

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE ROBERT F. BARRY,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH NO.: MSDE-MONT-OT-13-03089**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On January 25, 2013, XXXX and XXXX XXXX (Parents), by their attorney, Michael J. Eig, of Michael J. Eig and Associates, P.C., filed a due process complaint with the Office of Administrative Hearings (OAH) concerning their son, XXXX (Student). The Parents asserted that at an Individualized Education Program (IEP) team meeting on November 29, 2012, the Montgomery County Public Schools (MCPS): (1) incorrectly determined that the Student's disability code should be changed from other health impairment (OHI) to [disability] (disability), and (2) inappropriately determined that the Student's placement should be changed from his home school, [School 1] ([School 1]), to the [Program 1] program at [School 2] ([School 2]).

On February 27, 2013, the OAH received notice that the parties had conducted a resolution meeting on February 25, 2013, which did not resolve the case. On March 12, 2013, I conducted a telephone prehearing conference, and scheduled a hearing for April 16, 17 and 29,

2013. In agreeing to those dates, the parties explicitly waived the regulatory requirement that my decision be issued no more than forty-five days from the notice of the outcome of the resolution meeting. *See* 34 C.F.R. § 300.515(a) (2012).

On April 16, 17 and 29 and May 15, 2013 (an additional date added with the agreement of the parties), I conducted a hearing at the MCPS's office, 850 Hungerford Drive, Rockville, Maryland 20850. Benjamin W. Massarsky, of Michael J. Eig and Associates, P.C., represented the Parents. Mr. Massarsky, a member of the bars of New York State and the District of Columbia, was specially admitted to the Maryland bar for this case pursuant to an Order of the Circuit Court for Montgomery County. Matthew B. Bogin, of counsel to Michael J. Eig and Associates, P.C., who is a member of the bar of Maryland, also represented the Parents. Jeffrey Krew represented the MCPS.

At the conclusion of the hearing on May 15, 2013, the parties agreed that my decision would be due within thirty days – by June 14, 2013.

The hearing was held pursuant to the following laws: Individuals With Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415 (2010); 34 C.F.R. § 300.511 (2012); Md. Code Ann., Educ. § 8-413 (2008); Code of Maryland Regulations (COMAR) 13A.05.01; and Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings.

The contested-case provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012), and the Rules of Procedure of the OAH, COMAR 28.02.01, govern procedure.

ISSUES

1. Did the MCPS correctly determine that the Student is a child with a disability of [disability]?
2. Did the MCPS appropriately determine that the Student's placement should be in the [Program 1] program at [School 2]?

SUMMARY OF THE EVIDENCE

A. Exhibits¹

The following exhibits, pre-marked as XX exhibits, were, except as noted, admitted into evidence:

- XX #1 - Due Process Complaint, January 25, 2013
- XX #3 - Psychological Assessment, School Report/Cognitive and Achievement (School Report), XXXX XXXX, Ph.D.
- XX #4 - Psychological Assessment (Parent Report), Dr. XXXX
- XX #6 - Report to Parents on Student Progress
- XX #9 - Letter, March 22, 2012, from XXXX XXXX, Principal, [School 1], to the Parents
- XX #16 - Letter, June 8, 2012, from Mr. XXXX to the Student's father
- XX #24 - Multidisciplinary Evaluation Form – Emotional Disability, November 29, 2012
- XX #27 - Letter, December 17, 2012, from Dr. XXXX
- XX #38 - IEP, November 29, 2012
- XX #41 - (not admitted) Record of phone calls
- XX #42 - Curriculum Vitae, Dr. XXXX

¹ The parties exchanged pre-numbered exhibits. The Summary of Evidence contains all of the exhibits that were actually submitted at the hearing.

XX #47 - (not admitted) Letter from the Student's father to XXXX XXXX

XX #48 - Political Cartoon Assignment

XX #49 - Student drawing

The following exhibits, pre-marked as Board exhibits, were, except as noted, admitted into evidence:

Board #1 - Summary of Parent Conference, September 27, 2011

Board #2 - Functional Behavioral Assessment (FBA), October 10, 2011

Board #5 - Summary of Parent Conference, December 19, 2011

Board #6 - Letter, January 11, 2012, from XXXX XXXX, Acting Principal, [School 1], to the Parents

Board #7 - Behavioral Intervention Plan (BIP), January 24, 2012

Board #8 - Educational Management Team (EMT) Summary, February 22, 2012

Board #9 - Eligibility Screening Parent Interview/Questionnaire

Board #10 - Classroom Observation, XXXX XXXX, March 7, 2012

Board #11 - Student's Educational History, March 14, 2012

Board #12 - Screening Form, March 13, 2012

Board #13 - Letter, March 22, 2012, from Mr. XXXX to the Parents

Board #14 - FBA, April 23, 2012

Board #15 - Report of School Psychologist, XXXX XXXX, M.A., April 25, 2012

Board #16 - Report of Speech-Language Assessment

Board #17 - IEP (Initial Eligibility Evaluation), May 10, 2012

Board #18 - Letter, May 17, 2012, from Mr. XXXX to the Parents

Board #19 - Secondary Teacher Reports for Quarterly Progress

Board #20 - IEP (Manifestation Meeting), May 22, 2012

Board #21 - IEP, June 12, 2012

Board #22 - Report to Parents on Student Progress

Board #23 - Student's Suspension History

Board #24 - Request for Consultation, September 4, 2012

Board #25 - Letter, October 4, 2012, from XXXX XXXX, Principal, [School 1], to the Parents

Board #26 - Consult Observation Form, XXXX XXXX, October 8, 2012

Board #27 - Letter, October 10, 2012, from Ms. XXXX to the Parents

Board #28 - Secondary Teacher Reports for Quarterly Progress

Board #29 - Student Discipline Referral Form

Board #30 - Letter, November 27, 2012, from Ms. XXXX to the Parents

Board #31 - IEP, November 29, 2012

Board #32 - Letter, December 10, 2012, from Ms. XXXX to the Parents

Board #33 - Secondary Teacher Reports for Quarterly Progress

Board #35 - Due Process Complaint, January 25, 2013

Board #36 - Letter, January 28, 2013, from XXXX XXXX, Supervisor, Equity Assurance and Compliance Unit, MCPS, to Mr. Eig

Board #38 - Secondary Teacher Report for IEP Team Meetings

Board #39 - Secondary Teacher Reports for Quarterly Progress

Board #40 - Student's Middle School Mark Correction

Board #41 - Résumé of XXXX XXXX

Board #42 - Résumé of XXXX XXXX

Board #43 - Résumé of XXXX XXXX

Board #44 - Résumé of XXXX XXXX

Board #57 - Student's drawings

Board #58 - (not admitted)

B. Testimony

The following witnesses testified on behalf of the Student:

1. XXXX XXXX, Eighth-Grade Assistant Principal, [School 1]
2. XXXX XXXX, Ph.D., who testified as an expert in clinical psychology
3. The Student's father

The following witnesses testified on behalf of the MCPS:

1. XXXX XXXX, M.S., School Counselor, [School 1], who testified as an expert in school counseling
2. XXXX XXXX, M.Ed., Special Education Resource Teacher (RTSE), [School 1], who testified as an expert in special education
3. XXXX XXXX, M.A., School Psychologist, MCPS, who testified as an expert in school psychology
4. XXXX XXXX, M.A., Behavioral Support Teacher, [Program 1] Program, [School 3] ([School 3]), who testified as an expert in special education with an emphasis on students with a serious emotional disability

FINDINGS OF FACT

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

1. The Student is a fourteen-year-old boy, born XXXX, 1999. He lives with his younger sister and his parents in XXXX, Maryland.
2. The Student attended two MCPS elementary schools, [School 4] and [School 5], through the sixth grade. The Student was neither evaluated for nor did he receive special education services in elementary school.
3. Staff at [School 5], however, convened a parent conference on March 12, 2011 to

discuss the Student's rebellious behavior at school. (Board #2).

4. The Student scored as basic in reading and proficient in math on the sixth-grade MSA. His grades in sixth grade dropped appreciably. (Board #2).

5. During the summer before the Student's seventh-grade year, the Student's father met with staff at [School 1] to express his concerns about the Student's behavior.

6. The Student and his Parents were seeing a child psychologist, a Dr. XXXX, who recommended that the Student undergo psychiatric and psychological evaluations. (T. 257-258).

7. The Student was enrolled in [School 1] for seventh grade for the 2011-2012 school year.

8. Within the first few weeks of the school year, the Student had refused to work without major prompting, could not sit still, made physical contact with other students, instigated other students, made inappropriate comments or noises not related to class subject matter, manifested twitching or blinking behaviors, thrown food in the cafeteria, turned on gas in a science lab, and thrown a music stand that hit a classmate. (Board #2).

9. On September 27, 2011, staff at [School 1] convened a parent conference to discuss the Student's inappropriate behavior in school. (Board #1).

10. On October 10, 2011, staff at [School 1] conducted a FBA for the Student and determined that he was in need of a BIP focusing on following school rules and not instigating peers. (Board #2).

11. On November 3, 2011, the Student assaulted another student. Principal XXXX XXXX suspended the Student for one day. (XX #2).

12. Dr. XXXX, a licensed clinical psychologist, conducted a private comprehensive psychological assessment of the Student, whom she met with on November 8 and 10 and

December 2, 2011. Dr. XXXX also interviewed the Student's parents; his school counselor, Ms. XXXX; his Math teacher, Ms. XXXX; and his World Studies teacher, Mr. XXXX. (XX #3).

13. Dr. XXXX administered many formal tests, including cognitive and achievement tests such as the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), and the Woodcock-Johnson III Tests of Cognitive Ability (WJ-III), and personality and emotional assessments such as the Personality Assessment Inventory-Adolescent (PAI-A), the Behavior Assessment System for Children-Second Edition (BASC-2), the Conners 3, the Behavior Rating Inventory of Executive Function (BRIEF), and the Roberts-2. (XX #3).

14. In a school report that was eventually provided to some members of an EMT and the IEP team, Dr. XXXX reported the Student's scores on cognitive and achievement tests and selected scores on personality and emotional assessments. Dr. XXXX also provided a summary and conclusions about the Student, with some comments on his scores on various tests and assessments. (XX #3).

15. In the school report, Dr. XXXX provided a diagnostic impression: ADHD, NOS [not otherwise specified] (Combined Type); Dysgraphia; and Reading Disorder (language-based reading disability); Rule Out: Language Processing Disorder; Tic Disorder; Sleep Disorder. (XX #3).

16. In a parent report, which was never disclosed to the IEP team (and only disclosed to the MCPS as part of the Parents' disclosure for this hearing), Dr. XXXX provided additional scores on the personality and behavior assessments, an additional diagnostic impression of Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, and a Social-Emotional Assessment. (XX #4).

17. Dr. XXXX's parent report included BASC-2 clinical and adaptive scales results

and Conners 3 scores that were not included in the school report. (XX #4).

18. The BASC-2 clinical scales were based on ratings from the Student's father and two of the Student's teachers. The Student received consistently high ratings for aggression and conduct problems. He received high ratings from his father for anxiety, depression, somatization, and withdrawal. He received high ratings from one teacher for depression, somatization, atypicality, and withdrawal. He received high ratings from one teacher for somatization, atypicality, and withdrawal. (XX #4).

19. The Conners 3 scores were also based on ratings from the Student's father and two of the Student's teachers. The Student received high ratings for defiance/aggression; peer relations; DSM-IV conduct disorder; DSM-IV oppositional defiant disorder; restless-impulsive; and emotional lability. (XX #4).

20. In the school report, Dr. XXXX attributed the Student's struggles with emotional regulation and interpersonal relationships to his untreated ADHD and learning disabilities. (XX #3).

21. In the parent report, Dr. XXXX noted that the Student was at very high risk of developing a behavior disorder and/or a personality style that includes narcissistic and antisocial features. She noted his increased susceptibility to reacting to changes with extreme behavior, and his inflated sense of self-confidence, including grandiose ideas. Dr. XXXX recommended a school program for the Student that included on-site counseling, a strong behavior management component, and an organized program for social skills development. (XX #4, T. 166).

22. On December 19, 2011, staff at [School 1] convened a parent conference to discuss the Student's continued inappropriate behavior in school and to get information on the private testing of the Student. The implementation of a BIP was delayed pending the disclosure

of the private testing to the MCPS. (Board #5).

23. At some point during the 2011-2012 school year, the Student was seen by a psychiatrist, Dr. XXXX, who prescribed XXXX, a medication for ADHD, for the Student.

24. On January 11, 2012, the Student used profanity towards a school staff member. Acting Principal XXXX XXXX suspended the Student for a half day. (XX #5).

25. On January 24, 2012, [School 1]'s staff prepared a BIP to address the Student's inappropriate behaviors in class and at lunch. Teachers were directed to cue the Student to stay on task and to enforce any discipline outside the classroom to limit the Student's reaction in front of other students. (Board #7).

26. At some point, [School 1]'s administration decided to try to manage the Student's behavior in class without sending him out to the assistant principal. When this proved unsuccessful, [School 1]'s staff returned to removing the Student from class when he acted out, by taking him into the hallway or the assistant principal's office. (T. 557-558).

27. The Student's first-quarter grades in his academic subjects for the 2011-2012 school year were Es in English, Spanish, and Science, a C in Math, and a B in Advanced World Studies. (XX #6).

28. The Student's second-quarter grades in his academic subjects for the 2011-2012 school year were Es in English, Spanish, and Science, a D in Math, and a C in Advanced World Studies. (XX #6).

29. On February 22, 2012, an EMT, consisting of the Student's parents; school counselors, XXXX XXXX and Ms. XXXX; Ms. XXXX; Ms. XXXX, and others, met to consider the Student's need for special education services. Some members of the EMT reviewed Dr. XXXX's school report. The EMT suspected that the Student might have an attention disorder

or a speech-language disorder. The EMT decided to conduct a speech-language assessment and to have the Student complete a BASC-2 self-report, an assessment that the Student had not completed for Dr. XXXX. (Board #8).

30. On the BASC-2 self-report, the Student had a clinically significant rating for sensation seeking. All the other ratings were within the average range. (Board #15).

31. The speech-language assessment concluded that the Student had disordered expressive speech, a rapid rate of speech, a tendency to condense words, and frequent disfluencies that were consistent with cluttered speech, which is often concomitant with ADHD. The Student's expressive language skills were found to be in the mild to moderately delayed range. (Board #16).

32. On March 13, 2012, an IEP Team, consisting of the Student's parents; Dr. XXXX; Ms. XXXX, [School 1]'s acting principal; Ms. XXXX; Ms. XXXX; Ms. XXXX; Mr. XXXX, one of the Student's teachers; Mr. XXXX, a school psychologist; XXXX XXXX, a speech/language pathologist, and others, met to conduct a screening meeting of the Student's eligibility for special education. Dr. XXXX noted the Student's severe ADHD and need for external structure, as well as his weaknesses in comprehension and working memory. (Board #12). She did not disclose her diagnosis of an adjustment disorder.

33. On March 22, 2012, the Student disrespected other students and caused a class disturbance. Principal XXXX suspended the Student for one day. (Board #13, XX #9).

34. On April 20, 2012, the Student physically attacked another student. Principal XXXX suspended the Student for one day and half of another day. (XX #10).

35. On April 23, 2012, staff at [School 1] conducted a FBA for the Student and determined that he continued to exhibit a pattern of disruptive behaviors in the classroom,

including physical aggression toward other students. The Student performed better in classes with more one-to-one attention. [School 1]’s staff prepared a revised BIP focusing on positive reinforcement of good behaviors and allowing the Student to take breaks to reduce his impulsivity. (Board #14).

36. On May 10, 2012, the IEP team, relying largely on Dr. XXXX’s school report, and citing weaknesses in attention, executive dysfunction, and language that impacts him across all areas, including academics and social interactions, determined that the Student met the disability criteria for OHI based on his ADHD. (Board #17).

37. On May 16, 2012, the Student brought a white XXXX to [School 1] and displayed it to students in his band class. Principal XXXX suspended the Student for ten days and recommended expulsion. (Board #18).

38. On May 22, 2012, the IEP team conducted a manifestation meeting and agreed that the Student’s poor decision making and conduct were a result of his ADHD. The IEP team also noted that the Student had additional behavioral and social-emotional needs that were greater than those of the typical student with ADHD. (Board #21).

39. On June 12, 2012, the IEP Team produced an IEP for the Student. (Board #21).

40. The June 12, 2012 IEP documented the Student’s weaknesses in written language, reading, oral language, behavioral regulation, and attention/executive functioning. (Board #21).

41. The June 12, 2012 IEP documented the Student’s BIP, which was meant to increase his attention to task, reduce his aggressive behaviors, and increase his compliance with school rules. (Board #21).

42. The June 12, 2012 IEP provided for the following instructional supports: assistance with organization, repetition of instructions, frequent check-ins with teachers,

provision of directions in incremental steps, breaks, and visuals to support written information.
(Board #21).

43. The June 12, 2012 IEP provided for the following social/behavioral supports:
implementation of the BIP, structured time for organization, reinforcement of positive behaviors,
access to identified adult in times of stress, and preferential seating. (Board #21).

44. The June 12, 2012 IEP contained the following goals:

Goal: Organization: Given teacher feedback, prompting, and adult support, [Student] will demonstrate the ability to complete classwork, homework and projects that accurately represent the teacher/assignment directions, by the assigned deadline.

Goal: Attention: Given adult support, prompting, reminders, and use of a behavior monitoring tool, [Student] will sustain attention to academic tasks, directions, and classroom routines and procedures.

Goal: Speech and Language: In the small-group setting, [Student] will express his ideas clearly, with well-formulated sentences and in an organized fashion, given minimal reminders from the teacher.

Goal: Written Language: Given graphic organizers, access to a word processor, and adult support, [Student] will compose written presentations that express personal ideas, inform, and persuade.

Goal: Written Language: Given adult support and access to a word processor, [Student] will compose texts using the revising and editing strategies of effective writers and speakers.

Goal: Speech and Language: In the small-group setting, [Student] will speak 100% intelligibly, given a minimal reminder.

Goal: Reading Comprehension: Given use of a human reader, graphic organizers and fading support, [Student] will analyze important ideas and messages in a variety of texts across all academic areas.

Goal: Behavioral Regulation: Given adult support, social skill instruction, direct instruction in strategies, and use of a behavioral monitoring tool, [Student] will develop positive relationships with peers and adults.

(Board #21).

45. The June 12, 2012 IEP contained the following school year services: 15 hours per week of special education services in general education classrooms (inclusion classes for Math, Science, History and English); 3 hours and 45 minutes of special education services outside general education classrooms (a resource class). (Board #21).

46. In a normal 30-hour school week, the Student would receive 25 hours and 11 minutes per week of special education services in general education classrooms, and 4 hours and 49 minutes per week of special education services outside general education classrooms. (Board #21).

47. The IEP team was not certain that the Student's social/emotional goals could be met sufficiently at [School 1]. The Student's parents were scheduled to visit the [Program 1] program at [School 2]. (Board #21).

48. The Student completed the 2011-2012 school year while he was assigned to the [School 6] as part of his discipline for the XXXX incident. (T. 281).

49. The Student's final grades in his academic subjects for the 2011-2012 school year were an E in English; a D in Science; a C in Math, and a B in Advanced World Studies. He had dropped Spanish. (Board #22).

50. On September 4, 2012, at the beginning of the 2012-2013 school year, Ms. XXXX requested a consultation for the Student from the MCPS's ED Unit. The Student had already engaged in inappropriate language in class and refused to comply with classroom rules. (Board #24).

51. On October 3, 2012, the Student called his math teacher a "XXXXXX XXXXX." Principal XXXX XXXX suspended the Student for two days. (XX #18).

52. On October 8, 2012, XXXX XXXX conducted the ED consultation. [School 1]

staff reported to Mr. XXXX their suspicions that the Parents had not disclosed complete information about the Student. Mr. XXXX noted that since an early age the Student had been isolated socially, struggled to make peer connections, and sought attention negatively from peers. Mr. XXXX made suggestions concerning a behavior contract for the Student. (Board #26).

53. On October 9, 2012, after he was asked to move to the end of a line, the Student called a lunch room assistant a “XXXX XXXX.” Principal XXXX XXXX suspended the Student for two days. (Board #27).

54. In group assignments, a teacher or para-educator would work with the Student so that he would not be verbally abusive to peers. (T. 711).

55. In the first quarter of the 2012-2013 school year, the Student made sporadic progress on his goals for written language and reading, and his social/emotional/behavioral goals. He continued to struggle in his classroom behavior and interactions with peers; he made inappropriate comments and cursed, and he was not participating in or completing in-class work. (Board #28, Board #29).

56. On November 8, 2012, the Student threw a dead stinkbug on a female student. (Board #29).

57. On November 15, 2012, the Student punctured his finger with a push-pin and tried to smear blood on a fellow student. (Board #29).

58. On November 20, 2012, the Student berated a fellow student’s poor performance in gym class. He said the word “XXXXXX” at least twenty times, and when he was disciplined by the physical education teacher, responded that he did not care because he would not “XXXX” be there the next day. (Board #29).

59. On November 27, 2012, after having stabbed a peer in the neck with a pencil,² the Student confronted the classroom science teacher, asking her if she was afraid of him. Later, in the assistant principal's office, the Student expressed his intent to kill his science teacher by using various objects in the office – scissors, printer, and stapler. (T. 713-716). Principal XXXX XXXX suspended the Student for six days. (XX #21).

60. The Student's first-quarter grades in his academic subjects for the 2012-2013 school year were an E in English, Ds in Computer Applications, Advanced United States History, and Algebra, and a C in Investigation of Earth and Space. (Board #40).

61. The Student's second-quarter grades in his academic subjects for the 2012-2013 school year were Es in English, Advanced United States History, and Investigation of Earth and Space, a D in Algebra, and a C in Computer Applications. (Board #40).

62. On November 29, 2012, the IEP team conducted an Emotional Disability Evaluation. The IEP team considered the results of some of the psychodiagnostic testing performed by Dr. XXXX and reported in the school report: PAI; BASC-2; Conners 3; BRIEF; and Roberts-2. The IEP team also considered a BASC-2 self-report completed by the Student. (Board #31).

63. The IEP Team, over the objection of the Student's father, determined that the Student met the disability criteria for emotional disturbance and that this disability had an educational impact that required specialized instruction and related services. (Board #31).

64. The IEP team added the following emotional regulation goal to the Student's IEP: "Given adult support, social skills instruction, and a menu of coping strategies, [Student] will

² The Student had an on-going dispute with this peer, who, on this occasion referred to the Student as a terrorist. The Student's father claimed that the Student has often been teased or bullied due to his XXXX ethnicity, but, other

identify and manage his feelings appropriately within the school setting.” (Board #31).

65. The IEP team did not otherwise change the Student’s goals or services. (Board #31).

66. The IEP team, over the objection of the Student’s father, who referred to the IEP team as a kangaroo court with Kafkaesque procedures, proposed a placement in the [Program 1] program at [School 2]. (Board #31, T. 564).

67. The [Program 1] model is a program within a comprehensive school of self-contained, inclusion, mainstream, and resource-supported classes of usually no more than ten students, typically five or six. The [Program 1] program students have the opportunity to be in mainstream classes, but they are supported in those classes by a co-teacher or para-educator. There are at least two adults, sometimes three in the self-contained classes, which are provided for all core academic areas, such as English, Math, Science, and History. (T. 914-915).

68. The teachers in the self-contained class rooms are highly-qualified under federal law in their subject matters. Students in the [Program 1] program are also supported throughout the day by other staff members. The [Program 1] program has a RTSE, who leads a team of teachers, para-educators, a social worker, a psychologist, and a behavioral support teacher. The [Program 1] program, using research-based programs, provides training, typically on a daily basis, to help students develop successful social skills. The [Program 1] program provides mental health support, often in conjunction with private mental-health providers, but not individual therapy. (T. 917-919, 921-925).

than this one incident, the MCPS has not received any complaints about the Student being teased about his ethnicity.

69. The typical student in the [Program 1] program has executive functioning issues and either verbal or physical aggressive acting-out behavior or shutting down behavior. These students typically are not accessing the curriculum in their home school due to their interfering behaviors. The [Program 1] program provides strategy or quiet rooms where a student, accompanied by a staff member, can calm down and then return to class. Students in the [Program 1] program can return to a general education setting or their home school; in fact such returns are the goal. (T. 928-931).

70. The [Program 1] program at [School 2] could address several of the Student's identified issues, such as his difficulty forming friendships, his profanity, his aggressiveness, and his violence. (T. 930-931).

71. The Student, due to his social and emotional issues, is struggling to access the general education curriculum at [School 1].

72. Since November 29, 2012, the Student has made sporadic progress on his academic and social/emotional/behavioral goals. (Board #32).

73. Around January 1, 2013, Dr. XXXX prescribed XXXX for the Student. (T. 310).

74. Since January 2013, the Student has been somewhat calmer in school and he has received fewer disciplinary referrals. (T. 47-49). He is noticeably more lethargic, and often puts his head down or sleeps in his earlier classes. (T. 576).

75. The Student has difficulty performing classroom work. His homework, with the assistance of tutors or his parents, has improved. (T. 575-576).

76. The Student's third-quarter grades in his academic subjects for the 2012-2013 school year were Es in Advanced United States History and Investigation of Earth and Space, and Cs in Algebra, English, and Earth and Space Technology. (Board #40).

77. In April 2013, after he was asked to play the role of a female character in History class, the Student referred to the teacher as a “bitch.” The Student later apologized to the teacher. (T. 61).

DISCUSSION

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 300 (2012), Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012), 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).

In *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] 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 provide educational benefit to the handicapped child.

458 U.S. at 200-01 (emphasis added). *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

The IDEA contains the following, similar definition of FAPE:

special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge...[and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2008); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy”

or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), *citing Rowley*. Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 177.

“Educational benefit” requires that “the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002), *citing Rowley*, 458 U.S. at 192; *see also A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt*, 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, 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).

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 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) & 300.117 (2012). Yet, 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.*

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). In this case that is

the Parents.

The MCPS correctly determined that the Student is a child with a primary disability of [disability].

On November 29, 2012, the MCPS members of the IEP team determined that the Student met the criteria for ED under the IDEA. [Disability] is defined by regulation, in pertinent part, as follows:

[regulation]

As explained below, I find the MCPS's coding decision to be well supported by the record and essentially unassailable. Ms. XXXX, [School 1]'s school psychologist, was the MCPS's primary witness on the coding issue. Ms. XXXX has a Master's degree in psychology, seventeen years of experience as a school psychologist, and she is certified as a school psychologist by the State and by the National Association of School Psychologists. She testified as an expert witness in school psychology. Ms. XXXX, a RTSE who has a Master's degree in education, twelve years of experience in special education, and who testified as an expert witness in special education with an emphasis on students with emotional disability, and Ms. XXXX, [School 1]'s school counselor, who has a Master's degree in school counseling, three years of experience at [School 1], and who testified as an expert witness in school counseling, provided additional testimony. Ms. XXXX noted that the MCPS members of the IEP team did not have Dr. XXXX's parent report available to them when they determined that the Student met the first three criteria for [disability].

In contrast to the MCPS's position, the Parents' argument that the Student was not correctly coded as [disability], but should have continued to be coded as OHI based on his ADHD, was wholly unconvincing. The Student's father and Dr. XXXX obviously manipulated

the IEP process by withholding crucial information concerning the Student's social and emotional issues from the IEP team, which led the IEP team to its initial coding of OHI. This case cannot be fully understood without a discussion of the serious problems with the conduct of both the Student's father and Dr. XXXX, who impeded the MCPS during the IEP process for the Student. Even without relevant and valuable information that should have been provided by the Parents and Dr. XXXX, the MCPS members of the IEP team eventually determined correctly that the Student is a child with a primary disability of [disability].

As to the first criterion for [disability], Ms. XXXX testified that the Student's inability to learn could not be explained by an intellectual factor because the Student, based on testing, has average intelligence. She also testified that the MCPS members of the IEP team acknowledged the Student's ADHD as a health factor that affected the Student's ability to learn, but concluded that ADHD alone did not account for the Student's behavior and his inability to access the school curriculum. (T. 881-882). Ms. XXXX, as well as Ms. XXXX, testified that the Student's behaviors were more extreme than the behaviors of other students with ADHD, who might be restless and who might blurt things out in class, but who would not curse at or threaten teachers or other staff, or assault fellow students. Ms. XXXX noted that [School 1] had implemented a BIP for the Student to address his behavioral issues even though the Student, based largely on Dr. XXXX's school report, was coded as OHI. Despite the BIP, the Student's behavior did not improve and he continued to underperform academically.

Ms. XXXX testified that the Student's high ratings for aggression, conduct problems, anxiety, depression, somatization, withdrawal, defiance/aggression, peer relations; DSM-IV conduct disorder; DSM-IV oppositional defiant disorder; restless-impulsive; and emotional lability on the personality and emotional assessments conducted by Dr. XXXX corroborated the

MCPS staff's personal observations of the Student. She also testified that she agreed with Dr. XXXX's summary indicating that the Student's ratings were "consistent with patterns seen in children with social and emotional difficulties," (T. 832), and that the Student's "high number of maladaptive and antisocial responses were consistent with [Student's] disruptive behavior and difficulty managing his emotions." (T. 833). The MCPS's position that the Student's ADHD alone could not explain his inability to learn is well-founded, and is actually supported by evidence presented by the Parents in the form of the parent report.

The MCPS members of the IEP team were aware of the Student's social, emotional, and behavioral issues when they agreed with the disability code of OHI in June 2012. But even then the IEP team was not certain that the Student's social/emotional goals could be met sufficiently at [School 1]. At the hearing, the Parents argued that the MCPS members of the IEP team were fully aware of the Student's behaviors, but still endorsed the disability code of OHI in June 2012, and then failed to allow sufficient time for the implementation of that IEP before changing the code to [disability]. I find the Parents' argument on this point to be extremely disingenuous. The Student's father and Dr. XXXX deliberately misled the MCPS members of the IEP team about the true nature of the Student's social, emotional, and behavioral issues. Without access to Dr. XXXX's parent report, the MCPS members of the IEP team essentially acquiesced to a disability code of OHI, while simultaneously expressing doubts about whether the correct code should be [disability]. Given the nature of the evidence available to them, which did not include Dr. XXXX's relevant personality and emotional assessments, I do not fault the MCPS members of the IEP team giving the Student the benefit of the doubt concerning the reason for his academic struggles.

As to the first criterion, the Parents argued that the Student's inability to learn could be

explained solely by his ADHD. This argument (as well as arguments concerning the third, and, to some extent, second criteria), was based on Dr. XXXX's diagnosis of adjustment disorder with mixed disturbance of emotions and conduct. An adjustment disorder is the presence of psychological symptoms to an identified stressor. According to Dr. XXXX, some or all of the Student's behaviors and emotional symptoms are the result of him being expected to perform in school with ADHD that was untreated and with unrecognized learning disabilities. (T. 86). In addition to the problems with self-regulation, executive functioning, and impulse-control inherent with ADHD, the Student has emotional and behavioral issues arising from the stress of having to attempt to learn while having ADHD. Dr. XXXX, without much explanation, testified that she did not consider the Student to be [disability] because he did not have a primary disturbance of emotions and behavior, such as an anxiety disorder or depression. (T. 114). Dr. XXXX essentially testified that the Student's emotional and behavioral issues are situational, and that they should resolve once his ADHD has been managed. Therefore, Dr. XXXX opined that the Student did not meet the first criteria for [disability] because his inability to learn could be explained by his ADHD. (T. 112).

I was not convinced by Dr. XXXX's opinion on this specific criterion that ADHD alone explained the Student's behaviors and inability to learn. Neither in her reports nor in her testimony at the hearing did Dr. XXXX give any apparent serious consideration to a diagnosis other than an adjustment disorder related to the Student's then untreated ADHD. She did not explain how she determined that the Student's emotional issues were solely related to his ADHD. And she did not explain how the results of the personality and emotional assessments necessarily related to an adjustment disorder, rather than a primary disorder. Without such explanations, it is difficult to credit Dr. XXXX's opinion. It is especially difficult to do so

considering her conduct in this case. The preparation of two reports, leaving out a significant diagnosis and the social and emotional assessment summary and data in the school report, and meeting in person with the IEP team and not being candid about the missing diagnosis, summary, and data, all show a lack of good faith towards the staff at [School 1].

Dr. XXXX specifically denied ever having tried to avoid an [disability] code for the Student. (T. 170), but her rationalizations for the way that she prepared and disclosed the two reports demonstrate an unprofessional deference to the Student's father and an unfair and unprofessional treatment of third parties, specifically the staff at [School 1]. Dr. XXXX's theory – that the Student exhibits severe, offensive, and violent behaviors due to untreated ADHD – is difficult to accept at face value. The MCPS's witnesses consistently indicated that the Student's behaviors are not typical of students with ADHD. Her theory is even more difficult to accept when she failed to present that theory for discussion to the IEP team. Rather than defend her theory that the Student had an adjustment disorder stemming from his untreated ADHD, instead of a severe emotional disturbance in and of itself, she simply withheld almost all evidence of the Student's social and emotional issues from the IEP team. It is clear from the record that she withheld that information at the direction of the Student's father. From the outset of the IEP process through to the last day of the hearing, the Student's father denied that the Student had an [disability]. (T. 1009). Moreover, Dr. XXXX's diagnosis of an adjustment disorder, with its impulsive and maladaptive behaviors, is not inconsistent with a disability code of [disability]. Clearly, the Student can have more than one disability. He likely has ADHD and [disability], but Dr. XXXX refused even to consider as a primary disability what is obvious in her own parent report – the Student has severe emotional problems, resulting in inappropriate, threatening, and violent behavior, that might not be wholly related to his ADHD. The Student can still meet the

criteria for [disability] even if his dysfunctional behaviors and social skills, which prevent him from learning, stemmed from untreated ADHD.

As to the second criterion for [disability], Ms. XXXX testified that, after receiving input from the IEP team and reviewing information that had been accumulated over the past year, she concluded that the Student demonstrated an inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (T. 854). Ms. XXXX had observed the Student informally in Fall 2011, and, like other MCPS staff members, had noted the Student's difficulty interacting with peers. Rather than talk and interact with his peers, the Student would attempt to get their attention by performing for them or through other actions, such as throwing food. On October 8, 2012, XXXX XXXX, an [disability] consultant with the MCPS, noted that since an early age the Student has been isolated socially, had struggled to make peer connections, and had sought attention negatively from peers. (Board #26). Ms. XXXX testified that the Student did not have any close friends at school. (T. 527).

There were many instances demonstrating the Student's inability to interact appropriately with peers, teachers, and other school staff:

- On November 3, 2011, the Student assaulted a fellow student. (XX #2).
- On January 11, 2012, the Student used profanity towards a school staff member. (Board #6).
- On October 3, 2012, the Student, in response to being told that he had the wrong homework assignment, called his math teacher a "XXXXXX XXXXX." (Board #25).
- On October 9, 2012, after he was asked to move to the end of a line, the Student called a lunch room assistant a "XXXXXX XXXXX." (Board #27).
- On November 27, 2012, after having stabbed a peer in the neck with a pencil, the Student confronted the classroom science teacher, asking her if she was afraid of him. Later, in the assistant principal's office, the Student expressed his intent to

kill his science teacher by using various objects in the office – scissors, printer, and stapler. (T. 713-716)

- In group assignments, a teacher or para-educator would work with the Student so that he would not be verbally abusive to peers. (T. 711)

Additionally, Ms. XXXX testified that teachers and students had reported that they were afraid of the Student. One teacher asked that her own child be removed from a class with the Student, and many students submitted complaints about the Student. (T. 483-485).

As to the second criterion, the Parents, in addition to attributing the Student's social problems to his ADHD, asserted that the Student actually has been able to have successful relationships with peers and teachers. They cited, as examples, teacher reports on quarterly progress reports, dated October 22, 2012. The Student's Science teacher rated the Student satisfactory for appropriate interactions with staff and students. The Student's World Studies teacher rated the Student satisfactory for appropriate interactions for staff, but not with peers. (Board #28). The MCPS argued that the examples cited by the Parents, at best, represent the exception to the general rule concerning the Student's relationships with peers and teachers. Dr. XXXX testified, without elaboration, that the Student has the ability to make friends. (T. 113). The Parents did not identify even one fellow student with whom the Student is friends, or present any teachers to testify about a meaningful relationship with the Student.

The Student's attention-seeking behaviors with other students, as well as his verbally and physically abusive conduct toward peers and teachers, especially when contrasted with scant evidence from the Parents concerning the Student's positive relationships with peers and teachers, is overwhelming proof that the Student meets this criterion for [disability].

As to the third criterion for [disability], Ms. XXXX testified that the Student has displayed inappropriate types of behavior or feelings under normal circumstances. Most of the instances of the Student's inappropriate behaviors, some of which are outlined above, occurred

during routine school situations. The MCPS presented overwhelming evidence concerning the inappropriateness of the Student's behaviors.

As to the third criterion, Dr. XXXX, consistent with her impression that essentially all of the Student's issues stem from his ADHD, opined that as far as the Student is concerned there are no normal circumstances at school because he is always under the stress of being asked to perform academically while having ADHD. What would be a normal circumstance for any other student – taking out a homework assignment or, apparently, even having lunch in the cafeteria – is not normal for the Student because he is constantly in ADHD-driven “binds.”

(T. 113-114). I simply do not accept Dr. XXXX's premise that for the Student the classroom itself is not a normal circumstance or that being told to behave by a teacher is not a normal circumstance for a middle-school student. I find that the only meaningful way to read the regulation's use of the phrase “normal circumstances” is objectively; it is not specific to any particular child. Dr. XXXX's view that normal circumstances are to be based on the subjective situation of each student would make the regulation meaningless because normal would never, in fact, be an objective norm against which to measure a child's behavior. The Student's inappropriate behaviors, such as referring to a teacher and a cafeteria worker each as a “XXXXX XXXXX,” did not occur during any incident of academic rigor or stress, but during times when he was appropriately being told to behave himself.

The definition of [disability] also requires a determination that a child has manifested the characteristics of the three criteria discussed above over a long period of time to a marked degree that adversely affects a child's educational performance.

Ms. XXXX testified that the characteristics or behaviors must be long standing in the sense that they are not situational or related to a specific trauma. The Student has manifested

characteristics of all three criteria since at least the beginning of seventh grade. The Student has manifested the characteristics of the three criteria discussed above to a marked degree. Although the term “marked degree” is a bit vague, the Student’s inability to learn, his lack of social skills, and his inappropriate behaviors were not subtle. His grades, despite his average intelligence, include many Es in core academic subjects. He has no friends at school, he has attacked students and threatened teachers, his language has been vulgar and threatening, he stabbed a fellow student with a pencil, and he displayed an XXXX to other students. While the XXXX itself might not have had much potential as a weapon, it is obvious to me that the Student’s intention was to menace and frighten his fellow students as a way of attracting their attention or to express his displeasure with school staff. The Student’s manifestations of the three criteria satisfy any reasonable definition of the term “marked degree.” The Student’s behaviors have adversely affected his educational performance. The Student has average intelligence, with a full-scale intelligence quotient score of 96 on the WISC-IV, and scores in the average range on four summary scores – verbal comprehension, perceptual reasoning, working memory, and processing speed. His grades, despite his average intelligence, include many Es in core academic subjects. Largely due to his behaviors, the Student has been unable to access the curriculum at [School 1].

The MCPS appropriately determined that the Student’s placement should be in the [Program 1] Program at [School 2]³

During the telephone pre-hearing conference, the Parents, by Mr. Eig, indicated that this case did not raise an issue of least restrictive environment. The Parents essentially conceded that

³ The evidence presented by the MCPS concerning the coding and placement issues was overwhelming. The Student’s father was adamantly opposed to a disability code of [disability] for the Student and to the placement in the [Program 1] program at [School 2]. By filing a due process complaint, the Parents were able to invoke the stay-

[School 2], a comprehensive middle school not far from the Student's home school, was equivalent to [School 1] on the continuum of least restrictive environment. The Parents also essentially acknowledged the MCPS's right to consolidate certain services, such as services for students with [disability] in certain schools, rather than have to duplicate such services in every school. At the hearing, at least to some extent, the Parents attempted to revisit their pre-hearing position that this case did not raise an issue of least restrictive environment. I shall hold the Parents to their pre-hearing position. Moreover, even if [School 2] is a more restrictive environment than [School 1], it is the least restrictive environment for the Student.

XXXX XXXX, a behavioral support teacher with MCPS's Division of Emotional Disabilities, who has approximately thirty years of experience teaching children with emotional disabilities, testified as an expert witness in special education with an emphasis on students with emotional disabilities. Along with a social worker and a psychologist, she supports school staff with education and social skills development at [Program 1] programs at [School 3], the high school that the Student would attend, and an elementary school; she is not currently assigned to [School 2], but she was assigned there during the previous two school years. Although it is not a requirement for enrollment, the majority of students in an [Program 1] program have a disability code of [disability]. Ms. XXXX is involved in developing IEPs, FBAs, and BIPs, and works with teachers in developing instruction for students. She also provides direct services to some students for social skills, anger management, or a friendship group.

The [Program 1] model is a program within a comprehensive school of self-contained, inclusion, mainstream, and resource-supported classes of usually no more than ten students, typically five or six. The [Program 1] program students have the opportunity to be in mainstream

put provisions of the IDEA and the Student remained at [School 1] for the balance of the 2012-2013 school year.

classes, but they are supported in those classes by a co-teacher or para-educator from the [Program 1] program. There are at least two adults, sometimes three in the self-contained classes, which are provided for all core academic areas, such as English, Math, Science, and History. (T. 914-915). The teachers in the self-contained class rooms are highly-qualified under federal law in their subject matters. Students in the [Program 1] program are also supported throughout the day by other staff members. The [Program 1] program has a RTSE, who leads a team of teachers, para-educators, a social worker, a psychologist, and a behavioral support teacher. The [Program 1] program, using research-based programs, provides training, typically on a daily basis, to help students develop successful social skills. The [Program 1] program provides mental health support, often in conjunction with private mental-health providers, but not individual therapy. (T. 917-919, 921-925).

According to Ms. XXXX, the typical student in the [Program 1] program has executive functioning issues and either verbal or physical aggressive acting-out behavior or shutting down behavior. These students typically are not accessing the curriculum in their home school due to their interfering behaviors. The [Program 1] program provides strategy or quiet rooms where a student, accompanied by a staff member, can calm down and then return to class. Students in the [Program 1] program can return to a general education setting or their home school; in fact, such returns are the goal. (T. 928-931).

Ms. XXXX addressed what [School 2] could offer to address several of the Student's identified issues. (T. 931). In the area of making and maintaining satisfactory interpersonal relationships with peers, [School 2] encourages students, within a controlled setting, to interact appropriately with peers. As to inappropriate behaviors, [School 2] has resources such as the quiet rooms to allow students to deescalate. As to dangerousness, [School 2]'s staff is trained to

provide proactive support, de-escalation, and non-violent crisis intervention. (T. 930).

As to the Student specifically, Ms. XXXX testified that he matches the profile for many of the [Program 1] students. She reviewed the Student's files and she consulted with Ms. XXXX. (T. 939). She testified that the [Program 1] program can deal with students who, like the Student, have brought XXXX to school or who have acted out profanely or violently to peers and teachers. (T. 965-967).

Ms. XXXX also testified that Dr. XXXX's recommendation of a school placement for the Student described the [Program 1] program, with the possible exception of counseling; the [Program 1] program provides mental-health support, not direct therapy. (T. 951). Dr. XXXX, in the parent report, had made the following recommendation:

[Student] would be best served placed in a school environment designed to support students with significant ADHD and learning disability challenges. He needs a strong behavior management program, high external structure within the academic program, and access to reading and language services, counseling, and social skill development. . . .

(XX #4)

Ms. XXXX, who was accepted as an expert witness in special education with an emphasis on students with emotional disabilities, testified that, in her opinion, the Student's IEP goals and BIP could be implemented in the [Program 1] program at [School 2]. (T. 970-971; 973-980). Moreover, she testified that the Student is struggling to access his academic classes and not achieving to his ability. She further testified, quite convincingly, that a comprehensive school, such as [School 1], could not provide him the supports that he needs to be successful, and that he needs the supports provided by an [Program 1] program. (T. 940; 972). Ms. XXXX testified that, in her opinion, the Student would make significant and successful progress in the [Program 1] program. (T. 983). She also testified that, in her opinion, the [Program 1] program was the least

restrictive environment for the Student because he needed the immediate adult supports available at [School 2], and the ability to de-escalate outside a mainstream school environment, while still having extensive interaction with non-disabled peers. (T. 984-985).

Ms. XXXX testified that, in her opinion as an expert in school psychology, and based on her experience with [Program 1] programs, that the [Program 1] program at [School 2] was an appropriate placement for the Student that needed to be tried to deal with his significant emotional and behavioral issues and to get him on track academically. (T. 850). She noted that the Student was not learning at [School 1], he was not being socially successful with his peers, and he was only being “half-way” contained as to his behaviors. She expressed a genuine concern that the Student would hurt himself or again hurt another student. (T. 859). Ms. XXXX endorsed the placement at [School 2] because it could provide services to the Student more intensively than could [School 1]. The teachers at [School 1] are trained primarily to deal with students with learning disabilities, while the teachers and staff in the [Program 1] program are trained also to deal with behavior and social skills, which at this point are the Student’s primary needs. Ms. XXXX also cited [School 2]’s staffing and environment – a psychologist, a dedicated quiet room to de-escalate versus [School 1]’s use of the assistant principal’s office. Ms. XXXX emphasized that the IEP does not have to delineate exactly how services are to be provided. The staff at [School 2], with its expertise and breadth of specialties, would be better able to implement the IEP as written. (T. 859-862). Ms XXXX expressed her opinions that the Student would have made meaningful educational progress pursuant to the November 29, 2012 IEP and that the IEP would have provided the Student a FAPE in the least restrictive environment. (T. 862-863).

Ms. XXXX, who worked extensively with the Student at [School 1], expressed her

opinion as an expert in special education that the Student would have made meaningful educational progress pursuant to the November 29, 2012 IEP and that the IEP would have provided the Student a FAPE in the least restrictive environment. (T. 729-730).

Frankly, I do not see any genuine rational basis for the Parents' objection to the [Program 1] program at [School 2]. I agree with Ms. XXXX's assessment that the Student's father objected to the [Program 1] program primarily because of its name and the stigma attached to a disability code of [disability]. (T. 852). From the outset, the Student's father has resisted any suggestion that his son's primary issues are related to an emotional disturbance. He managed the disclosure of evidence concerning his son's social and emotional assessment, found a compliant psychologist to facilitate his selective disclosure of that evidence, and, even on the last day of the hearing, despite overwhelming evidence to the contrary, continued to insist that the Student has no emotional disability. (T. 1009).

The Student's father perceived the move to [School 2] as "horrific punishment," rather than a means of dealing with the Student's serious and immediate need to regulate his behavior and begin to perform academically. (T. 725). On December 17, 2012, Dr. XXXX wrote a letter urging the school members of the IEP team to keep the Student at [School 1] for the remainder of the 2012-2013 school year. She cited the Student's difficulty with transitions. (XX #27). At the time she wrote the letter, Dr. XXXX had not seen the Student for one year and she had had limited contact with the Student's father. She had not reviewed the Student's records from his last year of schooling, and she had no apparent familiarity with the [Program 1] program at [School 2]. Her letter was simply a reiteration of the Student's father's objections to the recommended placement. Dr. XXXX failed to present any cogent argument against the Student's placement at the [Program 1] program at [School 2], again highlighting the serious flaws with

her testimony.

The Fourth Circuit has provided guidance for evaluating conflicting testimony, especially conflicting testimony between experts: “First, in crediting the testimony of any witness, the Hearing Officer must explain *why* it (sic) chose to do so over conflicting testimony by another witness. In this regard, the Hearing Officer should be especially concerned with explaining why he may choose to credit the testimony of one of the [Parents’] expert witnesses over [school’s expert witnesses], whose professional opinions as local educators regarding the adequacy of the Summer 2001 IEP are entitled to deference. *MM [v. School District of Greenville County]*, 303 F.3d at 532-33. Additionally, if the Hearing Officer chooses to credit the testimony of any witness who did not actually observe [student] in the school setting, the Hearing Officer needs to expressly acknowledge such fact and explain why he chose to credit that witness’s testimony anyway. The same goes for the crediting of any expert witness.” *JH v. Henrico County School Board*, 395 F.3d 185, 197-198 (4th Cir. 2005).

The Fourth Circuit has noted, in the context of federal court review of a decision made by a state special education hearing officer, that a court should be reluctant to second-guess professional educators: “As we observed in *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990), ‘once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.’ Indeed, we should not ‘disturb an IEP simply because we disagree with its content,’ and we are obliged to ‘defer to educators’ decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides.’” *Id.* (internal citation and quotations omitted). *MM ex rel DM v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002).

This case presents conflicting testimony between the expert witnesses presented by the MCPS and Dr. XXXX. Following the guidance of the Fourth Circuit, I am reluctant to second guess the expert testimony of the MCPS's witnesses, three of whom were involved with the Student's IEP process essentially from the beginning when the Student was first referred for evaluation. Ms. XXXX, who testified primarily about the [Program 1] program, was less familiar with the Student, but her knowledge of students with [disability] was helpful. Her opinions, at least as to the specific subject matter of the [Program 1] program and students with [disability], are not diminished by her lack of contact with the Student. All four of the MCPS's experts testified in a professional manner and appear to have treated both the Student and his father with incredible patience and sanguinity. In terms of competing expert witnesses, this is not a close case.

As already noted, there were significant problems with Dr. XXXX's testimony, including her preparation of two reports and her implausible explanation for not providing the MCPS the parent report. Dr. XXXX testified that certain confidential family information was removed from the parent report because the Student's father did not want it disclosed to the MCPS. She also testified that material that was more relevant to the Student's psychotherapist was removed. (T. 139-140). But the information that was removed from the parent report and not disclosed to the MCPS was almost exclusively information about the Student's social and emotional makeup, which had nothing to do with any confidential family information, and which obviously was of value to an IEP team evaluating the Student. The most glaring example of the disingenuousness of Dr. XXXX's testimony was the fact that her recommendation for a school placement for the Student was removed from the parent report. It is obvious that such a recommendation was neither a confidential family matter nor an issue primarily for a psychotherapist. Moreover, the

recommendation described an [Program 1] program. Dr. XXXX was a willing participant in a concerted effort by the Student's father to withhold from the MCPS valuable information about the Student's social and emotional issues. Perhaps the staff at [School 1], in the absence of the private social and emotional assessments and in light of suspicions that information about the Student was being withheld, could have or should have requested permission to conduct its own assessments. The primary fault, however, lies with Dr. XXXX and the Student's father. Dr. XXXX's conduct severely undermined any reliance that I would place on her opinions about the Student's coding or placement. She appears to be a meticulous tester and a zealous advocate for her client, but seemed out of her depth as an expert witness in a special education hearing. She testified that she has only testified at one other such hearing. (T. 245-246). She did not seem to appreciate that an expert witness must be fair not just to the party for whom she is testifying, but to the other party and to the administrative law judge.

This case was extremely one sided. Neither Dr. XXXX nor the Student's father was a reliable witness. I further note the glaring absence of certain witnesses on behalf of the Parents. The Student's father testified that the Student has a psychiatrist, Dr. XXXX, who has prescribed XXXX for Student, ostensibly for his ADHD, and a psychologist, Dr. XXXX, who is providing psychotherapy and who participated in preparing the school and parent reports. These two professionals likely could have provided crucial information concerning the Student. I concur with the MCPS that this due process complaint likely was brought simply to invoke stay-put and keep the Student at [School 1] through the 2012-2013 school year. The Parents simply did not muster much of a case against the MCPS's determinations.

The Parents argued that the Student's behavior and academics have improved since the November 29, 2012 IEP and that this success undermines the accuracy of the [disability] code.

For several reasons, the Parents' argument is unconvincing. The Student's father testified that around January 1, 2013, Dr. XXXX prescribed XXXX to treat the Student's ADHD. Dr. XXXX did not testify at the hearing, and the MCPS presented testimony from Ms. XXXX that XXXX is not typically prescribed to treat ADHD. (T. 866-867). Based on the record before me, I cannot draw any reliable conclusions from the Student's apparent use of XXXX. I do not know for sure why Dr. XXXX prescribed XXXX; nor do I know the prescribed dose or even that the Student is actually taking XXXX. Without better evidence, I simply cannot accept the Parents' assertion that the Student's behavior and academics have improved because his ADHD is being treated. Moreover, the Student has not made any significant progress during the last half of the school year. He has been somewhat calmer in school and he has received fewer disciplinary referrals. (T. 47-49). But he also has been noticeably more lethargic, and often puts his head down or sleeps in his earlier classes. (T. 576). The Student continues to have difficulty performing classroom work. His homework, with the assistance of tutors or his parents, has improved. (T. 575-576). The Student's third-quarter grades in his academic subjects for the 2012-2013 school year were Es in Advanced United States History and Investigation of Earth and Space, and Cs in Algebra, English, and Earth and Space Technology. (Board #40). In April 2013, after he was asked to play the role of a female character in History class, the Student referred to the teacher as a "bitch." The Student later apologized to the teacher. (T. 61). Several witnesses for the MCPS testified that teachers have lower expectations for the Student and that he is essentially just being maintained or contained to avoid incidents of violent or disruptive behavior. This is not progress and nothing about the evidence of events after November 29, 2012 in any way undermines the accuracy of the disability code of ED and the appropriateness of the placement in the [Program 1] program at [School 2]. *See Schaffer ex. rel. Schaffer v. Weast*, 554

F. 3d 470, 477 (4th Cir. 2009) (an IEP's appropriateness is to be judged based on the information available at the time the IEP was written).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as follows:

1. The MCPS correctly determined that the Student is a child with a primary disability of [disability]. 34 C.F.R. § 300.8(c)(4)(i) (2012). *See* COMAR 13A.01.05.01.
2. The MCPS appropriately determined that the Student's placement should be in the [Program 1] Program at [School 2]. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117 (2012).
3. The IEP proposed by the MCPS on November 29, 2012, for the balance of the Student's 2012-2013 school year was reasonably calculated to provide the Student a free appropriate education in the least restrictive environment. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

ORDER

I **ORDER** that the due process complaint filed by the Parents concerning their son, XXXX, asserting that at an Individualized Education Program team meeting on November 29, 2012, the Montgomery County Public Schools had: (1) incorrectly determined that the Student's disability code should be changed from other health impairment to [disability], and (2) inappropriately determined that the Student's placement should be changed from his home school, [School 1], to the [Program 1] Program at [School 2], is DENIED.

June 14, 2013
Date Decision Mailed

Robert F. Barry
Administrative Law Judge

RFB/emh

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 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) (2008).

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.