

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE RICHARD O’CONNOR,**

*** ADMINISTRATIVE LAW JUDGE,**

*** THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH Nos.: MSDE-MONT-OT-17-05768**

*** MSDE-MONT-OT-17-07445**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On February 27, 2017, XXXX XXXX (Parent), on behalf of his son, XXXX XXXX (Student), filed two due process complaints with the Office of Administrative Hearings (OAH).

In the first complaint, the Parent alleges that the Montgomery County Public Schools (MCPS) has violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2010), by refusing to perform a functional behavioral assessment of the Student and implement a behavior intervention plan. The Parent’s requested remedy is that the MCPS perform a functional behavioral assessment and implement a behavior intervention plan for the Student.

In the second complaint, the Parent alleges that the MCPS has violated the IDEA by refusing to allow the Student’s paraeducators to attend and participate in Individualized Education Plan (IEP) team meetings concerning the Student. The Parent’s requested remedy is

that the MCPS be required to include the Student's paraeducators in IEP team meetings when requested by the Parent. These two complaints have been docketed under case number MSDE-MONT-OT-17-05768.

On March 12, 2017, the Parent filed a third complaint, requesting that the Student have an independent educational evaluation at public expense. This case has been docketed under case number MSDE-MONT-OT-17-07445.

The parties attended a resolution meeting in case number MSDE-MONT-OT-17-05768 on March 16, 2017 and notified the OAH on the same date that they did not resolve their disputes. On that date, I conducted a pre-hearing conference with the parties in case number MSDE-MONT-OT-17-05768. I issued a Pre-Hearing Conference Report and Scheduling Order on March 27, 2017. Among other things, the Order scheduled the hearing in case number MSDE-MONT-OT-17-05768 for April 20 and 21, 2017.

On March 27, 2017, the parties agreed in writing to waive the resolution meeting in case number MSDE-MONT-OT-17-07445.

On March 27, 2017, the MCPS filed a Motion to Consolidate the two above cases.¹ On March 30, 2017, the Parent filed a Response to the Motion to Consolidate, opposing the requested consolidation.

On April 6, 2017, I issued a Ruling on Motion to Consolidate, granting the consolidation in the interest of judicial economy, because the parties' witnesses were likely to be the same for both cases, and because the issues were well-framed and not overly complicated. I issued an order consolidating case numbers MSDE-MONT-OT-17-05768 and MSDE-MONT-OT-17-07445 for all purposes, including hearing and disposition. The consolidated hearing remained scheduled for April 20 and 21, 2017.

¹ The Motion to Consolidate also referenced case number MSDE-MONT-OT-17-05767, but that case had already been consolidated into case number MSDE-MONT-OT-17-05768 and the case number no longer exists.

On April 12, 2017, the MCPS filed a Motion to Dismiss or, in the Alternative, Motion for Summary Decision on the issues of the paraeducators' attendance at IEP meetings and the independent educational evaluation requested by the Parent. The Parent filed a Response and Opposition on April 19, 2017.

I held the hearing on April 20 and 21, 2017, as scheduled, at the MCPS's Carver Educational Center, 850 Hungerford Drive, Rockville, Maryland 20850. The Parent waived representation by counsel and represented the Student's interests.² Zvi Greismann, Esquire, MCPS Associate General Counsel, represented the MCPS.

34 C.F.R. § 300.515 states the following, in part:

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

34 C.F.R § 300.510 states the following, in part:

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

The forty-five-day timeline in the above regulations began on March 16, 2017, the date of the unsuccessful resolution meeting in case number MSDE-MONT-OT-17-05768. The forty-fifth day will be April 30, 2017, which is a Sunday. Therefore, to meet the regulatory time frame set forth above, the decision in this case must be issued not later than Friday, April 28, 2017.

² XXXX XXXX, the Student's mother, attended the first day of the hearing but did not actively participate in the proceedings. Where the term "Parents" is used, it refers to the Student's mother and father.

Because there had been insufficient time under the OAH's rules of procedure to rule on the MCPS's Motion to Dismiss or, in the Alternative, Motion for Summary Decision before the hearing convened, I heard arguments on the motion before beginning the hearing proper.³ I denied the MCPS's motion as to the issue of the paraeducators attending IEP meetings and deferred ruling on the issue of the independent educational evaluation, to be addressed in this decision.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are as follows:

1. Did the MCPS violate the IDEA by refusing to conduct a functional behavioral assessment of the Student and implement a behavior intervention plan at the Parent's request and, if so, what is an appropriate remedy?
2. Did the MCPS violate the IDEA by refusing to allow the Student's paraeducators to attend IEP meetings when requested by the Parent and, if so, what is an appropriate remedy?
3. Is the Student entitled to an independent educational evaluation at public expense?

³ See COMAR 28.02.01.12.

SUMMARY OF THE EVIDENCE

Exhibits

Both parties submitted binders of pre-marked exhibits at the beginning of the hearing. Additionally, the Parent moved into evidence the MCPS's Motion to Dismiss or, in the Alternative, Motion for Summary Decision and the exhibits attached thereto. Not all the marked exhibits were offered, and not all the offered exhibits were admitted into evidence. The status of the exhibits is as follows, with those described below having been admitted. All marked exhibits are part of the administrative record.

Parent's Exhibits:

1. Not admitted.
2. Not admitted.
3. Not admitted.
4. Not offered.
5. The Student's MAP [Measure of Academic Progress] Data, Fall 2014 through Fall 2016; Academic Student Profile, October 25, 2016; MAP Progress, grade 2 through grade 4; untitled document measuring progress in reading and mathematics through grade 3; Grade 3 Progress Report Card, 2015-2016; emails from XXXX XXXX to the Parent, January 9, 12, and 19, 2017.
6. The Student's schedule, 2016-2017.
7. Not offered.
8. IEP meeting notes, December 6, 2016.
9. IEP, January 24, 2017.
10. Not offered.
11. Not offered.
12. Not offered.
13. Not offered.

14. Not offered.
15. Not offered.
16. Not offered.
17. Not offered.
18. Not admitted.
19. Excerpt from the MCPS Special Education Procedures Handbook, 2007.
20. Information about functional behavioral assessments and behavior intervention plans from the MCPS website
21. Not admitted.
22. Not offered.
23. Not offered.
24. Motion to Dismiss or, in the Alternative, Motion for Summary Decision, with cover letter, April 12, 2017.
25. OAH Decision in case number MSDE-MONT-OT-16-29351, November 10, 2016.
26. OAH Ruling on Motions in case number MSDE-MONT-OT-16-29351, October 27, 2016.
27. Letters to the Parents from XXXX XXXX, March 1 and 17, 2017; IEP, March 17, 2017.
28. IEP Meeting Information and Sign In Page, December 6, 2016.
29. IEP, January 24, 2017.

MCPS's Exhibits:

1. Not offered.
2. Not offered.
3. Not offered.
4. Not offered.
5. Not offered.
6. Not offered.

7. Not offered.
8. Not offered.
9. Not offered.
10. Not offered.
11. Not offered.
12. IEP January 24, 2017.
13. Emails between XXXX XXXX and the Parent, January 25 through February 2, 2017.
14. Emails from XXXX XXXX to the Parents and XXXX XXXX, November 28 and December 1, 2016; IEP documents for the December 6, 2016 IEP meeting.
15. IEP, March 17, 2017.
16. XXXX XXXX *Curriculum Vitae*.
17. XXXX XXXX *Curriculum Vitae*.
18. XXXX XXXX *Curriculum Vitae*.
19. XXXX XXXX *Curriculum Vitae*.
20. XXXX XXXX *Curriculum Vitae*.
21. XXXX XXXX *Curriculum Vitae*.

Testimony

The Parent testified and presented testimony from XXXX XXXX, Principal of the MCPS elementary school that the Student attends.

The MCPS presented the following witnesses:

1. XXXX XXXX, accepted as an expert in special education and general education.
2. XXXX XXXX, accepted as an expert in special education and general education.
3. XXXX XXXX, accepted as an expert in school counseling.

4. XXXX XXXX, accepted as an expert in special education.
5. XXXX XXXX, accepted as an expert in school psychology.

FINDINGS OF FACT

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

1. The Student is nine years old and is in the fourth grade at an elementary school of the MCPS.

2. The Student's disability is Autism Spectrum Disorder.

3. The Student's IEP calls for him to have direct adult support from a paraeducator (also called an instructional assistant) for three hours a day.

4. The Student receives the three hours of adult support called for in the IEP and has the support of a paraeducator throughout the school day, except for five or ten minutes each day. Beyond the three hours called for in the IEP, the paraeducators are not directly assigned to the Student.

5. XXXX XXXX is the Student's general education classroom teacher; she teaches him writing, science, and social studies.

6. XXXX XXXX is the Student's mathematics teacher in a self-contained fourth-grade classroom with two paraeducators, one of whom is directly assigned to the Student. Ms. XXXX teaches the Student for about an hour and fifteen minutes each day.

7. XXXX XXXX teaches the Student reading for about an hour and forty-five minutes daily, in a group that includes six other pupils. Two paraeducators are with Ms. XXXX for the first half-hour of class, then one for the rest of the lesson. Ms. XXXX's classroom is not considered self-contained, but she, the paraeducators, and the seven pupils are the only ones in the classroom when the Student is present.

8. The Student also receives speech therapy for thirty minutes a week and occupational therapy for forty-five minutes a week, as provided in his IEP.
9. In the third quarter of his fourth grade year, the Student was reading at a level equivalent to the second quarter of third grade.
10. The Student is able to keep up with the fourth grade MCPS mathematics curriculum in Ms. XXXX's class.
11. In January 2017, the Student scored 193 on the Measure of Academic Progress (MAP) mathematics assessment. In the beginning of fourth grade he had scored 184, which indicated a second to third grade level of proficiency.
12. On November 27 and December 1, 2016, the Parent asked the MCPS to perform a functional behavioral assessment of the Student.
13. The Parent alleged that the Student's anxiety interfered with his learning.
14. The IEP team discussed the request for a functional behavioral assessment at the December 6, 2016 meeting. The school staff had not seen the Student display any behaviors that interfered with his learning and could not be managed easily by classroom intervention.
15. MCPS did not perform a functional behavioral assessment.
16. The Student's primary behavioral problems are that he sometimes becomes anxious, crying and shaking when faced with a difficult task, such as an academic assessment, and that he calls out in class.
17. The Student suffered at least one or two bouts of anxiety and crying early in the 2016-2017 school year, but has not had any such episodes since September 2016.
18. The Student's behavior of calling out in class has improved greatly over the course of the school year since his teachers instituted a chart system in which he gets a check mark for each block of instruction and a smiley face for each day that he does not call out.

19. On November 27, 2016, the Parent requested that the school have the paraeducators who worked with the Student attend the IEP meeting on December 6, 2016.

20. The paraeducators did not attend the December 6, 2016 meeting because they were covering the classrooms vacated by the Student's general education and special education teachers, who did attend the meeting.

21. On January 13, 2017, the Parent requested that the school have the paraeducators who worked with the Student attend the IEP meeting on January 24, 2017.

22. The paraeducators did not attend the January 24, 2017 meeting because they were covering the classrooms vacated by the Student's general education and special education teachers, who did attend the meeting.

23. Between the beginning of the 2016-2017 school year and December 2016, the school employed at least two different paraeducators who provided direct support to the Student at different times. Ms. XXXX, who is responsible for hiring paraeducators, did not feel that a suitable full-time candidate had applied for the position up to that time.

24. In mid-December 2016, Ms. XXXX hired a paraeducator to work directly with the Student for the rest of the 2016-2017 school year.

25. In early February 2017, Ms. XXXX arranged a meeting between herself, Ms. XXXX, and the Parent for fifteen minutes before the beginning of the school day.

26. The meeting took place in February 2017 and did not go well. The Parent inquired about logs of the paraeducators' interactions with the Student, which did not exist because they are not called for in the IEP and had never been requested by the Parent or agreed to by the school staff. Ms. XXXX became upset with the Parent's insistent inquiries and ended the meeting after twelve of the allotted fifteen minutes had passed.

27. On December 1, 2016, the Parent requested that the MCPS provide an independent educational evaluation for the Student because he did not agree with an evaluation performed by XXXX XXXX for the MCPS.

28. XXXX XXXX did not perform an evaluation of the Student; she did testify at a due process hearing held on November 2 and 3, 2016, concerning another unrelated due process complaint filed by the Parent.

29. The MCPS did not provide an independent educational evaluation for the Student because it could not identify an evaluation done by the MCPS with which the Parent disagreed.

30. The MCPS did not file for a due process hearing on the issue of the Parent's request for an independent educational evaluation because it never actually refused to do the evaluation; it simply could never identify an MCPS evaluation with which the Parent disagreed.

31. The Student has been receiving tutoring in mathematics at a XXXX learning center since December 2015.

32. The Student has had a reading tutor since July 2016.

DISCUSSION

The General Legal Framework

The identification, assessment and placement of students in special education are governed by IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. pt. 300 (2015); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2016); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412(a)(1)(A) (2010). The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services

to permit the child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined 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 educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201 (footnote omitted). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide FAPE to a student with disabilities. First, a determination must be made whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. *See also A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive some educational benefit. The United States Court of Appeals for the Fourth Circuit declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Nevertheless, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). To provide a FAPE, 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, taking into account:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3) (2010). The IEP depicts a student’s current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010). IEP teams must consider students’ evolving needs when developing their educational programs. *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009).

The Supreme Court has recently refined the requirements of an IEP in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017), holding as follows:

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly ... awaiting the time when they were old enough to ‘drop out.’ ” *Rowley*, 458 U.S., at 179, 102 S.Ct. 3034 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Id. at 1001. The Supreme Court rejected the argument that a disabled child must be given educational opportunities that are “substantially equal” to those of children without disabilities.

Id.

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) and 300.117 (2015). However, mainstreaming disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.* Accordingly, in such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district.

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). The Parent, therefore, has the burden of proving that the MCPS violated the IDEA by not performing a functional behavioral assessment of the Student, by not having the Student's paraeducators attend IEP meetings when requested by the Parent, and by not providing an independent educational evaluation of the Student at public expense. The Parent must also show that his proposed remedies for these alleged violations are appropriate.

A preliminary word about the scope of this hearing is in order. The Parent does not contend that the Student's current IEP or any of the IEPs covering the 2016-2017 school year are inadequate. The sufficiency of those IEPs is not at issue and will not be addressed. Likewise, the Student's academic progress, or lack thereof, is only tangentially involved – the Parent contends that the Student's behavior interferes with his learning and that, therefore, a functional behavioral assessment is required.

The Functional Behavioral Assessment

The Parent testified that the Student's behavior precludes him from learning "in certain environments" and that the Student gets overwhelmed and "short-circuits." The Parent also said that the Student is generally well-behaved. The Parent further argued that the Student's being more than a year below grade level in reading and mathematics shows that his behavior is interfering with his learning.

Ms. XXXX, the Student's reading teacher, testified that the Student is reading at about a second-quarter-of-third-grade level now, near the end of fourth grade. She explained that the Student's problems in reading stem from the Student's early success as a sight reader, which gave him an inadequate foundation for decoding words using phonics. His sight reading ability masked this deficiency for a while, but recently the lack of decoding skills has caught up with the Student. Recognizing this, Ms. XXXX has been diligently working on decoding this school year, and, according to her, the Student has made excellent progress in reading and written expression. He is now much better at comprehending written material and answering questions about it than he was at the beginning of the year.

Ms. XXXX testified that the Student's anxiety is not a behavioral issue, and that he does not misbehave in class except for occasionally giggling or trying to make other students laugh. She easily controls these misdemeanors by "giving him a look," and his anxiety has decreased significantly as the year has gone on. Ms. XXXX stated that the Student's behavior does not affect his learning.

Ms. XXXX, the Student's mathematics teacher, testified that the Student was shaky and crying in September 2016 when facing an assessment test, and perhaps another time or two, but has not had any more such episodes since then. She explained about the behavior sheet that the teachers maintain for the Student, giving him a check mark for each instructional segment when

he stays on task, and a smiley face if he makes it through the day without the minor disruptions he has been prone to in the past. Ms. XXXX said that the Student is very motivated by this positive reinforcement and his behavior is not a problem.

Ms. XXXX instructs the Student in the fourth grade mathematics curriculum, and he is able to keep up. His actual level of performance in mathematics on standardized tests is not clear from the record – in January 2017, the Student scored 193 on the MAP mathematics assessment. At the beginning of fourth grade he had scored 184, which indicated a second to third grade level of proficiency. No one testified about the meaning of the 193 score, but it is academic progress.

XXXX XXXX, the MCPS School Psychologist, regularly conducts functional behavioral assessments and evaluates students to determine whether such an assessment is necessary. He testified in general terms about the process and about his review of the Student's record and information he obtained from other members of the IEP team. Mr. XXXX testified that students requiring functional behavioral assessments show observable problem behaviors that are severe, frequent, and intensive, impacting their own learning and that of others. A functional behavioral assessment usually takes two to four weeks to perform and results in a behavior intervention plan that provides strategies for replacing the problematic behaviors with acceptable ones.

Mr. XXXX explained that there are three approaches to managing a pupil's behavior. The first is with universal supports; that is, the type of support and intervention that every student would receive in the classroom, such as Ms. XXXX's chart or Ms. XXXX's look. If those interventions don't work, the next step is to put behavioral goals and supports in the IEP. Only if these two approaches are unsuccessful would the third tier, a functional behavioral assessment, be appropriate. Typically, this step is required for only two to five percent of pupils with behavior problems.

Mr. XXXX agreed with the Student's teachers that the Student needed nothing more than classroom supports to manage his behavior. He has been responsive to those supports and does not need a functional behavioral assessment.

The IDEA addresses functional behavioral assessments briefly, as follows: "The IEP Team shall--(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]" 20 U.S.C.A. § 1414(d)(3)(B)(i) (2010). 34 C.F.R. § 300.324(a)(2)(i) contains exactly the same language.

In *Park Hill School Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011), twin fifth-grade autistic boys were not given a behavior intervention plan. The court held that this omission did not deny the boys a FAPE because the boys' IEPs addressed behavioral issues, and a functional behavioral assessment would be performed if those strategies were unsuccessful. *Id.* at 767.

In *E. Z.-L. ex rel. R.L. v. New York City Dept. of Educ.*, 763 F.Supp.2d 584 (S.D.N.Y. 2011), the court granted summary judgment to the school system. The parents of a nine-year-old autistic girl contended, among other things, that the child had been denied a FAPE because her IEP did not include a functional behavioral assessment and behavior intervention plan. The court held that the evidence before the independent hearing officer and state review office supported their findings that the child's behaviors did not significantly interfere with her education and, even if they did, interventions by the special education teacher in the classroom were adequate to address any problem behaviors. *Id.* at 596-7.

The above cases are not precedents, but they are useful instruction, because the situation in this case is very similar. In fact, the evidence suggests that the Student's behavior is less problematic than those of the children in *Park Hill* and *E. Z.-L.* The evidence does not support the Parent's contention that the Student's behavior interferes with his learning. The Student is

certainly not among that group of students with severe behavior problems who are usually the subjects of functional behavioral assessments. And the minor behavioral incidents that the Student does have are easily handled by quick classroom interventions.

For the above reasons, the Student does not meet the criteria in the IDEA that would require the MCPS to perform a functional behavioral assessment and develop a behavior intervention plan. 20 U.S.C.A. § 1414(d)(3)(B)(i) (2010). The Parent's complaint on this issue will be denied.

Attendance of Paraeducators at IEP Meetings

The Parent asked that paraeducators providing support to the Student be required to attend IEP meetings on December 6, 2016 and January 24, 2017. Ms. XXXX denied those requests, explaining in her testimony that, because all the Student's teachers were at the meetings, the paraeducators were needed to cover the teachers' classrooms.

Ms. XXXX arranged a meeting between the Parent and the Student's assigned paraeducator in February 2017, not as a substitute for an IEP meeting, but to provide the Parent the opportunity to meet the paraeducator. As set forth in Finding of Fact 26, that meeting was not successful.

In emails attached to his due process complaint on this issue, on November 27, 2016 and January 13, 2017 the Parent requested that the Student's paraeducators be present at the IEP meetings. The emails do not include any specific reasons for that request. The Parent's only testimony on this issue was to state that the IDEA supports his request and to ask rhetorically, "Why wouldn't you include her?"

The IDEA addresses the composition of the IEP team as follows:

The term “individualized education program team” or “IEP Team” means a group of individuals composed of—

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who--
 - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (II) is knowledgeable about the general education curriculum; and
 - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C.A. § 1414(d)(1)(B) (2010).

34 C.F.R. § 300.321(a) is slightly more specific:

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes—

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the public agency.

(5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

(6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

34 C.F.R. § 300.321(a) (2015).

The Parent bases his argument on sub-paragraphs (vi) and (6) above, contending that it allows a parent to require any “other individual” who has knowledge of the Student, such as a paraeducator, to attend the meetings. In other words, once the Parent, in his discretion, demands that a certain individual attend an IEP meeting, the MCPS must produce that person.

The common meaning of “discretion” is “the freedom or authority to make decisions and choices.” *Webster’s New World Dictionary*, 418. In legal terms, it can mean a power or right conferred by law, as on a public official, or the ability of a judge to decide what is right and fair, outside of strict constraints of law. *Black’s Law Dictionary*, 10th ed., 97. Discretion does not include the ability to order others to perform some action.

The IDEA and 34 C.F.R. § 300.321(a) mean that a parent, exercising his or her discretion, may include in the IEP team someone not in the categories named above who has knowledge or special expertise concerning the child. In other words, the Parent could bring such a person to the meeting. However, a paraeducator cannot be required to attend the meeting simply because the Parent requested her presence. A paraeducator is not one of the listed members of the IEP team, and the MCPS has no duty to bring her to the IEP meeting, despite the Parent’s wish that she be there. This is particularly true since the Parent offered no reason why the paraeducator’s presence at the meetings was necessary.

The MCPS did not violate the IDEA by not requiring the Student's paraeducators to attend the IEP meetings on December 6, 2016 and January 24, 2017. The participants at those meetings included all who were necessary under the IDEA. 20 U.S.C.A. § 1414(d)(1)(B) (2010). The Parent's complaint on this issue will be denied.

The Request for an Independent Educational Evaluation

The Parent's due process complaint concerning an independent educational evaluation at public expense includes the following relevant information: "MCPS completed its own evaluation and presented the results to [the Student's] parents on November 3, 2016. The parents objected to the public agency's evaluation and requested an IEE at the public's expense on 12/6/16."

Testimony from the Parent and Ms. XXXX at the hearing revealed that the so-called evaluation with which the Parent disagreed was actually testimony from XXXX XXXX, the Student's former teacher, at a prior, unrelated, due process hearing held on November 2 and 3, 2016. Neither party offered a transcript of Ms. XXXX's testimony from that hearing, but Administrative Law Judge XXXX XXXX summarized it thus:

Ms. XXXX XXXX testified that testing is anxiety provoking for the Student. She stated that his MAP-P and MAP-M scores show the Student's growth from year to year. She said that the Student made progress during third grade and that he was instructed and assessed on grade level. She stated that it was beneficial for the Student to be in the general education classroom interacting with his peers and that he demonstrated progress in this setting. She testified that "rehab," as suggested by Dr. XXXX, is not an educational term and that MCPS is charged with instructing students in the least restrictive environment. She said the Student received specialized instruction and support, which ensured he understood what he read and the math concepts. She stated MCPS tries to close achievement gaps but that there is no guarantee. She agreed what is written on the IEP should be implemented. She stated that the Student does not need compensatory services. She explained that his in-class performance is higher than testing alone shows because he becomes very anxious during testing.

Parent Ex. 25.

In his closing argument, the Parent cited 34 C.F.R § 300.305. That section is entitled “Additional requirements for evaluations and reevaluations” and does not support the Parent’s position – it merely sets forth the assessment and evaluation procedures that the IEP team must undertake.

Parents’ requests for independent educational evaluations are governed by 34 C.F.R. § 300.502(b), which provides:

- (b) Parent right to evaluation at public expense.
 - (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
 - (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
 - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
 - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
 - (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency’s evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
 - (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
 - (5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

Ms. XXXX testified that the MCPS did not agree with the Parent’s request for an independent educational evaluation because it could never identify an MCPS evaluation with which the Parent disagreed. The MCPS never actually refused to provide an evaluation at public expense, which would have triggered sub-paragraph (b)(2), above, because of this lack of information.

The IDEA does not specifically define the terms “evaluation” or “assessment.” However, 20 U.S.C.A. § 1414 provides a useful framework for determining what an evaluation is. An initial evaluation “shall consist of procedures-- (I) to determine whether a child is a child with a disability . . . within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and (II) to determine the educational needs of such child.” 20 U.S.C.A. § 1414(a)(1)(C) (2010). Reevaluations may be conducted at a parent’s request not more than once a year, and those reevaluations are done by the local education agency, not independently at public expense. 20 U.S.C.A. § 1414(a)(2)(A) and (B) (2010).

The local education agency must inform the parents of any evaluation it intends to perform and obtain parental consent for the evaluation. 20 U.S.C.A. § 1414(b)(1) and (c)(3) (2010). “The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.” 20 U.S.C.A. § 1414(a)(1)(E) (2010).

The evidence in this case establishes that Ms. XXXX did not conduct an evaluation of the Student when she testified on November 2 or 3, 2016. She talked about the Student’s progress in class and the strategies she was using with him, as well as certain special education goals of the MCPS. None of this meets the criteria of an evaluation under the IDEA. Furthermore, there is no evidence that the MCPS informed the Parent that Ms. XXXX would be conducting an evaluation or requested the Parent’s consent for any such evaluation, as the IDEA requires.

Because the Parent’s request for an independent educational evaluation was based on his disagreement with an evaluation allegedly performed by Ms. XXXX on November 3, 2016, and no such evaluation was actually performed, the Parent is not entitled to an independent educational evaluation at public expense. This request will be denied. 20 U.S.C.A. § 1414

(2010); 34 C.F.R. § 300.502(b).⁴

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student does not meet the criteria in the IDEA that would require the MCPS to perform a functional behavioral assessment and develop a behavior intervention plan. 20 U.S.C.A.

§ 1414(d)(3)(B)(i) (2010); 34 C.F.R. § 300.324(a)(2)(i) (2015); *Park Hill School Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011); *E. Z.-L. ex rel. R.L. v. New York City Dept. of Educ.*, 763 F.Supp.2d 584 (S.D.N.Y. 2011).

I further conclude as a matter of law that the MCPS did not violate the IDEA by not requiring the Student's paraeducators attend the IEP meetings on December 6, 2016 and January 24, 2017. 20 U.S.C.A. § 1414(d)(1)(B) (2010); 34 C.F.R. § 300.321(a) (2015).

I further conclude as a matter of law that the Parent is not entitled to an independent educational evaluation of the Student at public expense. 20 U.S.C.A. § 1414 (2010); 34 C.F.R. § 300.502(b) (2015).

ORDER

I **ORDER** that the three due process complaints filed herein by the Parent on February 27, 2017 and March 12, 2017 be, and are hereby, **DENIED** and **DISMISSED**.

April 28, 2017
Date Decision Mailed

Richard O'Connor
Administrative Law Judge

ROC/sm

⁴ I am deciding this issue on the evidence presented at the hearing, not by granting the MCPS's Motion to Dismiss, or in the Alternative, Motion for Summary Decision. Evidence concerning Ms. XXXX's testimony was necessary to the decision.

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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 Office of Administrative Hearings 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.