

IN RE: XXXX XXXX

v.

PRINCE GEORGE’S COUNTY

PUBLIC SCHOOLS

\* BEFORE T. AUSTIN MURPHY,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE  
\* OF ADMINISTRATIVE HEARINGS  
\* OAH No.: MSDE-PGEO-OT-05-36668

\* \* \* \* \*

**DECISION**

STATEMENT OF THE CASE  
ISSUE  
SUMMARY OF THE EVIDENCE  
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DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

This case arises from a request by XXXX XXXX (“Parent”), for a due process hearing to review the provision of a free appropriate public education (“FAPE”) to her daughter, XXXX XXXX, (“the Student” or “[Student]”), as a student with disabilities. The hearing was convened on September 22, 2005<sup>1</sup> and continued on September 23 and 26, 2005. At the hearing, Gail Viens, Esquire, 14201 School Lane, Upper Marlboro, Maryland, 20772, represented the Prince George’s County Public Schools (“PGCPS”) and the Parent was represented by Brian K. Gruber, Esquire, 7315 Wisconsin Avenue, Bethesda, Maryland, 20814. The hearing was held pursuant to the following laws: Individuals With Disabilities Education Act (“IDEA”) Reauthorization,

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<sup>1</sup> Md. Code Ann., Educ. § 8-413(f) and COMAR 13A.05.01.15 state that the hearing shall be held and the decision shall be made and written notice of it provided within 45 calendar days from the resolution meeting. The ALJ may grant an extension of time, not to exceed 60 days, at the request of a party. The request for the hearing was made on July 22, 2005. A Resolution Meeting was convened on August 5, 2005 with no settlement of the issues. 45 days from that date was September 19, 2005. The parties requested that the hearing convene on September 22, 2005 - more than 45 days from the resolution date and waived their right to have a decision rendered within 45 days of the request. Sixty days from August 5 is October 4, 2005.

Disabilities Education Act Amendments of 1997, 20 U.S.C.A. § 1415 (2000); 34 C.F.R. § 300.507 (2004); Md. Code Ann., Educ. § 8-413 (2004); Code of Maryland Regulations (“COMAR”) 13A.05.01; and 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); COMAR 28.02.01.

### **ISSUE**

The issues are:

1. Whether the PGPS developed an IEP and proposed a placement which was reasonably calculated to provide the Child a FAPE for the 2005-2006 school year.
2. Whether the Parent is entitled to reimbursement for the costs of the Child's education at [School 1] for the 2005-2006 school year.
3. Whether the [School 1] program is appropriate.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The Parent presented the following exhibits which were admitted into evidence, unless otherwise noted:

[Student] # 1. Request for Due Process Hearing, dated July 21, 2005

[Student] # 2. Letter from PGCPS to Brian Gruber, Esq., dated July 28, 2005

[Student] # 3. Response to Due Process Complaint Notice, dated July 28, 2005

[Student] # 4. School Team Request for Temporary Aide for 2002-2003 School Year

[Student] # 5. Letter from XXXX XXXX, dated August 20, 2004 (Not submitted for admission)

[Student] # 6. Letter from XXXX XXXX. M.D., dated November 8, 2004

- [Student] # 7. Letter from Brian Gruber, Esq. to Gail Viens, Esq., dated November 29, 2004  
(Identified but not offered for admission)
- [Student] # 8. Letter from Brian Gruber, Esq. to Gail Viens, Esq., dated December 9, 2004
- [Student] # 9. Letter from Brian Gruber to Gail Viens, dated January 23, 2005
- [Student] # 10. Individualized Education Plan (“IEP”), dated April 30, 2003
- [Student] # 11. Progress Report for Report Period October 29, 2003 (Not submitted for admission)
- [Student] # 12. IEP, dated March 26, 2005
- [Student] # 13. Progress Report for Report Period December 23, 2004
- [Student] # 14. IEP, dated March 17, 2005
- [Student] # 15. Kindergarten Report Card, School Year 2002-2003
- [Student] # 16. Kindergarten Report Card, School Year 2003-2004
- [Student] # 17. Primary Pupil Progress Report, 2004-2005 School Year
- [Student] # 18. Letter from PGCPS, dated May 16, 2005 (Not submitted for admission)
- [Student] # 19. School Student ARD Referral, dated October 8, 2004
- [Student] # 20. Primary Interim Progress Report, dated November 29, 2004
- [Student] # 21. Classroom Observation by XXXX XXXX, dated February 2, 2005
- [Student] # 22. First Grade Friday Folder for the period August 27, 2004 through December 17, 2004
- [Student] # 23. Theme Skills Test Record, dated December 9, 2004
- [Student] # 24. Our Earth Integrated Theme Test Record
- [Student] # 25. Special Friends Integrated Theme Test Record, dated April 25, 2005
- [Student] # 26. We Can Do It Theme Skills Test Record
- [Student] # 27. Maryland Practice and MSA Prep – Mathematics
- [Student] # 28. Letter from the Parent to Dr. XXXX, dated September 3, 2004

- [Student] # 29. Copy of [Student] # 29, received by "Mrs. XXXX" September 3, 2004
- [Student] # 30. Letter to Mrs. XXXX from the Parent, dated October 6, 2004
- [Student] # 31. Notice and Consent for Assessment, dated October 11, 2004
- [Student] # 32. Educational Report by XXXX XXXX, dated November 19, 2004
- [Student] # 33. Psychological Report by XXXX XXXX, Ed.D, N.C.S.P., dated December 2004
- [Student] # 34. Neuropsychological Report by XXXX XXXX, dated January 2005
- [Student] # 35. Prior Written Notice, dated March 23, 2005
- [Student] # 36. Email from XXXX XXXX to XXXX XXXX, dated May 13, 2005
- [Student] # 37. Email from XXXX XXXX to XXXX XXXX, dated June 29, 2005
- [Student] # 38. Email to XXXX XXXX from XXXX XXXX, dated August 28, 2005
- [Student] # 39. Adequate Yearly Progress and Additional Data for 2004 (Not submitted for admission)
- [Student] # 40. Prior Written Notice, dated July 22, 2005
- [Student] # 41. Prior Written Notice, dated September 14, 2005
- [Student] # 42. Prior Written Notice, dated October 14, 2004

PGCPS presented two documents which were admitted into evidence as follows:

PGCPS # 1. IEP, dated August 5, 2005

PGCPS # 2. Emails from Mrs. XXXX to XXXX XXXX and from XXXX XXXX to Mrs.

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Testimony

A. The Parent presented testimony from the following witnesses:

XXXX XXXX, Ph.D., Principal at [School 2]

XXXX XXXX, M.D., accepted as an expert in the field of Developmental Pediatric Medicine (Dr. XXXX testified telephonically.)

XXXX XXXX, Ph.D., who was accepted as an expert in the field of Neuropsychology

XXXX XXXX, [Student]'s Resource Teacher during the 2004-2005 school year, who was accepted as an expert in the field of Special Education

XXXX XXXX, Ph.D., who was accepted as an expert in the field of Special Education and Early Childhood Special Education

XXXX XXXX, Assistant Director of [School 1], who was accepted as an expert in the field of Special Education

XXXX XXXX, [Student]'s Co-teacher at [School 1], who was accepted as an expert in the field of Special Education

XXXX XXXX, the Student's mother

B. PGPS presented testimony from the following witnesses:

XXXX XXXX, [Student]'s Resource Teacher during the 2004-2005 school year, who was accepted as an expert in the field of Special Education

XXXX XXXX, [Student]'s Physical Education Teacher

XXXX XXXX, Guidance Counselor at [School 2], who was accepted as an expert in the field of Guidance Counseling

XXXX XXXX Ed.D., School Psychologist, who was accepted in the field of School Psychology

XXXX XXXX, Special Education Instructional Specialist, who was accepted as an expert in the field of Special Education and in the field of General Education

### **FINDINGS OF FACT**

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

1. The Student, born XXXX, 1997, experienced headaches and excessive sleep at age three. She underwent surgery to remove a brain tumor in November 2000 and again in March 2001.
2. The Student has diabetes insipidus, von Willebrand disease (type 1) and multiple hormone deficiencies (thyroid, adrenal and growth)
3. The diabetes insipidus is due to the lack of hormone that keeps water in her body. The Student requires an intake of no more than three ounces of water per hour. If she takes more

than the three ounces her sugar level will decrease and she is in danger of suffering a seizure.

4. The Student attended public school in Prince George's County attending kindergarten in the 2002-2003 school year, repeating kindergarten during the 2003-2004 school year and completing first grade during the 2004-2005 school year. During the last two years, the Student attended school at [School 2] in a general education classroom, with pull out services during the week.
5. An IEP was developed for the Student's repeated kindergarten year (2003-2204 school year). In the IEP, the Student was to develop math skills by mastering four short-term objectives with a criterion of 80%. The short-term objectives included recalling addition facts related to sums through 10; recalling subtraction facts related to sums through 10 and solving story problems requiring addition; solving story problems requiring subtraction. The Student was to develop reading readiness skills by mastering four short-term objectives with a criterion of 80%. The short-term objectives included identifying words that rhyme; answering questions immediately after listening to a story on the pre-primer level; discriminating between sounds and recalling details/predict the outcome or identifying the cause of an event in a selection written on a pre-primer level. As of October 29, 2003, the Student had not mastered one short-term objective.
6. An IEP was developed for the Student's First grade (2004-2005 school year). The IEP proposed that the Student would improve reading skills through successful completion of 80% of five short-term objectives. The short-term objectives included activating prior knowledge; recalling details/predict the outcome or identifying the cause of an event in a selection written on a first-grade level; retelling stories with beginning, middle and end; reading fluently during oral reading demonstrations and answering questions immediately after listening to a story on the first-grade level. The Student was to improve math skills by mastering 80% of seven short-term objectives. The short-term objectives included recalling addition facts related to sums through 10; solving story problems requiring subtraction; solving story problems requiring addition; recalling subtraction facts related to sums through 10; using estimation strategies when subtracting; using estimation strategies when adding and identifying the number before and after a given number less than 20. As of December 23, 2004, the Student had not mastered one short-term objective.
7. In February 2005, Dr. XXXX administered the Wesheler Intelligence Scale for Children-Fourth Edition which indicated that the Student fell within the borderline range. Her Verbal Comprehension Index and Perceptual Reasoning Index scores were within the borderline range. Her Working Memory Index score was within the average range. Her Processing Speed Index score was within the low average range. The testing with the perceptual-motor tests suggested that the Student has borderline abilities to conceptualize and copy visually presented information. Behavior Rating Inventory of Executive Function ("BRIEF") sub-test scores indicated that she had difficulties for initiation, working memory, and for planning and organizing.
8. Dr. XXXX suggested direct instruction, identifying what is to be taught and why, demonstrating the desired skill and engaging the Student in guided practice. Additionally,

when introducing new concepts or skills, it may be helpful to explain what the activity entails, what steps are involved and why the particular material is being presented. Dr. XXXX also proposed that teacher model the new concept, guide the Student in its application and gradually turn over responsibility for completing the activity once mastery is demonstrated.

9. Ms. XXXX administered the Woodcock-Johnson Psychoeducational Battery – R test to the Student in November 2004. Her score on the test placed her 1-2 standard deviation below the mean score. The test demonstrated that the Student had a strength in math calculating and story recall and that she was weak in understanding directions, fluency and passage comprehension.
10. Speech and language was tested on September 11, 2001 and indicated that the Student was within normal limits.
11. The IEP developed by PGCPs for the Student's second grade (2005-2006 school year) proposed that the Student would increase reading skills by mastering five short-term objectives. The criteria for determining success were three out of five times with some support. The Student was to improve math skills by mastering eleven short-term objectives. The Student would improve writing skills through a successful completion of three short-term objectives. The criteria for determining success were three out of five times. The Student was to improve school task related behaviors by completing two objectives. Success in that area was reached if she could master the two short-term objectives three out of five times. The IEP proposed that the appropriate placement would be at [School 2].
12. An IEP for the 2005-2006 school year was proposed on March 17, 2005 and revised on August 5, 2005 at the resolution meeting after the Parent filed this due process complaint.
13. The Student exhibited a desire to complete her assignments during her first grade at [School 2]. She exhibited excellent language skills and engaged in conversation with her peers in which she expressed her thoughts and needs. During her conversations, her language skills were on a level with first graders and her language was appropriate.
14. During the first grade, the Student was especially assertive in the small group discussions.
15. The Student was well liked at [School 2] and children gravitated toward her.
16. The Student took tests with her first grade class after the instruction on a particular theme was completed. In the first theme test, the Student only scored a 69%. ([Student] # 23) In the second test, she scored 49%. ([Student] # 24) The next test indicated a score of 35%. ([Student] #25) She scored only 23% on the last theme test. ([Student] # 26)
17. The Student's reading instructional material was below grade level but she passed to the second grade.
18. In January 2005, Dr. XXXX XXXX performed an independent educational and

neuropsychological evaluation of the Student. The evaluation indicated that the Student had trouble with giving elaborated answers and explaining what she was trying to relate. She also had difficulty understanding longer and more complex questions. The Student had a desire to move on during the evaluation, even when she was experiencing difficulty.

19. The educational/neuropsychological evaluation by Dr. XXXX concluded that the Student would benefit from a small student-to-teacher ratio, a dedicated aide, and associated services in speech/language therapy, occupational therapy, and visual accommodations.
20. The Student started her 2005-2006 school year at [School 1], a private school in XXXX County, and is presently attending school at [School 1].
21. The Student's Parent notified PGCPs that the Student would be attending [School 1] on July 21, 2005.
22. At [School 1], the Student is in a class with eight to twelve students, aged eight to ten years old, that is co-taught by two, state certified, special education teachers and three assistant teachers. There are occupational therapists, speech and language therapists, music therapists, nurses and a physical education teacher, which are available to the class. Each week there is a staff meeting involving all the teachers and support staff in a discussion of the students and any particular issue which would concern the various disciplines.
23. The Student is in the middle of the [School 1] class in ability and skill level.
24. The Student has made friends at [School 1] and engages in conversation with her peers and has a positive attitude toward the staff. She is enthusiastic about her attendance at the school.

## **DISCUSSION**

The identification, assessment and placement of students in special education is governed by the Individuals With Disabilities Education Act ("IDEA") Reauthorization, Disabilities Education Act Amendments of 1997, 20 U.S.C.A. § 1415 (2000), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-413<sup>2</sup>, and Code of Maryland Regulations ("COMAR") 13A.05.01.

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

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<sup>2</sup> Maryland's special education law is found at Sections 8-401 to 8-417 (2004 & Supp. 2005) of the Education Article of the Annotated Code of Maryland.

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 an 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. 173 (1982). Maryland’s General Assembly and the State Board of Education have enacted laws and regulations implementing the IDEA for Maryland’s students. Md. Code Ann., Educ. §§ 8-401-417 (2004 & Supp. 2005); 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).

The requirement of FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”

*Board of Education v. Rowley*, 458 U.S. 176 (1982).

In *Rowley*, the Supreme Court further interpreted FAPE as follows:

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child... We therefore conclude that the basic “floor

of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to give education benefit to the handicapped child.

458 U.S. 179-81, 102 S.Ct. 3037-38.

A student is not entitled to “[t]he best education, public or non-public, that money can buy” or “all the services necessary to maximize educational benefits.” *Hessler v. State Board of Education of Maryland*, 700 F. 134, 139 (4<sup>th</sup> Cir. 1983), citing *Rowley* at 458 U.S. 175, 102 S. Ct. 3034; *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4<sup>th</sup> Cir. 1990). The *Rowley* court went on to state that the main issue regarding FAPE is whether the Individualized Education Plan (“IEP”) is “*reasonably calculated to enable the child to receive educational benefit, not whether it will enable the student to maximize his or her potential.*” *Rowley*, 458 U.S. at 206-207. (Emphasis added.)

Thus under *Rowley*, the requirements of the IDEA are met if: 1) the school system complied with the IDEA’s procedural requirements; and 2) the IEP is reasonably calculated to provide educational benefit.

An IEP is a written description of the special education needs of the student and identifies the special education services that are to be provided to meet those needs. COMAR 13A.05.01.09A. The IEP, through its stated goals and objectives, sets the general direction to be taken by those who will implement the IEP, and serves as the basis for developing a detailed instructional plan for the child. 34 C.F.R. Part 300, App. C., question 41.

The Parent in the present case argued that the IEPs offered in the past by the school system were inadequate, and that the IEP proposed for 2005-2006 was actually worse than the one offered the year before. She argued that the proposed IEP was not reasonably calculated to provide a FAPE, in itself, and that the Student must be educated in a small structured classroom

by teachers and aides trained in the use of and actually using multi-modal communication services, including a range of assistance for attendance to her teachers. In fact, she urged that the Student should be placed at [School 1], a nonpublic school located in XXXX County, at PGCPS's expense, where the evidence showed that all of the referenced services would be provided in a small group, highly structured setting. She further argued that the Student's report card misconstrued the Student's failure to achieve success while other objective evidence of the Student's educational gains under the IEP are indicators of the Student's failure in the general education classroom.

The school system argued that the proposed IEP is reasonably calculated to provide a FAPE and that the Student did gain educational benefit under the prior IEP. PGCPS further argued that the Student was making educational progress and that any problems she had would be appropriately addressed by the use of assistance to improve the Student's skill in maintaining focus.

In *Rowley*, the Court addressed the concept of educational benefit in the federal statute:

It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such ... supportive services ... as may be required to assist a handicapped child to benefit from special education." § 1401(17) (emphasis added).

The *Rowley* Court noted that its view was supported by legislative history that demonstrated an intent by the legislature to attempt to enable disabled children to achieve a reasonable degree of self-sufficiency. *Id.* The Court viewed those references in the legislative history as evidence of Congress' intention that the services provided to disabled children be somehow educationally beneficial, whatever the nature or severity of their disability.

The Court noted that determining what amount of educational benefit satisfies the statute was to be determined on a case by case basis, in light of the child's disability or disabilities:

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

458 U.S. 176, 202.

In *Hall v. Vance*, 774 F.2d 629 (4<sup>th</sup> Cir.1985) the court noted that there is a continuum of expectation with regard to what constitutes educational benefit for children with varying degrees of disability:

Rowley recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. Instead, the Supreme Court left that matter to the courts for case-by-case determination.

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[T]he Court limited its analysis to that one case and recognized that promotions were a fallible measure of educational benefit. [citation omitted.] The district court did not err in discounting James' promotions in light of the school's policy of social promotion and James' test scores and independent evaluations. Nor was the district court compelled by a showing of minimal improvement on some test results to rule that the school had given James a FAPE. Rowley recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children. Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA [predecessor to the IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.

*Hall v. Vance*, 774 F.2d 629, 636 (4<sup>th</sup> Cir.1985). The *Hall* court said that trivial, minimal, academic advancement was not educational benefit under the facts and circumstances of that case.

Citing the *Hall* case, the district court in *Fritschle v. Andes*, 45 F.Supp.2d 500, 504 (D. Md. 1999) held that it was imperative that the educational placement "be likely to produce progress, not regression or trivial educational advance." That trial court also cited *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3d Cir.1999) which stated that the "IDEA 'calls for more than a trivial educational benefit' and requires a satisfactory IEP to provide 'significant learning,' . . . and confer 'meaningful benefit.' " *Id. See also, Polk v. Central Susquehanna*, 853 F.2d 171, 180-82 (3d Cir.1988).

In the instant case, no one disputes that the Student is entitled to a FAPE. An appropriate education for this Student is one that allows her to gain meaningful educational benefit. In some cases, it can be shown that a child can gain educational benefit without mastering goals in an IEP. However, the testimony in this case shows a Student who has been consistently struggling to keep up with her peers in the regular classroom, with the result that she is falling further and further behind. The progress notes, recorded only up to the first quarter in the 2003-2004 school year and the end of the first semester in the 2004-2005 school year indicated that the Student did not master one short term objective. It was never explained why the progress notes for the rest of the 2003-2004 or 2004-2005 school years were not available at the hearing. As of the date of the hearing, she was one year older than most of her peers in her classroom.

The Student in this case received special education and related services from the PGCPS during the 2003-2004 and 2004-2005 school years at [School 2]. The Parent filed for a hearing because it was her belief that the proposed IEP for the 2005-2006 school year is deficient in the

following respects:

- 1) the IEP, as developed, contains substantially the same goals and objectives as previous IEPs which do not provide substantial learning;
- 2) the IEP placement does not provide for sufficient direct, special education instruction;
- 3) the proposed placement in a general education setting is not appropriate;
- 4) the proposed program does not have a nurse on staff.

IDEA provides that the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP. 20 U.S.C.A. §§ 1414(a)(5)(2000). The IEP describes the student's current educational performance, sets forth annual goals and short-term objectives for improvements in the Child's performance, and describes the specially designed instruction and services that will assist the Child in meeting those objectives, and the extent to which the child will be able to participate in regular educational programs. *Id* at 1401(a)(20).

The Supreme Court, in *Rowley*, interpreted this broad mandate to be satisfied when a school system provides a student with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203.

"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. Botetcourt*, 980 F.2d at 1207. Nor is there a "requirement to guarantee any particular outcome for the child." *King v. Board of Educ. of Allegany County*, 999 F.Supp. 750, 767 (4<sup>th</sup> Cir. 1998).

In the instant case, the Parent alleges that the development of the IEP was so flawed that it interfered with the provision of a FAPE. Additionally, the Parent contends that the IEP and the placement proposed by PGCPs were not reasonably calculated to enable the Student to receive educational benefit.

PGCPs urges that the Student received meaningful educational benefit with the last IEP. However, PGCPs failed to explain this Student's slow progress since kindergarten. Similarly, her writing skills were still below the first grade level in 2004-2005 school year. Thus, the evidence is that in the 2 year period between kindergarten and the proposed second grade placement, her writing level has not advanced even one grade level and that in that time there is little or no information to show that she has advanced at all in academic subject matters. PGCPs presented no progress reports of the Student's success in meeting goals or objectives for the second half of the two preceding school years.

In 1985, the concept of progress was further refined by the U.S. Court of Appeals in *Hall v. Vance County Bd. of Educ.*, 774 F. 2d 629, 636 (4<sup>th</sup> Cir.). The *Hall* Court noted that "clearly, Congress did not intend that a school system could discharge its duty under the Act by providing a program that produces some minimal academic advancement, no matter how trivial. The *Hall* fact scenario involved a child of above average intelligence who suffered from dyslexia. Upon entering the fifth grade in Vance County, after repeating the second grade and being socially promoted thereafter, the *Hall* child was virtually illiterate. Quoting *Rowley*, the *Hall* Court recognized that there is no single substantive standard which describes how much educational benefit is sufficient to satisfy the Act."<sup>3</sup>

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<sup>3</sup> "The Act" refers to the Education for All Handicapped Children Act ("EAHCA"), the predecessor of IDEA.

In 1993, the Supreme Court further refined its interpretation of educational benefit in *Carter v. Florence County School District Four*, 114 S. Ct. 361. *Carter* involved a child (Sharon) who was learning disabled, scored slightly below average on achievement, and was reading below grade level. Sharon was a tenth grade student but was reading at a fifth grade level. The Court found that the child's progress of four months in reading level over a period of one year was too modest, and was insufficient progress to allow her to advance from grade to grade with passing marks.

Thus, case law developed over the years has established that *minimal* progress is not sufficient, but that a child must make *meaningful* progress. Meaningful progress must be considered along with a child's disability and ability to learn those skills being taught. The evidence presented by both parties shows that this Student, although disabled, should be able to make meaningful progress in reading, writing and mathematics. In fact, it is significant that the testing results in evidence is that this Student has not progressed in her ability to read, write, advance in broad knowledge, or perform in math on a level with children in lesser grades.

The PGCPS had as its chief witness Ms. XXXX XXXX, the Student's Special Education Resource Teacher. Ms. XXXX testified at length as to her contact with the Student and to the PGCPS efforts at providing meaningful educational progress to the Student. She noted that the Student had significant disabilities and was significantly below grade level. Her testimony concerning the 2004-2005 school year was that the Student was making progress. However, when her attention was directed to document [Student] # 13 she admitted that, as of December 23, 2004, the Student had not mastered one objective.

Ms. XXXX related in her testimony that the Student was able to attend to the instruction by her general education teacher and that at times she would be distracted. She stated that the

distractions were the same as the general education students displayed. She further testified that the general education teacher would consult with her and Ms. XXXX testified that the general education teacher would implement tactics to bring the Student on task. Ms. XXXX indicated that the Student was on task most of the time that she was alone with her.

I find that Ms. XXXX's testimony failed to demonstrate meaningful educational progress made by the Student in spite of the 2004-2005 school year report card from [School 2]. If I looked at the report card only, I would have to say that the Student is on grade level. The year-end report indicates that the Student is on level in all of the broad areas of Social Skills, Work habits, Reading, Oral and Written Communication, Mathematics, Social Studies, Art, Music, and Physical Education. However, I saw ample evidence from the theme tests ([Student] # 23, 24, 25, 26 and 27 that that is simply not the case. In the first theme test, the Student only scored a 69%. ([Student] # 23) In the second test, she scored 49%. ([Student] # 24) The next test indicated a score of 35%. ([Student] #25) She scored only 23% on the last theme test. ([Student] # 26)

Further, the report of a February 2, 2005 classroom observation of the Student by Ms. XXXX from the staff of PGCPS shows that the Student was unable to contribute to the small group discussion and was distracted during the discussion. Additionally, the general education teacher told Ms. XXXX that as the day gets older, the Student becomes more distracted.

The Student was also observed by XXXX XXXX in June 2005. Ms. XXXX observed that the Student was unable to successfully complete the exercise during a math class. In fairness to PGCPS, the observation occurred when the Student's regular teacher was out and a substitute teacher was conducting the class. Notwithstanding the fact that a substitute teacher was conducting the class, the Student was assisted by an aide and still could not perform the

function at a time that is close to the end of the school year. Even with a substitute teacher involved, it is obvious to me that the Student was not displaying what at that time of the year should have been meaningful progress.

In contrast, the Parent offered significant evidence that more effective strategies were available that could and should be used to address the Student's needs. Dr. XXXX testified that, having reviewed the IEP meeting notes and the observation notes of the Child in class, the Child had not progressed during the 2004-2005 school year.

The report of Dr. XXXX XXXX was entered into the record ([Student] #. 34). Dr. XXXX testified that she performed an independent educational and neuropsychological evaluation of the Student. The evaluation indicated that the Student had trouble with giving elaborated answers and explaining what she was trying to relate. She also had difficulty understanding longer and more complex questions. The Student had a desire to move on during the evaluation, even when she was experiencing difficulty.

The educational/neuropsychological evaluation by Dr. XXXX concluded that the Student would benefit from a small student-to-teacher ratio, a dedicated aide, and associated services in speech/language therapy, occupational therapy, and visual accommodations.

Finally, the testimony of XXXX XXXX, assistant Director of [School 1] demonstrated that an alternative placement in a nonpublic special education class was appropriate for the 2005-2006 school year. [School 1] staff has developed a proposed program for the Child with the following features:

- a. Typically related services would be pullouts for the child.
- b. A classroom would provide the child with verbal peers that would be good models for her to help her language development.

- c. There will be eight to twelve students total, the other students include another health impairment, speech and language disability, learning disorder and developmental disability. There are no mentally retarded students.
- d. There are from two special education teachers and three assistant teachers in the classroom at any one time.
- e. In essence the entire school day is a form of special education.

PGCPS had students placed at [School 1] for the current school year.

There was a discussion of the credibility of the witnesses by PGCPS in closing argument. Of particular concern to PGCPS, was that the experts provided by the Parent were paid by the Parent and should not be believed. PGCPS pointed to a mistake in Dr. XXXX's testimony regarding the fact that Dr. XXXX mistakenly pointed out that the Student repeated her first grade when, in actuality, the Student repeated Kindergarten. I am not influenced by that mistake. Although I caught it when it occurred, it was not that major of a mistake in the scheme of the testimony. I felt the opinions expressed by the witnesses for the Parent were corroborated by the facts. On the other hand the case for PGCPS was based upon the Student making progress during the year whereas the evidence such as the progress reports indicated otherwise.

Accordingly, I find that the Student's IEP for 2005-2006 was inappropriate, as it was not designed to meet the Student's specific educational needs. Without thoughtfully discussing or considering any alternative placement options, PGCPS proposed that the Student be placed at [School 2] in a general education class for all classes for the 2005-06 school year. That is virtually the same formula which resulted in the Student making no, or trivial progress for the 2003-2004 and 2004-2005 school years.

I conclude that PGCPs's proposed 2005-2006 IEP and placement at [School 2] is not reasonably calculated to enable the Student to receive educational benefits in the least restrictive environment.

IDEA contemplates education of disabled children in a public school setting. 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 which 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. *See also, Florence County School Dist. Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993), *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985).

*Burlington School Committee v. Dept. of Educ.*, 105 S.Ct. 1996 (1985) 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. *Burlington School Committee*, at 2002.

The main basis of the PGCPs objection to the Parent's request for the non-public placement, however, is that the law provides a presumption in favor of including children with disabilities in classes with nondisabled peers to the maximum extent feasible. In other words, 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" ("LRE")

consistent with his or her educational needs. 20 U.S.C.A. § 1414(5). Such a placement in the view of PGCPS, is that proposed in the IEP for 2005-2006 at [School 2], and not at [School 1] as urged by the Parents.

With regard to the 2005-2006 and subsequent school years, Ms. XXXX emphasized her belief that a more specialized special education setting would not be appropriate for the Student because it would deprive her of the influence of nondisabled peers. Her statements in this regard are understandable in the context of the best efforts being exerted by the PGCPS to assist the Student. However, she also stated, on cross examination by the Parent, that she felt attaining academic benefit was more important than placement with nondisabled peers. More importantly, Ms. XXXX reluctantly acknowledged, to a question by the Parent, that the Student had not mastered one of her goals during the 2004-2005 school year. Under the case law, it is the responsibility of the school authorities to focus their resources so that a child can continue to make meaningful educational progress. *Hall v. Vance*, 774 F.2d at 636.

In the instant case, the Parent contends that PGCPS cannot implement the IEP developed for the Student in a public school setting and that a more intensive, nonpublic placement is required. The Parent argues that a school devoted solely to education of disabled children is required. Conversely, PGCPS maintains that under the current IEP, the Student will make educational progress in the least restrictive environment. She is assigned to a general education classroom in a public school where her non-disabled peers are educated.

I conclude that the Student has made *de minimis* educational progress and that the proper, least restrictive placement under the continuum of placements contemplated by IDEA, is a nonpublic educational program.

Federal and state law also requires that students with disabilities be educated in the least restrictive environment. The federal and state regulations require that public agencies insure, to the maximum extent appropriate, that children with disabilities are educated with children who are not disabled. Those regulations require that the removal of children with disabilities from the regular educational environment will occur only if the nature or severity of the disability is such that education in regular classes (with the use of supplemental aids and services) cannot be achieved satisfactorily. 34 C.F.R. §300.550; COMAR 13A.05.01.10.

I am not convinced that, at this early stage of the Student's education, placement in a special education class is as harmful to her as the witnesses for PGCPs have warned. The Student had been at [School 1] for four weeks at the time of the hearing. The Parent testified that her attitude about school attendance has changed from negative to positive feelings. The Parent testified that the Student had no friends when she was at [School 2], in spite of the fact that children gravitated toward the Student at [School 2], and she already has two friends at [School 1]. According to the Parent, the Student enthusiastically shares with the Parent what occurred in school now that she is at [School 1].

More importantly, the plan proposed by PGCPs for the two previous years did not work. At least, at [School 1] there is a plan which is reasonably calculated to enable the Student to receive educational benefit. At [School 1], the classes have support not provided at [School 2] – two special education and three assistant teachers. This extra personnel will address the attention difficulties of the Student and help her to stay on task.

In their closing argument, PGPS argued that the Parent is precluded from receiving reimbursement due to her failure to comply with the notice requirements under IDEA. 20 U.S.C. § 1412(a)(10)(C)(iii) provides:

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in [section 1415\(b\)\(7\)](#) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception.

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if--

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to [section 1415](#) of this title, of the notice requirement in clause (iii)(I).

In *Kitchelt v. Weast*, 341 F.Supp.2d 553 (D. Md. 2004) the court held that parents' preference for their chosen private placement and commitment to that placement does not

constitute bad faith absent deliberate acts to obstruct the development of the IEP. Describing a sequence of events that, in some ways, echoes the instant case, the Court noted that

[Parents] may honestly believe from the beginning (and may ultimately be able to demonstrate) that the best education the public school system can give is not good enough, *i.e.*, is not “appropriate” within the meaning of FAPE.

The fact that parents may hold this view cannot ipso facto amount to an automatic disqualification, so long as they continue in good faith (*e.g.* no intentional delays, no obstructions) to participate in the development of an IEP and placement in the public school system. As always, parents run the risk of being proved wrong about the school system’s ability to provide a FAPE, in which case they will be denied reimbursement for a unilateral placement.

A further observation is in order. The mere fact that parents may enroll their child in a private school while the IEP process is underway—typically in the spring or summer for the fall term—is not by itself proof of bad faith on their part. In the great run of cases, the parents will simply be bowing to reality. Enrollments in special education facilities may fill up quickly. They may not always be available in late summer when the IEP is finally ready. As before, the key consideration is that the parents pursue in good faith the development of the IEP and the possibility of public school placement.

*Kitchelt*, 341 F.Supp.2d at 557 (FN1).

Simply being committed to private placement from the beginning of the IEP process or actually enrolling a child in a private placement while the IEP process is underway does not demonstrate bad faith on the part of parents. There was no assertion from PGCPS that the Parent engaged in actions which would be construed to be a deliberate delay, obstruction or attempt to thwart the development of an IEP. As early as July 21, 2005, after the proposed IEP of March 17, 2005 and before the proposed IEP of August 5, 2005, PGCPS certainly knew the Parent had enrolled the Student in the private placement, the Student did not begin school until August 2005 fulfilling the notice requirement of 20 U.S.C. § 1412(a)(10)(C)(iii). Therefore, the Parent should not be precluded from tuition reimbursement.

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Student’s 2005-2006 Individualized Education Programs with placement in a general education classroom at [School 2], a public school, is not reasonably calculated to provide the Student with a free appropriate public education as required by *Board of Education v. Rowley*, 458 U.S. 176 (1982). I further conclude, as a matter of law, that private placement is required to permit the Child to gain educational benefit, and that placement at [School 1] is an appropriate placement. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359 (1985)

**ORDER**

I **ORDER** that the Parents’ request that the Price George’s County Public School fund a private placement of the Child at [School 1], for the 2005-2006 school year be **GRANTED**.

October 4, 2005

Date

TAM/

\_\_\_\_\_  
T. Austin Murphy  
Administrative Law Judge

## **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) (2004).

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.