

XXXX XXXX

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE UNA M. PEREZ,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-MONT-OT-08-16493**

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DECISION

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STATEMENT OF THE CASE

On April 25, 2008, XXXX XXXX (Parent) filed a Request for Mediation/Due Process Hearing (Request) with the Montgomery County Public Schools (MCPS) on behalf of her son, XXXX XXXX (Student). 20 U.S.C. § 1415(f) (Supp. 2008). Also on April 25, 2008, MCPS transmitted the Parent’s Request to the Office of Administrative Hearings (OAH) via facsimile.

A hearing was held on June 25, 2008 before Una M. Perez, Administrative Law Judge (ALJ), at the headquarters of MCPS, 850 Hungerford Drive, Rockville, Maryland. Edmund W. Law, Esq., represented MCPS. The Parent appeared and represented herself.

The hearing was held pursuant to the following laws and regulations: Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C.A. § 1415(f) (Supp. 2008); 34 C.F.R. § 300.511 (2007); Md. Code Ann., Educ. § 8-413(e)(1) (2006); Code of Maryland Regulations (COMAR) 13A.05.01.15C; 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 OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2007); COMAR 28.02.01.

The due date for the decision in this case was to be June 30, 2008, forty-five days from May 14, 2008, the date the OAH was notified of the outcome of the mediation. Because it was not possible to schedule the hearing until June 25, 2008, the parties agreed that the decision would be issued no later than July 28, 2008. *See* 34 C.F.R. § 300.515(c)(2007); Md. Code Ann., Educ. § 8-413(h) (2006).

ISSUES

The issues are whether MCPS's Motion for Judgment should be granted, and, if not,

- Is MCPS's April 18, 2008 Individualized Education Program (IEP) for the Student's 2008-2009 school year reasonably calculated to provide him a free appropriate public education (FAPE)?
- Is MCPS's proposed placement of the Student for the 2008-2009 school year in the non-public [Program 1] ([Program 1]) the least restrictive environment within which, with appropriate modifications and accommodations, he can receive FAPE?

SUMMARY OF THE EVIDENCE

A. Exhibits

The Parent offered no documents into evidence.

I admitted the following exhibits into evidence on behalf of MCPS:

MCPS Ex. #1. [Program 2] ([Program 2]) Progress Update, March 28, 2007

MCPS Ex. #2. Goal Pages from the Student's MCPS IEP, April 18, 2007

MCPS Ex. #3. [Program 2] Progress Update, January 30, 2008

MCPS Ex. #4. The Student's IEP for the period February 2008 to May 2008, February 8, 2008

MCPS Ex. #5. Student Record of Transmittal Form, February 21, 2008

MCPS Ex. #6. The Student's IEP for the period February 2008 to February 2009, April 18, 2008

MCPS Ex. #7. Notice to Parents of IEP Team findings, recommendation, and decision, April 25, 2008

B. Testimony

The Parent testified in the Student's behalf.

The following witnesses testified on behalf of MCPS:

- XXXX XXXX, Parent Educator at [School 1], accepted as an expert in special education; and
- XXXX XXXX, [Program 2] Coordinator, MCPS, accepted as an expert in school administration with an emphasis on the education of pre-school students with disabilities.

FINDINGS OF FACT

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

1. The Student was born on XXXX, 2003.
2. The Student's primary disability is developmental delay. The areas affected by his disability are communication, cognition, socialization/interpersonal skills, fine motor skills, and gross motor skills.
3. The Student's initial evaluation, and the first IEP meeting concerning him, took place in July 2006.
4. In October 2006, at the age of three, the Student began attending the [Program 2] XXXX program at [School 1] ([School 1]), a MCPS school.¹ This is a self-contained pre-school program for children ages three to five with mild to moderate delays. It teaches

¹ The Student's "home school" is [School 2], but [School 1] is the MCPS school closest to his home that offers the [Program 2] XXXX program.

students a variety of pre-academic, social, and motor skills necessary for them to become ready for school.

5. The Student attended the [Program 2] program five mornings a week, for two and one-half hours per day. His class consisted of eight other three and four year olds. There was one teacher and one instructional assistant; sometimes a physical, occupational, or speech and language therapist was also present.

6. There were no non-disabled peers in the Student's class. The non-disabled students at [School 1] were on a different time schedule, and opportunities for interaction between the [Program 2] students and the general education students were limited.

7. During the 2006-2007 school year, the Student made steady progress and improved in many of his IEP goals. The IEP team recommended that he continue in the [Program 2] program for the 2007-2008 school year.

8. The Student missed approximately two months of attendance at the [Program 2] program in October and November 2007, because of family travel to [Country] and some episodes of illness.

9. Upon the Student's return, his teachers noticed a significant deterioration in the Student's rate of progress towards his IEP goals. The Student showed a decrease in his level of participation and regression in his language skills and his in-school behaviors. Overall, he needed more prompting, support and individual attention. Observers also noticed some safety concerns—the Student would try to leave the classroom if not closely monitored, and would sometimes turn the hot and cold water faucets on and off.

10. As of the end of January 2008, the Student was not making sufficient progress to meet nine of the thirteen goals on his IEP.

11. The Student's IEP team met on February 8, 2008, to consider his progress and refine the goals and objectives of his IEP.

12. The IEP team prepared a short-term IEP for the period February 11, 2008 through May 12, 2008. The thrust of that IEP was to make the Student's goals increasingly functional within the [Program 2] program at [School 1].

13. The IEP team also prepared a twelve-month IEP for the period February 2008 through February 2009. This IEP recommended a non-public placement for the Student at [Program 1], a more intensive pre-school program. Under this IEP, the Student would receive more intensive specialized instruction for a total of 23 hours each week (as compared to 12.5 hours in the [Program 2] program). The student to staff ratio in the [Program 1] program is two to three students per staff member, significantly lower than in the [Program 2] program.

14. There are no non-disabled students in the [Program 1] program.

15. The [Program 1] program closest to the Student's home is located in [City], in the XXXXXX XXXX building.

16. In both IEPs, the team recommended that the Student receive Extended School Year (ESY) special education and related services from July 7, 2008 through August 1, 2008. The Student is to receive those services in the [Program 2] program at [School 1].

17. Because the twelve-month IEP recommended a non-public placement, approval by the MCPS Central IEP Team was necessary. The Student's IEP team transmitted the twelve-month IEP to the Central IEP Team, which met on April 18, 2008.

18. The Central IEP Team approved the recommendation that the Student be placed in the [Program 1] program for the 2008-2009 school year.

19. The Parent had the opportunity to visit the [Program 1] program in [City] before the April 18, 2008 Central IEP Team meeting. Based on her visit, the Parent told the Team that she did not agree with the proposed placement of the Student in the [Program 1] program.

20. The Parent filed her Request on April 25, 2008.

DISCUSSION

MCPS Motion to Dismiss

As a preliminary matter, MCPS moved to dismiss the Parent's Request because the Parent failed to disclose exhibits and witnesses to MCPS at least five days prior to the hearing. *See* Md. Code Ann., Educ. §8-413(f)(1)(iii)(2006); COMAR 13A.05.01.15C(17); and 34 C.F.R. § 300.512(b)(2007). I denied the motion but instructed the Parent that she could not introduce or rely on any documents other than those disclosed to her in advance of the hearing by MCPS. In addition, although the Parent indicated that the Student's grandmother was available to testify, I ruled that only the Parent and the Student would be allowed to testify, as these were witnesses reasonably foreseeable by MCPS. The Parent did not call the Student to testify.²

The Individuals with Disabilities Education Improvement Act

The IDEA provides federal assistance to state and local agencies for the education of children with disabilities. 20 U.S.C.A. §§ 1400-1482 (Supp. 2008). 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 an educational benefit from the special education services. *See* 20 U.S.C.A. §§ 1412-1414 (Supp. 2008); 34 C.F.R. § 300.320 (2007). *See also Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Maryland's General Assembly and the State Board of Education have enacted laws and regulations implementing the

² The Student is only four and one-half years old; I was not aware of this fact when I made my oral ruling.

IDEA for Maryland's students. Md. Code Ann., Educ. §§ 8-401-417 (2006 and Supp. 2007); COMAR 13A.05.01.

Under both federal and state law, students with disabilities have the right to a “free appropriate public education” (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 school, or secondary school education 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.A. § 1401(9) (Supp. 2008). Maryland law defines FAPE similarly. *See* Md. Code Ann., Educ. § 8-401(a)(3) (2006).

The question of whether a student is receiving 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. The Supreme Court noted that the first inquiry is whether a school district complied with the procedures set forth in IDEA. The second inquiry is whether the IEP, developed through the IDEA's procedures, was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit. *Rowley*, 458 U.S. at 206-07.

Federal and State laws also mandate that children with disabilities be educated in the least restrictive environment (LRE). The federal and State regulations require that state education 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. 20 U.S.C.A. § 1412(a)(5)(A) (Supp. 2008); 34 C.F.R. § 300.114-120 (2007); COMAR 13A.05.01.10.

In deciding whether a child can be educated “satisfactorily in a regular classroom with supplementary aids and services,” the United States Court of Appeals for the Third Circuit fashioned the following three-pronged test:

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

Oberti v. Bd. of Educ., Borough of Clementon Sch. Dist., 995 F.2d 1204, 1217-18 (3rd Cir. 1993).

The Sixth Circuit earlier considered the same issue in *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983), and analyzed it as follows:

The proper inquiry is whether a proposed placement is appropriate under the [IDEA]. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the [IDEA’s] mandate. (citation omitted) In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

Roncker, 700 F.2d at 1063.

The Fourth Circuit adopted the *Roncker* standard in *Devries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989). More recently, it reiterated its holding in that case as follows:

In *DeVries*, we held that mainstreaming is not required where (1) the disabled child would not receive an educational benefit from mainstreaming into a regular class; (2) any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting; or, (3) the disabled child is a disruptive force in a regular classroom setting. [*DeVries*] at 879.

Hartmann v. Loudon County Bd. of Educ., 118 F.3d 996, 1001 (4th Cir. 1997).

There is no bright line test, such as passing marks and advancement from grade to grade, to determine whether a student is progressing or could progress educationally. *In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991). Rather, in such cases the decisionmaker must assess the evidence to determine whether the student's IEP and placement were reasonably calculated to enable him or her to receive appropriate educational benefit. *Id.*

Positions of the Parties

The Parent did not allege any procedural violations³ but asserted her disagreement with the recommendation that the Student be placed in the [Program 1] program. She does not like the fact that the [Program 1] program is located in a XXXX XXXXX, instead of a traditional school building that the Student is familiar with. She believes that the Student will not learn about transitions during the school day as they occur in a school building. She believes that the [Program 1] program is too restrictive because the Student will not have the opportunity to interact with non-disabled peers. Finally, she does not believe the Student needs a longer school day. She wants the Student to remain in the [Program 2]³ program at [School 1] for the 2008-2009 school year.

³ In a typewritten "Description of Problems" dated April 25, 2008, the Parent stated that "Additionally, [the Student] was evaluated by the head of the [[Program 1]] program without my written or verbal approval or consent." She did not testify about or present argument on this procedural issue at the hearing, so I decline to address it.

MCPS made a Motion for Judgment at the close of the Parent's case, which I neither granted nor denied, instead directing MCPS to present its case. COMAR 28.02.01.16E (2)(b). MCPS's position was that the Parent provided no evidence to show that MCPS denied the Student FAPE, and therefore that the Parent had failed to meet her burden of proof.

For the reasons that follow, I agree with MCPS's position and will grant its Motion for Judgment. Moreover, even if I had denied MCPS's motion, the outcome would be the same. Although the Parent produced some evidence, she would not prevail on the merits because she failed to meet her burden of proof.

Burden of Proof

The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party challenging an IEP. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The issues before me are whether the Student's IEP, recommending his placement in the [Program 1] program for the 2008-2009 school year, is reasonably calculated to enable him to receive appropriate educational benefit, and whether the proposed placement is the LRE within which the Student can receive FAPE. Therefore, in this case, the burden is on the Parent to demonstrate that MCPS's proposed placement of the Student is not reasonably calculated to provide him with FAPE in the LRE consistent with his educational needs.

Standard for Motion for Judgment

Under the OAH Rules of Procedure, a party may move for judgment at the close of the evidence offered by an opposing party, as provided in COMAR 28.02.01.16E:

E. Motion for Judgment

(1) A party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:

- (a) Proceed to determine the facts and render judgment against an opposing party; or
- (b) Decline to render judgment until the close of all evidence.

COMAR 28.02.01.16E is patterned after Md. Rule 2-519, Motion for Judgment, and is the OAH equivalent. Rule 2-519 “allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact.” *Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n. 4 (1998). In deciding a Motion for Judgment, the judge is not required to view the evidence in a light most favorable to the non-moving party. *Id.*

Analysis

I find that the Parent has not met her burden to establish that the IEP proposed by MCPS, and specifically the placement of the Student in the [Program 1] program, will not provide the Student with FAPE or that the Student is entitled to the relief specified in the Request, i.e., to remain in the [Program 2] program at [School 1] for the 2008-2009 school year. The Parent presented some evidence in support of her allegations, in the form of her own testimony; but this evidence was insufficient to show that the placement of the Student in the [Program 1] program will not provide the Student with FAPE or that the Student will receive FAPE if he remains in the [Program 2] program at [School 1].

Moreover, MCPS presented detailed and credible testimony from Ms. XXXX, an expert in special education, and from Ms. XXXX, the coordinator of the [Program 2] program. Both witnesses are familiar with the Student, his academic history, and his IEPs. Their testimony, and the documentary evidence presented by MCPS, establishes not only that the Student’s IEP and proposed placement are reasonably calculated to enable him to receive appropriate educational

benefit, but also that the Student will not receive FAPE unless he participates in the [Program 1] program. I further find that the relief requested by the Parent would not be appropriate and would cause the Student to fall further behind in his efforts to meet his IEP goals and objectives.

1. The Student's Initial Progress in the [Program 2] Program Was Satisfactory

The Student began participating in the [Program 2] XXXX program at [School 1] in XXXX 2006, when he reached the age of three. Ms. XXXX, a Parent Educator, observes the Student's [Program 2] class three to five times a week; he is part of her case load. She explained that the [Program 2] XXXX program is conducted in a separate classroom within [School 1]. The class consists of eight to ten pre-school children, taught by a Special Education teacher and a para-educator. Most students attend five days per week; the Student attended five days, for two and one half hours each morning.

Most of the [Program 2] participants' instruction, including music, is provided within the classroom, although the students go into the "media center" twice a month. There are no non-disabled pre-school students at [School 1]; the youngest general education students are in kindergarten. The [Program 2] program and the general education program have different hours (one starts at 9:00 a.m. and the other at 9:15 a.m.), so the students are not coming and going at the same time. Ms. XXXX described the opportunity for interaction between the two groups of students as minimal.

Ms. XXXX generally characterized the types of goals on the Student's IEP as follows: pre-academic, written language, self-help, play skills, attention, classroom behaviors, motor skills, oral language, and social interaction. During his first six months of participation in the [Program 2] program, the Student was making "steady progress over several domains" and had "improved in many of his IEP goals." MCPS Ex. #1, at 5. The Student's Special Education teacher and therapists, who prepared a Progress Update on March 28, 2007, opined that the

Student “would continue to benefit from a highly structured and predictable preschool setting with a low teacher to student ratio.” *Id.*

In April 2007, Ms. XXXX attended the Student’s IEP team meeting for the 2007-2008 school year. The team recommended that the Student return to the [Program 2] program at [School 1]. Ms. XXXX agreed; the Student had been making steady progress and he had not been in the program long enough to give the team any reason to think the placement was inappropriate.

The Student returned to the morning [Program 2] program at the beginning of the 2007-2008 school year. The rest of the students in his class were new to the program, and so were not as familiar with the routines as the Student. Ms. XXXX pointed out that the beginning of the school year is when students learn the routine and school behaviors. The Student received general and individualized instruction in pre-academic subjects such as colors, shapes, letter recognition, etc.

According to Ms. XXXX, the Student’s social skills were a strength, in that he would initiate interactions. She described him as being “in the mix” relative to his peers in this regard, and “in the middle” with regard to communication skills—not the best, but certainly not the worst. Ms. XXXX did note that there were some behavioral issues related to classroom safety. She described the Student as a “flight risk,” saying he was not motivated to stay with the group. He also had a propensity to turn the water and lights on and off. Overall, however, the Student was in the average range with his peers at the beginning of the 2007 school year.

2. The Student’s Rate of Progress Declined in Early 2008

There came a time in October and November 2007 when the Student was absent from the [Program 2] program for approximately two months. The absence was due to the Student’s travel to [Country] with his father; the Parent testified that the Student also had some episodes of

illness during that time.

When the Student returned to the [Program 2] program, his teachers noticed significant changes. Ms. XXXX described these changes as a decrease in the Student's level of participation across the board, deterioration in his language skills and school behaviors, and in general a need for more prompting, support, and individual attention. Stated otherwise, the Student was no longer "in the mix" with his peers.

The IEP team assesses the Student's progress towards his IEP goals quarterly. The January 2008 Progress Report documented that, in contrast to the previous two reports, the Student was not making sufficient progress to meet the majority of the goals on his IEP (nine of thirteen). MCPS Ex. #2. In general, his progress towards his academic and behavioral goals had declined, while his progress towards motor skills and balance goals remained satisfactory. *Id.*

The Student's Special Education teacher and therapists prepared a contemporaneous Progress Update, dated January 30, 2008, that described the Student's observed needs and behaviors in comprehensive detail. MCPS Ex. #3. Included among the observations was the point that the Student would leave a small group activity if not closely monitored, and often tried to leave the classroom during small group and free play times. MCPS Ex. #3 at 1. The Update also noted that the Student would play at the sink (with hot and cold water) turning the water up high. This behavior required re-direction. *Id.* at 2. He would put art materials such as play dough in his mouth if not monitored. *Id.* The final paragraph of the Progress Report stated:

[The Student] has many classroom needs and delays in communication and motor skills. His delays in cognition, play, social and self-help skills impact his ability to function in a [Program 2] XXXX class. [The Student] has not been making expected progress on his classroom goals and objectives. He requires more opportunities for repetition and practice, a smaller student: staff ratio, and a more structured environment. In addition, [the Student] needs a longer school day to provide more time for him to practice and learn new skills.

MCPS Ex. #3 at 5.

3. The IEP Team's Response

In light of the Student's declining rate of progress on his goals, his IEP team met on February 8, 2008. As explained by Ms. XXXX, the purpose of the meeting was twofold—first, to revise the Student's IEP to address the goals as to which he was making insufficient progress, and second, to make recommendations for an alternative placement in light of the last paragraph of the January 30, 2008 Progress Update.

The only remaining placement on the continuum of MCPS [Program 2] programs was the [Program 1] program, a non-public placement that would require approval by the MCPS Central IEP Team.⁴ For this reason, the Student's IEP team developed two IEPs—a short-term one for the period February 11, 2008 through May 12, 2008 (MCPS Ex. #4) and a twelve-month one for the period February 11, 2008 through February 6, 2009 (MCPS Ex. #6).

Ms. XXXX explained that the short-term IEP (MCPS Ex. #4) adjusted the Student's goals to be more functional and less academic, and more directed to behaviors and safety concerns. This IEP maintained the Student in his current separate twelve and one half hour weekly program within [School 1]—ten hours of direct special education instruction, one hour of direct speech therapy, one hour of direct occupational therapy, and one half hour of direct physical therapy. MCPS Ex. #4 at 18, 20, 21. It also provided that the Student would receive ESY services, because he has “critical life skills in several areas and has shown regression over natural school breaks.” *Id.* at 24.

The Student's IEP team transmitted the long-term IEP (MCPS Ex. #6) to the Central IEP Team on February 21, 2008. MCPS Ex. #5. The transmittal form itself contains a list of five

⁴ Ms. XXXX explained that the MCPS [Program 2] program is a continuum, ranging from the least to the most restrictive environment. The least restrictive is the [Program 2] XXXX Model, wherein special education teachers visit pre-schools for one hour per week and consult with teachers. The next level is the [Program 2] XXXX Program, in which special education is provided two mornings a week to pre-schoolers in a general education setting. Half the students have relatively mild delays and half are non-disabled. The next level is the [Program 2] XXXX Program, which is a self-contained program within a school for students with mild to moderate delays. The most restrictive level is the [Program 1] Program.

“Strategies/Interventions and Results.” These describe the Student’s need for individualized attention and a very high level of physical prompting, and his inability to follow classroom routines even after being on the same schedule for almost one and one-half years. *Id.*

As explained by Ms. XXXX, the goals in the long-term IEP were similar to those in the short-term IEP, but there were more of them and the expectations for the Student were increased. This IEP recommended that the Student be placed in [Program 1], a private separate day school. MCPS Ex. #6 at 20. It also recommended a doubling of the hours of direct special education and related services, from ten to twenty hours. *Id.* at 24. The amount of speech, occupational, and physical therapy remained constant at three hours. *Id.* Thus, the Student would be in pre-school for twenty-three (23) hours each week. Ms. XXXX agreed with the recommendation.

Ms. XXXX explained the differences between the [Program 2] XXXX and the [Program 1] programs. The students in [Program 1] have more significant needs across the board. The staff to student ratio is more favorable—one staff member to two or three students, enabling more individualized instruction. The longer school day affords more time for individualized, rather than group-based, practice of skills. There is more structure. Ms. XXXX testified that the method of instruction at [Program 1] is different, because the staff can focus on direct individual support. *See also* MCPS Ex. #6 at 20, referring to “specially trained staff.” Ms. XXXX also observed that the lower staff to student ratio is better to address any safety concerns.

4. The Central IEP Team Meeting

The Central IEP Team met on April 18, 2008. Ms. XXXX and Ms. XXXX were in attendance, as was the Parent. The Central IEP Team approved the recommendation in the twelve-month IEP that the Student be placed in [Program 1], and notice was provided to the Student’s parents on April 25, 2008. MCPS Ex. #7. The IEP envisioned that the Student would start at [Program 1] right away, but when the Parent promptly filed her Request, the “stay put “

provisions of IDEA⁵ came into play, and the Student remained in the [Program 2] XXXX program. Ms. XXXX testified that the Student did not finish the school year because of a family emergency, but left at the end of May.

5. The Appropriateness of the Placement in [Program 1]

The Parent took issue with Ms. XXXX's testimony suggesting that the Student's trip to [Country] caused him to fall behind. Ms. XXXX acknowledged that this was simply her opinion, but noted that it is not unusual for students to regress after a long absence. On re-direct examination, Ms. XXXX clarified that her opinion that the Student should be placed in the [Program 1] program was not based solely on the fact that the Student went away for a while. She had testified on direct that the absence may have contributed, but that there were a lot of "red flags" indicating a need for the IEP team to meet and revise the Student's IEP.

Regardless, there is no real dispute that the Student's performance, as observed by his teachers using objective criteria, deteriorated in early 2008. Moreover, he had been in the [Program 2] XXXX program for almost one and one-half years, and simply was not acquiring the skills he needed to be ready for school. His needs for individualized instruction, extensive physical prompting, close monitoring, and practice of skills had increased. The instruction and services provided in the [Program 2] XXXX program were not adequate to address those needs and to permit the Student to obtain an educational benefit.

Ms. XXXX testified that although the Student had regained some of his language skills⁶ as of April 2008, there were still big gaps in other areas, and he still needed extensive support and cues. As to the safety issues, she observed no significant change; the Student would still try to leave the classroom or playground. On cross-examination, the Parent asked Ms. XXXX if all children have safety concerns. Ms. XXXX acknowledged this, but responded that the Student

⁵ 20 U.S.C. § 1415 (j) (Supp. 2008).

⁶ The Parent pointed out that some of the language difficulty observed after the Student returned from his trip may have been because he spoke and heard a different language while traveling in [Country].

seemed to want to leave more than the other children.

Ms. XXXX agreed with the recommended placement in the [Program 1] program because it will offer the Student the enhanced support he needs, especially since he has only one more year before starting elementary school. She testified that as of the time the Student left school in May 2008, she still believed the proposed [Program 1] placement is appropriate—any improvements were not significant enough to cause her to change her recommendation.

Ms. XXXX, the MCPS [Program 2] Coordinator, is familiar with the Student; she spends time at [School 1] observing the [Program 2] class and consults with the team and the Parent Educator. She estimated that she had been in the Student's classroom for observations eight to ten times during the past year.

Ms. XXXX testified that, before the April 18, 2008 Central IEP Team meeting, the Student's IEP team had brought their concerns about the Student's rate of progress in the [Program 2] XXXX program to her attention. She attended the April 18, 2008 meeting as the [Program 2] representative. As the Coordinator, she has been to the [Program 1] program many times and is familiar with its structure and operations.

Ms. XXXX also agreed with the recommendation that the Student be placed in the [Program 1] program. As she expressed it, "Based on the opinion of the team that he wasn't making progress, we were obligated to do more for him." When asked why MCPS could not simply do more for the Student within the [Program 2] XXXX program, Ms. XXXX answered that the [Program 1] program would afford the Student much more time for repetition and personal instruction, and that the staff to student ratio was better, especially in light of the safety concerns with this Student.

Ms. XXXX's observations are consistent with the rationale expressed by MCPS in its letter to the Student's parents. MCPS Ex. #7. After the April 18, 2008 meeting, Ms. XXXX

continued to visit [School 1] and to discuss the Student with the staff there. She is still firmly of the opinion that the [Program 1] program will be better for the student, and that MCPS cannot meet his needs in the [Program 2] XXXX program.

The Parent offered no evidence, other than her personal objections to the [Program 1] program, to show that MCPS' April 18, 2008 IEP for the Student's 2008-2009 school year is not reasonably calculated to provide him with FAPE. To the contrary, I am persuaded that it is.

6. Is [Program 1] the LRE?

The Parent's major objection to the [Program 1] program, apart from the longer day and the physical location in a XXXX basement, is that the Student will not have the opportunity to interact with non-disabled peers.⁷ Although she acknowledged that the Student has a disability, she argued that the Student needs to be in an environment with children of different abilities. She testified in rebuttal that when she went to a festival at [School 1], the Student showed her the music room; also, other children at the school knew the Student by name and face. To her, this demonstrated the benefit of the traditional school setting and the presence of children of all abilities.

The Parent's concerns are understandable and not to be taken lightly. As explained in detail above,⁸ the IDEA requires that a local educational agency provide a student with FAPE in the LRE. Whether a particular placement is the LRE is a question of fact.

It is undisputed that the Student's current placement, the [Program 2] XXXX program at [School 1], is a self-contained special education program within a public school. Most of the work is brought in to the [Program 2] classroom. Although there are general education students at [School 1], there are none in the Student's class. In fact, the youngest general education students at the school are in kindergarten—i.e., beyond pre-school. The pre-school program

⁷ She also believes, and expressed at the IEP meetings, that the Student has benefited from the [Program 2] program at [School 1] and would continue to do so. See MCPS Ex. #4 at 6, MCPS Ex. #6 at 6.

⁸ See pages 7-9, above.

starts at a different time than the regular program, so the [Program 2] students are not “transitioning” at the same time as the general education students.

Nevertheless, the Student has a limited level of incidental interaction with non-disabled peers. Ms. XXXX testified that in her opinion, the Student was not really utilizing the models (i.e., imitating the behaviors) of non-disabled students in a way that would justify keeping him in the [Program 2] XXXX program.⁹ Moreover, Ms. XXXX testified that a private pre-school shares a playground with the [Program 2] program at [School 1]. She had observed the Student out there with these other students at recess times. She saw no interactions, and did not see the Student demonstrate any interest in his non-disabled peers. In fact, he tried to leave.

The [Program 1] program will be more restrictive than the [Program 2] XXXX program because it is limited to special education students with significant delays. Also, because it is not located within a MCPS school building, it will not give the Student the opportunity for even the minimal incidental interaction with non-disabled peers that he has had at [School 1]. The Parent did not specifically argue that the Student should be educated in the regular classroom, but asserted that he needed to be in an environment with children with different abilities, such as a public school.

On this point, *Hartmann, supra*, is instructive. As explained by the Fourth Circuit,

[T]he IDEA’s mainstreaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only ‘to the maximum extent appropriate.’ 20 U.S.C. § 1412(5)(B). Section 1412(5)(B) explicitly states that mainstreaming is not appropriate ‘when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.’ (citation omitted).

Hartmann, 118 F.3d at 1001.¹⁰

The Court of Appeals went on to list the three circumstances from *DeVries, supra*, in

⁹ Indeed, the Student’s January 30, 2008 Progress Update notes that he “continues to interact primarily with adults” within his own program. MCPS Ex. #3 at 3.

¹⁰ The cited section is now 20 U.S.C. § 1412(a)(5)(A) (Supp. 2008).

which mainstreaming is not required. *Hartmann*, 118 F.3d at 1001. Two of these are pertinent to this case.¹¹ The first is where “the disabled child would not receive an educational benefit from mainstreaming into a regular class.” *Id.* In this case, the only educational setting in which the Student has ever been placed is a self-contained special education class. In that setting, where he has been for almost two school years, he has not made sufficient progress towards the majority of the goals and objectives on his IEP.

The Student’s needs for individualized instruction, repetition and practice of skills, extensive physical prompting, monitoring to address flight concerns, and a low staff to student ratio are established by the record. MCPS believes that placement in the [Program 1] program will provide the Student with the educational benefit he needs. The Parent offered no evidence to show that the Student would receive an *educational* (as distinct from an incidental social) benefit by remaining in the [Program 2] XXXX program at [School 1].

The second *Hartmann* circumstance is where “any marginal benefit from mainstreaming would be significantly outweighed by benefits which could feasibly be obtained only in a separate instructional setting.” *Hartmann*, 118 F.3d at 1001. MCPS did not argue that the Student received no mainstreaming benefit whatsoever from his placement in the [Program 2] XXXX program, but emphasized the limited nature of his interactions with non-disabled peers.

These interactions are limited by the nature of the program itself and by the Student’s observed disinclination to engage with peers. MCPS also pointed out that the Student presents an “atypical” flight concern, which can be addressed more feasibly in the [Program 1] setting. MCPS argued that the small mainstreaming benefit that the Student might receive from remaining in the [Program 2] XXXX setting did not balance the Student’s need for more intensive services and the educational benefits of the [Program 1] program. The Court’s

¹¹ The third, that the disabled child is a disruptive force in the classroom, is not presented by this record.

language in *Hartmann* is again helpful:

The mainstreaming provision represents recognition of the value of having disabled children interact with non-handicapped students. The fact that the provision only creates a presumption, however, reflects a congressional judgment that receipt of such social benefits is ultimately a goal subordinate to the requirement that disabled children receive educational benefit.

Hartmann, 118 F.3d at 1002.

Applying these analyses from *Hartmann*, I find that the IDEA's presumption in favor of mainstreaming must give way in this case, and that the [Program 1] program, not the [Program 2] XXXX program, is the LRE in which this Student can receive FAPE. 20 U.S.C. § 1412 (a)(5)(A) (Supp. 2008).

Summary

Having heard and considered the evidence, I understand the Parent's concerns, and do not doubt that she is a caring parent who wants what is best for her child. For the reasons explained at length above, however, I cannot find that MCPS has failed in any of its obligations under the IDEA and State law. The Parent's evidence was insufficient to show that MCPS's proposed placement of the Student in the [Program 1] program was not reasonably calculated to provide him with FAPE in the LRE consistent with his educational needs. Therefore, MCPS's Motion for Judgment will be granted.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent failed to meet her burden of proof and that MCPS's Motion for Judgment should be granted. COMAR 21.02.01.16E. I further conclude that:

1. MCPS's April 18, 2008 IEP for the Student's 2008-2009 school year is reasonably calculated to provide him with FAPE. 20 U.S.C.A. § 1401(9) (Supp. 2008); Md. Code Ann., Educ. § 8-401(a)(3) (2006).

2. MCPS's proposed placement of the Student in the [Program 1] program for the 2008-2009 school year is the least restrictive environment within which, with the modifications and accommodations provided for in MCPS's April 18, 2008 IEP for the Student's 2008-2009 school year, he can receive FAPE. 20 U.S.C. § 1412 (a)(5)(A) (Supp. 2008); 34 C.F.R. § 300.114-116 (2007).

ORDER

It is therefore **ORDERED** that the MCPS Motion for Judgment be, and is hereby is **GRANTED**; and it is further

ORDERED, that the Parent's Request for Due Process hearing be, and it is hereby, **DISMISSED**.

July 24, 2008
Date Decision Mailed

UMP/ch

Una M. Perez
Administrative Law Judge

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final 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(j) (2006).

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.