

XXXX XXXX

\* BEFORE THOMAS G. WELSHKO  
\* ADMINISTRATIVE LAW JUDGE  
\* MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No. MSDE-CITY-OT-04-63562  
\*

V.

BALTIMORE CITY PUBLIC  
SCHOOL SYSTEM

\* \* \* \* \*

**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW

**ORDER**

**STATEMENT OF THE CASE**

This case arises from a request by XXXX XXXX and XXXX XXXX (“the Parents”) on behalf of their son, XXXX XXXX (“the student”), for a hearing to review the identification, evaluation or placement of the student, based on the Baltimore City Public School System’s (“BCPSS’s”) alleged failure to offer the student a free appropriate public education (“FAPE”). The parents filed their request for hearing on December 10, 2004 and, on December 14, 2004, BCPSS transmitted that request to the Office of Administrative Hearings (“OAH”) for a hearing.

On January 13, 2005, the hearing was held before Thomas G. Welshko, Administrative Law Judge (“ALJ”) at the Office of Administrative Hearings in Hunt Valley, Maryland. At the hearing, Marcia L. Conlin, Associate Counsel, Office of Legal

Counsel, 200 E. North Avenue, Baltimore, Maryland 21202, represented BCPSS. The Parents represented themselves.<sup>1</sup>

The hearing was held pursuant to the following laws: Individuals With Disabilities Education Act ("IDEA") Reauthorization, Disabilities Education Act Amendments of 1997, 20 U.S.C.A. § 1415 (2000); 34 C.F.R. § 300.507 (2001); Md. Code Ann., Educ. § 8-413 (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, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004) and the Rules of Procedure of the Office of Administrative Hearings ("OAH"), Code of Maryland Regulations ("COMAR") 28.02.01.

### **ISSUES**

The issues on appeal are:

(1) Whether BCPSS's proposed Individualized Education Plan ("IEP") and placement of the student in a modified curriculum at [School 1] ("[School 1]") for the 2004 - 2005 school year will afford the student with FAPE in the least restrictive environment and, if not,

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<sup>1</sup> At the outset of the hearing, the parents moved for a continuance, because they had only recently obtained legal counsel. According to the Parents, their attorney indicated that he needed at least a week to review the pertinent documents concerning the student's educational background. I determined that the Parents had sufficient time to obtain legal counsel prior to the scheduled hearing date, so I denied the Parents' motion for a continuance and directed that the hearing proceed.

(2) Whether the Parents are entitled to have the student placed at [School 2] (“[School 2]”).

(3) Whether BCPSS denied the student FAPE by failing to comply with IDEA’s procedural notification requirements.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits.**

The Parents offered three (3) exhibits, two (2) of which were admitted. (Parent Exhibit No. 2 was not admitted because it had not been disclosed to BCPSS at least five days before the hearing and because the information contained in it did not exist at the time of the parties’ November 24, 2004, IEP team meeting.) BCPSS offered seven (7) exhibits, all of which were admitted. (A complete List of Exhibits is attached as an Appendix.)

#### **Testimony.**

The following individual testified for the Parents:

The student’s father.

The following individuals testified for BCPSS:

XXXX XXXX, School Social Worker. Ms. XXXX was admitted as an expert in School Social Work.

XXXX XXXX, Special Educator. Ms. XXXX was admitted as an expert in Special Education.

XXXX XXXX, General educator.

XXXX XXXX, Principal, [School 1].

## FINDINGS OF FACT

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

### *Facts Concerning Student's Educational Profile.*

1. The student (date of birth: XXXX, 1994) has been diagnosed as other health impaired (Code 08). He also suffers from attention deficit hyperactivity disorder ("ADHD"). (Test. XXXX and XXXX; BCPSS [Exhibit] #1)

2. The student exhibited developmental problems early in life. He did not speak until he was three years old. Because of his language deficits, he was enrolled in early intervention programs. (BCPSS #1)

3. Testing in 1998 indicated that the student fit the profile of a child with Pervasive Development Disorder and Oppositional Defiant Disorder. Until March 2001, there was also concern that the student suffered from autism. Testing conducted by XXXX at that time revealed that he did not have autism, but instead, his developmental problems resulted from ADHD. (BCPSS #2)

4. From the time he started school, the student has had difficulty grasping basic concepts in Reading. While he can read a story fluently, his comprehension of written materials is low. He has needed support from classroom aides in order to understand written materials, although in recent months, he has become more independent in deciphering the written word. (Test. XXXX, XXXX, XXXX and the student's father; BCPSS #1)

5. The student has also had difficulty grasping basic concepts in Mathematics. He has not been able to tell time accurately. He does not understand the

value of different denominations of money. With prompting, however, he can solve some elementary mathematical problems (i.e., he can do some basic addition, subtraction, multiplication and division). (Test. XXXX, XXXX, XXXX and the student's father; BCPSS #1)

6. The student's ADHD makes him very distractible and fidgety. In the past, when unable to complete a task successfully, the student would shut down (i.e., be unresponsive). He has been known to scream, throw tantrums, bully and disrupt the play of other children, hit other children, rock back and forth in his chair for long periods, chew on clothing and eat paper. Personnel at BCPSS have had to develop strategies to keep the student on task. (Test. XXXX and XXXX; BCPSS #1)

7. The student's cognitive ability is within the intellectually deficient range of intellectual functioning as measured by the Wechsler Intelligence Scale for Children – Third Edition. His verbal IQ is 59, his performance IQ is 65 and his overall IQ is 59. (BCPSS #1)

8. The student also suffers from asthma. (Test. Student's father; BCPSS #2)  
*Facts Related to the Student's School Attendance and IEP History.*

9. The student began attending BCPSS in March 1998, when his parents enrolled him in the [Program 1] program. Educators began observing the student's negative behaviors there, such as delayed language, gross motor and fine motor skills and constant fidgeting. (BCPSS #2)

10. BCPSS tested the student in the late spring of 1998 and, in June 1998, based on that testing, a child study team recommended that the student receive special education instruction eleven hours per week in the [Program 2] (“[Program 2]”) along

with related speech-language therapy. In August 1998, an IEP team met and added a social work component to the student's IEP. (BCPSS #2)

11. The student continued to receive special education and related services in the [Program 2] program until March 2000, when the Parents withdrew him from BCPSS and moved to [State]. (BCPSS #2)

12. The Parents returned from [State] to Baltimore City in September 2000. At that time, they enrolled him in BCPSS School #[number] as a first grade student. The student's IEP was revised to increase his IEP to 26 hours per week. The IEP continued his related services of speech-language therapy and social work services. Additional testing of the student in September 2000 revealed that delays in his visual-perceptual motor skills made him eligible for occupational therapy ("OT"). He began receiving OT in November 2000. (BCPSS #2)

13. In April 2001, the student's family moved to XXXX County. From April 2001 through October 2001, the student received special education and related services in that county's school system in a self-contained setting. (BCPSS #2)

14. When the student returned to BCPSS in the fall of 2001, he was initially returned to the [Program 2] program. Based on the testing done at XXXX, BCPSS changed his disability code from 14 (autism) to 08 (other health impairment). (BCPSS #2)

15. In the fall of 2001, a Child Study Team determined that the student's special education instruction would be provided in a separate classroom. Speech-

language, OT and social work services would continue. The student's IEP remained unchanged for the remainder of the school year. (BCPSS #2)

16. BCPSS conducted a psychological assessment of the student in April 2002. That assessment revealed the current extent of the student's cognitive problems and the effect of his ADHD on his ability to access the school curriculum. (BCPSS #1)

17. The Parents transferred the student to [School 1] in the fall of 2002. (BCPSS #2)

18. In March 2003, the Child Study Team revised the student's IEP. The student's weekly hours in special education were reduced from 26 to 15 and he began receiving reading in a general education setting. He continued to receive speech-language, OT and social work services. (BCPSS #2)

19. At the conclusion of the 2003 – 04 school year, the Parents asked personnel at [School 1] to hold the student back a year because they perceived that he was not making adequate progress. [School 1] personnel considered this request, but decided that the student was making sufficient progress on his IEP goals and objectives to promote him to the next grade. (Test. XXXX)

20. In the fall of 2004, BCPSS cut the student's hours in special education to 14.25 per week. Other services remained the same. (BCPSS #2)

*Facts Related to the Student's Proposed IEP.*

21. In November 2004, the Parents requested an IEP meeting because they believed that the student was not progressing adequately in school. Additionally, in October 2004, the student instigated an altercation with another student. The school principal contemplated suspending the student from school because of his involvement

in this altercation, but decided not to do so. (Test. Student's father and XXXX; BCPSS #4)

22. In preparation for the upcoming IEP meeting, [School 1] administrators requested that a formal Student Observation Report and a School Social Worker Report be completed. (BCPSS #3 and #4)

23. XXXX XXXX, Instructional Associate, observed the student in his special education class on or about November 18, 2004. Ms. XXXX, in conjunction with XXXX XXXX, the student's special educator, prepared a Student Observation Report on November 18, 2004. (BCPSS #3)

24. XXXX XXXX, School Social Worker, issued a School Social Worker Report on November 1, 2004. (BCPSS #4)

25. The student exhibited the following behavior during Ms. XXXX's classroom observation on November 18, 2004:

[The student] was observed in his classroom. When the observer arrived in the classroom, [the student] had not yet returned from Ms. XXXX's class. He returned within a few minutes and Ms. XXXX allowed the students to have a bathroom break. When they returned to the classroom Ms. XXXX told her seven students to prepare for a math test. The students moved their desks so that they were not sitting near one another. Ms. XXXX explained that they would be given a two-part test in which they would solve multiplication and division tables. She proceeded to write several problems on the board. The students copied the problems onto their paper and solved the problems. [The student] did not appear to have any difficulty in solving the problems, although he neglected to place the heading on his paper. All of [the student's] problems were correct.

(BCPSS #2)

26. The student had the following social interaction profile as of November 2004:

a. [The student] is charming and often witty when he becomes comfortable with you. However, he does tend to interrupt his peers in counseling sessions and is often known to have to get the last word out in a conversation. He continues to need verbal cueing or warnings to get him back on task.

b. [The student's] behaviors during the 2002 – 03 school year were quite negative, but there was significant improvement during the 2003 – 04 school year.

c. Even [during] this school year, redirection for the student has decreased. He doesn't always need to have redirection or cueing to get him back on task. [The student] still has a tendency to incessantly talk but with a signal or a redirection, he can remain quiet. He continues to provide the psychologist and [the social worker] when he is being spoken to or he is speaking to someone else. He also does not show any emotional problems or withdrawal as he did two years ago.

d. [The student] does have a tendency to self-correct others when names are spoken incorrectly. While this might not bother the child whose name is being mispronounced, [the student] must indicate that you are calling this person by the wrong name. With lots of redirection he is able to see that if [it] doesn't effect the other child, it shouldn't bother him. [The student] still continues to have a problem with perfection. He will still blurt out "I messed up" and crumple paper up and throw it away. Furthermore, he continues to have problems listening to others while discussing issues. He feels the need to blurt things out that come to mind and must again be corrected. He also becomes argumentative with some group members and some peers when information is misunderstood. However, those behaviors have been controlled this year and aren't as severe as they were two years ago.

e. [The student's current] behaviors while not as severe [do] have an impact on the student's social and emotional well-being. [The] lack of control that the student exhibits often is the root to his problems. Often times [the student] is unable to control his impulsivity, and often blurts out things before thinking about it. This is what really gets him into trouble without him realizing or understanding what just happened.

(BCPSS #4 at 1 - 2)

26. On November 24, 2004, [School 1] staff convened an IEP meeting to discuss possible changes in the student's IEP. XXXX XXXX; XXXX XXXX, Special Educator; XXXX XXXX, Regular Education Teacher; and XXXX XXXX, School Psychologist/Psychometrist; XXXX XXXX, School Principal; and XXXX XXXX, Assistant Principal, participated in the IEP meeting on behalf of BCPSS. The Parents participated in the meeting on behalf of the student. Ms. XXXX left during the IEP meeting because

she had another appointment. (Test. XXXX and student's father; BCPSS #6)

27. Discussions during the IEP meeting resulted in an impasse between the parties. The [School 1] staff determined that no changes were needed to the student's IEP; the parents wanted the student transferred to [School 2]. (Test. Student's father; BCPSS #7)

28. [School 1] staff developed an IEP for the student which contained the following annual goals:

- a. The student will improve reading comprehension skills from a fourth grade level.
- b. The student will improve math skills from a fourth grade level.
- c. The student will improve writing skills from a fourth grade level.
- d. The student will improve visual-perceptual and fine motor skills to enhance academic performance.
- e. The student will learn strategies to deal with frustration.
- f. The student will learn strategies to help enhance social skills.

(BCPSS #7)

29. The IEP provided that the student would be afforded instructional accommodations and modifications such as modeling, extra response time, repetition of directions and receiving small group instruction to meet his academic goals and objectives. (BCPSS #7)

30. The IEP provided that the student would receive instruction from a special educator or regular educator in achieving his academic goals and objectives. It provided that an occupational therapist and other staff would assist him in achieving his visual-perceptual and fine motor skills. The IEP provided that the school social worker, psychologist or other mental health provider would assist the student in his goal

related to dealing with frustration. The IEP further provided that the school social worker, psychologist or other qualified mental health provider would assist the student in goal dealing with enhancing social skills. (BCPSS #7)

31. The IEP required the student to receive 15.00 hours of direct special education per week along with 17.67 hours of regular education per week at [School 1]. It also called for him to receive 30 minutes of counseling services per week and 60 minutes of occupational therapy per week. Transportation was also included in the IEP as a required service. (Test. XXXX; BCPSS #7)

32. The 15.00 hours per week of special education that the IEP called for the student to receive constituted approximately 44% of the time outside the regular education environment. (BCPSS #7)

33. On or about December 14, 2004, BCPSS mailed the following documentation to the Parents:

- 1988 Consent Decree Summary.
- Consent Decree Time Line Fact Sheet.
- Arbitration by Court/Monitor/Due Process Hearing Summary.
- Procedural Safeguards: Parental Rights Booklet.

(Test. XXXX; BCPSS #6)

34. [School 1] does not issue the student the same report card as for general education students. His report card is based on whether he is meeting his IEP goals and objectives. (Test. XXXX)

35. At the beginning of the school year, [School 1] initiated a contest for its students called a [Contest]. A first prize of a XXXX was offered to the student who was the first to read and summarize 50 books. The student won this contest. (Test. XXXX)

## DISCUSSION

After carefully reviewing all of the documentary evidence and testimony, I conclude that BCPSS's proposed IEP provides the student with FAPE. BCPSS's proposed IEP addresses the student's cognitive and social interaction problems, as well as his ADHD. Furthermore, it contains suitable goals and objectives to allow the student to progress adequately and designates appropriate staff to help him achieve those goals and objectives. All salient issues raised by the parties will be addressed in detail below.

### *I. The Law and Burden of Proof.*

Title 20, Section 1401(8) of the United States Code defines free appropriate public education:

(8) Free appropriate public education--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 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(8)(2000).

Similarly, 34 C.F.R. § 300.13 (2001) defines free appropriate public education:

### **§ 300.13 Free appropriate public education.**

As used in this part, the term free appropriate public education or FAPE means special education and related services that –

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State; and

(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340 -- 300.350.

The question presented here is not whether the student must be afforded an opportunity to make optimal progress or even whether he is being provided with the best education available. On the contrary, it is whether the educational program and related services offered by a school system is "reasonably calculated to enable a child to achieve passing marks and advance from grade to grade." *Board of Education v. Rowley*, 458 U.S. 176, 204 (1982). Additionally, the courts have clearly stated that IDEA does not guarantee any student "the best education, public or nonpublic, that money can buy" or "all [the] services necessary to maximize educational benefits." *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4th Cir 1983), citing *Rowley*. What is required, quite simply, is an appropriate education. See also *Conklin v. Anne Arundel Co. Bd. of Educ.*, 946 F.2d 306 (4<sup>th</sup> Cir. 1991), and COMAR 13A.05.01.03.

There is no bright line test to establish whether a child is progressing or could progress educationally. *Conklin*, 946 F.2d at 316. Rather, the decision-maker must assess the evidence to determine whether a child's IEP and placement were reasonably calculated to enable him to receive an appropriate educational benefit. "Educational benefit" means that the child goes from one level of knowledge to a more advanced level of knowledge; that he or she makes some educational progress. What meets the definition of "educational benefit" may vary depending on where a child is located along

the spectrum of disabilities.

In the recent case of *Weast v. Schaffer*, 377 F.3d 449 (4<sup>th</sup> Cir. 2004), the United States Fourth Circuit Court of Appeals resolved the issue of which party bears the burden of proof in cases brought under the IDEA in this circuit. It held that “parents who challenge an IEP have the burden of proof in the administrative hearing.” *Id.* at 456. In this case, the Parents initiated this proceeding. Therefore, I conclude that the burden of proof rests with them. It is by a preponderance of the evidence. Md. Code Ann., State Gov’t § 10-217. Therefore, I will organize my discussion along the lines of the Parents’ contentions.

## *II. Contentions of the Parents.*

In their hearing request, the Parents identified three areas of concern about the student’s progress in school: his grades, his behavior and his report card. I will summarize the Parents’ arguments concerns related to each topic.

The student’s father testified that he does not believe that the student is making any progress in his current placement at [School 1]. Thus, the grades that he receives are meaningless. The student’s father asserted that the homework assignments that his son is doing this year in the fifth grade are the same assignments that he had in the fourth grade and the same assignments that he had in the third grade. He remarked that the student told him that he did not need any assistance with his homework this year presumably because the assignment was so familiar to him he could complete the assignment effortlessly. He accused [School 1] staff of promoting the student from one grade to another while still keeping the student at the same educational level. The student’s father maintained that the student could learn more if he were challenged. He

wants his son to be reading at the fifth grade level, and not be stuck at the third grade level.

The student's father expressed great concerns about the student's ability to function in the "real world." He noted with particularity that the student cannot consistently tell time or differentiate between denominations of currency. He related that, recently, he gave the student a one-dollar bill, and asked how much money he had. The student replied, "a dollar." He gave him a five-dollar bill and asked the question again. The student similarly replied, "a dollar." He gave a ten-dollar bill and got the same result.

The student's father conjectured that the student's inability to understand basic numerical concepts does not bode well for the future. He conjectured that the student could not even get a job as a janitor without understanding some math; he stated that even janitors need to know how to mix specific quantities of bleach and other cleaning solutions, for example, to perform their jobs.

The student's father also contended that he has not seen any marked improvement in the student's behavior. He referred to an incident that occurred earlier in the school year where the student got in a fight with another student in the school cafeteria. He accused [School 1] staff of not doing enough to address the student's behavioral problems.

The student's father further argued that the student should be getting the same report card that all other students get. The report card issued to him from last year essentially has all "3s" in every subject with the exception of music, visual arts and physical education, indicating that the student is not performing at grade level. A

narrative section on the second page addresses his progressing meeting his IEP goals.

Moreover, the student's father argued that [School 1] staff does not care about his son. To illustrate this point, he noted that XXXX XXXX, the principal of [School 1], walked out in middle of the November 24, 2004, IEP meeting.

In passing, the student's father contended that BCPSS is violating the federal No Child Left Behind Act of 2001 ("NCLBA"), Pub. L. 107 – 110, Title I, § 101, January 8, 2002, 115 Stat. 1439, by not ensuring that the student is attaining grade level in reading and mathematics. He averred that BCPSS is leaving his son behind.

The Parents also maintained that BCPSS never provided them with the *Procedural Safeguards: Parental Rights* booklet, so they were unaware of hearing requirements, such as the five-day disclosure rule regarding evidence they wanted to present.

The Parents, in general, feel that [School 1] and BCPSS have failed the student. They do not believe the November 24, 2004, IEP will provide him FAPE and want him transferred to [School 2], a private school for disabled students.

### *III. Response of BCPSS.*

BCPSS responded to the Parents' assertions by noting that the student is making significant progress on his IEP goals. They noted that he is beginning to master reading and mathematical skills, albeit at a slower pace than students in the general curriculum. XXXX XXXX, the School Social Worker assigned to [School 1], testified that the student's behavior has improved significantly since the 2002 – 03 school year. She emphasized that he is better able to remain on task and does not become as frustrated as he did two years ago. XXXX XXXX, [School 1]'s principal, explained that special education students

are not, by definition, performing at grade level (students performing at grade level are generally ineligible for special education). Ms. XXXX also noted that she left the November 24, 2004, IEP meeting because she had another appointment. She did not leave because she did not care about the student. She noted that her assistant principal remained at the meeting until the end. Ms. XXXX maintained that BCPSS sent all relevant materials concerning parents' due process rights to the Parents on December 14, 2004.

#### *IV. Analysis.*

Despite the Parents' concerns, the evidence presented by BCPSS indicates that the student is making educational progress under BCPSS's direction. The IEP proposed by BCPSS and his continued placement at [School 1] are designed to provide the student a free appropriate public education.

The evidence presented shows that the student's ADHD has a considerable impact on his ability to focus and, therefore, to learn. Testing in 2002 revealed that he has significant cognitive impairments. As measured by the Wechsler Intelligence Scale for Children – Third Edition, his verbal IQ is 59, his performance IQ is 65 and his overall IQ is 59. In fact, his cognitive problems, fidgeting, and tendency to become easily frustrated were so pronounced that it was mistakenly thought that he had autism. For the first three years that the student was enrolled in BCPSS, he was placed in the [Program 2] program, an educational program for children with autism. Further evaluation by XXXX in March 2001, however, revealed that the student did not have autism, but instead suffered from ADHD. When the student returned to BCPSS in the fall of 2001, after having attended school in XXXX County, BCPSS reformulated the

student's education program to take into account this updated diagnosis.

From the fall of 2002 to the present, the student has attended [School 1]. In that time, strategies employed by [School 1] staff have ameliorated the worst of the student's ADHD symptoms as they relate to his ability to learn in the classroom. In the fall of 2002, the student's typical classroom behavior included screaming, throwing tantrums, hitting and disrupting the play of other children, rocking back and forth in his chair for long periods, chewing on clothing and eating paper. If he became frustrated with being unable to complete a task he would withdraw and shut down. While the student still has a tendency to blurt things out—particularly during counseling sessions—and still needs redirection, he does not need redirection as often as he did two years ago. A classroom observation of the student on November 18, 2004 is illustrative of the progress that he has made. The student's special education teacher, XXXX XXXX, told the seven students in the class, including the student, to prepare for a math test. The students moved their desks so that they were not sitting near one another. Ms. XXXX instructed the student that she was giving them a two-part test which involved solving both multiplication and division problems. She wrote the problems on the board. The students copied the problems onto their paper and solved them. The student did not appear to have any difficulty in solving the problems, although he did not place the heading on his paper as instructed. All of the student's problems were correct.

Additionally, the student actually *won* a reading contest. At the beginning of the school year, [School 1] announced a reading competition called a [Contest]. The first student who read fifty books and accurately summarized their contents would win first prize, a XXXX. The student applied himself and read fifty books, mainly those found in his reading classroom. Some of these books admittedly were very simple; one was a pop-up book. Yet, Ms. XXXX, the student's regular educator, in response to my questioning, testified that some of the books were at the third, fourth and fifth grade level. Moreover, the student had to provide an accurate summary of the contents of each book. It is important to note that the student did not receive any help from his parents. The student's father indicated that he did not even know that the student had entered the [Contest] until he won the XXXX. This achievement by the student is nothing short of remarkable. It shows that he can achieve when he applies himself despite his pervasive disabilities.

The student's father's contention that the student is repeating assignments from prior years might be accurate. [School 1] staff, however, at this stage of the student's academic development is concerned with improving the student's comprehension skills and compensating for his ADHD than it is with having him achieve grade level on his assignments. As noted above, measuring the educational progress of a student with a disability varies depending on where a student is located along the spectrum of disabilities. *Conklin, Id.* at 316. In addition, the student has no chance of ever achieving grade level until he overcomes the deleterious effects of his ADHD.

My overall impression is that BCPSS's strategies in addressing the student's ADHD are beginning to pay off. They are making the student available for classroom

learning. Making a child available for learning must be accomplished first before the student can acquire and hone academic skills. With continued effort, the student will be able to master basic math concepts, such as telling time and counting money, and will be able to comprehend reading material at some point without extensive modifications or assistance. To this end, I conclude that the November 24, 2004, IEP is a continuation of a successful educational plan for this student. The IEP provides goals and related objectives in six areas, three of which are academic and three of which concern strategies to address his ADHD and social interaction deficiencies. Curriculum modifications and aides are provided to assist the student in achieving his goals and objectives. Appropriate personnel to provide him with direct assistance are listed as well. The IEP also ensures that the student is in the least restrictive educational setting. He is in special education for 44% of the school week. The remainder of the time he is in regular education classes where he accesses the curriculum with modifications and aides as needed. It is interesting to note that the student is in a general education reading class.<sup>2</sup>

Even if the Parents had shown some deficiency in BCPSS's proposed IEP, they presented no evidence to demonstrate why [School 2] would be an appropriate placement for the student. The only information about [School 2] in the record is that it is a school dedicated solely to the education of children with special needs. Therefore, it would be much more restrictive than the student's current placement at [School 1] where he only spends 44 percent of the time in a special education environment.

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<sup>2</sup> The amount of time that the student is in a self-contained special education class has decreased from 26 hours a week in 2002 to 15 hours a week today. This is another example of how the student has made educational progress over the past two years.

BCPSS is required by law to educate special education students in the least restrictive environment (“LRE”). See 20 U.S.C.A. § 1412(a)(5)(A) (2000) and COMAR 13A.05.01.10B(3)). BCPSS maintains that the student does not need to be educated in an environment that is so restricted. Based on the evidence presented, I agree. The student benefits from not being in a self-contained special education setting a hundred percent of the time. This is particular true since developing social interaction skills is one of his IEP goals.<sup>3</sup>

With regard to BCPSS’s alleged violation of the NCLBA, I find that the Parents do not have a cause of action under IDEA to enforce that act. Very little case law exists on this subject because the NCLBA has only been law for three years. Nevertheless, the United States District Court for the Southern District of New York has examined the issue of whether individuals have private enforcement rights under the NCLBA, and it concluded that they do not. See *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.*, 269 F. Supp. 2d 338, 344 – 47 (2003). In that case, the District Court held that the Congressional intent of the NCLBA is to provide a mechanism to hold states, school districts and schools accountable for ensuring all children have a quality public education, and not to create a right to a specific level of education for any particular child. *Id.* at 340 – 42, 344 – 47. I adopt this reasoning by the District Court.

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<sup>3</sup> *Devries v. Fairfax County School Board*, 882 F.2d 876, 878 (4th Cir. 1989), recognized that “mainstreaming of handicapped children into regular school programs where they might have opportunities to study and socialize with non-handicapped children is not only a laudable goal but is a requirement of the [IDEA].”

Finally, I will address the Parents' accusation that BCPSS violated IDEA's procedural requirements by not providing them with the Parental Rights Booklet and other materials to ensure their procedural rights. See 20 U.S.C.A. § 1415(d) (2000). Nevertheless, [School 1]'s School Social Worker XXXX XXXX testified that BCPSS mailed all required procedural materials to the Parents on December 14, 2004, approximately one month before the scheduled hearing date. Ms. XXXX was forthright in her statement. I do not doubt the truthfulness of her testimony.

In summary, I find that BCPSS's proposed IEP of November 24, 2004 and placement at [School 1] provides the student with meaningful educational benefit. The Parents' request for a change in placement to [School 2], therefore, is denied.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing findings of fact and discussion, I conclude, as a matter of law, that:

(1) BCPSS's proposed IEP and placement of the student in a modified curriculum at [School 1] for the 2004 - 2005 school year will afford the student with FAPE in the least restrictive environment. 20 U.S.C.A. § 1401(8) (2000); 20 U.S.C.A. § 1412(a)(5)(A) (2000); 34 C.F.R. § 300.13 (2001); COMAR 13A.05.01.03; COMAR 13A.05.01.10B(3); *Board of Education v. Rowley*, 458 U.S. 176, 204 (1982); *Conklin v. Anne Arundel Co. Bd. of Educ.*, 946 F.2d 306 (1991).

(2) Because BCPSS has afforded the student FAPE, the Parents are not entitled to have the student placed at [School 2]. *Id.*

(3) BCPSS did not commit any procedural violating that would invalidate the IEP review process. 20 U.S.C.A. § 1415(d) (2000).

**ORDER**

I **ORDER** that:

The Parents' request that the student be removed from [School 1] and placed at [School 2] is **DENIED**.

January 20, 2005  
Date

\_\_\_\_\_  
Thomas G. Welshko  
Administrative Law Judge

TGW/tgw

**REVIEW RIGHTS**

Any party aggrieved by this Final Decision of the Maryland State Department of Education may file a petition for judicial review with the circuit court for the county where the child resides or the United States District Court for Maryland, without regard to the amount in controversy, within one hundred eighty (180) days after the date that notice of the decision is sent. Md. Code Ann., Educ. § 8-413(h) (1999). The aggrieved party may enforce the decision through a proceeding in the appropriate court if it is not fully implemented. COMAR 13A.05.01.15M.

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 the judicial review process.