

XXXX XXXX,

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOL SYSTEM

\* BEFORE STEPHEN J. NICHOLS,

\* AN ADMINISTRATIVE LAW JUDGE

\* OF THE MARYLAND OFFICE

\* OF ADMINISTRATIVE HEARINGS

\* OAH No.: MSDE-HOWD-OT-13-29619

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### **DECISION**

STATEMENT OF THE CASE  
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SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER  
REVIEW RIGHTS

### **STATEMENT OF THE CASE**

On July 31, 2013, XXXX and XXXX XXXX (Parents) on behalf of themselves and their son, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the evaluation, provision of services, and/or placement of the Student by the Howard County Public School System (HCPSS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). On August 12, 2013, the HCPSS filed a written response to the Due Process Complaint. 20 U.S.C.A. § 1415(c)(2)(B)(ii) (2010).

On September 6, 2013, a telephonic pre-hearing conference was held at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. The following individuals participated: Stephen J. Nichols, Administrative Law Judge (ALJ); Jeffrey A. Krew, Esquire, representing HCPSS; and Holly L. Parker, Esquire, representing the Parents and the Student. During the conference, a four-day hearing was scheduled.

On Monday, September 23, 2013; Tuesday, September 24, 2013; and Thursday, September 26, 2013, the ALJ held a hearing in this matter at the HCPSS Cedar Lane Special Center, 5451 Beaverkill Road, Columbia, MD 21044. 20 U.S.C.A. § 1415(f)(1)(A).<sup>1</sup> On Friday, October 4, 2013, the ALJ completed the hearing as a telephonic hearing at the OAH with the parties and their representatives participating and presenting closing oral arguments over the telephone.

The IDEA and the applicable regulations provide for a thirty-day resolution period when a due process complaint is filed during which a resolution meeting or a mediation session is to take place: “If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.” 20 U.S.C.A. § 1415(f)(1)(B)(ii). “Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.” 34 C.F.R. § 300.510(b)(2) (2012). 34 C.F.R. § 300.510(c) provides for possible adjustments to the thirty-day resolution period such as “[a]fter . . . the . . . resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible . . . .” 34 C.F.R. § 300.510(c)(2). A final decision must be reached and mailed to the parties “not later than 45 days after the expiration of the 30 day period under §300.510(b), or the adjusted time periods described in §300.510(c) . . . .” 34 C.F.R. § 300.515(a) (2012).

On July 31, 2013, the Parents filed the Due Process Complaint. On August 14, 2013, the parties signed a written statement that no agreement was possible at the end of a resolution meeting. The forty-five day window for issuing a decision in this case ends on September 28, 2013. However, the parties jointly agreed to waive the time limits set forth in 34 C.F.R. § 300.515 because the parties and their

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<sup>1</sup> On September 24, 2013, the HCPSS made a motion for judgment at the close of the evidence offered by the Parents. The ALJ “decline[d] to render judgment until the close of all the evidence.” COMAR 28.02.01.12E(2)(b). Subsequently, the HCPSS presented its evidence in this case. “In so doing, the [HCPSS] withdr[ew] the motion.” COMAR 28.02.01.12E(3).

witnesses were not available to conclude the hearing prior to September 28, 2013.<sup>2</sup> Therefore, the parties agreed that the due date for the decision would be thirty days after the close of the record. The record closed on October 4, 2013. Therefore, the decision must be issued not later than Sunday, November 3, 2013. This decision is issued before that date and is timely.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a) (2012); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and COMAR 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the OAH Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES**

(1) Whether the May 31, 2012 Individual Education Program (IEP) prepared by the HCPSS was reasonably calculated to provide the Student with meaningful educational benefit during the 2012-2013 school year.

(2) Did the HCPSS fail to provide the Student with an opportunity for a free appropriate public education (FAPE) during the 2012-2013 school year?

(3) Whether the April 10, 2013 IEP prepared by the HCPSS is reasonably calculated to provide the Student with meaningful educational benefit for the 2013-2014 school year.

(4) Whether placement of the Student at the [Program 1] at the [School 1], as proposed by the HCPSS for the 2013-2014 school year, will provide him with an opportunity for a FAPE in the least restrictive environment (LRE); and if not, whether placement of the Student at the [Program 2] at [School 2], a non-public school, as sought by the Parents for the 2013-2014 school year is appropriate.

(5) Was HCPSS required to provide the Student with Extended School Year (ESY) services for

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<sup>2</sup> In addition, both attorneys of record in this case were at another four-day IDEA hearing before another ALJ in Montgomery County, Maryland on the dates of September 30, 2013 through October 3, 2013.

the summer of 2012 in order for him to receive a FAPE?

(6) Did the HCPSS fail to provide the Student with appropriate ESY services for the summer of 2013?

(7) Whether the Parents are entitled under the IDEA to be reimbursed for a private evaluation of the Student.

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

The following Student Exhibits were admitted as “Parents” Exhibits:<sup>3</sup>

#### **Parents**

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
1	05/24/13	Letter from Holly Parker to XXXX XXXX – [School 2] information
2	09/10/12	Letter from Holly Parker to XXXX XXXX – Letter of Representation
3	06/05/13	Letter from Holly Parker to XXXX XXXX – [Program 1] observation issue
4	06/06/13	Letter from XXXX XXXX to Holly Parker – [Program 1] observation issue
5	06/11/13	Letter from XXXX XXXX to Holly Parker – [Program 1] observation issue
7	2012-2013	Student’s Daily Point Sheets
8		XXXX XXXX, PsyD <i>Curriculum Vitae</i>
9	2/16/12	IEP Team Meeting documentation

The following HCPSS Exhibits were admitted as “Board” Exhibits:

#### **Board**

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
1	12/14/07	Psychological Assessment – XXXX XXXX, HCPSS
2	3/31/08 & 4/19/08	Psychiatric Evaluation – XXXX XXXX, M.D., XXXX
3	12/19/10	OT Assessment Report – XXXX XXXX, MS, OTR/L, HCPSS

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<sup>3</sup> Parents Ex. No. 6 was marked, but an objection was sustained and it was not admitted into the record.

<b>Board Ex. No.</b>	<b>Date</b>	<b>Description</b>
4	12/20/10	Psychological Assessment – XXXX XXXX, M.A./A.G.S., NCSP, HCPSS
5	1/31/11	Functional Behavior Assessment and Behavior Intervention Plan
6	5/20/11	Functional Behavior Assessment and Behavior Intervention Plan
7	4/30/12	Functional Behavior Assessment and Behavior Intervention Plan
8	3/9/12, 4/18/12 & 5/10/12	Speech-Language Evaluation – XXXX XXXX, SLP, HCPSS
9	5/11/12 & 5/31/12	IEP Team Meeting Documentation
10	June 2012	6th Grade Report Card
11	2011-2012	Disciplinary Referral Forms
12	10/16/12	IEP Team Meeting Report
13	12/4/12	Letter to Parents from XXXX XXXX
14	12/20/12	Letter to Parents from XXXX XXXX
15	1/2/13	Request for Due Process Hearing
16	1/4/13	Letter to Parents from XXXX XXXX
17	11/26/12 - 1/9/13	Behavioral Data
18	1/14/13	Letter to XXXX XXXX from Holly Parker
19	1/15/13	Letter to Holly Parker from XXXX XXXX
20	1/29/13	Letter to Jeffrey Krew from Holly Parker
21	1/30/13	Letter to Holly Parker from Jeffrey Krew
22	1/30/13	Letter to Jeffrey Krew from Holly Parker
23	1/30/13	Due Process – Resolution Meeting – Tracking Form
24	1/31/13	Letter to XXXX XXXX from Holly Parker
25	2/4/13	Letter to Jeffrey Krew from Holly Parker
26	2/4/13	Letter to Holly Parker from Jeffrey Krew
27	2/15/13	Functional Behavior Assessment and Behavior Intervention Plan
28	2/19/13	IEP Team Meeting Report
29	3/27/13	Educational Assessment – XXXX XXXX (HCPSS)
30	4/4/13	Letter to XXXX XXXX from Holly Parker

<b>Board</b>		
<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
30-A	2/5/13 & 2/6/13	Psychological Evaluation – XXXX XXXX, Psy.D.; XXXX XXXX, Psy.D.; & XXXX XXXX, Psy.D., XXXX
31	4/5/13	Teacher Evaluation Form for Application to XXXX at [School 3] – completed by XXXX XXXX
32	4/5/13	Educator Report for XXXX Camp – completed by XXXX XXXX
33	4/9/13	Letter to Parents from XXXX XXXX
34	4/10/13	Review of Independent Assessment – XXXX XXXX, Psy.D., HCPSS
35	4/10/13	Functional Behavior Assessment and Behavior Intervention Plan
36	4/10/13	IEP & IEP Team Meeting Report
37		Summary of Interventions
38	5/20/13	Letter to Parents from XXXX XXXX
39	5/22/13	IEP Team Meeting Report
40	6/6/13	IEP Team Meeting Report
41	2012-2013	Disciplinary Referral Forms
42	June 2013	7th Grade Report Card
42-A		2011-2012 and 2012-2013 School Years Behavior Analysis Comparison
43	7/17/13	IEP & IEP Team Meeting Report
44		Information regarding [Program 1]
45	7/30/13	Request for Due Process Hearing
46	8/12/13	Letter to Holly Parker from Jeffrey Krew
47	8/14/13	Letter to Holly Parker from Jeffrey Krew
48		XXXX XXXX, Ph.D. <i>Curriculum Vitae</i>
49		XXXX XXXX, Psy. D. <i>Curriculum Vitae</i>
50		XXXX XXXX <i>Curriculum Vitae</i>
51		XXXX XXXX <i>Curriculum Vitae</i>
52		XXXX XXXX <i>Curriculum Vitae</i>
53		XXXX XXXX <i>Curriculum Vitae</i>
54		XXXX XXXX <i>Curriculum Vitae</i>
55		XXXX XXXX <i>Curriculum Vitae</i>
56		XXXX XXXX <i>Curriculum Vitae</i>
57		XXXX XXXX <i>Curriculum Vitae</i>
58		XXXX XXXX <i>Curriculum Vitae</i>

**Board**

<b>Ex. No.</b>	<b>Date</b>	<b>Description</b>
59	10/5/10 & 10/12/10	Developmental Pediatrics Evaluation – XXXX XXXX, M.D., XXXX, Inc.
60	5/20/2011	Annual Goal(s) Progress Report for IEP
61	5/11/2012	Annual Goal(s) Progress Report for IEP

**Testimony**

The Student presented the following witnesses:

The Student's mother (Also called as a rebuttal witness)

The Student's father

XXXX XXXX, Ph.D. Admitted as an expert in Psychology  
Director  
XXXX

HCPSS presented the following witnesses:

XXXX XXXX Admitted as an expert in Special Education  
Instructional Team Leader  
Special Education Department  
[School 4]

XXXX XXXX, Psy.D. Admitted as an expert in School Psychology  
School Psychologist  
HCPSS

XXXX XXXX, Ph.D. Admitted as an expert in Psychology with an  
Mental Health Services Specialist emphasis on students with social/emotional  
Team Leader, [Program 1] conditions  
[School 1], HCPSS (Also called by the Parents as an adverse witness)

**Stipulations**

HCPSS and the Student entered into a number of stipulations of fact. In pertinent part, those stipulations are incorporated into the findings of fact, below.

## **FINDINGS OF FACT**

After considering all of the testimony and exhibits, the ALJ finds, by a preponderance of the evidence, the following to be fact:

1. The Student was born on XXXX, 2000. He is XXXX years old.
2. The Student attended [School 5] from first grade through the fifth grade (2010-2011 school year). [School 5] is a school in the HCPSS.
3. When the Student was in the second grade (2007-2008 school year), the Parents requested that HCPSS evaluate his eligibility for special education and related services under the IDEA.
4. The HCPSS conducted psychological, educational, and occupational therapy assessments and determined that the Student was eligible for special education and related services under the IDEA while he was in the second grade.
5. On December 14, 2007, as part of the eligibility review, a psychological assessment of the Student was completed by XXXX XXXX, School Psychologist (report dated January 18, 2008). The results of the assessment were shared with the Student's IEP team for consideration in preparing his IEP. In pertinent part, the report reads:

Based on the evaluation results, [the Student] is currently demonstrating symptomatology and characteristics related to Depression, [Attention Deficit Hyperactivity Disorder (ADHD)], and a Pervasive Developmental Disorder. At this time, it does appear that [the Student] is having the most difficulty in regard to his emotional and behavioral stability. . . .

In light of the above, the following recommendations are made. It is recommended that the IEP Team review the results of this evaluation in combination with other evaluations and educational information to determine if an educational disability exists and whether the potential disability will require the need for special education services.

(Bd. Ex. #1, p. 464)

6. Ms. XXXX used the following techniques in evaluating the Student: Review of Records; Parent Questionnaire; Student Interview; Behavioral Observations; Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV); Behavior Assessment System for Children – Second Edition (BASC-2) including Parent Rating Scale (PRS) and Teacher Rating Scale (TRS); ADHD Symptoms Rating Scale (ADHD-SRS); and the Gilliam Asperger's Disorder Scale (GADS). (Bd. Ex. #1, p. 456)
7. As part of Ms. XXXX's psychological assessment, the WISC-IV was administered in order to assess the Student's cognitive abilities. The WISC-IV provides a global assessment of overall intelligence. The Student's performance on the WISC-IV



yielded a high average Full Scale IQ score (77th percentile) suggesting an age-appropriate level of high average overall intellectual functioning. Percentile scores of 25 to 75 are considered to be in the average range. The report summarized that “[c]urrent assessment findings indicate that [the Student] is overall cognitively functioning in the high average range compared to students his age.” (Bd. Ex. #1, p. 463)

8. XXXX XXXX, M.D., performed a psychiatric evaluation of the Student while he was in the second grade. The evaluation took place on March 31, 2008 and April 19, 2008. Dr. XXXX prepared a report of her psychiatric evaluation. The Parents shared that report with the Student’s IEP team for consideration in preparing his IEP. In pertinent part, the report reads:

[The Student] is a seven year old with symptoms of multiple psychiatric disorders. [The Student] has multiple symptoms of depression including low self esteem, irritable mood, tantrums, and trouble sleeping. His history of negative self statements and thoughts of suicide are consistent with a depressive disorder as well. [The Student] has a strong family history of depression and anxiety making him more susceptible genetically to affective disorders. [The Student] also has symptoms of a Pervasive Developmental Disorder including problems with social skills and a lack of development of age appropriate friendships, problems with eye contact, and deficits in pragmatic speech. Many children with PDD also have problems with sensory integration as [the Student] does. Finally, [the Student] has many symptoms of ADHD including poor attention span, problems with organization, impulsiveness and being easily distracted. Many children with PDD have symptoms of depression, anxiety and ADHD as [the Student] does.

(Bd. Ex. #2, p. 572)

9. Among her recommendations, Dr. XXXX reported:

[The Student] has symptoms of multiple diagnoses but the symptoms that are interfering most significantly at this point with his functioning in school are symptoms of depression. His current IEP which lists his disability as Emotionally Disturbed is therefore very appropriate.

(Bd. Ex. #2, p. 573)

10. XXXX XXXX, M.D., a Developmental Pediatrician, conducted a developmental pediatrics evaluation of the Student when he was in the fifth grade and prepared a report of the evaluation. The evaluation took place on October 5, 2010 and October 12, 2010. The Parents did not share that report with the Student’s IEP team or anyone else at HCPSS.<sup>4</sup> In pertinent part, the “Diagnostic Impressions” in the report are:

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<sup>4</sup> The Parents did share that report with Dr. XXXX for his use in a February 2013 psychological assessment of the Student. HCPSS first obtained a copy of Dr. XXXX’s report on the second day of the instant hearing.

1. Attention Deficit Hyperactivity Disorder (ADHD), combined type. I agree with this diagnosis. . . .
2. Probable Asperger's Syndrome. [The Student] was previously given a diagnosis of Pervasive Developmental Disorder (PDD). I do not think he strictly meets criteria for this disorder because PDD requires atypical or delayed language before the age of 3 years and [the Student's] early language development was normal. If he is on the autism spectrum, he might be better described as Asperger's Syndrome, but it is hard to isolate out these symptoms with all of the other overlapping challenges. Asperger's Syndrome is manifested by symptoms in 3 different areas, as described below. . . .
3. I suspect he has bipolar disorder. He has pressured speech, talks almost constantly, acknowledges racing thoughts, and has some grandiose thoughts about himself. He also can have rapid mood swings.

(Bd. Ex. #59, pp. 4-5)

11. XXXX XXXX, a HCPSS special education teacher, conducted an educational assessment of the Student when he was in the fifth grade and prepared a report of the assessment, dated December 7, 2010. The results of the assessment were shared with the Student's IEP team for consideration in preparing his IEP.
12. XXXX XXXX, MS, OTR/L, a HCPSS occupational therapist, conducted an occupational therapy assessment of the Student when he was in the fifth grade and prepared a report of the assessment, dated December 19, 2010. The results of the assessment were shared with the Student's IEP team for consideration in preparing his IEP.
13. XXXX XXXX, M.A./A.G.S., NCSP, a HCPSS school psychologist, conducted a psychological assessment of the Student when he was in the fifth grade and prepared a report of the assessment, dated December 20, 2010. The psychological assessment took place on October 25 and 27, 2010 and November 10, 16, 22 and 30, 2010. Based on the data collected in her psychological evaluation, Ms. XXXX reported that "[the Student] continues to meet the criteria for Attention Deficit Hyperactivity Disorder (ADHD)- Combined Type." (Bd. Ex. #4, p. 503) Further, "[t]he . . . evaluation also indicates that [the Student] continues to meet the criteria for Pervasive Developmental Disorder NOS." (Bd. Ex. #4, p. 504) Ms. XXXX also reported that "[the Student's] condition of Anxiety and Depression have existed for a period of time, to a marked degree . . . . [and] the data does indicate the presence of the educational handicapping condition of Emotional Disability (ED) that requires special education." *Id.* The results of the assessment were shared with the Student's IEP team for consideration in preparing his IEP.

14. Ms. XXXX used the following techniques in evaluating the Student: WISC-IV; Behavioral Assessment System for Children (BASC): Parent, Teacher and Self Reports; Behavior Rating Inventory of Executive Functioning (BRIEF): Parent and Teacher Reports; Asperger's Syndrome Diagnostic Scale (ASDS); Multidimensional Anxiety Scale for Children (MASC); Classroom Observations; and Review of Student Records. (Bd. Ex. #4, p. 495)
15. On or about January 3, 2011, while the Student was at [School 5], a Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) were prepared for him. XXXX XXXX, School Psychologist; XXXX XXXX, Special Education Teacher; XXXX XXXX, General Education Teacher; and the Parents participated in the meeting at which the FBA/BIP was prepared. On January 31, 2011, the Student's initial BIP was completed.
16. The Student had difficulty with coping skills, problem solving skills, and social interaction skills that functioned to produce behaviors that were the targets of the BIP. The BIP strategies attempted to reduce the antecedents that prompted targeted behaviors in order to reduce or eliminate them and to encourage more desirable replacement behaviors. Initially, the Student's crying, banging his head with his fist and saying he wanted to hurt himself, and enuresis (urinating himself) were the targeted behaviors on the BIP.
17. On April 13, 2011 and May 20, 2011, while the Student was in the fifth grade, his FBA and BIP was reviewed and revised. The April 13, 2011 revision was prompted by an increase in the Student's targeted behaviors. The May 20, 2011 revision added "Close Adult Supervision, Crisis Prevention and Crisis Intervention" to the BIP. (Bd. Ex. #6, p. 517)
18. [School 4] is a comprehensive (including non-disabled peers) middle school in the HCPSS.
19. In August 2011, the Student entered the sixth grade (middle school) and attended the [Program 3] at the [School 4] during the 2011-2012 school year.
20. [Program 3] is a program that provides special education and other related services to students with IEPs whose disabilities include an emotional disability or a behavioral-related disability and who come from families that live in the corresponding region of Howard County.
21. XXXX XXXX, School Psychologist, was assigned full-time to the [School 4] because the [Program 3] is located there.
22. The Student's targeted behaviors were always being addressed by [Program 3] staff during the school year by means described in the Student's BIP to reduce the antecedents that prompted the targeted behaviors and to encourage the frequency of replacement behaviors. However, when the Student's targeted behaviors got to the point that the school environment was disrupted, he was physically aggressive, or he

threatened peers or staff, a disciplinary referral would be made to the school administration.

23. The Student, while in sixth grade, received the following disciplinary referrals during the 2011-2012 school year:

<u>Date</u>	<u>Incident</u>	<u>HCPSS Disciplinary Action</u>
November 1, 2011	Student would not go to class, he cried and screamed and kicked doors	Phone contact made with Student's father to calm Student down
March 29, 2012	Student left support area without permission, screaming, slamming doors, trying to punch staff	Morning detention and the Parents were subsequently contacted

24. While the Student was in the [Program 3], XXXX XXXX, Behavior Support Teacher, and Dr. XXXX would collaborate on the Student's BIP and make changes to strategies and targeted behaviors before making written revisions to the BIP. Ms. XXXX gathered antecedent data on the Student's targeted behaviors through informal observations and written data collection (daily point sheets) from his teachers.

25. On or about April 30, 2012, the Student's FBA and BIP were updated (after his entry into middle school). The Parents had reported that the Student had many tantrums and meltdowns at his home, often over homework; he had engaged in physical confrontations with his sister and his Parents; he had destroyed property and he had refused to do any schoolwork. The Parents also shared that they continued to address the Student's mental health concerns with medical and therapeutic interventions. Among other updates, the FBA noted that the Student had demonstrated difficulty sharing with others. The Student's disruptive behaviors of throwing his glasses, kicking desks, and screaming were added to the list of targeted behaviors on the BIP. These targeted behaviors occurred daily (or several times per day) during the first quarter and a half of the 2011-2012 school year. During the end of the second quarter and most of the third quarter, the Student demonstrated these behaviors once or twice a week. Towards the end of the third quarter to the beginning of the fourth quarter, the Student's disruptive behaviors increased back to the level from earlier in the school year (two to three times per day).<sup>5</sup>

26. During the 2011-2012 school year (sixth grade), the Student was in a classroom of one or two students in a self-contained classroom outside of the general education setting for his Reading and English classes. The Student was in a general education

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<sup>5</sup> The first quarter begins in August and ends the last week of October. The second quarter begins the first week of November and ends the second week of January. The third quarter of the school year starts from the middle of January and ends the middle of March. The fourth quarter of the school year starts in the middle of March and ends at the conclusion of the school year.

classroom, with special education supports, for Science, Social Studies, tutorial, and Math.<sup>6</sup>

27. “C,” one of his peers in the [Program 3], who had been his one-time friend, teased and bullied the Student. [Program 3] investigated and took action on each and every incident of teasing or hazing that staff observed or was brought to staff attention. XXXX XXXX and/or Dr. XXXX had problem-solving sessions with “C” and the Student regarding the bullying and teasing incidents that came to staff attention; some sessions were successful in resolving the hazing incidents and some were not. In January 2012, “C” was placed at another school. The Student was not the victim of bullying while in the [Program 3] after January 2012.
28. On February 16, 2012, an IEP team meeting convened. The Parents attended along with XXXX XXXX, their family (special education) navigator. The team determined that the Student was not eligible for ESY services during summer 2012. At that time, the IEP team had no data or information available to it that would support a determination that the Student’s educational gains during the normal school year would be significantly jeopardized if he did not receive ESY services. At that time, the IEP team had no data or information available to it that would support a determination that there were significant interfering behaviors, emerging skills, breakthrough opportunities, or that the nature and severity of the Student’s disabilities suggested a need for ESY services. At the February 16, 2012 IEP team meeting, the Parents agreed with the determination made regarding ESY services.
29. XXXX XXXX, SLP, a HCPSS Speech Language Pathologist, conducted an initial speech-language evaluation of the Student while he was in the sixth grade and prepared a report of the evaluation, dated April 22, 2012. The speech-language evaluation took place on March 9, April 18, and May 10, 2012. The results of the assessment were shared with the Student’s IEP team for consideration in preparing his IEP
30. On May 11, 2012 and May 31, 2012, an annual IEP team meeting was held for the purpose of reviewing the Student’s assessments, his classroom performance, and his progress on meeting annual IEP goals. The Parents attended along with XXXX XXXX, their educational advocate. The IEP team reviewed all available information including teacher reports, Parents’ reports, and previously completed assessments. The IEP Team determined the Student’s present levels of educational performance and developed an IEP for the Student for the 2012-2013 school year listing special education, related services, educational and behavioral goals, objectives, and accommodations.
31. The Student’s May 31, 2012 IEP listed his primary disability code as Emotional Disability.<sup>7</sup>

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<sup>6</sup> After the May 11, 2012 IEP Team meeting, the Student’s Math assignment changed and he had Math in a self-contained classroom outside of the general education setting.

<sup>7</sup> COMAR 13A.05.01.03B(23) defines the term “Emotional Disability:”

32. The Student's May 31, 2012 IEP specified a special education program for the 2012-2013 school year with eleven hours of direct special education classroom instruction in a self-contained classroom outside of the general education setting for Math, English, and tutorial and eight hours in a general education classroom, with special education supports, for Science and Social Studies.
33. As related services during the 2012-2013 school year, the May 31, 2012 IEP specified that the Student was to receive one hour of occupational therapy (two thirty-minute sessions) each school quarter, thirty minutes of speech-language therapy each week, and forty-five minutes of psychological services each week from a licensed professional counselor/psychologist.
34. At the time of the May 2012 IEP team meetings, the Student required the goals and objectives under the headings that were listed in the May 31, 2012 IEP for Self Management/Behavior, Written Language, Social Interaction Skills, Social Emotional, Study Organizational Skills, and Speech – Fluency.
35. The May 2012 IEP team noted that the Student required "behavioral supports for disruptive behaviors across all academic settings." (Bd. Ex. #9, p. 748) In answering the IEP question regarding how the Student's disability affected his involvement in the general education curriculum, the IEP team noted:

[The Student's] primary handicapping educational disability is emotional disability due to his Anxiety and Depression. It should be noted that [the Student] also has ADHD – Combined Type and Pervasive Developmental Disorder NOS. His disabilities impact all academic, social, and related arts areas throughout the school day. Both quality and quantity of work as well as interacting with others are impacted. [The Student] has difficulty handling frustrations, concentrating for long periods of time on non-preferred [sic], and contributing as a working member of a cooperative learning group.

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(a) "Emotional disability" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a student's educational performance:

- (i) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (iii) Inappropriate types of behavior or feelings under normal circumstances;
- (iv) A general, pervasive mood of unhappiness or depression; or
- (v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(b) "Emotional disability" includes schizophrenia.

(c) "Emotional disability" does not include a student who is socially maladjusted, unless it is determined that the student has an emotional disability.

(Bd. Ex. #9, p. 753)

36. The May 2012 IEP team determined that the [Program 3] at [School 4] continued to be the LRE in which the Student's educational needs could be met during the 2012-2013 school year.
37. At the time of the May 2012 IEP team meetings, to make meaningful educational progress, the Student required the number of hours in special education, related services, access to the general education curriculum, and direct special education classroom instruction in a self-contained classroom as was listed on the May 31, 2012 IEP.
38. At the end of the Student's sixth grade year, the [Program 3] reported that the Student had received three "A" letter grades, eight "B" letter grades, and three "C" letter grades in his classes at school. The Student had letter grades of B's or C's in all of his core subjects (Reading, Math, English, Science and Social Studies). The letter grades reflect that the Student was performing on a high or an acceptable level in all his core subjects and reading on grade level. The Student was promoted to the next grade.
39. In August 2012, the Student entered the seventh grade and attended the [Program 3] at [School 4] during the 2012-2013 school year.
40. During the 2012-2013 school year (seventh grade), the Student received all of the special education and related services as specified in the May 31, 2012 IEP.
41. During the 2012-2013 school year, the Student was in a self-contained classroom of three students outside of the general education setting for his English class. The Student was in a self-contained classroom of two students outside of the general education setting for his Math and tutorial classes. In the self-contained classroom, the Student had a special education teacher and, sometimes, a para-educator (dependent on the number of students in the class). The Student was in a general education classroom, with special education supports, for Science and Social Studies. In the general education classroom, the Student had a teacher and the assistance of a para-educator to help him (and other class students who would have an IEP).
42. Dr. XXXX provided the forty-five minutes of psychological services each week to the Student in both individual and group settings; the psychological services were split between thirty minutes in a group setting (one or two in the group) and fifteen minutes in a private, one-on-one setting. Dr. XXXX also provided advice and consultation to [Program 3] staff on implementing the Student's BIP and dealing with the Student's behaviors that were interfering with his academic progress.
43. At various times during the 2012-2013 school year, the Student misperceived that he was the subject of teasing during recess at school when he and peers would play games. When peers would not play the game he wanted to play or would not agree

- with him that he had been successful in the game being played, the Student reported to [Program 3] staff or to his Parents that he had been the victim of teasing. The [Program 3] staff investigated each and every report of teasing that was brought to staff attention. When staff observed or the investigation revealed that the Student had misperceived the situation, the staff would have problem-solving conversations with the Student in order to correct his misperceptions. [Program 3] staff had multiple training sessions with the Student over such misperceptions during the school year.
44. During the 2012-2013 school year, [Program 3] staff and the Parents held monthly meetings to review and discuss the Student's targeted behaviors on his BIP. Initially, the Student displayed targeted behaviors of throwing his glasses, hitting his head, kicking desks, and screaming. The Student's targeted behaviors were regular but somewhat intermittent; he might display his targeted behaviors for several days in a row and then a day or two might pass without any targeted behaviors. Not considering those incidents resulting in a disciplinary referral, the Student's targeted behaviors would on the average take place two or three days out of each week.
45. One of the attempted strategies to control the Student's targeted behaviors was for [Program 3] staff to contact the Parents over the telephone so that they could support the effort to calm the Student down and redirect him. The Parents were contacted by [Program 3] staff approximately twenty to thirty times during the 2012-2013 school year.
46. On October 16, 2012, an IEP team meeting was convened to address the Parents' concerns with the Student's behavior and to review his progress at school. The Parents attended along with their attorney. During the meeting, the Parents indicated they did not believe that the Student was making progress in the [Program 3] and expressed interest in a referral to the Central Educational Placement Team (CEPT) for a different placement. The Parents also voiced their belief that the Student should be "labeled multi-handicapped to reflect autism and emotional disability." (Bd. Ex. #12, p. 776) After a review of all available information including academic performance, behavioral data, and teacher input, the IEP team determined that the Student's May 31, 2012 IEP was still educationally relevant and appropriate at that time.
47. At the time of the October 16, 2012 IEP team meeting, to make meaningful educational progress, the Student required the number of hours in special education, related services, access to the general education curriculum, and direct special education classroom instruction in a self-contained classroom as was specified in his May 31, 2012 IEP.
48. Ms. XXXX (with the active assistance of Dr. XXXX) worked closely with the Student during the 2012-2013 school year. As the year went on, Ms. XXXX and the rest of the [Program 3] staff were progressively less and less successful in being able to calm the Student down and redirect him when he demonstrated targeted behaviors.
49. Ms. XXXX and Dr. XXXX continued to collaborate on the Student's BIP and make changes in responsive strategies (reminding, problem-solving steps, crisis



intervention, redirection, and calming down) before incorporating those changes into written revisions to the BIP. In addition to informal observations and written data collection (daily point sheets) from his teachers, Ms. XXXX collected Antecedent Behavioral Consequence (ABC) data on the Student during the period of November 20, 2012 through January 9, 2013.

50. The Student received the following disciplinary referrals during the 2012-2013 school year:

<u>Date</u>	<u>Incident</u>	<u>HCPSS Disciplinary Action</u>
September 11, 2012	The Student was running and screaming in hallways	Lunch detention and the Parents were subsequently contacted
September 12, 2012	The Student was running in halls, screaming, kicking lockers – restraint and seclusion were used as an intervention	Assigned to Friday Night school
November 27, 2012	The Student left class, entered hallway and kicked doors	Lunch detention
December 3, 2012	The Student caused a classroom disturbance by being disrespectful to staff, destroying school property, and not obeying school rules.	Suspended one day (December 4, 2012)
December 20, 2012	The Student threatened to punch staff when staff were trying to intervene as the Student threw chairs and other objects	Suspended one day (December 20, 2012)
January 4, 2013	The Student attacked a staff member by throwing a chair and also attacked Ms. XXXX by punching her on the arm	Suspended one day (January 7, 2013)
January 10, 2013	While in an emotional crisis, the Student threatened to kill staff with a gun or knife and attacked staff by throwing objects, kicking, slapping and punching, and slamming doors	Placed in seclusion twice and later taken to emergency room at hospital for evaluation after Mobile Crisis was contacted and responded to the school
January 14, 2013	The Student threw objects, yelled in hallway, screamed, and kicked lockers	Morning detention
January 23, 2013	The Student charged at Ms. XXXX and kicked and	Lunch detention on two days

	punched her	
January 29, 2013	The Student screamed obscenities, kicked lockers, went outside the school building and had to be escorted to the calming room	Lunch detention
March 7, 2013	The Student wanted to sit in a certain seat on school bus, yelled at other students, used obscenities, and refused to obey directions of bus driver and his/her assistant	Conference with Student
March 12, 2013	While being dissuaded from making stabbing gestures with a pen, the Student threw the pen and hit the staff member in the face	Lunch detention and the Parents were subsequently contacted
March 22, 2013	The Student refused to do his work during class, eloped from class, kicked lockers, screamed, hit staff, and left the school building	Suspended half day
April 8, 2013	The Student slammed desk disturbing other classes, slammed door on a staff member who responded to the disturbance, and left the school building while cursing	Suspended half day
April 18, 2013	When asked to wait before speaking while interrupting a staff member, the Student threw an object at the staff member and slammed a door	Exclusion from class
April 19, 2013	The Student eloped from class, threw chairs and other objects, slammed doors, and screamed obscenities	Exclusion from class
May 20, 2013	The Student eloped from class, roamed hallways, screamed, hit and kicked walls and lockers, ignored staff directions, threw objects at staff, and left school building three times	Suspended one day (May 21, 2013)

51. The Student's disruptive behaviors increased as the school year progressed. The additional disruptive behaviors included task refusal, eloping from the classroom, eloping from the school building, and physical aggression. The additional disruptive

behaviors demonstrated by the Student during the 2012-2013 school year made it difficult for him to be successful in a comprehensive middle school.

52. On January 10, 2013, while in an emotional crisis at school, the Student had threatened to kill [Program 3] staff with a gun or a knife; had attacked staff by throwing objects, kicking, slapping and punching; and had also been slamming doors. On that date, the Student was twice placed in seclusion in the “calming room.” Mobile Crisis was contacted and responded to the school along with a police escort. After Mobile Crisis arrived, the Student was taken to the emergency room at a hospital for an evaluation and, when released from the hospital, his Parents took him home.
53. The “calming room” or “quiet time room” was a small room with a window that was available as a voluntary retreat for the Student to work in if he felt he was under stress. A seclusion strategy was not on the Student’s BIP, so the “calming room” was used involuntarily only as absolutely necessary when the Student posed a threat to the safety of himself or others. The Student was not left alone when he was in the calming room. A staff member, customarily XXXX XXXX, would be present outside the calming room so that the Student would not be alone and unobserved or unsupervised. The Student was in the calming room only for a matter of minutes at a time.
54. On or about February 15, 2013, Dr. XXXX prepared a draft of revisions to the Student’s FBA and BIP.
55. On February 19, 2013, an IEP team meeting convened to review the Student’s behavior, his progress at school, and to review the Student’s BIP. The Student’s mother attended along with XXXX XXXX, Ph. D., the Parents’ educational consultant. During this meeting, the Parents informed the rest of the team that the Student had just had a medication change to help control his behavior after the events on January 10, 2013. For the last two weeks before the meeting, the Student had been relatively calm and had not had any episodes of aggression. The team agreed that “since there [had] only been two incidents [of seclusion] and both within the same day, seclusion [was] not going to be added to his BIP at [that] time.” (Bd. Ex. #28, p. 711) After a review of the Student’s academic performance and behavioral data and teacher’s reports, the IEP team also determined to update the Student’s BIP using the ABC data that had been collected and, if necessary, revise current strategies contained in the BIP.
56. XXXX XXXX, Instructional Team Leader, Special Education Department, [School 4], completed an educational assessment of the Student (report dated March 27, 2013) based on the Woodcock-Johnson III - Tests of Achievement (Woodcock-Johnson III) administered on or about January 31, 2013. The Woodcock-Johnson III measures performance in the areas of Reading, Writing, Math and General Knowledge. Results of the Broad Reading Cluster of the Woodcock-Johnson III revealed that the Student’s performance was in the high average range of achievement for his age (standard score – 117). Results of the Broad Mathematics Cluster of the Woodcock-Johnson III revealed that the Student’s performance was in the average range of

- achievement for his age (standard score – 97). The results of the Broad Written Language Cluster of the Woodcock-Johnson III revealed that the Student’s performance was in the high average range of achievement for his age (standard score – 117). The results of the Academic Knowledge Cluster of the Woodcock-Johnson III revealed that the Student’s performance was in the average range of achievement for his age (standard score – 99). Based on these test results, the conclusion of the report was that the Student did not demonstrate “difficulty in an area of educational performance.” (Bd. Ex. #29, p. 554)
57. On April 4, 2013, the Parents’ attorney forwarded to HCPSS a report of a private psychological evaluation completed by XXXX in February 2013. In that report, as a result of multidisciplinary testing, classroom observation, a clinical interview with the Student, and information provided in conversation with the Parents, XXXX XXXX, Ph.D., indicated that the Student’s disabilities included Asperger’s Disorder (on the Autism spectrum), ADHD – Combined Type, Anxiety Disorder Not Otherwise Specified (Mixed Anxiety-Depressive Disorder), sensory processing weakness, and fine motor weakness.
58. XXXX used the following techniques in evaluating the Student: Developmental Test of Visual-Motor Integration (VMI); Oral and Written Language Scales, Second Edition (OWLS-II); WISC-IV; Woodcock-Johnson III: Tests of Cognitive Abilities: Select Subtests; Brown A.D.D. Scales (BADDS): Parent Form; Conners, Third Edition – Short Form (Conners): Parent, Teacher & Self-Report Forms; BRIEF: Parent, Teacher & Self-Report Forms; Delis-Kaplan Executive Functioning System (D-KEFS): Select Subtests; ASDS: Parent and Teacher Reports; Revised Children’s Manifest Anxiety Scale, Second Edition (RCMAS-2); Reynolds Adolescent Depression Scale, 2nd Edition (RADSD-2); BASC-2: Parent & Teacher Report Forms; Roberts Apperception Test for Children, Second Edition (Roberts-2); Incomplete Sentence Form (ISF); Clinical Interview with the Student; and Classroom Observation (Feb. 12, 2013) (Bd. Ex. #30-A, pp. 5-6)
59. During the February 2013 evaluation by XXXX, in order to assess the Student’s cognitive abilities, the WISC-IV and selected subtests from the OWLS-II, the Woodcock-Johnson III, and the D-KEFS were administered to the Student. The WISC-IV provides a global assessment of overall intelligence. The Student’s performance on the WISC-IV yielded an average Full Scale IQ score (27th percentile) suggesting an age-appropriate level of average overall intellectual functioning. Percentile scores of 25 to 75 are considered to be in the average range. All scores on the standardized tests of cognitive ability were within the average to low average range. However, the results obtained “likely underestimates” the Student’s true potential cognitive abilities due to the Student’s “pervasive physical restlessness, impulsivity, difficulties with attention/concentration, and an inconsistent response pattern evidenced on the testing.” (Bd. Ex. #30-A, p. 599; Bd. Ex. #36, p. 668)
60. As part of his report, Dr. XXXX provided the following recommendation concerning the Student’s classroom environment:

In light of his diagnoses, [the Student] will do best in a small, structured, special education setting with social skills training integrated into the day so that his learning, emotional and behavior needs are met, his teachers should be specially trained to work with students who have Autism Spectrum Disorders. Additionally, teachers need to be flexible in their demands so that his learning needs can be addressed.

. . . .

In view of the ongoing speech difficulties, [the Student] should continue to receive appropriate speech/language therapy. Both receptive and expressive language processing should be addressed within therapy sessions. The academic and social impact of [the Student's] language organization problems on speaking and writing should also be addressed.

[The Student] should continue to receive occupational therapy to address his fine-motor and handwriting weaknesses as well as to improve his use of assistive technology devices.

(Bd. Ex. #30-A, p. 592)

61. The report of the February 2013 evaluation by XXXX was forwarded to Dr. XXXX for a review of the independent assessment of the Student. During his review, Dr. XXXX determined that the testing materials and procedures used to assess the Student's need for special education and related services were technically sound and that the evaluator was professionally qualified to conduct the evaluation. Based on Dr. XXXX's review, HCPSS accepted the independent evaluation as a valid assessment for use in determining the Student's need for special education, related services, and placement.
62. On April 10, 2013, an annual IEP team meeting convened for the purpose of reviewing the Student's assessments, his classroom performance, and his progress on meeting annual IEP goals. The Parents, the Parents' attorney, and Dr. XXXX attended. The IEP team reviewed all available information including teacher reports, Parent's reports, and previously completed assessments, including Ms. XXXX's educational assessment of the Student (report dated March 27, 2013) and Dr. XXXX's psychological evaluation report. The IEP Team determined the Student's present levels of educational performance and developed an IEP for the Student for the 2013-2014 school year listing special education, related services, educational and behavioral goals, objectives, and accommodations.
63. The IEP team changed the Student's primary disability code from Emotional Disability to Multiple Disabilities (due to his diagnoses of Autism and ADHD, with an Emotional Disability being secondary).<sup>8</sup>

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<sup>8</sup> COMAR 13A.05.01.03B(44) defines the term "Multiple Disabilities:"

(a) "Multiple disabilities" means concomitant impairments, such as intellectual disability-blindness or intellectual disability-orthopedic impairment, the combination of which causes such severe educational problems that the student cannot be accommodated in special education programs solely for one of the impairments.

64. The Student's April 10, 2013 IEP specified a special education program for the 2013-2014 school year with twenty hours of direct special education classroom instruction in a self-contained classroom outside of the general education setting for all of his core subjects: Math, English, Science, Social Studies, and tutorial. The Student would receive instruction services out of the general education setting for all academic areas. The IEP also provided that "[the Student] will have the option of attending the general education class for [S]cience and [S]ocial [S]tudies in order to participate in science lab or a special group activity if his behavior has been appropriate for the day." (Bd. Ex. #36, p. 692) The Student would be able to participate with his non-disabled peers in the general education setting for related arts (with behavioral supports) and for lunch.
65. The April 10, 2013 IEP specified as related services during the 2013-2014 school year that the Student was to receive one thirty-minute session of occupational therapy each school quarter, thirty minutes of speech-language therapy each week, and one hour of psychological services each week from a licensed professional counselor/psychologist.
66. At the time of the April 10, 2013 IEP team meeting, the Student required the goals and objectives under the headings for Self Management/Behavior, Written Language, Social Interaction Skills, Social Emotional, Study Organizational Skills, and Speech – Fluency that were listed on the IEP.
67. The April 10, 2013 IEP team noted that "[the Student] meets the criteria for multiple disabilities (Autism and Other Health Impairment due to ADHD) . . . [h]e also meets the criteria for a secondary emotional disability." (Bd. Ex. #36, p. 668) In answering the IEP question regarding how the Student's disability affected his involvement in the general education curriculum, the IEP team noted:
- [The Student's] emotional disability impacts all academic, social, and related arts areas throughout the school day. Both quality and quantity of work as well as interacting with others are impacted. [The Student] has great difficulty responding appropriately when a request or preferred activity is delayed or denied.
- Due to [the Student's] other health impairment (i.e. attention deficit disorder), he had difficulty concentrating for long periods of time as required for content area classes. He needs support to bring, organize and utilize class materials.
- [The Student's] autism impacts his ability to communicate effectively with peers and teachers in all activities in the school setting. He needs assistance to navigate his social interactions throughout the school day.

(Bd. Ex. #36, p. 673)

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(b) "Multiple disabilities" does not include students with deaf-blindness.

68. The April 10, 2013 IEP team determined that the Student's educational needs could not be met during the 2013-2014 school year at the [Program 3] at the [School 4] and referred the Student's placement decision to the CEPT. In listing a reason for the referral, the IEP team noted that "[d]ata shows that [the Student] has not made the educational and behavioral progress necessary and has deteriorated significantly in the last quarter." (Bd. Ex. #36, p. 701)
69. The April 10, 2013 IEP team determined that the Student was eligible for ESY services during summer 2013. The IEP team noted that "[the Student's] IEP does contain goals that are considered to be critical life skills in the areas of social, emotional, behavior, and social interaction" and that he was making "very limited progress and requires continued education." The IEP team also noted that the Student had "significant interfering behaviors," "disruptive behaviors," and that his BIP required "continued intervention and instruction." (Bd. Ex. #36, p. 682)
70. The April 10, 2013 IEP specified that the Student was scheduled to "receive 30 minutes daily of instruction to address behavioral/social/emotional goals" during the ESY. (Bd. Ex. #36, p. 692)
71. On or about April 10, 2013, the Student's FBA and BIP were updated. The additional disruptive behaviors, including elopement, task refusal, and physical aggression, were added to the BIP and new replacement behaviors, education strategies, and prevention strategies that had been developed were recorded. The FBA noted that the Student's task refusals, eloping, and physical aggression resulted in less instructional time for the Student. The FBA also noted that the Student's outbursts sometimes resulted in the removal of peers from the classroom next to his classroom, disrupting their instruction.
72. On May 22, 2013, a CEPT meeting convened. The Parents and their attorney attended. The CEPT reviewed all available information, including the April 10, 2013 IEP, and discussed the Student's level of performance, behavioral deterioration, and the 2011-2012 and the 2012-2013 school years in the [Program 3]. The CEPT rejected continuation of the Student at [School 4] as a possible placement. The CEPT discussed placement of the Student at the [Program 1] at the [School 1], part of the HCPSS. XXXX XXXX, Ph.D., Team Leader, [Program 1], described the [Program 1] and indicated that the Student's IEP could be implemented at the [Program 1]. The Parents and their attorney expressed several concerns with a placement at the [Program 1]. During the last ten minutes of the meeting, the Parents expressed their desire that the Student be placed at the [Program 2] at [School 2]. The CEPT determined to continue the meeting to further discuss the Student's placement at the [Program 1] at the [School 1] and the Parents' request for the Student's placement at [School 2]. In listing a reason for continuance, the CEPT noted "[it] did not have time to finish the discussion and needs information on [School 2] to consider the Parents' request for placement at [School 2]." (Bd. Ex. #39, p. 662)

73. [School 2] is a private, non-public placement, part of the XXXX Health System, located in XXXX, Maryland. “[School 2] is approved as a special education school by the Maryland State Department of Education.” (Parent Ex. #1, p. 4)
74. About two days before the May 22, 2013 CEPT meeting, Dr. XXXX had reviewed the Student’s April 10, 2013 IEP and, based on his review, had thought that the Student’s IEP could be implemented at the [Program 1]. Dr. XXXX is a regular member of the CEPT.
75. On June 6, 2013, an IEP team meeting convened at the [School 4] for the purpose of reviewing the Student’s BIP and to discuss his behavior following incidents that had taken place at school on May 16, 2013 and May 20, 2013. The Student’s mother participated in the meeting telephonically via a speaker telephone. On May 16, 2013, as a result of a behavioral incident that had occurred, the Student had been taken to the calming room and involuntarily placed in seclusion for five minutes as a therapeutic measure to calm him down. On May 20, 2013, as a result of a behavioral incident that had occurred, a two person transport was required to take the Student to the calming room and a ten minute seclusion followed in order to calm him down. Involuntary seclusion occurred on those two days because the Student was presenting a risk of harm to others. During this meeting, the Parents informed the rest of the IEP team that the Student had just had a medication change before the two incidents occurred, his behavior at home also had deteriorated, and the new medication trial had been stopped. The IEP team agreed that the Student did not typically demonstrate a pattern of physical aggression towards staff and that both seclusion and restraint should not be added to his BIP at that time.
76. On or about June 15, 2013, the 2012-2013 school year ended.
77. At the end of his seventh grade year, the [Program 3] reported that the Student had received six “B” letter grades, five “C” letter grades, and one “E” grade in his classes at school. The Student had letter grades of B’s or C’s in all of his core subjects (Math, English, Science and Social Studies). The letter grades reflect that the Student was performing on a high or an acceptable level in all his core subjects. The Student received a letter grade of “E” in Digital Citizenship because he had frequently refused to go to that class. The normal Digital Citizenship class teacher was absent for much of the school year and the Student did not like the substitute teacher. The Student was promoted to the next grade.
78. After the school year ended, from June 24, 2013 through July 19, 2013, the Student attended an ESY program at the [School 6] from 9:00 a.m. to 11:30 a.m. During the program, the Student made sufficient progress on his ESY goals and objectives and was successful.
79. On July 17, 2013, a CEPT meeting convened as a continuation of the May 22, 2013 meeting. The Parents, the Parents’ attorney, and Dr. XXXX attended. The purpose of the meeting was to continue consideration of the Student’s placement. After discussion of the programs, availability of family counseling, faculty qualifications,



- student populations, travel time and distance, sensory supports, and behavioral supports offered at the [Program 1] and the [Program 2] at [School 2], the consensus of the IEP team was that the LRE in which the Student's educational needs could be met was the [Program 1] at the [School 1]. During the meeting, the Parents and their attorney expressed the same concerns with a placement at the [Program 1] that they had raised earlier. In addition, the Parents pointed out that [School 2] provided an educational program that lasted for twelve, not ten, months and had mandatory family counseling, and those features were not available at the [Program 1].
80. The HCPSS has not previously placed students at [School 2].
81. The Student's home is 0.4 miles from the [Program 1] at the [School 1] in XXXX, Maryland. The commute time to the [Program 1] would be approximately three minutes each way. The Student's home is approximately 27 miles from [School 2].
82. The [Program 1] and the [Program 4] are based at the [School 1].
83. The [Program 4] is an alternative educational program for middle and high school students in the HCPSS who have not been successful at a comprehensive school. The [Program 4] is approximately three times as large as the [Program 1] and serves approximately 120 students. Only a small percentage of the students in the [Program 4] have IEPs.
84. [Program 4] and [Program 1] students do not share classrooms or common study areas at the [School 1]. [Program 4] and [Program 1] students eat lunch in the same lunchroom but on different shifts. [Program 4] and [Program 1] students do have access to each other in the hallways when classes change. Adult supervision is available in the hallways when classes change.
85. Each bus that brings students to the [School 1] has a driver and an aide to provide adult supervision.
86. Currently, there are approximately 42 students at the [Program 1]. Eight of those students are middle school students. Approximately 40% of the students in the [Program 1] have a diagnosis on the autism spectrum.
87. [Program 1] staff consist of four mental health professionals (a clinical psychologist, a school psychologist, and two LCSWs), three mental health technicians, an assistant program director, a special education team leader, five special education qualified teachers, one highly-qualified science teacher, one dual-certified teacher, and four para-educators. Teacher to student ratio at the [Program 1] is one to two.
88. In terms of cognitive functioning, students in the [Program 1] range from average to above average intelligence. In terms of cognitive functioning, the Student's latest (February 2013) intelligence testing places him in the middle of the group of eight middle school students that are in the [Program 1].

89. Therapeutic services and social skills services are tailored to the needs of individual students and are integrated into all educational programming at the [Program 1].
90. Each classroom in the [Program 1] has a teacher and a para-educator. A middle school classroom at the [Program 1] will have from two to three students in the class.
91. The goals and objectives listed on the Student's April 10, 2013 IEP are almost identical to goals and objectives that have been successfully implemented for students at the [Program 1].
92. Occupational therapy and speech and language services, as specified in the Student's April 10, 2013 IEP, are available at the [Program 1]. XXXX XXXX, HCPSS Speech Language Pathologist, who now provides speech-language services to the Student and who conducted the Student's speech-language assessment is the same person who provides speech and language services to students at the [Program 1].
93. The [Program 1] at the [School 1] can provide the Student with a classroom environment as described by Dr. XXXX in his recommendation quoted in Finding of Fact #60 (above).
94. At the time of the July 17, 2013 IEP team meeting, the Student required the goals and objectives under the headings for Self Management/Behavior, Written Language, Social Interaction Skills, Social Emotional, Study Organizational Skills, and Speech – Fluency that are listed in the April 10, 2013 IEP.
95. At the time of the July 17, 2013 IEP team meeting, to make meaningful educational progress, the Student required the number of hours in direct special education, related services, and classroom instruction in a self-contained classroom as listed in the April 10, 2013 IEP.
96. The [Program 1] can implement the April 10, 2013 IEP and provide the requisite hours in special education, related services, accommodations, and behavioral interventions as needed to enable the Student to meet his goals and objectives in the IEP.
97. Middle school students at the [Program 1] can participate in clubs and/or teams at the [School 7], a comprehensive middle school, located approximately one mile in distance from the [School 1].
98. At the time of the July 17, 2013 IEP team meeting, to make meaningful educational progress, the Student required the behavioral and emotional supports of a highly structured, specialized program in a self-contained environment as provided by the [Program 1] to reduce distracting stimuli and provide ongoing behavioral and therapeutic interventions. The [Program 1] is the LRE that would enable the Student to receive a FAPE for the 2013-2014 school year.

99. On July 30, 2013, the Parents filed a Due Process Complaint with the OAH requesting a hearing to contest the proposed placement of the Student at the [Program 1] and requesting that the Student remain at the [Program 3] pursuant to the “stay-put” procedural safeguard of the IDEA.<sup>9</sup> The Student has continued to attend school at the [Program 3] at the [School 4] during the pendency of the instant administrative adjudication.

## **DISCUSSION**

### **LEGAL FRAMEWORK**

The IDEA provides federal assistance to state and local agencies for the education of disabled children. To receive this federal assistance, a state must provide special education services that are designed to meet the unique and individual needs of a child with a disability. The identification, assessment, and placement of a child in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2013); COMAR 13A.05.01. The IDEA defines a “child with a disability” as follows:

(3) Child With A Disability.

(A) In General. The term “child with a disability” means a child—

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this title as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof needs special education and related services.

20 U.S.C.A. § 1401(3) (2010). Maryland law defines “child with a disability” similarly. Md. Code Ann., Educ. § 8-401(a)(2) (Supp. 2013).

Under both federal and state law, a child with a disability has the right to a free appropriate public education (FAPE). A FAPE also is defined in the IDEA:

(9) Free appropriate public education

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<sup>9</sup> “Student’s Status During Proceedings. Unless the parent and the public agency agree on an alternative placement, the student shall remain in the present educational placement during the pendency of an administrative or judicial proceeding in accordance with 20 U.S.C. §1415(j) and 34 CFR §300.518.” COMAR 13A.05.01.15C(19).

The term “free appropriate public education” means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). Maryland law defines FAPE similarly. Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2013).

In the context of a FAPE, 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, 316 (4th Cir. 1991).

An educational program offered to a student must be tailored to the particular needs of a child with disabilities through the development and implementation of an IEP, taking into account:

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

20 U.S.C.A. § 1414(d)(3) (2010).

The IEP identifies a student's present levels of academic and functional performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those goals and objectives, and indicates the extent to which the child will be able to participate with children without disabilities in regular educational programs. *Id.* § 1414(d)(1)(A).

To comply with the IDEA an IEP must, among other things, allow a disabled child to advance toward measurable annual academic and functional goals that meet the needs resulting from the child's disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. *Id.* § 1414(d)(1)(A)(i)(II), (IV), (VI). The child's disability or disabilities and resulting needs are determined by using a variety of relevant functional, developmental, and academic information, including assessments and other evaluative materials. *Id.* § 1414(a)(1)(C)(i), (b)(2)-(3).

In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court stated that implicit in the congressional purpose in enacting the IDEA is a requirement that the education to which access is provided is sufficient to "confer some educational benefit upon the handicapped child." *Id.* at 204. However, 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 to "all services necessary to maximize his or her potential." *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. 176). "[T]he issue is not whether [the placement advocated by the parents] is better, or even appropriate, but whether [the school system] has offered . . . an appropriate program for the Child at [the placement which it recommended]." *A.B. ex rel D.B. v. Lawson*, 354 F.3d 315, 324 (4th Cir. 2004). In *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), the Court stated:

The [IDEA] requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that

the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to the appellant, and is therefore in compliance with the requirements of the IDEA.

*Id.* at 459-60.

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being accorded a FAPE under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis for determining whether a school district has offered a FAPE. First, a determination must be made as to whether there has been compliance with the procedures set forth the IDEA. *Rowley*, 458 U.S. at 207. Under appropriate circumstances, a procedural error may justify reimbursement of tuition paid to a private institution in which a student is enrolled. *Tice v. Botetourt*, 908 F.2d 1200, 1207-08 (4th Cir. 1990); *cf.* *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U.S. at 207. Once an IEP is shown to be procedurally proper, the judgment of the school system's educators regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit, as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *Lawson*, 354 F.3d at 325-29; *M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 532-33 (4th Cir. 2002).

Courts have held that "[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment." *Hartman v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998). "Ultimately, [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 Cnty.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).

The IDEA has always expressed a statutory preference for educating children with learning disabilities in the least restrictive environment with their non-disabled peers. The IDEA provides at 20 U.S.C.A. § 1412(a)(5)(A) (2010) 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.

To the maximum extent possible, the IDEA seeks to mainstream, or to include, the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. *Id.* To this end, the IDEA requires public agencies like HCPSS to offer a continuum of alternative placements that meet the needs of children with disabilities for special education and related services. 34 C.F.R. §§ 300.114-116. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. 34 C.F.R. §§ 300.114-.116, 300.38; COMAR 13A.05.01.10B.

The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Honig v. Doe*, 484 U.S. 305 (1988); *Hartmann*, 118 F.3d 996. 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. 34 C.F.R. §

300.114(a)(2)(ii). In some instances, 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. *Burlington*, 471 U.S. at 369.

The Fourth Circuit in *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989), followed the *Sixth Circuit's* mainstreaming standard, stating as follows:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

*Id.* at 878-79 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S.

864). In *Hartmann*, 118 F.3d at 1001, the Fourth Circuit reconfirmed the mainstreaming standards set forth above, noting that the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate.

#### MAY 31, 2012 IEP

The Parents' Due Process Complaint (p. 5) reads:

Prior to the start of the 2012-2013 school year, HCPSS coded [the Student] as a student with an emotional disability. HCPSS developed an IEP and recommended services that were based upon the diagnosis of an emotional disturbance. [The Student's] Parents were in disagreement with this diagnosis and notified HCPSS of their concerns. . . . [The Student] was previously privately diagnosed with ADHD and Pervasive Developmental Disorder. HCPSS failed to properly identify [the Student's] disability, resulting in an inappropriate IEP. The result of this failure was to place [the Student] in a program that did not meet his educational and social/emotional needs.



A party who requests a due process hearing seeking relief bears the burden of proof in the matter. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the Supreme Court defined in the *Weast* case, the burden of proof in this case is on the Parents to establish the merits of their allegations.

The Parents presented XXXX XXXX, Ph.D., as their only expert witness. Dr. XXXX testified as an expert in the field of psychology. Based on his February 2013 psychological assessment, Dr. XXXX stated that the Student's primary educational disability is Asperger's Disorder (on the Autism spectrum) and, therefore, the Student should have a primary disability code of Autism on his IEP. The Parents contend that the HCPSS failed to develop an appropriate IEP for the 2012-2013 school year. According to the Parents, the special education coding used by the HCPSS on the Student's May 31, 2012 IEP was inaccurate as it listed his primary disability code as Emotional Disability and not Autism.

When the Student was in the second grade, the HCPSS was aware that the Student demonstrated symptomatology of Depression, ADHD, and Pervasive Developmental Disorder (on the Autism spectrum) as reported by the psychological assessment of the Student conducted by XXXX XXXX, HCPSS School Psychologist (report dated January 18, 2008). Based on her assessment, she believed that "[the Student] is having the most difficulty in regard to his emotional and behavioral stability." (Bd. Ex. #1, p. 464) While the Student was still in the second grade, the Parents arranged for a private psychiatric evaluation of him by XXXX XXXX, M.D. Among her recommendations, Dr. XXXX reported:

[The Student] has symptoms of multiple diagnoses but the symptoms that are interfering most significantly at this point with his functioning in school are symptoms of depression. His current IEP which lists his disability as Emotionally Disturbed is therefore very appropriate.

(Bd. Ex. #2, p. 573)

XXXX XXXX, HCPSS School Psychologist, conducted another psychological assessment of the Student when he was in the fifth grade. Based on the data collected in her psychological evaluation, Ms. XXXX reported that "[the Student] continues to meet the criteria for Attention Deficit Hyperactivity

Disorder (ADHD)- Combined Type.” (Bd. Ex. #4, p. 503) Further, “[t]he . . . evaluation also indicates that [the Student] continues to meet the criteria for Pervasive Developmental Disorder NOS.” (Bd. Ex. #4, p. 504) Ms. XXXX also reported that “[the Student’s] condition of Anxiety and Depression have existed for a period of time, to a marked degree . . . . [and] the data does indicate the presence of the educational handicapping condition of Emotional Disability (ED) that requires special education.” *Id.*

Dr. XXXX testified that Autism, Asperger’s Disorder, and Pervasive Developmental Disorder NOS fall on the autism spectrum in descending order of severity. Dr. XXXX also testified that there was an “enormous amount of overlap between the diagnoses” on this spectrum.<sup>10</sup> (Tr. 259:7) During cross-examination, Dr. XXXX indicated that he did not disagree with XXXX XXXX’s psychological evaluation as conducted or as reported when the Student was in the fifth grade. Dr. XXXX also expressed no concerns with the psychological assessment conducted by XXXX XXXX and her January 18, 2008 report or with the private psychiatric evaluation done by Dr. XXXX and her report. Dr. XXXX testified that he was able to isolate Asperger’s Disorder as the Student’s primary educational disability as of February 2013 because his is the fifth in a series of psychological/psychiatric assessments and he had the advantage of the lapse of time and the accumulation of data. According to Dr. XXXX, Emotional Disability currently is still a secondary educational disability for the Student.

XXXX XXXX, Psy.D., testified as an expert witness for HCPSS in the field of school psychology. In his testimony, Dr. XXXX indicated that the data obtained by XXXX XXXX when the Student was in the fifth grade supports educational handicapping coding of Other Health Impaired (OHI) due to ADHD, Autism due to Pervasive Developmental Disorder NOS, and Emotional Disability due to Anxiety and Depression. According to Dr. XXXX, the data obtained by Ms. XXXX also supports the

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<sup>10</sup> The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association provides a common language and standard criteria for the classification of mental disorders. The current version, recently released, is the DSM-V (fifth edition). DSM-V was published on May 18, 2013. Dr. XXXX’s diagnosis was consistent with the DSM-IV. In DSM-V, presumably in recognition of the amount of overlap, the separate categories of Autism, Asperger’s Disorder, and Pervasive Developmental Disorder NOS have been eliminated.

determination that Emotional Disability was the Student's primary educational disability. Dr. XXXX was part of the May 2012 IEP team. Dr. XXXX testified that at the time of the May 2012 IEP team meeting there was no information available that would prompt a change of the Student's primary educational handicapping coding from Emotional Disability to Autism, and "[he] had no question as to whether or not [Emotional Disability] was [the Student's] primary [educational disability]." (Tr. 580:8-9)

While the Student was in the fifth grade, an educational assessment was also completed with a report of that assessment, dated December 7, 2010. An occupational therapy assessment of the Student was also completed with a report of the assessment, dated December 19, 2010. An initial speech-language evaluation of the Student was done while he was in the sixth grade with a report of that evaluation, dated April 22, 2012.

The results of the psychological, educational, speech-language, and occupational therapy assessments of the Student conducted by HCPSS staff and the private psychiatric evaluation of the Student by Dr. XXXX were shared with the Student's IEP team for consideration in preparing his IEP for the 2012-2013 school year. The special education, related services, educational and behavioral goals, objectives, and accommodations contained in the May 31, 2012 IEP were derived from all available information including observations, teacher reports, academic testing, Parents' reports, the previously completed HCPSS assessments, and the private psychiatric evaluation. The record reflects that HCPSS recognized that the Student had a disability on the Autism spectrum at all times relevant before the development of his May 31, 2012 IEP. The May 2012 IEP team was aware that the Student had several disabilities, but according to the assessments that were available to the HCPSS at the time, the Student's primary educational handicapping condition was properly listed as Emotional Disability.

An IEP is defined as a "written statement" that includes "[a] statement of the child's present level of academic and functional performance including . . . [h]ow the child's disability affects the

**child's involvement and progress** in the general education curriculum . . . .” 34 C.F.R. § 300.320(a)(1)(i) (emphasis added). “[T]he public agency must . . . [u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining . . . [w]hether the child is a child with a disability under §300.8; and . . . [t]he **content of the child's IEP** . . . .” *Id.* § 300.304(b)(1) (emphasis added). “The child is **assessed in all areas related to the suspected disability**, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities . . . .” *Id.* § 300.304(b)(4) (emphasis added). “In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, **whether or not commonly linked to the disability category in which the child has been classified.**” *Id.* § 300.304(b)(6) (emphasis added).

The IEP guides the delivery of special education supports and services for a student with a disability. In their argument, the Parents contend that if the primary disability code for the Student listed on the IEP is not accurate then the IEP must be invalid. When questioned about this on cross-examination, Dr. XXXX stated:

[MR. KREW]

**Q. Thank you. I'm just curious because I think if nothing else, our past colloquy had demonstrated the importance that you place on the disability code for educational planning and programming purposes, correct?**

[WITNESS]

A. Yes.

**Q. You think that a child's IEP is directed to address the primary handicapping condition, do you not?**

A. Yes.

**Q. Thank you. So in other words, [the Student's] IEP should look a lot different now that he's primarily autistic as opposed to his earlier IEPs where he was primarily [Emotional Disability], right?**

A. Yes.

(Tr. 307:12-24)

According to the Parents, an IEP is directed to address the primary handicapping condition and, as a consequence, the Student's May 31, 2012 IEP should have looked much different if he had been coded with a primary disability of Autism.

The primary disability code on an IEP is an eligibility category. The primary disability code on an IEP does not drive the services to be provided to a student. As evidenced by the last quoted regulation, all of the child's educational needs may not be covered by the eligibility category of his/her primary disability code. "Because all children are different, with different strengths and weaknesses and thus different needs, it is impossible to formulate specific, universal guidelines for their education, and indeed, IDEA does not purport to do so."<sup>11</sup> A disabled child may have individual strengths as well as weaknesses. *See* 20 U.S.C.A. § 1414(d)(3)(i). A child's strengths may allow him/her to be involved in, and progress in, the general education curriculum despite the effect(s) of a disability. It is the "the academic, developmental, and functional needs of the child" for special education and related services as determined by a variety of information, including tests, observations, parental input, formal assessments and other evaluative materials and the goals and objectives designed to meet those "education needs" that drive services in an IEP, not the eligibility category label that appears as the primary disability code. *Id.* § 1414(a)(1)(C)(i)(II), (b)(2)-(3), (d)(3)(iv). "Congress passed the IDEA to provide disabled children with programs 'that emphasize[ ] special education and related services designed to meet **their unique needs** and prepare them for further education, employment, and independent living.'" *M. S. v. Fairfax Cnty. Sch. Board*, 553 F.3d 315, 319 (4th Cir. 2009) (citing 20 U.S.C.A. § 1400(d)(1)(A)) (emphasis added).

As Dr. XXXX confirmed the then-existing assessments and private evaluation provided to the May 2012 IEP team support the educational handicapping coding of OHI, Autism, and Emotional Disability. According to Dr. XXXX, given those disabilities, all requisite assessments and evaluations

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<sup>11</sup> Theresa M. Willard, Note, *Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students*, 31 Ind. L. Rev. 1167, 1169 (1998).

had been conducted to determine the Student's educational needs. In his testimony, Dr. XXXX further indicated that if he had been coded with a primary educational handicapping code of Autism, no additional assessments were required to determine the Student's needs for special education and related services. Dr. XXXX's testimony on these points was not contradicted.

XXXX XXXX, IEP Team Chairperson, testified for the HCPSS as an expert witness in the field of special education. According to Ms. XXXX, the number of hours of direct special education, related services, educational and behavioral goals, objectives, and accommodations listed in the May 31, 2012 IEP were reasonably calculated to meet the Student's educational needs for the 2012-2013 school year and to provide him with meaningful educational benefit. Ms. XXXX also testified that if the Student had been coded with a primary educational handicapping code of Autism, no additional assessments were required to determine the Student's needs for special education and related services.

In their testimony, Dr. XXXX, Ms. XXXX, and XXXX XXXX, Ph.D., Psychologist, HCPSS (admitted as an expert in psychology with an emphasis on students with social/emotional conditions) indicated that the primary disability code on an IEP, by itself, does not drive the special education supports and services to be provided. The HCPSS witnesses are correct as their opinions are consistent with IDEA provisions.

The Parents allege that the HCPSS violated the IDEA through its "failure to fully and adequately diagnose [the Student] in all areas of his suspected disability." (Parents' Due Process Complaint, p. 6) The facts as found are inapposite. The ALJ remains unpersuaded and finds no violation of the IDEA on this ground.

Although not cited in support by the Parents, a similar issue was before the Eleventh Circuit in *Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275 (11th Cir. 2008) (upholding six years of prospective compensatory education at a private placement). In that case, "there [was] substantial evidence to support the finding of the administrative law judge that [the child] was misdiagnosed [by the

local education agency] in 1998.” *Id.* at 1287-88. The opinion in *Draper* reflects that the local education agency grossly misjudged the child’s educational handicapping coding and clearly failed to assess the child in all areas of suspected disability. At the time of the child’s initial eligibility evaluation, the local education agency had determined that the child had a mild intellectual disability and had failed to assess for a “specific learning disability even though he displayed signs of dyslexia, such as writing letters, numbers, and words backwards.” *Id.* at 1281. The evidence — confirmed by expert testimony — demonstrated that the local education agency should have discovered that it had misdiagnosed the child as mildly intellectually disabled much earlier than when it did in 2003. The local education agency had failed to conduct a timely reassessment of the child, his educational needs for special education and related services were clearly not met in his IEPs, and he made no academic progress over a series of years.

The facts in this case do not match the critical facts that were present in *Draper*. Most importantly, there is no expert testimony that HCPSS should have used an educational handicapping code of Autism instead of Emotional Disability as the primary disability code based on the information it had until April 4, 2013, when the Parents’ attorney forwarded to HCPSS a report of a private psychological evaluation completed by XXXX in February 2013.

The Parents contend that the change in the Student’s primary disability code from Emotional Disability in April 2013, the additional hours of special education services, and the referral to the CEPT are an acknowledgement by HCPSS that the May 31, 2012 IEP was not reasonably calculated to provide educational benefit and that the continuation of the Student in the [Program 3] for the 2012-2013 school year was inappropriate. This type of argument was rejected by the Fourth Circuit in *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009) (evidence describing a child’s tenth grade IEP, which the parents had accepted and which, they argued, was an admission by the local education agency that the eighth grade IEP was inadequate was properly discounted). In relevant part, the opinion reads:

[R]eview of IEPs under the IDEA is meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *Burlington*, 736 F.2d at 788; *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). But this prospective review would be undercut if significant weight were always given to evidence that arose only after an IEP were created. *Cf. Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 161 (3d Cir. 1994) (affirming the district court's conclusion that evidence of a later IEP was "irrelevant to the issue of the appropriateness of" prior IEPs). Judicial review would simply not be fair to school districts, whose decisions would be judged in hindsight "based on later assessments of a student's needs at [a] later point in time." Brief for Appellees at 28; *see also Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995). And more importantly, if services added to a later IEP were always used to cast doubt on an earlier one, school districts would develop a strong disincentive against updating their IEPs based on new information. This scenario is the exact opposite of what Congress intended when it provided for regular review and revision of IEPs, *see* 20 U.S.C. § 1414(d)(4)(A), and it would do little to help the interests of disabled children.

*Id.* at 477. Consistent with the court's ruling in *Schaffer*, the ALJ rejects the Parents' argument that the validity of the May 31, 2012 IEP should be judged with the advantage of hindsight from April 2013.

The Parents did not offer evidence suggesting that the Student's unique needs for special education and related services were not properly determined. The Parents failed to present evidence to show that the goals and objectives, given the Student's educational needs, were not reasonable and appropriate. The Parents failed to present evidence that challenges Ms. XXXX's expert opinion that the number of hours in special education, related services, access to the general education curriculum, and amount of direct special education classroom instruction in a self-contained classroom, as listed in the Student's May 31, 2012 IEP, were reasonably calculated to provide him with meaningful educational benefit for the upcoming school year and that his continued placement at the [Program 3] was an appropriate placement.

The Parents have failed to meet their burden of proof that the May 31, 2012 IEP was not reasonably calculated to provide the Student with meaningful educational benefit during the 2012-2013 school year. At the time of the May 2012 IEP team meetings, to make meaningful educational progress, the Student required the number of hours in special education, related services, access to the general



education curriculum, and direct special education classroom instruction in a self-contained classroom as was listed in the May 31, 2012 IEP. The continued placement of the Student in the [Program 3] at [School 4] was appropriate, and that placement was the LRE in which the Student's educational needs could be met during the upcoming school year. The ALJ remains unpersuaded that the May 31, 2012 IEP was not appropriate for the 2012-2013 school year.

#### 2012-2013 SCHOOL YEAR

The Parents' Due Process Complaint (p. 5) reads:

During the 2012-2013 school year . . . [the Student] was unsuccessful in his educational program. He received numerous disciplinary referral forms. HCPSS often placed [the Student] in the "containment" room for much of the school day. HCPSS collected over fifty pages of reports that provide documentation of [the Student's] inability to receive an appropriate education thought the school day. In spite of this documentation, HCPSS failed to develop an appropriate FBA or BIP for [the Student]. Previously, [the Student] experienced bullying and his peer relationships were negatively impacted. HCPSS failed to appropriately address the peer bullying issues, continuing [the Student] in the program where the incidents occurred. HCPSS advised the [P]arents that staff would be assigned to "stay with [the Student]" but this often did not occur. . . . Parents requested that HCPSS hold an IEP Team meeting to consider referral and placement of [the Student] to an alternative school setting. In spite of a plethora of documentation showing [the Student's] lack of progress in the program, HCPSS denied the request and maintained that he was appropriately placed in a comprehensive public middle school.

In the seventh grade, the Student continued in the [Program 3] at [School 4] during the 2012-2013 school year. The implication of the Due Process Complaint is that the HCPSS failed to appropriately address peer bullying issues and this made continuation of the Student in the [Program 3] during the 2012-2013 school year inappropriate.

"C," one of the Student's peers in the [Program 3], who had been his one-time friend, teased and bullied the Student during the first half of the 2011-2012 school year (sixth grade). The [Program 3] investigated and took appropriate action on each and every incident of teasing or bullying that staff observed or was brought to staff attention. XXXX XXXX and/or Dr. XXXX had problem-solving sessions with "C" and the Student regarding the bullying and teasing incidents that came to staff attention. In January 2012, "C" was placed at another school. The evidence does not demonstrate that

the Student was the victim of any instances of actual bullying or hazing while in the [Program 3] after January 2012.<sup>12</sup>

The Student reported to his Parents and to [Program 3] staff that he was teased by peers during the 2012-2013 school year. Ms. XXXX testified that the [Program 3] staff investigated each and every report of teasing that was brought to staff attention. Ms. XXXX stated that the Student's misperceptions were the basis of the teasing reports he made during the 2012-2013 school year. The Student misperceived that he was the subject of teasing during recess at school when he and peers would play games. At those occasions when staff observed or the investigation revealed that the Student had misperceived the situation, the staff would have problem-solving conversations with the Student in order to correct his misperceptions. [Program 3] staff had multiple training sessions with the Student over such misperceptions during the school year. In her testimony, the Student's mother agreed that each report of teasing made by the Student was pursued by [Program 3] staff. During cross-examination, the Student's mother also agreed that many incidents of teasing as reported by the Student were determined, after investigation, to be unfounded. The Parents presented no evidence of any specific incident where the Student was the actual victim of teasing or bullying during the 2012-2013 school year.

The ALJ remains unpersuaded that the Student was the victim of peer teasing or bullying during the 2012-2013 school year. The Parents' contention that continued placement of the Student in the [Program 3] during the 2012-2013 school year was inappropriate because of peer bullying or teasing issues is rejected.

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<sup>12</sup> On cross-examination, Ms. XXXX did imply some teasing may have occurred as part of middle school because of the Student's habits (aside from his misperceptions about peer games). (Tr. 384:7-16) Ms. XXXX was asked about the time the Student was punched in the face on the bus and said: "I cannot recall that incident. I'm not saying it didn't happen. I just do not remember." (Tr. 466:9-10) There was also mention of a water fountain incident when Ms. XXXX was not present, "but [she did] remember it being talked about." (Tr. 466:14-15) When these events took place and what (if anything) happened was not established by the evidence.

In the Due Process Complaint, the Parents allege that HCPSS “failed to develop an appropriate FBA or BIP for [the Student]” during the 2012-2013 school year. The record does not support the allegation.

During the 2012-2013 school year, [Program 3] staff and the Parents held monthly meetings to review and discuss the Student’s targeted behaviors on his BIP. XXXX XXXX, Behavior Support Teacher, worked closely with the Student during the school year. Ms. XXXX and Dr. XXXX continued to collaborate on the Student’s BIP and make changes in responsive strategies (reminding, problem-solving steps, crisis intervention, redirection, and calming down) before incorporating those changes into written revisions to the BIP. In addition to informal observations and written data collection (daily point sheets) from his teachers, Ms. XXXX collected Antecedent Behavioral Consequence (ABC) data on the Student. On or about February 15, 2013, Dr. XXXX prepared a draft of revisions to the Student’s FBA and BIP. On February 19, 2013, an IEP team meeting convened to review the Student’s behavior, his progress at school, and to review the Student’s BIP. The IEP team decided to update the Student’s BIP using the ABC data that had been collected, and, if necessary, revise strategies contained in the Student’s BIP. As the Student’s disruptive behaviors increased during the school year, [Program 3] staff members were progressively less successful in being able to calm him down and redirect him from disruptive behaviors. These additional disruptive behaviors included task refusal, eloping, and physical aggression. On or about April 10, 2013, the Student’s FBA and BIP were updated. On June 6, 2013, an IEP team meeting convened at [School 4] for a review of the Student’s BIP. The IEP team decided not to add seclusion and restraint to his BIP at that time, and the Student’s mother agreed with that determination.

The “calming room” was used involuntarily only as absolutely necessary when the Student posed a threat to the safety of himself or others. The Student was not left alone when he was in the calming room. The evidence demonstrates that the Student was in the calming room only for a matter of

minutes, not “for much of the school day” as alleged by the Parents. A staff member, customarily XXXX XXXX, would be present outside the calming room so that the Student would not be alone and unobserved or unsupervised. The “calming room” was also available as a voluntary retreat for the Student if he felt he was under stress.

The [Program 3] staff sought to develop and implement strategies to avoid antecedents for the Student’s targeted behaviors and to reinforce replacement behaviors. Dr. XXXX provided advice and consultation to [Program 3] staff on dealing with the Student’s behaviors that were interfering with his academic progress. Unsuccessful strategies were discarded and new strategies were added. Data on targeted behaviors were collected and used to make decisions on developing new strategies. The Student’s FBA and BIP were updated and revised. Dr. XXXX testified that the strategies used by staff were reasonably calculated to replace targeted behaviors with more desirable behaviors and that best practices were followed by him and [Program 3] staff in these efforts. No evidence from the Parents contradicts Dr. XXXX’s opinions on these matters. In his testimony, Dr. XXXX indicated that Dr. XXXX and the [Program 3] followed best practices in regard to the Student’s FBA and BIP. During cross-examination, the Student’s mother acknowledged that she had no reason to believe that the FBA of the Student and the BIP prepared for him were anything other than appropriately calculated to address his targeted behaviors. When the Student’s mother was asked what, if any, expert had told her that [Program 3] staff had not been utilizing best practices regarding the Student’s FBA and his BIP, her reply was “I can’t answer that question.” (Tr. 141:1) During testimony, the Student’s mother admitted that [Program 3] staff were making efforts to implement the BIP and to decrease the frequency of the Student’s targeted behaviors, and she also indicated that she had no doubt that XXXX XXXX was doing her job correctly.

The Student’s disruptive behaviors increased as the school year progressed and it became more and more difficult for him to be successful in a comprehensive middle school. However, the fact that

the Student's behavior became progressively more problematical does not demonstrate that the Student's FBA and BIP as developed and revised during the school year was not reasonable, appropriate, and consistent with best behavioral intervention practices. The ALJ remains unpersuaded that continuation of the Student in the [Program 3] during the 2012-2013 school year was inappropriate because of the his FBA and the BIP. The Parents' contention on this ground is also rejected.

On October 16, 2012, an IEP team meeting convened to address the Parents' concerns with the Student's behavior and to review his progress at school. During the meeting, the Parents indicated they did not believe that the Student was making progress in the [Program 3] and expressed interest in a referral to the CEPT for a different placement. The Parents also voiced their belief that the Student should be "labeled multi-handicapped to reflect autism and emotional disability." (Bd. Ex. #12, p. 776) After a review of all available information including academic performance, behavioral data, and teacher input, the IEP team determined that the Student's May 11, 2012 IEP was still educationally relevant and appropriate at that time.

Although the HCPSS later adopted the educational handicapping code advocated by the Parents during the October 16, 2012 IEP team meeting, the evaluations and assessments available to the HCPSS, at the time, still reflected that Emotional Disability was the correct primary disability code for the Student. Looking at the pattern of disciplinary referrals, only two had taken place at the time of the October 16, 2012 IEP team meeting. The Student's continued behavioral issues properly raised the Parents' concerns; however, his disruptive behaviors, at that point in the school year, had not escalated to the more intense and serious level of physical aggression, eloping, and classroom disruption that are reflected in the later 2013 disciplinary referrals. The Parents present no expert testimony that calls into question the decision of the October 16, 2012 IEP team that the Student's continued placement in the [Program 3] was appropriate at that time.

Ms. XXXX completed an educational assessment of the Student (report dated March 27, 2013) based on the Woodcock-Johnson III - Tests of Achievement (Woodcock-Johnson III) administered on or about January 31, 2013. According to the results of the Woodcock-Johnson III standardized testing, the Student's academic progress was right where you would expect him to be given the results of his test scores. Ms. XXXX testified, in her opinion, that based upon the standardized scores the Student continued to make progress in his academic skills during the 2012-2013 school year. Ms. XXXX also testified, in her opinion, that the results of the standardized test suggested that the impact of the Student's disabilities on his academic progress was light. The Parents offer no evidence that contradicts XXXX XXXX's expert testimony on these points. In her testimony, the Student's mother acknowledged that her son's academic scores on this standardized test — on subjects other than mathematics — were "strong." (Tr. 51:19) Given the complexity of his multiple disabilities, it is reasonable and permissible to infer that the Student's disabilities were having only a light impact on his academic progress as a result of the special education, related services, and behavioral supports that were being provided to him in the [Program 3] and that he, therefore, had been obtaining meaningful educational benefit, at least up to that point, during the school year. XXXX did not perform any educational testing during its evaluation of the Student. No evidence from the Parents contradicts the HCPSS evidence that the Student did not demonstrate "difficulty in an area of educational performance" and had obtained educational benefit during the 2012-2013 school year." (Bd. Ex. #29, p. 554)

At the end of his seventh grade year, the [Program 3] reported that the Student had received six "B" letter grades, five "C" letter grades, and one "E" grade in his classes at school. The Student had letter grades of B's or C's in all of his core subjects (Math, English, Science and Social Studies). The Student received a letter grade of "E" in Digital Citizenship because he had frequently refused to go to that class. During the 2012-2013 school year, the Student was making passing grades in all but one class that he refused to attend, and he was promoted to the next grade. "[T]he achievement of passing

marks and advancement from grade to grade will be **one** important factor in determining educational benefit.” *Rowley*, 458 U.S. at 207 n.28 (emphasis added).

“[T]here is no substantive standard in the IDEA regarding the level of education to be provided, nor is there any requirement that state and local educators must maximize the potential of disabled children . . . [s]imilarly, there is no requirement to guarantee any particular outcome for the child.” *King v. Bd. of Educ. of Allegany Cnty.*, 999 F. Supp. 750, 767 (D. Md. 1998) (citing *Rowley*, 458 U.S. at 189-90, 192). The IDEA does not guarantee a successful school year for each disabled student; it only guarantees an opportunity for a FAPE that includes an IEP reasonably calculated to enable the student to receive meaningful educational benefit. On these grounds, the Parents’ evidence falls far short of the mark to conclude that HCPSS failed to provide the Student with an opportunity for a FAPE during the 2012-2013 school year.

#### APRIL 10, 2013 IEP

The Parents allege that the HCPSS violated the IDEA through its “failure to develop an appropriate IEP for the . . . 2013-2014 school [year].” (Parents’ Due Process Complaint, p. 6)

On April 4, 2013, the Parents’ attorney provided the HCPSS with Dr. XXXX’s psychological evaluation report. The HCPSS accepted Dr. XXXX’s independent evaluation as a valid assessment for use in determining the Student’s need for special education, related services, and placement. On April 10, 2013, an annual IEP team meeting convened for the purpose of reviewing the Student’s assessments, his classroom performance, and his progress on meeting annual IEP goals. The IEP team reviewed all available information including observations, teacher reports, Parents’ reports, and previously completed assessments, including Ms. XXXX’s educational assessment of the Student (report dated March 27, 2013) and Dr. XXXX’s psychological evaluation (report dated February 2013).

The IEP team noted that “[the Student] meets the criteria for multiple disabilities (Autism and Other Health Impairment due to ADHD). He also meets the criteria for a secondary emotional

disability.” (Bd. Ex. #36, p. 668) The IEP team changed the Student’s educational disability code from an Emotional Disability to Multiple Disabilities (due to his diagnoses of Autism and ADHD, with an Emotional Disability being secondary).

The IEP Team developed an IEP for the Student for the 2013-2014 school year listing special education, related services, educational and behavioral goals, objectives, and accommodations. The IEP included goals and objectives for the Student under headings for Self Management/Behavior, Written Language, Social Interaction Skills, Social Emotional, Study Organizational Skills, and Speech – Fluency. The IEP specified twenty hours of direct special education classroom instruction in a self-contained classroom outside of the general education setting for all academic subjects. The IEP also provided that “[the Student] will have the option of attending the general education class for [S]cience and [S]ocial [S]tudies in order to participate in science lab or a special group activity if his behavior has been appropriate for the day.” (Bd. Ex. #36, p. 692) The Student would participate with his non-disabled peers in the general education setting for related arts (with behavioral supports) and lunch. The Student was to receive one thirty-minute session of occupational therapy each school quarter, thirty minutes of speech-language therapy each week, and one hour of psychological services each week from a licensed professional counselor/psychologist as related services. At the Parents’ request, the HCPSS agreed to return to the use of the three-ring binder system to assist the Student with organization of his materials, and that change was incorporated into the IEP. With the exception of a recommendation regarding testing, all of the accommodations recommended by Dr. XXXX in his report were incorporated into the IEP. The IEP team deferred consideration as to Dr. XXXX’s recommended accommodation that the Student not be given more than one test a day in order to collect more data regarding that possible educational need.

In their testimony, Dr. XXXX, Ms. XXXX, and Dr. XXXX indicated that the level of direct special education, related services, educational and behavioral goals, objectives, and accommodations



on the April 10, 2013 IEP would meet the Student's educational needs and the IEP was reasonably calculated to provide him with meaningful educational benefit during the 2013-2014 school year. There is no credible and reliable evidence that contradicts the testimony from the HCPSS expert witnesses regarding the special education, related services, educational and behavioral goals, objectives, and accommodations on the April 10, 2013 IEP.

Dr. XXXX stated he had thought that the April 10, 2013 IEP team had changed the Student's educational handicapping coding from a primary disability of Emotional Disability to Autism.<sup>13</sup> Dr. XXXX indicated that an IEP with a primary disability code of Autism would look different from the April 10, 2013 IEP that had been prepared by the IEP team. However, Dr. XXXX did not explain how the IEP would be different or challenge, and explain why, the special education, related services, educational and behavioral goals, objectives, and accommodations on the April 10, 2013 IEP would not meet the Student's educational needs or was not reasonably calculated to provide him with meaningful educational benefit. As there were no specifics and explanation, the ALJ cannot find any merit in Dr. XXXX's implied disagreement with the April 10, 2013 IEP.

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<sup>13</sup> COMAR 13A.05.01.03B(8) defines the term "Autism:"

(8) "Autism" means a developmental disability that:

- (a) Does not include emotional disability as defined in §B(23) of this regulation;
- (b) Significantly affects verbal and nonverbal communication and social interaction;
- (c) Is generally evident before 3 years old;
- (d) Adversely affects a student's educational performance; and
- (e) May be characterized by:
  - (i) Engagement in repetitive activities and stereotyped movements,
  - (ii) Resistance to environmental change or change in daily routines, and
  - (iii) Unusual responses to sensory experiences.

In her testimony, Ms. XXXX indicated that no educational programming elements found on an IEP are included based on the student's primary disability code. When Dr. XXXX was asked the significance of the change in the Student's IEP from the primary disability code for Emotional Disability to Multiple Disabilities, he stated that the difference was "other than the first page in changing the code . . . nothing." (Tr. 611:6-7) When Dr. XXXX was asked how important disability coding was in educational programming for a child as complicated as the Student, he indicated that he did not find it important.

As already discussed, above, the Student's educational needs determine what special education supports and services should be on his IEP, not the primary disability code.

In her testimony, Ms. XXXX explained that the Student's behavior had deteriorated and he had not made expected educational progress. This behavioral deterioration was illustrated by the Student's verbal threats and physical aggression toward [Program 3] staff, by the Student slamming doors, kicking lockers, eloping from class and the school building, running and screaming in the hallways, and throwing chairs and other objects. A further illustration of the Student's behavioral deterioration is found in the April 10, 2013 update to the FBA noting that the Student's behaviors sometimes resulted in the removal of peers from the classroom next to his classroom, disrupting their instruction. The Student's behavioral deterioration made him less available to obtain expected educational progress. In her testimony, Ms. XXXX indicated that the intensity and continuity of the disruptive behaviors at school had been increasing during the second half of the school year.

Dr. XXXX testified that in contrast to what he had seen in the latter part of the 2012-2013 school year, during the 2011-2012 school year and roughly the first half of the 2012-2013 school year, the Student could be calmed a lot quicker when he had outbursts, he was easily redirected when he acted out, and he was not physically aggressive. Dr. XXXX's perspective is supported by the written record of disciplinary referrals, and no credible and reliable evidence undercuts his testimony on this point.

The Student's behavioral deterioration and lack of educational progress resulted in changes to his IEP, including the increase in direct special education classroom instruction in a self-contained classroom outside of the general education setting for all of his academic subjects. The Student's behavioral deterioration also prompted consideration of a change in placement from the comprehensive middle school environment. The April 10, 2013 IEP team determined that the Student's educational needs could not be met during the 2013-2014 school year at the [Program 3] and referred the Student's placement decision to the CEPT. In listing a reason for the referral, the IEP team noted that "[d]ata shows that [the Student] has not made the educational and behavioral progress necessary and has deteriorated significantly in the last quarter." (Bd. Ex. #36, p. 701) Ms. XXXX testified that the April 10, 2013 IEP team made a referral to the CEPT at the right time and for the right reason. Dr. XXXX's testimony was consistent with Ms. XXXX on the timing of the need to consider a change in the Student's placement.

The ALJ remains unpersuaded that the April 10, 2013 IEP does not appropriately meet the Student's educational needs and/or was not reasonably calculated to enable him to receive meaningful educational benefit for the 2013-2014 school year.

#### PLACEMENT

At the May 22, 2013 meeting, the CEPT noted that "[the Student's] needs can no longer be met in a comprehensive school environment, even with the support of the [Program 3]." (Bd. Ex. #39, p. 661) The Parents agreed with that determination. Ms. XXXX testified that during the July 17, 2013 CEPT meeting, the Parents did not raise concerns with the IEP's goals, objectives, accommodations, supports, hours of direct special education services, degree of access to the general education environment, etc. — only with the Student's placement. There is no evidence to the contrary. The Parents believe that the appropriate placement for the Student is at [School 2]. In her testimony, the Student's mother indicated that she had made it clear during the May 22, 2013 CEPT that she never had

any interest in the [Program 1], “[n]ot for my child, no.” (Tr. 175:9) From the beginning of the first CEPT meeting, the Student’s mother was only interested in [School 2]. At the end of the second CEPT meeting, HCPSS offered a placement for the Student at the [Program 1] at the [School 1].

Dr. XXXX, Ph.D., Psychologist, testified for the HCPSS as an expert witness in the field of psychology with an emphasis on students with social/emotional conditions. His testimony regarding the characteristics and opportunities available at the [Program 1] at the [School 1] was not contradicted.

It is not disputed that the [Program 1] can provide the Student with the recommended classroom environment described in the written report of the psychological assessment from Dr. XXXX. Dr. XXXX testified that therapeutic services are integrated 100% into educational implementation. Social skills services are tailored to the needs of individual students and are integrated into all programming at the [Program 1]. The teacher to student ratio at the [Program 1] is one to two. Each classroom in the [Program 1] has a teacher and a para-educator. A middle school classroom at the [Program 1] will have from two to three students in the class. Approximately 40% of the students in the [Program 1] have a diagnosis on the autism spectrum. Teachers in the [Program 1] have the requisite training and experience working with students on the autism spectrum to be flexible in their demands so that the Student’s learning needs can be met.

The [Program 1] is a highly structured, specialized program in a self-contained environment to reduce distracting stimuli and provide ongoing emotional supports and behavioral interventions to meet the Student’s educational needs. Although the Student’s social-emotional profile is complicated, it is what [Program 1] staff deal with every day. In his testimony, Dr. XXXX indicated that the [Program 1] controls numerous factors in the school environment that cannot be controlled in a comprehensive middle school and can better implement the Student’s BIP. The goals and objectives listed on the Student’s April 10, 2013 IEP are almost identical to goals and objectives that have been successfully implemented for students at the [Program 1]. Occupational therapy and speech and language services,

as specified in the Student's April 10, 2013 IEP, are available at the [Program 1]. Although students do not have access to non-disabled peers, students at the [Program 1] can participate in clubs and/or teams at the [School 7], a comprehensive middle school, located approximately one mile from the [School 1].

According to Dr. XXXX, the April 10, 2013 IEP can be implemented at the [Program 1], the Student would be expected to obtain meaningful educational benefit in that program, and the [Program 1] would be an appropriate placement that would provide the Student with an opportunity for a FAPE in the LRE. Based on information from Dr. XXXX, Ms. XXXX and Dr. XXXX also indicated that the [Program 1] would be an appropriate placement for the Student and would be the LRE that could provide him with an opportunity for a FAPE for the upcoming school year. During cross-examination, Dr. XXXX admitted that knew "nothing about the [Program 1]." (Tr. 323:5)

During the CEPT meetings, the Parents expressed disagreement with the [Program 1]. The Parents point out that the [Program 1] and the [Program 4] are at the [School 1]. The Parents maintain that placement at the [Program 1] is unacceptable because it poses a risk to the Student as a possible target of students in the [Program 4] who may bully or tease him. However, [Program 4] and [Program 1] students do not share classrooms or common study areas at the [School 1]. [Program 4] and [Program 1] students eat lunch in the same lunchroom, but on different shifts. [Program 4] and [Program 1] students may have access to each other in the hallways when they change classes, but adult supervision is available in the hallways when classes change. Dr. XXXX also stated that students in the [Program 4] and [Program 1] tend to self-segregate. Because of the structure and use of the facilities, adult supervision, and the segregated environment, it is unlikely that the Student will be bullied or teased by [Program 4] students if he attends the [Program 1].

In the past, the Student has ridden the bus to school. [Program 4] and [Program 1] students may ride on the same bus to school, but each bus that brings students to the [School 1] has a driver and an aide to provide adult supervision. Further, the Student's home is 0.4 miles from the [Program 1], and

the commute time would be approximately three minutes each way. Because of the adult supervision and the limited duration of exposure, it is unlikely that the Student will be bullied or teased by [Program 4] students while he is on the bus on the way to the [Program 1]. The risk of teasing or peer hazing, of course, cannot be totally eliminated at, or on the way to, the [Program 1]; but, teasing or hazing is a risk that cannot be totally eliminated in any school environment where there is any exposure to peers.

In his psychological report, Dr. XXXX's "Diagnostic Conclusions" on the Student included "[b]ullying, difficulty with peer interactions and educational problems." (Bd. Ex. #30-A, p. 590) Dr. XXXX reached this conclusion based on information he had obtained from the Parents. During his cross-examination, Dr. XXXX admitted that he did not speak with the Student's teachers when he had observed the Student in [Program 3] classrooms at school. As already discussed, the ALJ remains unpersuaded that the Student was the victim of any instances of actual bullying or hazing while in the [Program 3] after January 2012. As this one of Dr. XXXX's "Diagnostic Conclusions" appears to be based on less than accurate information, it can be discounted, and that portion of Dr. XXXX's report provides no support for the Parents' proffered fear of a risk of peer bullying at the [Program 1].

The Student's mother is a licensed XXXX (XXXX). The Student's mother testified, as she had indicated during the May 22, 2013 CEPT meeting, that she has a client in the [Program 1]. The Student's mother objects to having her son in a placement where she also has a client because of confidentiality issues. This concern has no place in the IDEA analysis of what placement is appropriate for the Student. If the Student's mother perceives that a genuine issue could occur if the Student attends the [Program 1] along with one of her clients, the simple remedy is for the Student's mother to end the professional relationship and have her present client at the [Program 1] seen by another XXXX.

The faults that the Parents suggest regarding the Student's placement at the [Program 1] seem illogical, unreasonable, or have no merit under the IDEA. The Parents grasp at straws in an attempt to demonstrate that the [Program 1] is inappropriate. The credible and reliable evidence demonstrates that

placement of the Student in the [Program 1] would be an appropriate placement, he would be expected to obtain meaningful educational benefit in that program, and the [Program 1] would be the LRE that could provide the Student with a FAPE for the 2013-2014 school year.

During the July 17, 2013 CEPT meeting, XXXX XXXX, CEPT Chairperson and Instructional Facilitator, Department of Special Education, HCPSS, asked what the Parents were looking for at [School 2] outside of what could be provided at the [Program 1]. “[The Student’s mother] shared that they [were] looking for a 12-month program to limit [the Student’s] transitions.” (Bd. Ex. #43, p. 651) The Parents point out that [School 2] is a twelve-month program and the [Program 1] is not.

Dr. XXXX testified that a twelve-month program would be an appropriate placement for the Student and, he explained, a twelve-month program would prevent what he termed to be a “dramatic” risk of regression during an unstructured summer break for a student with an Autism diagnosis. (Tr. 270:13) Dr. XXXX was not admitted as an expert witness in special education. Dr. XXXX did not opine that in the absence of a twelve-month program, the Student would not or could not receive meaningful educational benefit. Further, as Dr. XXXX incorrectly indicated that an IEP is directed to address the primary handicapping condition, the value of his opinion regarding what is appropriate, from an IDEA perspective, is questionable. In their testimony, Dr. XXXX, Ms. XXXX, and Dr. XXXX stated that the April 10, 2013 IEP is reasonably calculated to provide the Student with meaningful educational benefit for the 2013-2014 school year. The April 10, 2013 IEP does not call for a twelve-month program for the Student. No expert testified that a twelve-month program is required in order for the Student to receive meaningful educational benefit for the upcoming 2013-2014 school year. Insofar as Dr. XXXX’s testimony implies such a requirement, the ALJ remains unpersuaded that a twelve-month program is required in order for the Student to obtain meaningful educational benefit for the 2013-2014 school year.

The April 10, 2013 IEP provided that the Student receive ESY services during summer 2013. HCPSS evidence in the record that the Student made sufficient progress on his ESY goals and objectives during summer 2013 and had been successful is unchallenged. At a later point in the upcoming school year, the Student may be determined to be eligible for ESY services in summer 2014. If past experience is any guide, an ESY program is all that may be required under the IDEA to address the risk of the Student's regression at the end of the 2013-2014 school year.

In addition, the Parents pointed out that [School 2] provides mandatory family counseling and that feature is not available at the [Program 1]. In his testimony, Dr. XXXX stated that family counseling could be provided during normal school hours if the Parents are available at that time and willing to participate, but family counseling is not a mandatory part of programming at the [Program 1]. Although mandatory family counseling may be desired by the Parents, there is no evidence that it is required in order for the Student to have an opportunity for a FAPE during the 2013-2014 school year.

The Parents' Due Process Complaint mentions only one alleged IDEA procedural error, and it has to do with the question of placement.

The Parents contend that they were not allowed by the HCPSS to participate in the placement decision. In his testimony, Dr. XXXX stated that he had reviewed the April 10, 2013 IEP two days prior to the May 22, 2013 CEPT meeting and, based on his review, had thought that the Student's IEP could be implemented at the [Program 1]. The Parents argue that Dr. XXXX and Ms. XXXX had predetermined that the Student's placement would be at the [Program 1] and that predetermination excluded them from any real participation in the placement decision. The Parents find support for this argument in the testimony of Dr. XXXX and Ms. XXXX. Dr. XXXX testified that Ms. XXXX, Ms. XXXX, and Dr. XXXX verbally agreed that the [Program 1] placement was appropriate at the CEPT meetings and that neither he nor Ms. XXXX verbalized a placement opinion. Ms. XXXX testified that she was not asked to voice her opinion regarding whether the Student's placement at the [Program 1]



was appropriate during the two CEPT meetings. On redirect examination, Dr. XXXX stated that he would have spoken up if he had disagreed. The Parents also allege that their procedural right to participate in a placement decision was denied because the HCPSS would not seriously consider placement of the Student at [School 2]. The Student's mother testified that she was told during the July 17, 2013 CEPT meeting that the HCPSS does not place students at [School 2].

IDEA procedural safeguards include “[a]n opportunity for the parents of a child with a disability . . . **to participate in meetings with respect to the** identification, evaluation, and **educational placement** of the child . . . .” 20 U.S.C.A. § 1415(b)(1) (2010) (emphasis added). The statutory language is mirrored in the applicable regulation: “The parents of a child with a disability must be afforded an opportunity **to participate in meetings with respect to . . . [t]he** identification, evaluation, and **educational placement** of the child . . . .” 34 C.F.R. 300.501(b)(1)(i).

Rulings from federal courts that have squarely addressed parental participation in the IEP process do not support the Parents' argument that they were not allowed by the HCPSS to participate in the Student's placement decision as required by the cited statute and regulation.

The Eastern District of New York analyzed the definition of meaningful parental participation under 20 U.S.C.A. § 1415(b)(1) in *Danielle G. v. New York City Department of Education*, No. 06-CV-2152, 2008 U.S. Dist. LEXIS 60192, at \*15-16 (E.D.N.Y. August 7, 2008).<sup>14</sup> The parents alleged that the result of the IEP review was predetermined and, therefore, they were denied the opportunity of meaningful participation. The parents' claim centered on a “pre-conference” that was held among school district personnel directly before a scheduled IEP meeting, where the mother was asked to wait outside of the pre-conference for over a half hour before being asked to join the meeting. During this pre-conference, the parents contend, the school district made their decisions for their daughter's IEP. To

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<sup>14</sup> *Danielle G.* is an unpublished decision. Courts generally frown upon reliance on unpublished decisions. However, U.S. Court of Appeals for the Fourth Circuit Rule 36(c) provides that if no other case provides similar precedential value, the court will consider an unpublished decision. No other case was located within the Fourth Circuit or the Maryland Appellate Courts that addresses this issue with the clarity of *Danielle G.* Therefore, the reasoning in *Danielle G.* can be considered as persuasive on this point.

substantiate their claim, the parents pointed to testimony from the student's speech therapist indicating that the IEP recommendations were, in fact, made at this preliminary meeting; to the recommendation made by the school district's special education committee at the end of the meeting to terminate certain services; and to a comment made by the school district's representatives that more evaluations needed to be conducted because the student's services were too costly. *Id.* at \*16. The parents alleged that the mother had only "limited participation at the meeting." *Id.*

The *Danielle G.* court held that the school district's "pre-conference," intentionally excluding the parents' participation did *not* deprive the student's parents of meaningful participation in the formation of her IEP because the record did not support a finding that the student's educational needs were predetermined. *Id.* at \*17. Specifically, the court noted that the mother had the "opportunity" to participate meaningfully in the actual meeting that occurred after the pre-conference; however, she offered nothing in the meeting beyond saying that she needed to confer with her lawyer regarding the school district's recommendations. *Id.* at \*18-19. Interestingly, the court reasoned that "[a]lthough [the parent] was under no obligation to make any statements during the IEP meeting, her lack of participation does not suggest that she was denied an opportunity to participate in [the Student's] IEP formulation." *Id.* at \*19. The court further reasoned that even though the school district's witnesses admitted that they came into the meeting with a certain identifiable placement option, there was no evidence that suggested that the school district's option was unalterable or that otherwise hindered the parents' participation in continuing the IEP meeting. *Id.* See also *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) ("[W]hile a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement."), *aff'd*, 39 F.3d 1176 (4th Cir. 1994) (unpublished disposition).

In *A.E. v. Westport Board of Education*, 463 F. Supp. 2d 208 (D. Conn. 2006), the court held that "[n]othing in the IDEA requires the parents' consent to finalize an IEP[;] [i]nstead, the IDEA only

requires that parents have an opportunity to participate in the drafting process.” *Id.* at 216. The court noted that even though there was evidence that the school district met and appeared to have determined a placement for the child prior to the IEP meeting, there was also evidence that the school district had an open mind during the IEP meeting. *Id.* at 217. The court also noted, *inter alia*, that the parents attended other IEP meetings during the school year, had an independent evaluation conducted on their child, and were represented by a qualified parent advocate. *Id.* See also *Tammy S. v. Reedsburg Sch. Dist.*, 302 F. Supp. 2d 959, 975 (W.D. Wis. 2003) (where parents contended that they never participated meaningfully in the IEP process because they were not part of the consensus that finalized the IEP; holding that parents of a learning disabled student participated “sufficiently” in the development of their child’s IEP as they attended two IEP meetings that year prior to the proposed placement in the IEP, there was evidence that the school district considered (albeit, rejected) their therapist’s recommendations, and attended an additional meeting after the IEP meeting in question).

The IDEA allows schools to engage in preparatory activities in order to develop a proposal for an IEP meeting, discuss potential services and placements for the affected child, and even come to an IEP meeting with a written “game plan” in hand. See *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247 (2d Cir. 2009).

The Parents, their legal representative, and on July 17, 2013, their expert witness, appeared and discussed the Student’s placement decision at the CEPT meeting(s). Various aspects of placement at the [Program 1] and [School 2] were discussed such as availability of family counseling, faculty qualifications, student populations, travel time and distance, sensory supports, and behavioral supports. Even though Dr. XXXX had reviewed the April 10, 2013 IEP before the May 22, 2013 CEPT and had thought it could be implemented at the [Program 1], there is no credible evidence that option was considered to be unalterable by HCPSS personnel or that the Parents’ participation in the CEPT meeting was hindered. The HCPSS did not finalize its placement decision during the May 22, 2013 CEPT

meeting. A second CEPT meeting was scheduled and held on July 17, 2013 to further discuss placement after additional information on [School 2] was obtained by the HCPSS. The continuation and rescheduling of the CEPT meeting is at odds with the perspective that the HCPSS did not have an open mind or that placement of the Student at the [Program 1] was unalterable. The Parents contend that the HCPSS simply would not consider placement at [School 2]. Yet, a fair consideration of the evidence leads to the view that HCPSS would not agree to a placement at [School 2] as it had an available placement for the Student within the public school system that was appropriate. The Parents were afforded a full opportunity to participate in the CEPT meetings and in the Student's placement decision. The ALJ remains unpersuaded that the HCPSS violated IDEA procedural safeguards, cited above, on the grounds raised by the Parents.

The Parents maintain that placement at the [Program 1] is inappropriate. The facts as found, based on the credible and reliable evidence in the record, are inapposite. The Parents do not want a placement at the [Program 1] as they no longer trust the HCPSS to educate their son and they believe that the [Program 2] at [School 2] would be the best possible educational program for the Student.<sup>15</sup> The ALJ is not unsympathetic to the Parents' wishes. They may be correct. Placement at the [Program 2] may be the best possible educational program for the Student. That, however, is not the standard by which the opportunity for the provision of a FAPE must be judged. "IDEA's FAPE standards are far more modest than to require that a child excel or thrive . . . . The 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) (judgment ordering the local education agency to pay two-years of private school tuition vacated as the district court had repudiated the administrative law judge's findings and discarded the

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<sup>15</sup> The Parents' Due Process Complaint names the [Program 2] at [School 2] as their desired placement. Dr. XXXX testified that the [Program 6] at [School 2] is his recommended placement for the Student, but suggests that [School 2] staff would place the Student in the program they believe is the best fit for him. Simply put, there is no expert testimony in this record on whether the [Program 2] at [School 2] would be an appropriate placement for the Student.

expertise of the IEP team without reason or explanation) (citing *Rowley*, 458 U.S. at 203). Under the IDEA, the Student is entitled to a FAPE but not the best possible educational program if another program in the public school system is appropriate and will provide him with an opportunity for meaningful educational benefit.

### EXTENDED SCHOOL YEAR

The Parents allege that the HCPSS violated the IDEA through its “failure to offer appropriate ESY services for the summers of 2012 and 2013.” (Parents’ Due Process Complaint, p. 6)

The Fourth Circuit has “articulated . . . a formal standard for determining when ESY Services are appropriate under the IDEA: ‘ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.’” *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002) (citing *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537-38 (4th Cir. 2002)). “In *MM*, we carefully emphasized that, under this standard, ‘the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.’” *Id.*

In pertinent part, COMAR 13A.05.01.08B provides:

(2) Extended School Year Services.

(a) At least annually, the IEP team shall determine whether the student requires the provision of extended school year services in accordance with Education Article, §8-405, Annotated Code of Maryland.

(b) The IEP team shall consider:

(i) Whether the student's IEP includes annual goals related to critical life skills;

(ii) Whether there is a likelihood of substantial regression of critical life skills caused by the normal school break in the regular school year and a failure to recover those lost skills in a reasonable time;

(iii) The student's degree of progress toward mastery of IEP goals related to critical life skills;

- (iv) The presence of emerging skills or breakthrough opportunities;
- (v) Interfering behaviors;
- (vi) The nature and severity of the disability; and
- (vii) Special circumstances.

(c) Following the consideration of factors described in §B(2)(b) of this regulation, the IEP team shall determine whether the benefits the student with a disability gains during the regular school year will be significantly jeopardized if that student is not provided with an educational program during a normal break in the regular school year.

“‘Critical life skill’ means a skill determined by the individualized education program (IEP) team to be critical to the student’s overall educational progress.” COMAR 13A.05.01.03B(15).

On February 16, 2012, an IEP team meeting convened. The Parents attended along with XXXX XXXX, their family (special education) navigator. The IEP team determined the Student was not eligible for ESY services during summer 2012. The HCPSS made the ESY determination during February 2012 as a matter of administrative convenience in order to have time to prepare goals, objectives, and program services for the summer months (if there had been a different outcome).

Dr. XXXX and Ms. XXXX were at the February 16, 2012 IEP team meeting when the ESY determination was made. Ms. XXXX, the IEP team Chairperson, testified that the Student had his best time behaviorally and academically during the 2011-2012 school year when the ESY decision was made in February 2012. In her testimony, Ms. XXXX stated “[i]t was determined that [the Student] did not meet the criteria as far as critical life skills or regression of his degree of progress. Going through the questions [for ESY eligibility on the February 16, 2012 IEP], he did not meet the eligibility.” (Tr. 527:9-13) The ESY eligibility questions on the IEP form reflect the criteria found at COMAR 13A.05.01.08B(2)(b). (See Parent Ex. #9, p. 726) Dr. XXXX also indicated in his testimony that when the ESY determination was made in February 2012, the Student was doing well in regards to his targeted behaviors and was making academic progress. Ms. XXXX testified that at the February 16, 2012 IEP team meeting, the Parents agreed with the determination that was made regarding ESY services. The

Parents presented no evidence that contradicts Ms. XXXX or Dr. XXXX on these points. There is no evidence that the Parents asked HCPSS at any time to reconsider the determination made regarding the Student's eligibility for ESY services until after the beginning of the 2012-2013 school year. Therefore, the ALJ has found that the Parents agreed with the determination that was made at the February 16, 2012 IEP team meeting regarding ESY services. Further, the Parents offer no expert testimony on whether the Student met any of the criteria found at COMAR 13A.05.01.08B(2) for a determination that he was eligible for ESY during summer 2012.

Dr. XXXX testified that a twelve-month program would be appropriate for the Student as a student with a disability of Autism as there is a dramatic risk of loss in terms of behavior, academic, and social-emotional skills when such a student leaves a structured school environment to an unstructured summer. However, he also testified that he was able to isolate the Student's diagnosis of Asperger's Disorder (on the Autism spectrum) when he did in 2013 based on the advantage of the lapse of time and having accumulated data up to the point of his evaluation, including the testing performed at XXXX. There is no reliable and credible evidence that at the time of the February 16, 2012 IEP team meeting, the team should have been a recognition that a risk existed that the educational benefit the Student had obtained during the 2011-2012 school year would be "significantly jeopardized" if ESY services were not provided.

At the February 16, 2012 meeting, the IEP team had no data or information available to it that would support a determination that the Student's educational gains during the 2011-2012 school year would be significantly jeopardized if he did not receive ESY services. At that time, the IEP team also had no data or information available to it that would support a determination that there were significant interfering behaviors, emerging skills, breakthrough opportunities, or that the nature and severity of the Student's disabilities suggested a need for ESY services. (Finding of Fact #28) The ALJ remains

unpersuaded that the HCPSS violated the IDEA or failed to provide a FAPE by not providing ESY services for the summer of 2012.

The April 10, 2013 IEP team determined that the Student was eligible for ESY services during summer 2013. The IEP team noted that “[the Student’s] IEP does contain goals that are considered to be critical life skills in the areas of social, emotional, behavior, and social interaction” and that he was making “very limited progress and requires continued education.” The IEP team also noted that the Student had “significant interfering behaviors,” “disruptive behaviors,” and his BIP required “continued intervention and instruction.” (Bd. Ex. #36, p. 682)

The Student’s behavior and academic progress during the second half/last quarter of the 2012-2013 school year stand in stark contrast to what had been the situation during February 2012. The April 10, 2013 IEP team’s analysis and approval of ESY services is a proper recognition of the deterioration in the Student’s behavior and academic progress and that certain goals were critical to the Student’s overall educational progress. COMAR 13A.05.01.03B(15).

After the 2012-2013 school year ended, from June 24, 2013 through July 19, 2013, the Student attended an ESY program at the [School 6] from 9:00 a.m. to 11:30 a.m. In her testimony, Ms. XXXX indicated that she had information from the ESY program at the [School 6] that the Student made sufficient progress on his ESY goals and objectives and had been successful. The Parents presented no evidence from any source that contradicts this report from Ms. XXXX.

During cross-examination, the Student’s father was asked if he agreed that the Student had been successful during the ESY program. In reply, the Student’s father stated that depends on the definition of successful. In the next question, the Student’s father was asked to explain what he had meant by the word “successful” when he had “shared that [the Student] had been successful in the summer program at [School 6] [Middle School] this summer” during the July 17, 2013 CEPT meeting. (Bd. Ex. #43, p. 651) When faced with this record of his earlier statement, the Student’s father’s explanation was anything but



clear. On redirect examination, the Student's father stated that the Student had not started in the ESY program as of the July 17, 2013 CEPT meeting (the Student finished the ESY program at [School 6] on July 19, 2013) and then during re-cross examination indicated that he did not recall the start/stop dates of the ESY program. The impression taken from this exchange was that the Student's father was being evasive and inaccurate, and the ALJ has drawn the inference that the Student's father's statement as it is reported in the notes of the July 17, 2013 CEPT meeting is accurate.

During the summer of 2013, the Student made sufficient progress on his ESY goals and objectives and was successful. (Finding of Fact #78) The ALJ remains unpersuaded that HCPSS violated the IDEA by failing to provide the Student with appropriate ESY services for the summer of 2013.

#### REIMBURSEMENT FOR PRIVATE PSYCHOLOGICAL EVALUATION

As part of their "[p]roposed [s]olution," the Parents request "[r]eimbursement for private evaluations." (Parents' Due Process Complaint, p. 7) "[C]hildren with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by" a State education agency or local education agency. 20 U.S.C.A. § 1415(a) (2010). The procedures required by the IDEA include:

An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, **and to obtain an independent educational evaluation of the child.**

*Id.* § 1415(b) (emphasis added). 34 C.F.R. § 300.502 further delineates a parent's or child's and a local education agency's rights with respect to private evaluations:

§300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

If a parent is dissatisfied with the local education agency's evaluation of his or her child as a child with a disability or a disabled child's special needs, he or she may seek to obtain an independent educational evaluation at the local education agency's expense. The local education agency can escape its obligation to pay for the independent educational evaluation by requesting a due process hearing and

establishing at the hearing that its evaluation was “appropriate.” *See Krista P., & Mr. and Mrs. P., v. Manhattan Sch. Dist.*, 255 F. Supp. 2d 873 (N.D. Ill. 2003).

There are several private evaluations noted in the findings of fact. Only one took place during a period of time not barred by limitations under the IDEA.<sup>16</sup> On April 4, 2013, the Parents’ attorney forwarded to HCPSS a report of a private psychological evaluation completed by XXXX in February 2013. Yet, prior to that date, the Parents had not notified the HCPSS of any disagreement with any HCPSS evaluation of the Student and had not notified the HCPSS that they would seek an independent educational evaluation at public expense. During cross-examination, the Student’s mother admitted that the Parents had obtained Dr. XXXX’s psychological evaluation even though they did not notify the HCPSS they disagreed with any evaluation performed by the local education agency. As the Parents never notified the HCPSS that they disagreed with an evaluation and had not informed it that they would be seeking an independent educational evaluation at public expense, the HCPSS was never in a position to “[f]ile a due process complaint to request a hearing to show that its [most recent psychological evaluation had been] appropriate.” 34 C.F.R. § 300.502(b)(2)(i). Dr. XXXX’s psychological evaluation was a private evaluation obtained by the Parents outside of, and apart from, their IDEA right to seek an independent educational evaluation at public expense.

The private psychological evaluation conducted by XXXX in February 2013 was “an evaluation obtained at private expense.” *Id.* § 300.502(c). The only obligation of the HCPSS under the IDEA was

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<sup>16</sup> The relevant provisions of the IDEA are as follows:

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent. ....

20 U.S.C.A. § 1415(f)(3)(C)-(D) (2010). Maryland law has the same two-year time limitation on the filing of a due process complaint and the same type of exceptions. Md. Code Ann., Educ. § 8-413(d)(3), (4) (2008).

to consider that evaluation “in any decision made with respect to the provision of FAPE to the [Student],” not to pay for it. *Id.* § 300.502(c)(1). The ALJ rejects the Parents’ request for reimbursement of the expense of obtaining Dr. XXXX’s psychological evaluation.

### **CONCLUSIONS OF LAW**

Based upon the Findings of Fact and Discussion, the ALJ concludes as a matter of law that the May 31, 2012 IEP prepared by the HCPSS was reasonably calculated to provide the Student with meaningful educational benefit during the 2012-2013 school year. 20 U.S.C.A. § 1414(a)(1)(C)(i)(II), (b)(2)-(3), (d)(1), (3); 34 C.F.R. § 300.304(b).

Based upon the Findings of Fact and Discussion, the ALJ concludes as a matter of law that the HCPSS did not fail to provide the Student with a FAPE during the 2012-2013 school year. 20 U.S.C.A. § 1401(9); Md. Code Ann., Educ. § 8-401(a)(3).

Based upon the Findings of Fact and Discussion, the ALJ also concludes as a matter of law that the April 10, 2013 IEP prepared by the HCPSS is reasonably calculated to provide the Student with meaningful educational benefit for the 2013-2014 school year. 20 U.S.C.A. § 1414 (a)(1)(C)(i)(II), (b)(2)-(3), (d)(1), (3); 34 C.F.R. § 300.304(b)

Based upon the Findings of Fact and Discussion, the ALJ further concludes as a matter of law that placement of the Student at the [Program 1] at the [School 1], as proposed by the HCPSS for the 2013-2014 school year, is appropriate and will provide him with an opportunity for a FAPE in the LRE. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114; 34 C.F.R. § 300.116.

Based upon the Findings of Fact and Discussion, the ALJ concludes as a matter of law that the HCPSS was not required to provide the Student with ESY services for the summer of 2012 in order for him to receive a FAPE. COMAR 13A.05.01.08B.

Based upon the Findings of Fact and Discussion, the ALJ concludes as a matter of law that the HCPSS did not fail to provide the Student with appropriate ESY services for the summer of 2013.

Based upon the Findings of Fact and Discussion, the ALJ concludes as a matter of law that the Parents are not entitled under the IDEA to be reimbursed for a private psychological evaluation of the Student completed by XXXX in February 2013. 34 C.F.R. § 300.502(c).

### **ORDER**

THEREFORE IT IS ORDERED, that the April 10, 2013 IEP and the placement proposed by HCPSS for the Student at the [Program 1] at the [School 1] for the 2013-2014 school year be, and hereby is, AFFIRMED; and

IT IS FURTHER ORDERED, that the Parents' request for an order directing that HCPSS place the Student at [School 2] during the 2013-2014 school year be, and hereby is, DENIED; and

IT IS FURTHER ORDERED, that the Parents' request for compensatory education and/or for reimbursement for a private evaluation be, and hereby is, DENIED.

October 23, 2013  
Date Decision Mailed

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Stephen J. Nichols  
Administrative Law Judge

SJN/kkc

### **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.