

XXXX XXXX

V.

HOWARD COUNTY PUBLIC

SCHOOLS

* **BEFORE DEBORAH H. BUIE,**
 * **AN ADMINISTRATIVE LAW JUDGE**
 * **OF THE MARYLAND OFFICE**
 * **OF ADMINISTRATIVE HEARINGS**
 * **OAH NO.: MSDE-HOWD-OT-13-21061**

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DECISION

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STATEMENT OF THE CASE

On June 3, 2013, XXXX and XXXX XXXX (Parents), on behalf of their child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting mediation and hearing to review the identification, evaluation, or placement of the Student by the Howard County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On June 4, 2013, HCPS notified OAH that it declined to mediate. On June 13, 2013, OAH received notice that the parties had conducted a resolution meeting on June 12, 2013, which did not resolve the case. The matter was scheduled for a telephone prehearing conference on June 26, 2013.

I held a telephone prehearing conference on June 26, 2013. The Student was represented by Holly Parker, Esq. Jeffrey A. Krew, Esq., represented the HCPS. By agreement, the parties

requested that the hearing be scheduled for August 19, 20, 22 and 23, 2013. Under the federal regulations, a hearing must be conducted and a decision is due within forty-five days of certain triggering events. 34 C.F.R. 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2012). I had counsel for the parties' review each of their calendars to determine whether the hearing could be completed within the 45 day period. Each attorney reviewed their calendar with me. Due to scheduling conflicts, including a multi-day due process hearing before the OAH and scheduled summer vacations with witness unavailability, the parties waived their right to have the hearing within the forty-five-day period and agreed that the decision in this case would be issued no later than thirty days after the record closed. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008).

I held the hearing on three days as scheduled; however the matter concluded on August 22, 2013, thereby cancelling the fourth scheduled day of August 23, 2013. Holly Parker, Esq., represented the Student. Jeffrey A. Krew, Esq., represented the HCPS. At the close of the Parents' case, HCPS made a Motion for Summary Decision (Motion). After giving each party ample time to be heard on the Motion, I denied the Motion and proceeded with the hearing. At the conclusion of HCPS' case, HCPS renewed its Motion which I took under advisement and instructed the parties that I would issue my decision based on the evidence presented, as the Motion was essentially the basis of HCPS' case in chief. The close of the record occurred on August 27, 2013.¹

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)-(d) (2012); Md. Code Ann., Educ. § 8-413(e)-(h) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

¹ Ms. Parker requested three business days to submit a Summary of Exhibits and Table of Authorities.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A .05.01.15C; COMAR 28.02.01.

ISSUES

The issues in this case are as follows:

1. Did the HCPS fail to develop an appropriate Individualized Educational Plan (IEP) for the Student for the 2012-2013 school year?
2. Did the HCPS inappropriately refuse to determine that the Student's placement should be at [School 1] for the 2012-2013 academic school year; and if so
3. Is tuition reimbursement (and related expenses and costs) for the 2012-2013 school year at [School 1], the Parents' unilaterally chosen private school placement, appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Student²:

- A. Notes from XXXX XXXX, [School 2], January 17, 2012 (Student Ex. 1)
- B. Letter from Holly Parker to HCPS attorney D. Furman, July 26, 2012 (Student Ex. 2)
- C. Withdrawal of mediation request, July 31, 2012 (Student Ex. 3)
- D. IEP Team Meeting Report, with cover letter from XXXX XXXX, July 13, 2012 (Student Ex. 4)

² Because of considerable inconsistency between the pre-marked Student exhibits and the Student exhibits actually offered into evidence, I have assigned letter designations to the exhibits for the purpose of uniformity; however, the pre-marked number identified for the record by Counsel, based upon pre-hearing disclosures, is included for reference purposes. These exhibits represent all documents offered and admitted, except where otherwise noted.

- E. Letter from D. Furman to Holly Parker, August 24, 2012 (Student Ex. 11)
- F. Letter from [Mother] to XXXX XXXX, August 26, 2012 (Student Ex. 12)
- G. Student's 3rd quarter report card, April 2, 2013 (Student Ex. 44)
- H. Notice of October 11, 2012 IEP team meeting from XXXX XXXX to Holly Parker, October 3, 2012 (Student Ex. 23)
- I. Letter from XXXX XXXX, MSW, to HCPS, October 9, 2012 (Student Ex. 26)
- J. Request for Records and Release of Records, November 15, 2012 (Student Ex. 29)
- K. Letter from XXXX XXXX to Student, February 13, 2012 (Student Ex. 90)
- L. Letter from Jeffrey Krew, with attached documents to XXXX XXXX, July 24, 2013 (Student Ex. 91)
- M. Resume of XXXX XXXX, MSW, LCMFT³

I admitted the following exhibits on behalf of the HCPS⁴:

- Board 1 Education Assessment Report, October 28, 2010
- Board 2 Mediation Agreement, October 20, 2011
- Board 3 [School 2] Annual Educational Report, November 14, 2011
- Board 4 Student's Approved IEP, December 5, 2011
- Board 4-A [School 1] Application for Admission- SY 2012-2013, March 20, 2012
- Board 5 Student's 9th Grade report card, June 7, 2012
- Board 5-A [School 1] Accounts Receivable Printout, June 14, 2012
- Board 6 Application for Home/Hospital Teaching, July 2012
- Board 7 IEP team meeting report, July 11, 2012
- Board 8 HCPS referral packet to [School 3], July 17, 2012

³ Licensed Clinical Marriage and Family Therapist

⁴ Omitted exhibit numbers represent exhibits not offered for admission.

Board 9 E-mail from [School 3] Director of Admissions to XXXX XXXX, July 31, 2012

Board 10 Letter to Holly Parker from XXXX XXXX, August 20, 2012

Board 11 Letter to [Mother] from XXXX XXXX, August 28, 2012

Board 12 [School 1] enrollment contract for SY 2012-2013, August 30, 2012

Board 15 Settlement and Release Agreement SY 2012-2013, September 25, 2012

Board 16 IEP team meeting report, October 11, 2012

Board 17 Observation Report, Dr. XXXX XXXX, December 20, 2012

Board 18 Observation Report, XXXX XXXX, December 21, 2012

Board 19 IEP team meeting report, January 11, 2013

Board 20 Letter to [School 1] Administrator from XXXX XXXX, January 22, 2013

Board 24 Notice for March 21, 2013 IEP team meeting, March 11, 2013

Board 25 E-Mail string between Parent and XXXX XXXX, March 15, 2013

Board 26 Notice of rescheduled IEP team meeting, March 20, 2013

Board 27 Student's Draft IEP, April 12, 2013

Board 28 IEP team meeting report, April 12, 2013

Board 30 Due Process Hearing Request, May 30, 2013

Board 32 HCPS Response to Due Process Hearing Request, June 10, 2013

Board 33 Educational Assessment Report, June 26, 2013

Board 38 XXXX XXXX Curriculum Vitae

Board 40 XXXX XXXX Curriculum Vitae

Testimony

The Parent, [Mother], testified and presented the following witness:

- XXXX XXXX, Head of [School 1]
- XXXX XXXX, Coordinator Learning Specialist for High School Curriculum at [School 2] in the Model Asperger Program (MAP)
- XXXX XXXX, Instructional Facilitator of HCPS Special Education Dept.
- XXXX XXXX, MSW, LCMFT

The HCPS presented the following witnesses:

- XXXX XXXX, accepted as an expert in special education with an emphasis on placement of special education children
- XXXX XXXX, accepted as an expert in special education

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. The Student filed a request for mediation on July 26, 2012 and withdrew the request on July 31, 2012.
2. The Student's most recent due process request was filed on May 30, 2013.
3. The Student was in the 99th percentile in Written Language in the 2012-2013 school year.

FINDINGS OF FACT

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

1. The Student is XX years old and has been diagnosed with Asperger's Syndrome. She also carries a diagnosis of [Disease], XXXX.

2. The Student has always performed at or above grade level academically. She scored at the High level in written language.
3. The Student was found eligible for special education services by the HCPS while in the fourth grade, as a student with Autism. The Student's disability makes it difficult for her to identify and manage triggers to her emotional responses and, as a result, restricts her from socializing and interacting appropriately with peers in a more typical setting. Written language expression is also impacted by the Student's disability.
4. The Student attended [School 4]. In 8th grade, she experienced social and emotional issues in that setting, including self-injurious behaviors, and her Parents withdrew her from school in October 2009. She was home-schooled thereafter, for the remainder of the school year. In August 2010, the Student was unilaterally placed at [School 2] for the 2010-2011 school year (9th grade).
5. The IEP team conducted a reevaluation of the Student and in April 2011 recommended placement at [School 3] for the 2011-2012 school year. The Parents filed a request for mediation and on October 20, 2011, a mediation agreement was reached whereby HCPS agreed to reimburse the Parents for seven months of tuition and the costs of related services for the Student's attendance at [School 2] for the 2010-2011 school year. HCPS also agreed to fund the tuition and related service of counseling for the Student's attendance at [School 2] for the 2011-2012 school year.
6. At [School 2], the Student did well academically when working largely one-on-one and in small groups. She required more accommodations when working in a larger group. Organizational tasks in the classroom remained a challenge for the Student. Her peer

relationships continued to be impacted by periodic signs of a false sense of entitlement and inappropriate or off-mark interactions with peers.

7. The Student did not achieve any of the goals established on the [School 2] IEP; however, she made progress in each of the goal areas. Her goal areas included developing self-advocacy skills and being able to identify how peer relationships develop into friendships, which requires support from a mental health provider.
8. At the end of the first semester of the 2011-2012 school year at [School 2], the Student earned four As, one B, and two Cs. Her second semester grades were four As, two Bs, and one C.
9. From October 29, 2011 through November 2, 2011, the Student was hospitalized at [Hospital] adolescent in-patient unit due to her unsafe behaviors at home and acts of aggression towards her mother.
10. On November 21, 2011, the Parent was notified of a scheduled IEP team meeting for December 5, 2011. A draft of a proposed IEP was included.
11. On December 5, 2011, an IEP team meeting was held. The meeting was attended by the Parent ([Mother]); the Student; XXXX XXXX, the Student's case manager; XXXX XXXX, a Special Educator; XXXX XXXX, a Mental Health Professional; XXXX XXXX; XXXX XXXX; and two associate teachers. Placement was continued at [School 2] through the end of the 2011-2012 school year.
12. Plans for the Student's transition to a less restrictive setting were discussed at the December 2011 IEP meeting. The Student expressed her desire to take some courses at [School 5] ([School 5]). Ms. XXXX was tasked with setting up an observation at [School 5], the Student's local high school. The team agreed that observations of both

settings at [School 2] and [School 5] would be necessary and a follow-up IEP team meeting would be necessary to determine other possible transition activities.

13. During the December 5, 2011 IEP team meeting, the Parent shared her sentiments about the Student's desire to do well and be recognized for her efforts and accomplishments. She also expressed a concern with the distance to [School 2], and raised the issue of whether the Student could participate in physical education, which at that time for the Student, was an activity being replaced with study hall.
14. After team discussion, review of assessments and progress on goals, it was determined that the Student required a small specialized classroom setting to access the curriculum with classroom instruction fused with social skills and peer interaction instruction. Twenty-nine hours of special education classroom instruction per week and one hour of counseling per week was recommended. A private separate day school was deemed an appropriate placement with [School 2] as the service school, until the end of the 2011-2012 school year.
15. The December 5, 2011 IEP was approved. The Student was scheduled for her next annual review on or about December 4, 2012.
16. The IEP included instructional supports such as frequent checks for comprehension of direction and written supports such as checklists, recipes, routine and written instructions. The supports were required across the day in a small, highly structured classroom to assist the Student in the areas of executive function, maintaining attention to task and self-management.
17. The IEP included two goals for written language expression in the area of academics and six behavioral goals in self-management. The first progress report in January 2012

indicated that the Student was making sufficient progress on all of the goals except the self-management goal to keep an organized binder for class and homework completion.

18. By the Spring of 2012, the Student and [School 2] staff had begun to discuss mainstreaming her into a less restrictive setting. Generally, [School 2] seeks to transition students into a less restrictive setting, with more typical peers, after the 9th/10th grade because, according to its staff, the school is considered to represent a “small bubble” within the realm of educational settings.
19. The Student became increasingly unhappy with having to attend [School 2] and expressed to [School 2] staff her desire to interact with more typical peers. On February 13, 2012, Ms. XXXX, [School 2]’s placement coordinator, wrote to the Student acknowledging her (the Student’s) dismay with attending [School 2] and scheduling a meeting to discuss her future choices. Sometime thereafter, Ms. XXXX referred the Parents to the [School 1].
20. On March 20, 2012, the Parents applied to the [School 1] for the Student’s admission for the 2012-2013 school year. On June 14, 2012, the Parents placed a \$2,000.00 deposit with [School 1] to hold a spot for the Student in the upcoming school year.
21. At the time the Parents applied to the [School 1], XXXX XXXX was the Admissions Director at the school. She left their employ sometime later that Spring and became self-employed in a private practice. During the summer of 2012, the Parents hired Ms. XXXX as the Student’s therapist.
22. On July 11, 2012, a Central Education Placement Team (CEPT) meeting was held. The purpose of the meeting was to review the Student’s IEP and discuss placement for the 2012-2013 school year. Ms. XXXX and Ms. XXXX from [School 2] participated by

telephone. Also present were both Parents (and their attorney Ms. Parker), XXXX XXXX, and several HCPS special educators, including XXXX XXXX, the chair of the special education department at [School 5].

23. A discussion ensued regarding the small class sizes at [School 2] (8 -11 students) and concerns that a return to the Student's home school, [School 5], might not be appropriate for the Student due to the large environment. [School 5] was rejected as a possible placement option.
24. [School 6] in the XXXX was discussed but then rejected because of concerns with the physical environment.
25. [School 3] was proposed as a placement option. The Student and her Parents, along with their attorney, Ms. Parker, had previously visited [School 3] in May 2011. The Student did not like [School 3] and her Parents preferred that the Student remain in the small environment at [School 2]. Ms Parker did not think [School 3] was an appropriate placement for the Student.
26. Ms. XXXX was adamant that [School 3] was an appropriate placement for the Student; that the school could implement the Student's IEP and provide her with educational benefit. In addition, HCPS could provide the transportation. The commute to [School 3] could be as long as an hour and the Parents were concerned about the Student being on the bus for that period of time.
27. [School 3] was accepted at the Student's placement and the Parents stated their disagreement.
28. Around this time in July 2012, the Student was having a difficult time with her social interactions and, during an unspecified period, was physically ill and on a liquid diet.

The Student was absent 21 days during the 2011-2012 school year and frequently late because of resistance to attending school. The Parents were considering placing the Student in home and hospital teaching. They had obtained an application from HCPS and, on the same day as the CEPT team meeting, on July 11, 2012, obtained the required statement from the Student's physician to support the application.

29. The Parents did not mention home and hospital placement at the July 11, 2012 CEPT team meeting.
30. As a result of the outcome of the CEPT team meeting, on July 17, 2012, HCPS sent a referral package to [School 3] for the Student's placement for the 2012-2013 school year.
31. On July 31, 2012, the [School 3] Director of Admissions e-mailed Ms. XXXX informing her that the Student was scheduled for a preadmission interview on August 8, 2012. That interview was subsequently rescheduled by the parents to August 14 and then August 16, 2012. The Student never attended the preadmission interview.
32. The Parents did not discuss the [School 1] as a placement option at the July 11, 2012 IEP team meeting. They did, however, file a request for mediation.
33. The July 26, 2012 mediation request, stipulated to by the parties, was withdrawn on July 31, 2012 because of settlement negotiations. Negotiations related to the Student's placement for the 2012-2013 school year were ongoing into August 2012 with offers and counter offers presented by the Parents through their counsel, Ms. Parker, and Mr. Furman, counsel for HCPS.

34. Meanwhile, the Student began attending the [School 1] on August 27, 2012 and the Parents signed an enrollment contract for the Student's attendance at the [School 1] on August 30, 2012. The Parents agreed to pay the [School 1] \$24,550.00.
35. At no time did the Parents notify HCPS of the Student's placement at the [School 1].
36. On September 13, 2012, as a result of the ongoing negotiations precipitated by the July 2012 mediation request and withdrawal, the Parents signed a settlement agreement in which HCPS offered to fund payment of tuition at [School 2] for another school year, that is, 2012-2013. HCPS does not provide transportation to [School 2] so it agreed also to reimburse \$3,000.00 for transportation.
37. The terms of the settlement agreement provide for due process to remain available to the Parents at any time after the signing of the agreement on September 13, 2012 but bar claims against HCPS from October 2009 "through the date this agreement is signed by the parents."⁵
38. Despite the Parents' agreement to have HCPS fund the Student's attendance at [School 2] for the 2102-2013 school year, the Student never attended [School 2].
39. HCPS learned that the Student had never attended [School 2] via a phone call from [School 2], during the last week of September 2012, to Ms. XXXX related to questions associated with how a cost sheet should be handled since the Student was sick and had not yet been in attendance.
40. Ms. XXXX, thereafter, on October 3, 2012, notified Ms. Parker that an IEP team meeting would be scheduled on October 11, 2012. Because information obtained from [School 2] during the phone call suggested that perhaps the Student was ill, Ms. XXXX

⁵ This finding addresses HCPS' Motion that sought to dismiss the Parents' due process complaint because of the settlement agreement.

also asked Ms. Parker if the Parents had a completed home and hospital application, and, if so, to forward it to HCPS as soon as possible.

41. An IEP team meeting was held on October 11, 2012. The purpose of the meeting was to review the Student's attendance and consider home and hospital, if appropriate. In attendance were: the Parent ([Mother]), Ms. Parker, Ms. XXXX, XXXX XXXX (Director of Student Services/Transition Specialist), and XXXX XXXX. The Parent revealed for the first time to HCPS that the Student had been attending the [School 1] since the end of August 2012.
42. The Student did not attend [School 2] for the 2012-2013 school year and HCPS did not make any tuition reimbursement payments to [School 2] for the 2012-2013 school year.
43. At the October IEP team meeting, the Parent requested funding for the [School 1] and presented two letters (one from the Student's therapist, Ms. XXXX) and an e-mail to support her request. HCPS rejected the request; however, Ms. XXXX was willing to set up observations of the Student at the [School 1] and reconvene another IEP team meeting to review the observation and the documents submitted by the Parent. In addition, due to the medical documents presented from the Student's doctor and therapist, HCPS wanted to have a medical professional present at the next IEP team meeting to review the new medical information.
44. One of the documents presented to the IEP team was from the Student's private therapist, Ms. XXXX. Ms. XXXX recommended that the Student continue at the [School 1] because it offered a supportive small setting where she could improve her social interaction skills.

45. Two HCPS employees observed the Student at the [School 1]. Dr. XXXX XXXX, [School 5] psychologist, observed on December 20, 2012 and for a period of 47 minutes found the Student to be on-task 99% of the time. Her social interactions were not noted to be unusual. Ms. XXXX XXXX, head of [School 5] Special Education, observed the Student on December 21, 2012. Ms. XXXX observed the Student to be on task without the use of specialized instruction or accommodations.
46. A follow-up IEP team meeting was held on January 11, 2013 for the purpose of reviewing observations and letters provided by Parent. The Parent, the Student's therapist, and Ms. Parker were in attendance. The team discussed Dr. XXXX's and Ms. XXXX's observations, as well as the documents presented by the Parents, and reached a consensus that [School 3] was the least restrictive environment in which the Student's educational needs could be met. The Parent did not agree and requested placement at the [School 1] expressing that it is the best school for the Student. The Parent also requested a new IEP. HCPS agreed to collect data from [School 1] and develop a new IEP. Placement would continue at [School 2] as provided in the settlement agreement.
47. On January 22, 2013, HCPS requested from the [School 1] data and supporting documentation related to progress toward the Student's goals and objectives, work samples, discipline records, etc.
48. Notice for a February 28, 2013 IEP team meeting was sent to the Parents on February 8, 2013. The purpose of the meeting was to review existing data, determine the need for assessments and develop and approve an IEP. Ms. Parker responded on February 13, 2013, indicating that the 28th was an acceptable date.

49. The IEP team meeting scheduled for February 28, 2013 did not go forward, for unexplained reasons, and was rescheduled for March 21, 2013. On March 15, 2013, the Parent e-mailed Ms. XXXX and indicated that Ms. Parker was not available for the meeting on March 21, 2013. The Parent also forwarded to Ms. XXXX a letter from the Student's physician, Dr. XXXX, for consideration by the team. XXXX XXXX, HCPS school nurse, wrote to Dr. XXXX concerning the Student's diagnosis of [Disease]. Dr. XXXX responded on April 11, 2013.
50. The IEP team meeting was rescheduled for April 12, 2013.
51. On April 12, 2013, an IEP team meeting was held. In attendance were the Parent ([Mother]); her attorney, Ms. Parker; Ms. XXXX; Dr. XXXX; XXXX XXXX; a nurse and a resource teacher; as well as the Student's English teacher, who participated by telephone; and the Student's therapist, Ms. XXXX. Representatives from the [School 1] were invited but none were available to attend.
52. At the meeting, the Parent, the Student's therapist, and Ms. Parker each expressed her belief that the [School 1] is the best school to meet the Student's needs.
53. The data from [School 1] provided to HCPS (at HCPS' request) consisted of the Student's third quarter report card and six pages of individual student reports for January, February, and March 2013, which provided grades of individual classwork or homework assignments. Some work samples were also provided; however, no progress reports related to goals or objectives were provided.
54. At the April 12, 2013 IEP team meeting, an IEP draft was developed from present levels provided in the information from the [School 1] and information from the Student's private therapist and physician. Due to the limited data from the [School 1],

however, and questions about the nature of the Student's disability or disabilities, the IEP team agreed to conduct a reevaluation to determine if the Student remains eligible for special education and related services, as well as to determine the disability. The team would then develop and approve the IEP. Educational and psychological assessments were recommended along with classroom observation.

55. On April 18, 2013, Ms. XXXX forwarded to the Parents the two consent forms: a *Parental Consent for Evaluation or Reevaluation*, as well as an *Informed Consent for Psychological Assessment* form. The Parents did not return the consent forms.
56. The Student completed the 2012-2013 school year at [School 1]. [School 1] is a private general education school that is not considered a special education school, but rather considers its small learning setting to be a college preparatory school for children challenged by neurocognitive and physical disabilities, anxiety and/or depression. There are approximately 55 students enrolled at [School 1]. None of the students currently enrolled are funded by public school systems.
57. [School 1] does not prepare an IEP for its students. If a student, such as this particular Student, enrolls at [School 1] with an IEP, the staff does not implement the IEP; however, it is placed in the Student's file. None of the twelve faculty members are MSDE Board certified. Any accommodations provided to the Student, such as quiet space or an individual room for assignments or providing a calculator, were made based upon the staff's assessment of her needs not per specific goals/objectives established in an IEP.
58. The Student's grades were very good at [School 1]. She earned all A's and B's and was on the honor roll.

59. The Student's attendance at [School 1] was fair. Absences remained an issue for the Student, however.
60. The Student's IEP provides for five social/emotional goals requiring special education services. [School 1] does not have a psychologist on site. The Student receives therapy privately with Ms. XXXX.
61. [School 1] cannot fully implement the Student's IEP. There is no mental health provider on staff to support the social/self-management goals and objectives. There is no nurse on staff at [School 1].
62. [School 3] is a certified special education school. Social workers and psychologists are on staff with psychiatric consultation available as required. The program offers a focus on Autism/Asperger's and emotionally disabilities. The school is a member of MANSEF⁶ and employs special education certified teachers. The teachers at [School 3] can implement the Student's IEP, which requires twenty-nine hours of special education classroom instruction and one hour of counseling per week. The Student's goals for self-management behavior, social interaction, and study/organizational skills could be implemented at [School 3].
63. The December 5, 2011 and April 12, 2013 IEPs, followed up with the requested assessments for educational and psychological assessments, as well as classroom observation is appropriate to allow the Student to benefit educationally from the instruction described in the IEP.

⁶ Maryland Association of Non Public Special Education Facilities.

DISCUSSION

The Legal Framework

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2013), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2012) and COMAR 13A.05.01. The IDEA provides that all students with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412 (2010). Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991).

The requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined a 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 provide educational benefit to the handicapped child.

458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures

set forth in the IDEA; second, there must be a determination as to whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. The Parents did not allege nor did they produce any evidence to support a finding that the HCPS failed to comply with procedures. As there were no procedural compliance issues, the following analyses will first turn on whether the IEP, as developed, is reasonably calculated to enable the Student to receive educational benefit.

To provide a FAPE, the student's educational program must be tailored to the student's particular needs and take 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)(A) (2010).

Among other things, an IEP depicts a student's current educational performance, sets forth annual goals and short-term objectives and measurement of improvements in that performance, describes the specifically-designed instruction and services that will assist a student in meeting those objectives, and indicates the extent to which a student will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010).

Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. "Ultimately, the [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details

of that education to state and local school officials.” *Barnett v. Fairfax County School Board*, 927 F. 2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).⁷

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, a student must be placed in the least restrictive environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). Yet, placing 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.* and 34 C.F.R. § 300.114(a)(2) (2012). 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. *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

There has always been a statutory preference for educating children with learning disabilities in the LRE with their non-disabled peers. The IDEA provides as follows:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2010).

However, this “mainstreaming” requirement is “not an inflexible federal mandate.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

⁷ The IDEA is not intended to deprive educators of the right to apply their “professional judgment.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3rd 996, 1001 (4th Cir. 1997).

The IDEA does not require a local educational agency to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a) (2012). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington* at 373-374). Parents may recover the cost of private education only if they satisfy a two pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs.

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, in this matter, the Parents have the burden of proving that the Student's IEP, specifically as it pertains to the Student's proposed placement for school year 2012-2013 at [School 3], is not reasonably calculated to provide educational benefit to the Student. If I determine that a FAPE was not afforded to the Student, then the Parents have the burden of showing that [School 1] is an appropriate private school placement.

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*. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District of Greenville County*, 303 F. 3d.

523, 527 (4th Cir. 2002). The IEP is not required to “maximize” educational benefit; it does not require the “ideal.” *A.B. ex rel B.B. v. Lawson*, 354 F.3d 315, 327,330 (4th Cir. 2004).

Position of the Parties

Parents

The Parents argue that the HCPS has not provided the Student with a FAPE for the 2012-2013 school year. The IEP developed and approved in December 2011 provided for continued placement at [School 2] (that is, outside the general education setting) through the end of the 2011-2012 school year per the Parents’ request pursuant to a settlement agreement. The IEP provided for twenty-nine hours of special education services outside the general education setting and one hour a week of counseling outside the general education setting. The Student remained enrolled at [School 2] until the end of the 2011-2012 school year, but the Parents chose not to re-enroll her at [School 2], choosing instead [School 1]. Meanwhile, IEP team meetings held from October 2012 through March 2013 did not result in the development of an approved IEP although, at the January 2013 IEP team meeting, HCPS did recommend placement at [School 3]. The Parents argue that placing the Student at [School 3] for 2012-2013 would result in a denial of a FAPE. As a result of the denial of a FAPE, they argue that [School 1] is an appropriate unilateral placement for the Student and that the HCPS should reimburse them the cost of tuition and related costs and expenses for the Student’s attendance at [School 1] during the 2012-2013 school year.

HCPS

The HCPS argues that it provided the Student with a FAPE for the 2012-2013 school year based on the IEP team recommendations that [School 3] would provide the Student with personalized instruction with sufficient support services to permit the Student to benefit educationally from that instruction. Alternatively, if it is determined that the HCPS did not afford the Student a FAPE, then HCPS argues that [School 1] is not an appropriate placement for the Student and that reimbursement for tuition and related costs and expenses should be denied.

Student Background

The Parent, [Mother], testified that the Student carries a diagnosis of Autism. [Mother] described the behaviors the Student exhibited while enrolled at [School 4] that caused her to withdraw the Student and home-school her. During that time, the Student was self-injurious, was the subject of bullying and was terrified of going to school. The Parents filed a request for mediation and enrolled the Student at [School 2]. In October 2011, the Parents and HCPS entered into a settlement agreement for placement at [School 2] at the expense of HCPS (reimbursement for seven months) and the Parents withdrew their request for mediation.

[Mother] stated that, during the 2011-2012 school year, the Student became disillusioned with the lack of more typical peers while attending [School 2] and experienced difficulties with her social interactions. In addition, she became physically ill and, in the spring of 2012, was diagnosed with [Disease]. In July 2012, the Parents obtained an application for home schooling but did not complete and submit it until October 2012. [Mother] maintained that staff at [School 2] recommended the [School 1] to the Parents and after a visit and consultation with the Student, who liked what she observed there, her psychiatrist and therapist, decided to give the [School 1] a try. [Mother] acknowledged she never discussed the unilateral placement with HCPS but the

Parents have been immensely satisfied with the Student's performance at the [School 1], indicating that she has made friends for the first time, has felt like part of the community, and even participates in extra curricular activities like volleyball and softball. Academically, [Mother] testified that the Student earned all A's, except for Art, and is enthusiastic to return for the 2013-2014 school year.

2011-2012 School Year

The Student was found to be eligible for special education services under the educational disability of Autism, which is believed to impact her in written expression, social interaction skills and self-management behavior. In April 2011, the IEP team recommended the Student be placed at [School 3]. The Parents disagreed with the placement and filed a request for mediation. On October 20, 2011, a mediation agreement was reached and HCPS funded the Student's placement at [School 2] during the 2011-2012 school year. The Student did well initially, earning four As, one B, and two Cs at the end of the first semester; however from October 29, 2011 through November 2, 2011, the Student was hospitalized at [Hospital]'s adolescent in-patient unit due to her unsafe behaviors at home and acts of aggression towards her mother. On November 21, 2011, the Parent was notified of a scheduled IEP team meeting for December 5, 2011. A draft of a proposed IEP was included. On December 5, 2011, an IEP team meeting was held. Plans for the Student's transition to a less restrictive setting were discussed. The Student expressed her desire to take some courses at [School 5]. Ms. XXXX was tasked with setting up an observation at [School 5], the Student's local high school. After team discussion, review of assessments and progress on goals, it was determined that the Student required a small specialized classroom setting to access the curriculum with classroom instruction interfaced with social skills and peer interaction instruction. A private separate day school was deemed an

appropriate placement with [School 2] as the service school. The December 5, 2011 IEP was approved. The Student was scheduled for her next annual review on or about December 4, 2012.

The Parents fully participated in the development and approval of the December 2011 IEP and did not object to goals or objectives. During the time around January 2012, however, the Student became increasingly unhappy with the lack of interaction with more typical peers and, after some discussion, Ms. XXXX, [School 2]'s placement coordinator, referred the Parents to [School 1]. On March 20, 2012, the Parents applied to [School 1] for the Student's admission for the 2012-2013 school year and subsequently placed a \$2,000.00 deposit with [School 1] to hold a spot for the Student in the upcoming school year.

Unilateral Placement at [School 1]

The Parents prefer to have the Student educated in a small classroom setting. There were approximately seven students in the Student's classroom at [School 1] and the Student acclimated well to that setting. Earlier IEP team meeting discussions on the issue of placement indicate that other service schools such as [School 5] and [School 6] were discounted as inappropriate placements due to the larger physical classroom setting. Mr. XXXX testified that [School 1] has no Maryland certified educators and has no obligation to implement an IEP since it is not certified as a special education school. He maintained, however, that the Student was generally very strong academically and was only provided accommodations as needed to deal with her social and self-regulation difficulties. Mr. XXXX maintained that the Student improved in those areas as the school year progressed; however, he had no written findings or documentation.

The Parents had obviously made their decision about [School 1] when they submitted an application for admission in March 2012, paid a \$2,000.00 deposit in June 2012 and signed an

enrollment contract for the Student's attendance at [School 1] on August 30, 2012. By entering into this contract, the Parents were financially committing themselves to pay to [School 1], \$24,550.00, whether the Student attended class there or not. I find that the Parents had no intention of sending the Student to [School 2] once they were already financially committed to [School 1]. Nevertheless, [Mother] negotiated with HCPS's attorney late into the summer of 2012, requesting continued payment for [School 2] and, on September 15, 2012, signed the settlement agreement for HCPS funding of [School 2]. In addition, she attended the July 2012 CEPT meeting and did not tell the team of her decision to enroll the Student at [School 1].

This kind of evasiveness was also quite evident during [Mother]'s testimony. The Parent vacillated on just about every question on cross-examination, as if the answer was staged in a way to capture the necessary elements of a failure to provide FAPE. Throughout her testimony, the Parent had trouble recalling many events, particularly those events that might negatively impact the Student's legal position. For example, when asked by her attorney why she didn't present the home school application to the CEPT team at the July 2012 team meeting she responded that "no one wanted it." She implied that Ms. XXXX would not listen to her. Then, however, on cross-examination, [Mother] stated that she did not present the home schooling application because she hadn't obtained all of the necessary medical certifications at the time of the July 2012 CEPT team meeting. These are just two examples of many vague and conflicting statements made by the Parent. While appearing to be intimately involved (as she should be) in her Student's education, when asked on cross-examination if the Student had an IEP at [School 1], she responded "I don't know if I can answer that." She also stated that she did not ask about the teachers' certifications or about whether individualized instruction was available at [School

1]. Those responses did not convey as credible given the passionately concerned impressions she presented on direct examination.

In any event, the terms of the settlement agreement are not relevant because neither party executed its obligation; the default result of which is the Parents interrupted the development of the IEP process, when after the July 11, 2012, CEPT team meeting, the Parents filed a request for due process and then withdrew the request because of the settlement negotiations, which we now know were not entered into in good faith. These circumstances leading to the 2012-2013 placement of the Student at [School 1] reflects on the motivation of the Parents and their sincerity during the IEP process. I find the Parents' failure to disclose the information about the Student's placement at [School 1] or their commitment to pay tuition for the entire year as of September 15, 2012 very troubling. The Parents applied to [School 1] before the July 11, 2012 team meeting but did not mention this at the meeting. Counsel for the Parents argued that the \$2,000.00 was only provided to hold the Student's place. However, certainly by the time that the settlement agreement was signed on September 13, 2012, which I might add was after considerable back and forth communications between the Parents and Mr. Furman, the Parents were already committed to [School 1] for the entire year's tuition, whether the Student attended or not. It is not plausible, therefore, that the Parents were willing to forfeit \$24,550.00 by sending the Student to [School 3], particularly when they had full tuition reimbursement as an offer from HCPS.⁸

⁸ It should be noted that the Parents' failure to properly notify HCPS of their placement of the Student at [School 1] in violation of the 10-day provision mandated by COMAR13A.05.01.16C would also prohibit tuition reimbursement. I have rendered a decision, however, based upon an analysis of FAPE, rendering moot the issue of notice.

The IEP for the 2012-2013 School Year is Appropriate

One of the primary purposes of the IDEA was “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs” 20 U.S.C.A. § 1400(d)(1)(A) (2010); *see also MM, supra*.

Under IDEA, a state must provide all children with disabilities a FAPE. 20 U.S.C.A. §§ 1400(c), 1412(d)(1)(1)(A). A FAPE requires the school district to provide instruction that suits the child's needs, as well as related services to ensure that the child receives some educational benefit from instruction. 20 U.S.C.A. § 1401(9); *see also* Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012) (defining FAPE); 20 U.S.C.A. § 1401(26) (2010) (defining related services). However,

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential. (citations omitted).

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993).

Rather the [FAPE] requirement is satisfied when the state provides the disabled child with “personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.” *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 330 (4th Cir. 2004), citing *Rowley*, 458 U.S. at 203.

From the review of the documentary evidence and the December 2011 IEP, as well as the draft April 2013 IEP, it is abundantly clear that all of the Student’s identified areas of weakness are addressed through goals and/or accommodations, supplementary aids, services, and supports provided under that IEP. Although the Student’s parents rejected the IEP, they really do not argue otherwise. Instead, the Parents effectively conceded that only the decision to place the

Student at [School 3] for delivery of the listed accommodations, aids, and services is being challenged in this proceeding. Basically, the Parents and their witnesses claim that the program described in the IEP can only be successfully delivered to the Student in a small, self-contained special education setting such as [School 1].

To this end, the Parents contend that the IEP developed for the 2012-2013 school year was not appropriate. Ms. XXXX, the Student's therapist, testified that she began working with the Student during the summer of 2012, after she left the employ of [School 1]. Ms. XXXX was accepted as an expert in social work and she opined that the Student's relationships with her peers and teachers benefitted greatly from the small setting at [School 1]. Ms. XXXX also stated that she visited [School 3] with the Student and her Parents in the spring of 2013 and had a favorable impression of the school, but that the Student was very against attending there.

Other than the Student's therapist, there was no expert testimony presented to even broadly allege that the IEP should have included more or different goals, objectives, accommodations or specialized instruction. Mr. XXXX, the head of [School 1], testified and provided little in the way of meaningful testimony since he stated he didn't recall whether he ever participated in the Student's IEP team meeting by telephone and he had never taught the Student. When asked about the Student's attendance, he stated "it was OK" but provided no specifics. Ms. XXXX of [School 2] also testified about the Student's needs, stating that the Student did well academically, receiving A's and B's and one C, which was due to difficulty managing her time and organizing assignments. However, Ms. XXXX maintained that the Student faced challenges with her social interactions, sometimes doing hurtful things to others and ultimately not desiring to attend school at [School 2] due to the lack of more typical peers.

Ms. XXXX is the Coordinator of Model Asperger Program but presented no particular expertise in special education.

I am persuaded that the Student needs a small classroom setting, with instructional supports, such as supports for staying on task and being organized and enhanced teacher feedback, to name just a few. Her IEP provides for that and the Parent concurs that the Student needs those accommodations. Due to the Parent's faltering and wavering testimony, however, I am left with little in the form of persuasive evidence of the Student's needs beyond what is addressed in the IEP. The Parent argues simply that the IEP does not provide for the best placement for the Student.

It must necessarily follow that if there were no broad assertions of an inappropriate IEP (other than placement), there were no specific assertions offered. Without more, I can not find that the HCPS failed to provide the Student FAPE for the 2012-2013 school year. In evaluating the appropriateness of the IEP team's decision on placement, I find that the IEP team considered assessment results, information from the Student's teachers and service providers, information from the private evaluators, and concerns of the Parents, and developed an IEP that was consistent with the evaluative data, as required by the regulations. The goals address all of the deficits identified by the evaluative data. All the deficits that impact the Student's ability to progress in the general curriculum have been addressed either through the development and implementation of an annual goal or with the provision of appropriate accommodations. The Parents did not offer any evidence that the annual goals are inappropriate to meet the Student's needs.

The IEP process was exhaustively exercised with voluminous requests to the Parents for attendance at IEP team meetings, but those efforts were frustrated by the Parents' unavailability.

HCPS documents lay out in a credible fashion, after being blindsided with the news of the Student's enrollment somewhere other than what was set out in the settlement agreement, the agency's efforts to get the Student back on track with establishing her special education needs. From October 2012 until April 2013, IEP team meetings were scheduled and rescheduled until finally, on April 12, 2013, a draft IEP was proposed, requiring, however, additional assessments. The Parents did not provide the required consents for the assessments and, therefore, a final IEP was not approved. The Student was scheduled for a new IEP in December 2012; however, the Parents have not raised a procedural issue related to any delay and certainly no procedural issue presents itself under these particular circumstances.

On July 11, 2012, a CEPT team meeting was held. At the meeting, the Student's goals and objectives and her progress were reviewed for the 2012-2013 school year. The Parents did not object to the goals or the objectives. A discussion ensued about the Student's home school [School 5] and the Parent commented that while she "would love" to see the Student at her home school, the placement was not appropriate at that time. The CEPT team discussed other placement options and Ms. XXXX explained that [School 3] is very appropriate for the Student because [School 3] could fully implement the Student's IEP and HCPS could provide transportation. [School 3] was considered a possible placement by the CEPT team and the Parents stated their disagreement. A referral packet was forwarded to [School 3].

The IEP offered by the HCPS addresses the Student's needs as identified in Ms. XXXX's letter. It contained measurable social and emotional goals and objectives to achieve those goals. Again, the Parents had no issue with either the goals or the objectives. Ms. XXXX, a special education expert who observed the Student in the classroom at [School 1], testified that she did not observe the implementation of the IEP, whereby social skills or self-management was being

addressed. She stated that she was familiar with [School 3] and recommended it based on the Student's needs and HCPS' experience with the program.

I find Ms. XXXX to be a very credible witness with decades of experience in special education. She expressed confidence that the Student's needs could be met in the [School 3] setting. I concur with her conclusion. I note that Ms. XXXX did not observe the Student at the [School 1]; however, I nevertheless find her testimony credible and persuasive. As stated by the 4th Circuit Court of Appeals in the case of *JH v. Henrico County School Bd.*, 395 F.3d 185, 197-198 (4th Cir. 2005), "if the Hearing Officer chooses to credit the testimony of any witness who did not actually observe [the 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 reports." As part of her evaluation, Ms. XXXX consulted with Dr. XXXX and Ms. XXXX and reached a professional judgment. Accordingly, I give great weight to her testimony based on her knowledge of the [School 3] program and her professional expertise in the area of special education. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002).

I note, however, "the required deference to the opinions of the professional educators [does not] somehow relieve the hearing officer or the district court of the obligation to determine as a factual matter whether the IEP is appropriate simply because a teacher or other professional testified that the IEP is appropriate." *County Sch. Bd. v. Z.P. ex. Rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005). Counsel for the Student appropriately argued that despite presenting testimony from education experts, I should nevertheless give consideration to the Student's witnesses and I

am mindful of this. The Student's witnesses testified that the Student has benefitted greatly from her time spent at [School 1] due to the unique small setting. I find that the evidence does support that contention. In all respects, I have certainly given their testimony the appropriate consideration, as discussed above. With that said, I find that the Parents did not offer sufficiently credible evidence to contradict the opinions offered by HCPS staff.

As previously stated, there is no allegation of any procedural issue with the IEP. The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant to second guess the judgment of education professionals." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir.1990). Based on the evidence before me, I find that the IEP, as written, would permit the Student to benefit educationally from the instruction provided in the IEP.

Least Restrictive Environment (LRE)

It is a legal requirement that a student with disabilities be educated in the least restrictive environment to achieve a FAPE. The law requires that these students participate in the same activities as their nondisabled peers to the maximum extent appropriate. 20 U.S.C.A. § 1412(a)(5) (2010). The IDEA regulations require the IEP team to first consider whether the provision of supplementary aids and services will permit placement of a student with a disability in the regular education environment rather than a more restrictive environment. 34 C.F.R. § 300.114(a)(2) (2012). The IEP team recommended that the Student be placed in [School 3] outside the general education classroom. I am sympathetic to the Parents' desire to have the child receive the best education possible and to maximize her full potential. However, the law does not require the public agency to fund educational services for a student at a private day

school simply because a parent is seeking the best education for the student to maximize his fullest potential.

After carefully reviewing all of the evidence presented by the parties, I find that the Student's 2012-2013 IEP was designed by her IEP team with a full understanding of the Student's educational needs, as well as her behavioral issues. Appropriate goals, objectives and other services are included in the Student's IEP, which are reasonably calculated to allow the Student to make meaningful educational progress. Moreover, as the evidence presented established, the IEP team's decision to place the Student at [School 3] for the 2012-2013 academic year will afford the Student a FAPE because she will have the opportunity to receive educational benefit in the least restrictive environment. [School 3] must provide the Student's instruction outside the general classroom setting, but with the opportunity to interact with peers and adults while building improved social behaviors. As previously discussed, I am persuaded that [School 3] has the staff and structure to implement the Student's IEP. A more restrictive setting would be in violation of the IDEA. 34 C.F.R. § 300.114(a)(2) (2012).⁹

In conclusion, pursuant to *Carter*, the appropriateness of a parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Carter*, 510 U.S. 7; *Burlington*, 471 U.S. 359. In this matter, I have concluded that the IEP and placement offered by the public agency offers the Student a FAPE. Accordingly, an analysis pursuant to *Burlington* and *Carter* is inapplicable and the issue of whether [School 1] is appropriate does not need to be addressed in this decision.

⁹ Another issue rendered moot by upholding the appropriateness of the IEP is whether [School 1] can be an appropriate placement when it is not certified to provide special education services by MSDE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that the Parents have failed to establish that the IEP implemented by Howard County Public Schools for the 2012-2013 academic year was not reasonably calculated to offer the Student educational benefit. 20 U.S.C.A. §§ 1400- 1487 (2010).

I further conclude that the IEP and placement determined by Howard County Public Schools is reasonably calculated to offer the Student a free and appropriate public education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

ORDER

I **ORDER** that the Parents' request to have the Student placed at [School 1] at the expense of Howard County Public Schools, is **DENIED**.

September 13, 2013
Date Decision Mailed

Deborah H. Buie
Administrative Law Judge

DHB

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.

The Office of Administrative Hearings is not a party to any review process.