; *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993*); Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985).

To clarify, if the services and placement proposed by a School District were reasonably calculated to provide a FAPE to the child, the Parent(s) are not entitled to reimbursement for their private placement of the Child during the school year. On the other hand, if the proposed services and placement were inappropriate, Parents *may* be entitled to such reimbursement, provided that the follow statutory guidelines.

Similar to the Supreme Court in *Rowley*, the *Burlington* Court established a two-part test, which must be satisfied before a court will order reimbursement for private school placement. First, it must be determined that the services provided under an individualized education plan at a public school are inappropriate. Second, it must be determined that the private placement desired by the parent is proper under the IDEA. *Id.*, at 2002.

Denial of FAPE

Reimbursement for tuition for private placement is awarded only where the public school system failed to provide the student with a FAPE. So, the customary question, and the question most addressed in case law, is whether a child is receiving, or could receive, beneficial instruction as a result of his/her IEP placement. Otherwise stated, the issue is whether the student's IEP and school system's placement were calculated to provide him/her some educational benefit. In this case, however, there was no IEP and there is still no IEP for me to consider. The burden is on the school system to provide an IEP prior to the beginning of the school year. 20 U.S.C.A. § 1414 (d)(2)(A). Although not as common an issue as the appropriateness of an IEP, there is case law that stands for the proposition that failure to provide an IEP constitutes a denial of FAPE.

In Court in *Gadsby v. Grasmick*, 109 F.3d 940, 950 (1997) held that the failure of the Baltimore City School System to provide the appellant student with an IEP prior to the beginning of the school year constituted a failure to provide FAPE and violated the IDEA. In concluding that parents who unilaterally placed their child in private education when no IEP was developed were entitled to reimbursement for private education, the Court noted:

> "Central to the provision of a free appropriate public education is the development of an IEP by the LEA for each child with a disability within its jurisdiction, *See id., § 1401(a)(18)* (defining 'free appropriate public education' as special education and related services provided in conformity with IEP).
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> * * * *
>
> "[It is] clear that the remedy ordered by the Board in this case – reimbursement of Eric's private school tuition—is an appropriate remedy under the IDEA where the LEA fails to develop an appropriate IEP by the beginning of the school year." *Gadsby* at 951.

Further, in *Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148

F.Supp.2d 576, 584 (Md. 2001) the Court commented:

> [In] "*Gadsby By Gadsby* and other cases excusing technical violations in the IEP process, the procedural violations involved the failure to give the required parental notice and the failure did not negatively impact the development of the IEP or the provision of a FAPE. *See* 109 F.3d at 956. While not liable for failing to give the parents notice of the rejection, the state agency in *Gadsby v. Gadsby* was liable for the local agency's complete failure to develop an IEP. *See* 109 F.3d at 955. "Central to the provision of a free appropriate public education is the development of an IEP by the [local education agency] for each child with a disability within its jurisdiction." *Id.* at 950. It is undisputed that no IEP was developed for the 1998-1999 school year. Such a violation goes to the heart of the district's ability to provide a FAPE and resulted in a denial thereof."

The School District contends that there was no denial of FAPE and as such, reimbursement is not appropriate. Additionally, the School District argues that the absence of an IEP is merely a procedural error that must be assessed as to its impact upon the Child's education. In essence, the School District argues that despite there being no IEP for the Child for either school year, there was "no harm" since the Child was being educated during the 2003/2004 and 2004/2005 school years at [School 1].

The School District also argues that the Parent had an agenda and that she wanted the Child to remain at [School 1], as evidenced in part by paying the tuition deposits. It is the School District's position that the failure to complete the IEP is because of the Parent's delay and dilatory actions and lack of cooperation. The School District argues that this case is analogous to the situation addressed in *Sanger v. Montgomery County Board of Education,* 916 F. Supp. 518 (1996), wherein the parent "blocked every effort" to develop an IEP. The *Sanger* Court went on to chronicle the parent's actions in that case, and determined that reimbursement for private placement should be denied.

The parent argues that it is the School District's burden to provide an IEP and a FAPE. She contends that she did not unduly delay the IEP process.

I do not find that the Parent's actions in this case rise anywhere near the deliberate and

purposeful delaying actions taken by the parents in *Sanger*. In a case wherein the court found parental action not quite as egregious as was in *Sanger*, but nonetheless a bar to reimbursement, the Court in *S.M. v. Weast*, 240 F.Supp.2d 426, 436 -437 (D. Md., 2003) stated:

> There is an aspect of this case, however--the parents' alleged failure to cooperate in the development of the IEP--that merits comment. For if indeed there was such a lack of cooperation, it would also be possible to conclude that reimbursement should be denied, without reaching the issue of whether the child was offered a FAPE. That was certainly the import of this Court's holding in *Sanger v. Montgomery County Bd. of Educ.,* 916 F. Supp. 518, where the Court found that the parents and their counsel had "blocked every effort by MCPS to develop a new [IEP]." *Id.* at 527.

In *Weast*, the essential element in the Court's denial of reimbursement was that the parents "withheld critical documents from the ARD [IEP] Committee." I conclude that the School District has not shown that the absence of an IEP for two years was due to parental actions anywhere close to the parental actions in *Sanger or Weast*. There were delays brought about by cancellations and postponements in scheduling and completing IEP team meetings by both sides. Such things as schedule conflicts, mix-ups, and the Parent's rightful request (and School District's agreement) for additional evaluations occasioned delays throughout the two school years that are the subject of this hearing. However, I do not find the parent to be the perpetrator, and the School District to be the innocent victim as found in either the *Sanger or Weast* case. I find no bad faith on the Parent of the parent.

I further conclude that the Parent's continued enrollment of the Child at [School 1] during the pendency of the proceedings is not a bar to reimbursement. I find nothing improper and no bad faith on the part of the parent for continuing her child's education while the IEP process continued. To do so, she had to pay the tuition deposit. Her desire for the Child to remain at [School 1] is not in and of itself a bar to tuition reimbursement. The Court in *S.M. v. Weast*, 240 F.Supp.2d 426, 436 -437 (D. Md., 2003) noted:

> As the Court has observed before, parents are not to be faulted simply because they may have been of a firm mind to send their child to private school, while engaged in developing an IEP for the child. *See Sarah M. v. Weast,* 111 F.Supp.2d at 701, n. 6.

However, keeping the Child at [School 1] was certainly a risk that the Parent had to face in the event that the School District actually completed an appropriate IEP that called for placement elsewhere. In such a happenstance, tuition reimbursement would be denied. Interestingly, the School District appears to have tacitly condoned the Parent's Placement at [School 1] because it now argues that there was "…no loss of educational opportunity because the child was enrolled in and attending… [[School 1]]…"[4]

In this case, the School District would have me place the burden for completing an IEP on the Parent. Likewise, the School District would have me place the onus for the absence of an IEP on the Parent. However, I may not switch the burden of providing a FAPE under IDEA and/or the obligation to complete an IEP under IDEA (and also pursuant to the ALJ's decision in Case Number [number], issued August 8, 2003) from the School District to the Parent. The School District's burdens are inescapable in this case, and its failures particularly onerous, noting especially that there has not been an IEP for *two years*[5]. This is not merely a procedural error as argued by the School District. The IEP is the basis for the provision of FAPE. *Honig v. Doe*, 484 U.S. 305, 311 (1988). The School District cannot shirk its obligations to the Child in this case by alleging that it is the Parent's fault that there has not been an IEP completed in *two years*.

Even if I were to have agreed with the School District's argument, that the parent was being dilatory and/or deliberately delaying the completion of an IEP *for two school years*, it is

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[4] In its Closing Memorandum, on page 10, the School District stated, "In this instance, there was no loss of educational opportunity because the child was enrolled in and attending a private school of his parent's choice during the entire time that the school system was engaged in the IEP development process." The School District reiterated this position on page 12 of its Closing Memorandum.

[5] Actually, in considering ALJ Avery's decision of August 8, 2003, there has not been an *appropriate* IEP for *three years*.

still the School District's obligation to provide an IEP prior to a school year. There are procedures that the School district could have, and indeed should have taken if the School District felt that the Parent was being non-cooperative with the IEP process, for two *school years*.

Federal regulations provide that the public agency is responsible for taking steps to ensure that "one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate…" 34 C.F.R. § 300.345(a). Conversely, the IDEA and the applicable regulations impose an obligation on schools to provide special education services to a disabled child in situations where the parent refuses to participate in the process necessary to allow the child to receive the services he or she needs. Within the federal regulations, 34 C.F.R § 300.505 provides in relevant part:

> (d) Additional State consent requirements. In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

The regulations even allow for an IEP meeting to be conducted without a parent in attendance. 34 CFR § 300.345 (d). See also 20 U.S.C. § 1414(c)(3). The relevant State law, COMAR 13A.05.01, provides as follows in pertinent part:

.13 Procedural Safeguards – Consent

* * *

B. Consent for Special Education Services.

(1) A public agency shall obtain written parental consent before the initial provision of special education and related services to a student with a disability.
(2) If a parent refuses to provide or revokes consent for the initiation of special education and related services the public agency shall initiate mediation or due process as described in 20 U.S.C. § 1415(e) and (f),

and Regulation .15 of this chapter.

(3) *After the initiation of special education and related services, parental consent is not required to implement the student's IEP*. (emphasis added)

COMAR 13A.05.01.13B.

This is not some naive school system caught up in its first special education issue. The School District has been involved with this Child's education and represented by counsel for years. If, especially after the decision in the previous Due Process hearing, the School District felt that the Parent was being dilatory, obstructive, uncooperative, overly or covertly refusing to participate in the formulation of an IEP or the provision of FAPE, the School District had an obligation to act on that belief.

I conclude that the School District had either not considered the Parent to be delaying the IEP process, at least until she filed this for this Due Process hearing, or, that it simply condoned any of the alleged delays that it would now allege are attributable to her. Either way, since the School District did not act to fulfill its obligations and prepare an IEP for *two school years*, it cannot now escape its responsibility by blaming the Parent. Simply put, the School District could have prepared an IEP for either or both of the two school years and given that IEP to the Parent. At that time, if the Parent disagreed with it, she would then have had the burden to challenge the appropriateness of that IEP.

The standard of review to be applied in this case is a preponderance of the evidence. However, even beyond that standard, I find clearly and convincingly that the School District denied the Child a FAPE for both school years.

Tuition Reimbursement

When a Parent removes a Child from a public placement to a private placement, because the Parent does not agree with the IEP implementation, or doesn't feel that his/her child will receive FAPE under a proposed IEP, she does so at her own financial risk. *Burlington,* 471 U.S.

at 397.[6] In other words, the Parent must prove that the proposed IEP is inappropriate and that the private school placement is proper under IDEA. In this case these was no IEP. Therefore, the Parent does not have to prove that the School District's placement was not appropriate.

The Parent alleges that she is entitled to tuition reimbursement for both the 2003/2004 and 2004/2005 school years because the School District did not offer the Child a FAPE. The Parent also contends that [School 1] is an appropriate placement, as evidenced by the testimony of the teachers attesting to the Child's progress during the just past and current school years.

The School District has not specifically argued that [School 1] is not an appropriate placement. To the contrary, the School District has clearly represented that [School 1] is an appropriate placement, and that as a result of being educated there, the Child has not suffered any loss in education. While I am inclined to follow most of that proposition, I note that the "free" in FAPE, means free to the parent and child, not free to the school system. For the past three school years, the School District has paid essentially nothing but the costs of evaluations and its attorney fees. Thus, since the School District argues that the Child is being properly educated, that is, not being denied an appropriate education while at [School 1], then the School District must pay for it.

For the reasons that follow, I find that the Parent should prevail in her request for tuition reimbursement for the Child's education at [School 1]. Even though the School District has not disputed the appropriateness of the Child's placement at [School 1], under the second part of the *Rowley* and the *Burlington* tests, I believe that it is the parent's burden to show that the placement is proper. I note again, that for three school years, the School District has offered nothing to the Child. ALJ Avery found the IEP for the first year (2002/2003) was not

[6] Various words are used to describe the requirements of the proposed private placement: "appropriate" is the most common, but "proper" has its adherents also, as does "reasonable." All refer to a placement reasonably calculated to lead to educational benefit.

appropriate, and there has been no IEP completed for the last two school years. Thus, the School District offered no special education placement. Therefore, I am nearly drawn to the conclusion that the Parental placement virtually anywhere that offered education to children with special educational needs would be a more appropriate placement than simply leaving the Child to make due with no educational placement offered by the School District.

Nonetheless, I conclude that [School 1] is an appropriate placement for the Child. The [School 1] of the 2003/2004 and the 2004/2005 school years is different from the [School 1] of the 2002/2003 school year (wherein ALJ Avery ruled[7] that [School 1] was not an appropriate placement for the Child). [School 1] has since been accredited. It has also had some personnel changes, including some of the staff who have provided personalized services to the Child. Unlike in the 2002/2004 school year at [School 1], the Child has made progress in the 2003/2004 and 2004/2005 school years.

In concluding that [School 1] is a proper, appropriate placement, the testimony of the experts in this case goes beyond my generalized conclusion that for the second and third school years without an appropriate IEP for a child in need of special education services, that child's placement virtually anywhere, would be appropriate. The testimony of Ms. XXXX and Ms. XXXX, who teach the Child, verified his meaningful, albeit slow, academic progress. Without an IEP with its attendant goals and objectives, measurement of progress is problematic, at best. However, since the essentially uncontradicted evidence has shown that the Child has made educational progress at [School 1] during the 2003/2004 school year and so far in the 2004/2005 school year, I need not recite the specifics of that progress.

Indeed, it would certainly appear specious for the School District to dispute the Child's

[7] The parties have advised me that ALJ Avery's decision is on appeal.

progress at [School 1], while at the same time, represent[8] that there has been no denial of an appropriate education while he has been educated at [School 1]. Although the School District questioned the progress of the Child during cross-examination of Ms. XXXX and Ms. XXXX, it presented no credible evidence disputing the Child's progress.

For all of the reasons stated, I find that [School 1] is an appropriate placement for the Child for the 2003/2004 and 2004/2005 school years. Thus, the Parent is entitled to tuition reimbursement. I found no bad faith or other misfeasance or malfeasance on the part of the Parent that would equitably prompt a reduction in full tuition reimbursement.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that: (1) the School District did not complete an IEP and did not provide a FAPE for the Child for both the 2003/2004 and 2004/2005 school years; (2) the Parent's unilateral placement of the Child at [School 1] provided an appropriate education for both the 2003/2004 and 2004/2005 school years; and, therefore, (3) the Parent should be reimbursed for both the 2003/2004 and 2004/2005 school years. 20 U.S.C.A. § 1401 (2000); 20 U.S.C.A. § 1412; Md. Code Ann., Educ. § 8-413; COMAR 13A.05.01. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

ORDER

I ORDER that the Parent's request for tuition reimbursement for placement of the Child at [School 1] for the 2003/2004 and 2004/2005 school years be, and hereby is, **GRANTED**.

January 31, 2005
Date

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A. J. Novotny, Jr.
Administrative Law Judge

[8] School District's Memorandum of Closing Argument, pages 10 and 12.

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) (1999).

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.