

XXXX XXXX,

v.

CARROLL COUNTY

PUBLIC SCHOOLS

* BEFORE JEROME WOODS, II,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH NO.: MSDE-CRRL-OT-14-22224

* * * * *

DECISION

STATEMENT OF THE CASE
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ORDER

STATEMENT OF THE CASE

On June 23, 2014, Holly Parker, Esquire, on behalf of XXXX XXXX (Parent) and her son, XXXX XXXX (Student), filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Carroll County Public Schools (CCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on July 24, 2014 with the parties. Leslie Stellman, Esquire, represented the CCPS. The Parent represented the Student.¹

¹During the pre-hearing conference, the parties' representatives were advised of the time requirements for issuing a decision. The parties agreed that they waived a resolution session. Documentation of the waiver was presented on August 28, 2014, the last day of the hearing. During the conference, the parties requested that I waive the time requirements for issuing a decision set forth in 34 C.F.R. § 300.515 and COMAR 13A.05.01.15C, so that a hearing could be scheduled to accommodate their calendars while allowing sufficient time to render a written decision. The parties agreed to allow thirty days from the conclusion of the hearing for the issuance of a written decision on the merits.

I held a hearing on August 26, August 27, and August 28, 2014. Mr. Stellman and Rochelle S. Eisenbeg, Esquire, represented CCPS. Ms. Parker represented the Student and the Parent.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511 (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. 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. Was the Individualized Education Program (IEP) and placement developed by the CCPS reasonably calculated to provide the Student with a free appropriate public education (FAPE) for the 2013-2014 and 2014-2015 school years, and if there was a denial of FAPE, is placement at [School 1] (a separate day school) at the expense of CCPS appropriate?
2. Did the CCPS properly determine that the Student did not require extended school year (ESY) services for the summer of 2014?
3. Did the CCPS properly determine that the Student could participate in the IEP team meeting on April 10, 2014, after the Parent informed the IEP team that she did not want the Student to participate?

SUMMARY OF THE EVIDENCE

A. Exhibits

CCPS offered the following exhibits, which I admitted into evidence:

- CCPS Ex 1 Psychological Assessment results, by XXXX XXXX, M.D., February 21, 2008
- CCPS Ex 2 Woodcock Johnson Results, April 21, 2008
- CCPS Ex 3 Behavior Rating Summary, by XXXX XXXX, PsyD., April 10, 2009
- CCPS Ex 4 Prior Written Notice, January 20, 2010
- CCPS Ex 5 IEP, April 5, 2011
- CCPS Ex 6 Prior Written Notice, January 6, 2012
- CCPS Ex 7 Prior Written Notice, March 30, 2012
- CCPS Ex 8 IEP, April 19, 2012
- CCPS Ex 9 Multidisciplinary Evaluation Review, March 30, 2012 with the following
assessment results:
- Academic Assessment, February 29, 2012
 - Classroom Observation, March 19, 2012
 - Communication Assessment, February 14, 2012
 - Psychological Report, March 23, 2012
 - Summary of Assessments, March 30, 2012
- CCPS Ex 10 Student essay, English 10, September 16, 2013
- CCPS Ex 11 Amendment/Modification to IEP, November 28, 2012
- CCPS Ex 12 Chart containing Amended IEP services and hours, September 10, 2013
- CCPS Ex 13 IEP and Behavioral Intervention Plan, April 18, 2013
- CCPS Ex 14 Written Notice, of April 18, 2013 meeting
- CCPS Ex 15 Prior Written Notice June 11, 2013 IEP meeting
- CCPS Ex 16 Prior Written Notice September 9, 2013 IEP meeting

- CCPS Ex 17 Amendment Modification to IEP with consent to attend [School 2], September 9, 2013
- CCPS Ex 18 Student essay, September 12, 2013
- CCPS Ex 19 Meeting Notice of September 16, 2013 IEP meeting, September 13, 2013
- CCPS Ex 20 Prior Written Notice September 19, 2013 IEP meeting
- CCPS Ex 21 Student essay, October 4, 2013
- CCPS Ex 22 Carroll County Youth Services Bureau Report, by XXXX XXXX, LSCW-C, January 6, 2014
- CCPS Ex 23 Prior Written Notice January 17, 2014 IEP meeting
- CCPS Ex 24 Meeting Notice March 18, 2014 IEP meeting, March 13, 2014
- CCPS Ex 25 Prior Written Notice March 18, 2014 IEP meeting
- CCPS Ex 26 Alternate Program Referral to [School 2], July 26, 2013
- CCPS Ex 27 Letter from the Parent and Student, requesting placement at [School 2], to XXXX XXXX, Pupil Personnel Worker, August 6, 2013
- CCPS Ex 28 Graph of Referrals, 2008-2014
- CCPS Ex 29 Meeting Notice of April 18, 2014 IEP meeting
- CCPS Ex 30 Draft IEP for discussion at April 10, 2014 IEP meeting
- CCPS Ex 31 Attendance Referrals
- CCPS Ex 32 IEP goals and progress reports reviewed at April 10, 2014 IEP meeting
- CCPS Ex 33 IEP meeting summary, April 10, 2014
- CCPS Ex 34 [School 2] Behavior report, blank
- CCPS Ex 35 [School 2] Mission Statement
- CCPS Ex 36 Letter from Ms. Eisenberg to Ms. Parker, April 22, 2014
- CCPS Ex 37 Final Draft Behavioral Intervention Plan with Functional Behavioral Assessment, April 18, 2013
- CCPS Ex 38 Classroom Behavioral Expectations, January 31, 2014

CCPS Ex 39 Letter from XXXX XXXX, Principal, [School 2] to XXXX XXXX, [School 3]
CCPS Ex 40 Student transcript, behavioral referrals, ninth grade
CCPS Ex 41 IEP, April 18, 2013 with functional achievement information
CCPS Ex 42 IEP Snapshot, for April 18, 2013 IEP
CCPS Ex 43 Student math assignments from [School 2]
CCPS Ex 44 Daily Binder Checklist
CCPS Ex 45 [School 1], program description
CCPS Ex 46 Excerpt, No Easy Answers, XXXX XXXX
CCPS Ex 47 Student Attendance History, 2010-2014
CCPS Ex 48 Resume, XXXX XXXX, Pupil Personnel Worker
CCPS Ex 49 Resume, XXXX XXXX, Special Educator, [School 2]
CCPS Ex 50 Resume, XXXX XXXX, Principal, [School 2]
CCPS Ex 51 Resume, XXXX XXXX, Supervisor of Special Education, CCPS
CCPS Ex 52 IEP, April 10, 2014

The Parent offered the following exhibits, which I admitted into evidence:

PNT Ex 1 Letter from Ms. Parker to XXXX XXXX, OAH, August 18, 2014
PNT Ex 2 Letter from Ms. Parker to Ms. XXXX XXXX, OAH, August 13, 2014
PNT Ex 3 Pre-Hearing Conference Report and Order, July 25, 2014
PNT Ex 4 Notice of non-settlement, July 29, 2014
PNT Ex 5 Notice of Hearing, July 28, 2014
PNT Ex 6 Agreement to Mediate, July 24, 2014
PNT Ex 7 Letter from Mr. Stellman to Ms. XXXX, July 22, 2014
PNT Ex 8 Letter from Ms. Eisenberg to Ms. Parker, July 2, 2014
PNT Ex 9 Email from Ms. Eisenberg to Ms. XXXX, June 27, 2014

PNT Ex 10	Letter of Findings, Maryland State Department of Education (MSDE), June 9, 2014
PNT Ex 11	Letter from XXXX XXXX, Chief Family Support and Dispute Resolution, MSDE to Ms. Parker, May 22, 2014
PNT Ex 12	MSDE Complaint form, May 16, 2014
PNT Ex 13	Letter from Ms. Parker to Ms. Eisenberg, April 23, 2014
PNT Ex 14	Letter from Ms. Eisenberg to Ms. Parker, April 22, 2014
PNT Ex 15	Draft IEP, provided at April 10, 2014 IEP meeting
PNT Ex 16	IEP, April 10, 2014
PNT Ex 17	MSDE Complaint form, May 16, 2014
PNT Ex 18	Report Card 2013-2014
PNT Ex 19	Prior Written Notice March 18, 2013 IEP meeting
PNT Ex 20	Letter from Ms. Parker to XXXX XXXX, Director of Special Education, CCPS, March 26, 2014
PNT Ex 21	Classroom Behavioral Expectations, January 31, 2014
PNT Ex 22	Consent to Release Personal Information, April 10, 2014
PNT Ex 23	Draft IEP, March 17, 2014
PNT Ex 24	Carroll County Youth Services Bureau Report, by XXXX XXXX, LSCW-C, January 6, 2014
PNT Ex 25	Maryland School Assessment Reports, January 2014
PNT Ex 26	Student Detail Report, December 18, 2013
PNT Ex 27	Prior Written Notice September 19, 2014 IEP meeting
PNT Ex 28	Prior Written Notice September 9, 2013 IEP meeting
PNT Ex 29	(1) Behavioral Intervention Plan, April 23, 2014
PNT Ex 30	(2) Behavioral Intervention Plan, April 23, 2014
PNT Ex 31	IEP Progress Report, April 18, 2013

PNT Ex 32 IEP Goals, April 18, 2013

PNT Ex 33 IEP chart on goals and progress, January 2010 through April 18, 2013

PNT Ex 34 Draft IEP, February 2014

PNT Ex 35 Draft IEP, March 2014

PNT Ex 36 Draft IEP, February 2014

PNT Ex 37 Psychological Report, March 23, 2012

PNT Ex 38 IEP Goals, April 5, 2011

PNT Ex 39 Behavioral Rating Summary, by XXXX XXXX, PsyD., April 10, 2009

PNT Ex 40 Behavior chart with the following attachments:

- Resume, XXXX XXXX, Director of Related Services, [School 1]
- Resume, XXXX XXXX, Director of Admissions, [School 1]
- XXXX XXXX, Special Educator

B. Testimony

The Student testified on his own behalf and presented testimony from the following witnesses:

1. XXXX XXXX, Special Educator, accepted as an expert in special education;
2. The Parent;
3. XXXX XXXX, Teacher, [School 2]; and
4. XXXX XXXX, Director of Admissions, [School 1].

The following witnesses testified on behalf of the CCPS:

1. XXXX XXXX, former Assistant Principal, [School 3];
2. XXXX XXXX, Pupil Personnel Worker;
3. XXXX XXXX, Special Educator, [School 2], accepted as an expert in special education;
4. XXXX XXXX, Principal, [School 2], accepted as an expert in special education, general and special education administration and autism;

5. XXXX XXXX, Supervisor of Special Education, CCPS, accepted as an expert in special education.

FINDINGS OF FACT

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

1. The Student is sixteen years old (date of birth: XXXX, 1998) and is currently not attending school.
2. The Student is diagnosed as a student with autism and other health impairment, as defined under the IDEA, as a result of a diagnosis of attention deficit hyperactivity disorder (ADHD).
3. The Student is not attending school because the Parent does not approve of the CCPS proposed placement.
4. At the conclusion of the 2012-2013 school year, the Student received the following grades:
 - Algebra I Data Analysis A: D
 - Algebra I Data Analysis B: F
 - Conceptual Physics: F
 - English 9: D
 - Government: C
 - Intro to Food: D
 - Learning Resource General: P
 - Physical Education: C
5. During the 2012-2013 school year, the Student was tardy sixteen times.

IEP DEVELOPMENT FOR THE 2013-2014 SCHOOL YEAR

6. The evaluative data used to develop the Student's IEP for the 2013-2014 school year was ascertained from assessments conducted during the 2011-2012 school year as part of the Student's reevaluation, and from the results of a Functional Behavioral Assessment (FBA) and Behavioral Intervention Plan (BIP) conducted and developed during the spring of the 2012-2013 school year.

7. A speech/language assessment was conducted on February 14, 2012 using the Clinical Evaluation of Language Fundamentals Fourth Edition (CELF-4). The assessment was utilized to determine the Student's levels of performance regarding receptive and expressive language skills.

8. A classroom observation was conducted on February 29, 2012.

9. An educational assessment was conducted in March 2012 to evaluate the Student's cognitive and academic abilities. As part of the educational assessment, the Woodcock Johnson III test was administered and the Student was evaluated in the areas of math, reading, written language, written expression, academic fluency, and academic application skills.

10. An additional classroom observation was conducted on March 19, 2012 to assess the Student's behavioral functioning during the class time and to assess whether he required additional adult assistance during the school day.

11. On March 23, 2012, a psychological assessment record review was conducted to determine the Student's executive and attentional functioning skills. As part of the record review, the Student's performance results on the Wechsler Intelligence Scales for Children-Fourth Edition (WISC-IV), the Behavior Assessment Scale for Children Second Edition (BASC-2), the Behavior Rating Inventory of Executive Function (BRIEF), the Gilliam Asperger's Disorder Scale (GADS) and the Asperger's Syndrome Diagnostic Scale (ASDS) from April 10, 2009 were reviewed.

12. The academic assessment, including the Woodcock Johnson III results, indicates that the Student's academic skills are in the average range for his age. The Student's fluency with academic tasks is within the superior range and his ability to apply academic skills is within the average range. When compared to others at this age level, the Student's standard score is superior in broad reading and his brief reading score is in the high average range. The Student's

standard scores are average when compared to same-age peers in broad mathematics, math calculation, brief mathematics, broad written language, written expression, and brief writing skills.

13. The CELF-4 results indicate that the Student's oral language skills are stronger than his ability to understand the information that he receives. The Student received average scores on all of the individual subtests of the CELF-4. The Student demonstrated strength on the formulated sentence subtest in which he was required to verbally produce meaningful sentences using correct grammar, syntax, vocabulary, and sentence structures. The Student's lowest score was on the Understanding Spoken Paragraphs subtest. This subtest measured the Student's ability to answer questions about the content of three spoken paragraph stories, including the understanding of the main idea, memory for detail, and the ability to make inferences and predictions. The Student made most of his errors on the questions which required him to remember specific details and he experienced difficulty sustaining his attention during the subtest.

14. The CELF-4 results also indicate that the Student has average skills in receptive and expressive language skills. The Student's deficits in auditory attention affect his ability to maintain focus and to remember facts and details when presented with lengthier pieces of information. With regard to the Student's pragmatic language skills, including the Student's ability to analyze, integrate and respond appropriately in various social contexts, the Student demonstrated strength in informing, explaining, or stating an opinion during a social or everyday situation. The Student also exhibited strength in his ability to attend to setting, event, situational, and context characteristics that direct his language to be used during a social or everyday situation.

15. The CELF-4 results indicate the Student experiences weakness in persuading or negotiating in order to obtain a goal, and in noticing/remarking on the mood and point of view of the listener or speaker during an interaction. The Student sometimes experiences difficulty in giving a logical reason for his response to the test items.

16. With regard to the Student's common, verbal, and nonverbal communication skills that are necessary for obtaining, responding to and giving information in classroom situation or social interaction, the CELF-4 results indicate the Student has a weakness in maintaining eye contact and appropriate body position during a conversation. Additionally, the Student has a weakness in introducing and maintaining topics of conversation using appropriate strategies for getting attention and for responding to interruptions and interrupting others. The Student also has difficulty in starting or responding to verbal and nonverbal negotiations appropriately.

17. The CELF-4 results also indicate that in the area of nonverbal communication skills, the Student exhibits weakness in expressing messages nonverbally, using nonverbal cues appropriate to the situation and in knowing how someone is feeling based on nonverbal cues.

18. The Student's receptive and expressive language skills are within the average range when compared to same-aged peers. The Student experiences inadequate communication abilities in context for his age level. His deficits in pragmatic skills have an impact on his understanding and usage of social communication skills in the school environment and in everyday situations.

19. With regard to the Student's social/emotional, executive functioning and behavioral skills, the Student experiences difficulty in all aspects of executive function and maintaining emotional control in the school setting. The Student has deficits regarding inhibiting impulsive responses, adjusting to changes in routine or task demands, initiating problem solving

activity, sustaining working memory, planning and organizing problem solving approaches, organizing materials, monitoring his behavior and his work for mistakes, and expressing and regulating his emotions.

20. On June 11, 2013, the IEP team convened and reviewed the Student's progress and any lack of progress toward achieving the annual IEP goals and objectives. The team also discussed the Student's present levels of performance as ascertained by the results of the evaluative data obtained from the assessments and anecdotal information shared by the Parent and teachers regarding the Student's academic, social/emotional, executive functioning and communication skills needs.

21. At the IEP team meeting on June 11, 2013, the team, including the Parent, reviewed the IEP developed on April 18, 2013 and determined the IEP remained appropriate to meet the Student's needs. The Parent was provided notice of her Procedural Safeguards and Parental Rights.

22. The team determined that the Student continued to require special education services under IDEA as a student with autism and continued to require specialized instruction and related services to address deficits in academic-math problem solving, academic speech/language pragmatics, academic-study/organizational skills, academic-written language content and behavioral self-management skills.

23. The IEP team determined that the Student be provided direct instruction in a special education classroom to address the deficits identified in the IEP with regard to improving his skills and task completion related to executive functioning, behavior management, math, and written language skills and to complete assignments from his general education classes.

24. The annual goals reviewed and determined to be appropriate by the IEP team on June 11, 2013, reflect the areas of deficits identified on the IEP as ascertained from the

evaluative data. The Parent agreed with the annual goals developed to address the Student's deficits.

25. The Student required a BIP to address his problematic behaviors identified in the FBA conducted in the spring of 2013.

26. The BIP developed addressed the Student's problematic behaviors.

27. The BIP indicates that the Student demonstrated the following problematic behaviors as determined by anecdotal information and the FBA: non-compliance, oppositional behavior, head down (sleeping), withdrawn, appears depressed, impulsive, walks out of class or designated areas without permission, lack of classwork and homework completion, refusal to participate, refusal to attempt written work, insubordination, tardy to school and classes, refusal to leave media center, theft from classroom teacher, cheating, incident of poking a student, incident of pouring milk on another student's lunch, struck another student with a stick, and moved school furniture and tray inappropriately.

28. In order to assist the Student with maintaining appropriate behaviors, the Student required the following behavioral interventions by his educators:

- Establish a positive relationship with the Student by connecting with him one-to-one and giving feedback on what he is doing well;
- Clearly state expectations and model appropriate behaviors with samples;
- Provide direct support to start and initiate tasks;
- Learn to read what the Student's behavior is communicating i.e. is he struggling with attention, distractions, auditory processing;
- Break down assignments into smaller increments and use frequent checks to ensure understanding;
- Assist with organizing;
- Encourage the Student to ask for help;
- Encourage the Student to take breaks to increase focus, alertness, task completion;
- Maintain select numbers and group structure when working with the Student;
- Provide rewards or incentives to earn activity preferences for completed work, following directions and refraining from negative actions;
- Use a points sheet to track progress and rewards earned.

29. With regard to testing and instructional accommodations, the Student requires the following:

- Use of visual cues;
- Notes and outlines (instruction);
- Electronic word processor;
- Math tools and calculation devices;
- Graphic organizer;
- Extended time;
- Multiple, frequent breaks; and
- Reduced distractions.

30. With regard to supplementary aids/services, and modifications, the Student requires the following:

- Check for understanding;
- Provide alternative ways for the Student to demonstrate learning;
- Assistance with organization;
- Instructional supports;
- Break down assignments into smaller units;
- Encouragement to ask for assistance when needed;
- Frequent eye contact/proximity control;
- Behavioral supports.

31. When reviewing the Student's progress toward achieving the annual goals as a ninth grade student at [School 3], the team determined that the Student required a more structured setting than a typical high school because of the Student's disruptive behaviors. Additionally, with regard to the least restrictive environment in which the Student would receive his program, the team determined that the Student could receive his specialized instruction both in and outside of the general education classroom. The Student could receive specialized instruction in the general education classroom, with nondisabled peers, but the setting needed to be smaller and more structured.

32. With regard to related services, the IEP requires that the Student receive sixty minutes per week of speech/language therapy services to address his communication skills needs, six hours and forty minutes of specialized instruction outside of the general education

classroom and three hours per week of specialized instruction in the general education classroom to address his academic and executive functioning deficits. Specifically, the Student was to continue to be inside the general education classroom for at least 80% of the school day.

33. The school-based members of the IEP team determined that the Student's IEP could be implemented at [School 2].

34. [School 2] consists of approximately 60 students and provides alternative educational opportunities for general education students and students receiving special education services who demonstrate difficulties in the areas of behavioral and emotional interaction in a traditional school setting. The school has a Principal, Assistant Principal, School Psychologist, Crisis Counselor, School Counselor, Nurse, Pupil Personnel Worker, School Social Worker, and Special Education Teacher. The IEP team, including the Parent, agreed that the [School 2] should be explored as a possible location for which the Student could receive his services.

35. The team agreed that the Parent would visit [School 2] and the IEP team would reconvene at the beginning of the 2013-2014 school year to review the Student's program and make any necessary revisions.

36. On July 26, 2013, the Pupil Personnel Worker XXXX XXXX completed an Alternative Program Referral for [School 2]. Ms. XXXX spoke with the Parent and advised her that the Student could transfer to [School 2] voluntarily and that the IEP would need to be modified because of the new environment, since the school has much smaller class sizes than [School 3].

37. On August 1, 2013, Ms. XXXX sent correspondence to the Parent advising that if the Student attended the [School 2] and was successful, the Student "may continue in this placement." CCPS Ex 26.

38. On August 6, 2013, the Parent and the Student sent joint written correspondence to Ms. XXXX, requesting that the Student attend [School 2].

39. On August 20, 2013, Ms. XXXX, Principal of [School 2], sent correspondence to administrative staff at [School 3] informing them that [School 2] could meet the Student's needs and that he would be able to begin classes at the start of the school year.

40. On September 9, 2013, the IEP team Chairperson/Special Education Teacher XXXX XXXX, Principal XXXX XXXX and the Parent determined that the Student's special education instruction needs could be met in the general education classroom in the small structured classroom environment at [School 2]. Because of the small, structured environment at [School 2], the Student no longer required six hours and forty minutes of special education services per week outside of the general education classroom, with a special education teacher as the service provider, and did not require three hours per week of specialized instruction in the general education classroom with a special education teacher as the service provider. The IEP was amended so that all specialized instruction in the academic areas would be provided in the general education classroom with the general education teachers as the service providers, and special education teacher, instructional assistant and other staff as secondary service providers. The Student was to continue to receive the speech/language and counseling services and the supplementary aids, and modifications. Additionally, the Student was to continue to be inside the general education classroom for at least 80% of the school day.

41. The Parent signed the written amendment to the IEP and received notice regarding her Procedural Safeguards and Parental Rights.

42. On September 11, 2013, the Parent requested an IEP team to discuss concerns regarding the Student.

43. On September 19, 2013, the IEP team convened, including the Parent, and

discussed the Parent's concerns and reviewed the IEP and amendments made on September 9, 2013 to the IEP. The Parent discussed her concerns that the Student acknowledged using drugs outside of the school, away from school grounds.

44. Additionally at the meeting, the team discussed whether the Student could return to [School 3], his home school and the school he would attend if nondisabled, since his attendance at [School 2] was voluntary. The team, including the Parent, agreed that the Student should remain at [School 2] since he was "showing success in the small, structured environment" consistent with his needs. CCPS Ex 20.

45. To ensure the Student remained successful, the team agreed that staff would increase supervision of the Student especially in transitional and unstructured time like lunch and dismissal to the school bus.

46. After the Student's attendance at [School 2] began, he experimented with marijuana and engaged in self-injurious behavior (self-cutting). The actions occurred outside of the school environment and such behaviors were not displayed at school. The Student also engaged in stealing, outside of the school environment. As a result of the Student's behavior in the at-large community, in January 2014, the Student and his family was referred to the Family Preservation Program (FP) by the Department of Juvenile Services.

47. The Student received services from the FP to address his problematic behaviors that occurred outside of the school environment.

48. During the 2013-2014 school year, the Student made sufficient progress toward achieving the annual goals on the IEP regarding academic-study organizational, math problem solving, written language content, speech/language pragmatics, and behavioral/self-management skills.

49. The Student achieved one of the objectives regarding bringing the necessary

materials for each class with regard to his academic-study organizational skills.

50. The Student achieved one of the objectives regarding matching the verbal sentence with its mathematic representation pertaining to word problems related to the academic-math problem solving skills.

51. The Student achieved one of the objectives regarding organizing his writing pertaining to the academic-written language content skills.

52. The Student achieved one of the objectives regarding demonstrating use of a variety of strategies for effective comprehension and expression of language in social situations, regarding the goal academic-speech/language pragmatics skills.

53. The Student also achieved one of the objectives regarding initiating working independently regarding his behavioral-self management skills.

54. The Student passed the Maryland High School Assessment in the areas of English and Government and is working toward receiving a regular high school diploma.

IEP DEVELOPMENT 2014-2015 SCHOOL YEAR

55. On March 18, 2014, the IEP team convened, including the Parent, and discussed the Student's progress toward achieving the annual goals, parental concerns and the Student's academic and behavioral performance. At the meeting, the school-based members of the team, discussed with the Parent that since the Student began attending [School 2], his grades increased and his problematic behaviors decreased. Additionally, since attending [School 2] the Student had made sufficient progress toward achieving the annual goals, including progress towards managing problematic behaviors regarding preparedness for class, organizational and executive functioning skills.

56. The Student's progress toward achieving the annual academic, behavioral, speech/language and social/emotional goals, as well as the increase in grades,

are documented in the Student's classroom-based assignments, progress reports, BIP and teacher observations. This information was shared with the Parent at the meeting on March 18, 2014.

57. On April 1, 2014, CCPS sent written notice to the Parent informing her that it would convene an IEP team meeting on April 10, 2014. The notice informed the Parent that the Student would be invited to participate at the meeting. The notice also indicated the purpose of the meeting was to:

- Review the IEP, and revise as appropriate;
- Discuss transition services;
- Consider the need for ESY services; and
- Determine the appropriate placement in the least restrictive environment.

58. The Parent received notice regarding her Procedural Safeguards and Parental Rights.

59. On April 10, 2014, at approximately 10:00 a.m., the IEP team convened to review and revise the Student's IEP if necessary and to discuss postsecondary transition services. The Parent and her attorney Ms. Parker were present, as well as the attorney for CCPS, Ms. Eisenberg.

60. At the meeting, the school-based members of the team requested that the Student be permitted to participate in the meeting, but the Parent informed the team that she did not want the Student to participate.

61. The team discussed the Student's improved behavior documented on his behavioral reports since his admission to [School 2], and his progress toward achieving the annual goals. Additionally, the team discussed the Student's FP services to address his problematic behavior observed away from school and the Student's need for a full evaluation consisting of the implementation of new assessments, to be completed by March 2015, since the Student's current assessments were conducted in 2012.

62. The team recommended that the Test of Written Language (TOWL) Pragmatic Profile of Everyday Communication in School-Aged Children, Test of Pragmatic Language, Test of Problem Solving, and an informal observation, Comprehensive Executive Functioning Inventory, Autism Spectrum Rating Scale, assistive technology and cognitive assessments be conducted.

63. The Parent did not provide consent for the assessments to be conducted.

64. The Parent and her attorney left the meeting prior to its completion because they did not agree with the school-based members of the team regarding aspects of the Student's program, including the team's decision that the Student should remain at [School 2] because he was making progress in the small classroom setting and highly structured environment.

65. The Parent and Ms. Parker left the room at approximately 11:15 a.m. While the Parent exited the meeting, Ms. Eisenberg informed the Parent and Ms. Parker that the school-based members of the team would continue with the meeting in order to complete the IEP. Additionally, Ms. Eisenberg requested that the Parent and Ms. Parker not leave the meeting.

66. The Parent did not leave the meeting because of any emergency situation.

67. After the Parent and her attorney left the meeting, school staff brought the Student to the meeting. The Student was in the meeting for approximately 10 minutes and expressed his desire to remain at [School 2] and his desire to pursue a career in the culinary arts after he completed high school.

68. The Parent retains educational decision making rights over the Student.

69. The school-based members of the team determined that the Student continued to

require special education services under IDEA as a student with autism and continued to require specialized instruction and related services to address deficits in academic-math problem solving, academic speech/language pragmatics, academic-study/organizational skills, academic-written language content and behavioral self-management skills.

70. The IEP team determined that the Student be provided direct instruction in the general education classroom to address the deficits identified in the IEP with regard to improving his skills and task completion related to executive functioning, behavior management, math, and written language skills and to complete assignments from his general education classes.

71. The annual goals that the IEP team determined to be appropriate on April 10, 2014, reflect the areas of deficits identified on the IEP as ascertained from the evaluative data and the Student's then-present levels of performance and progress toward achieving the annual goals.

72. The IEP requires that the Student receive sixty minutes per week of speech/language therapy services to address his communication skills needs, thirty minutes per week of counseling services to address his behavioral skills/need and twenty-three hours and forty-five minutes per week of specialized instruction in the general education classroom to address his academic and executive functioning deficits.

73. With regard to testing and instructional accommodations, the Student requires the following:

- use of visual cues;
- notes and outlines (instruction);
- electronic word processor;
- math tools and calculation devices;
- graphic organizer;
- extended time;
- multiple of frequent breaks; and
- reduced distractions.

74. With regard to supplementary aids/services, and modifications, the Student requires the following:

- Check for understanding
- Provide alternative ways for the Student to demonstrate learning;
- Assistance with organization;
- Instructional supports;
- Break down assignments into smaller units;
- Encouragement to ask for assistance when needed;
- Frequent eye contact/proximity control;
- Behavioral supports.

75. The Student continued to require the use of the BIP.

76. With regard to the least restrictive environment in which the Student would receive his program, the team determined that the Student requires the behavioral and organizational supports of a specialized program in a general education environment to reduce distracting stimuli and provide ongoing behavioral interventions as needed. The Student's IEP would be implemented in the general education classroom with specialized instruction provided by a special educator and/or instructional assistant and general education teacher. Specifically, the Student would be inside the general education classroom for at least 80% of the school day.

77. After reviewing the Student's progress at [School 2] toward achieving the IEP goals, the school-based members of the team determined that the Student should not return to [School 3] because the setting at [School 2] was smaller and more structured. The Student requires a smaller, more structured environment in order to receive educational benefit.

ESY DETERMINATION FOR SUMMER OF 2014

78. At the completion of the 2013-2014 school year, the Student did not require ESY services.

79. An analysis of whether the Student required ESY services at the completion of the

2013-2014 school year was conducted at the IEP team meeting on April 10, 2014, after the Parent exited the meeting.

80. With regard to ESY services, the Student's IEP discussed at the April 10, 2014 meeting contains annual goals related to critical life skills in the areas of speech/language, math problem solving, written language and behavioral self-management skills.

81. The IEP team determined that there is no likely chance of the substantial regression of critical life skills caused by the normal school (summer) break or a failure to recover those skills in a reasonable time.

82. The IEP team determined that the Student demonstrated a degree of progress toward mastery of the IEP goals and objectives related to critical life skills.

83. The IEP team determined the Student did not demonstrate any emerging skills or breakthrough opportunities.

84. The IEP team determined the interruption of programming for the Student's behavior was not likely to prevent the Student from receiving benefit from his educational program without ESY services.

85. The IEP team determined that the nature and severity of the Student's disability did not warrant ESY Services, nor were there any special circumstances necessitating the same.

86. At the conclusion of the 2013-2014 school year, the Student received the following grades:

- Algebra I: C
- Art 11: B
- Art 12: B
- Conceptual Algebra: C
- Conceptual Physics: B
- English 10: C
- Foundations of Technology: C
- Physical Education: A
- [School 2] Seminar, 10, 11: C

- [School 2] Seminar, 29, 30: A
- U.S. History: B.

87. During the 2013-2014 school year, the Student was tardy three times.

88. The Student's educational needs can be met at [School 2].

DISCUSSION

Burden of Proof

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent has the burden of proving that the Student's IEP was not reasonably calculated to provide educational benefit to him, and that placement at a separate day school is appropriate.

The Parent contends that the Student's IEP for the 2013-2014 and 2014-2015 school years were not reasonably calculated to meet the unique needs of the Student. She also contends that CCPS did not properly determine whether the Student required ESY services at the conclusion of the 2013-2014 school year and did not follow proper procedures when allowing the Student to participate at the IEP team meeting on April 10, 2014.

The Parent believes that if I sustain the allegations, then CCPS has not offered the Student a FAPE since the 2013-2014 school year. The Parent is requesting that the Student be placed at [School 1], a separate day school. The Parent maintains that a separate day school is the least restrictive environment in which to implement the Student's IEP. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

With regard to the appropriateness of the Student's IEP, to prove her case by a preponderance of the evidence, the Parent must convince me that it is more likely than not that

the Student's IEP failed to provide the Student a FAPE. Merely raising doubt does not constitute proof by a preponderance of the evidence.

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. 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).

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

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child... We therefore conclude that the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

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

procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. See *In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his/her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. 458 U.S. at 202.

The IEPs in effect for the 2013-2014 and 2014-2015 school years were reasonably calculated to provide the Student with a FAPE

The Student is identified as a student with autism and an other health impairment as a result of a diagnosis of ADHD. The IEP developed for the 2013-2014 and 2014-2015 school years required that the Student receive special education services under IDEA as a student with autism and ADHD. Specifically, the Student required specialized instruction and related services to address deficits in academic-math problem solving, academic speech/language pragmatics, academic-study/organizational skills, academic-written language content and behavioral self-

management skills. The IEP team determined that the Student be provided specialized instruction in a general education classroom and pull out services for speech/language therapy and counseling to address the deficits identified in the IEP with regard to improving his skills and task completion related to executive functioning, behavior management, math, and written language skills and to complete assignments from his general education classes.

The goals and objectives of the disputed IEP were developed in accordance with the applicable law and regulations and the Parent did not dispute the developed goals when the IEP was developed for the 2013-2014 school year. This is very important because the annual goals are what determine the Student's placement. Additionally, the goals on the 2014-2015 IEP are essentially the same, with some changes to the objectives.

An IEP is the "primary vehicle" through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527 (4th Cir. 2002); *see* 20 U.S.C.A. § 1414(d)(1)(A). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents, and their representatives, discuss the child's abilities and needs with school staff.

At the IEP team meeting on June 11, 2013, the team, including the Parent, developed an IEP that included goals and objectives to address the Student's identified academic, social/emotional, executive functioning and communication skills needs. The team considered all of the evaluative data ascertained to determine the Student's then-present levels of performance, the Student's academic and behavioral performance and information provided by the Parent.

In evaluating the appropriateness of the Student's IEP, the Parent argues that the IEP and placement offered by CCPS for the 2013-2014 school year was inappropriate because some of the goals were repeated from the previous IEP and because the placement was not determined in accordance with the law. The Parent maintains that [School 1] is the appropriate placement for the Student because the Student requires a small, structured milieu.

It is overwhelmingly clear from the record and testimony that the Parent is knowledgeable, caring, and diligent with regard to the Student's academic and social/emotional needs. The record demonstrates that she is vigilant in assessing the Student's progress and extremely diligent in investigating services, strategies or therapies that she thinks could help the Student achieve success in school. In observing the Parent's demeanor while testifying, I was convinced that she genuinely has a difference of opinion with CCPS personnel about whether the Student would receive educational benefit from the program that the IEP team selected. However, the Parent has simply adopted a preference for a school and therefore assumes that this is the only placement and location where the Student can learn and make progress. She did not present credible evidence that established that the program and placement offered and developed by CCPS is inappropriate for the Student.

In this case, essentially all of the witnesses agree that the Student would benefit from a program that offers a significant amount of supports as a result of his behavioral, executive functioning, attentional, academic and social/emotional skills needs. Ms. XXXX, a special educator, testified that with correct structured supports to address the Student's executive functioning deficits, including behavioral supports, the Student could make progress. Ms. XXXX, the Student's English teacher, essentially said the same thing in her testimony. In fact, all of the CCPS witnesses agree with these assertions as well. Moreover, it is fatal for the

Parent's case that she could not offer a single witness who could testify as to the alleged inappropriateness of the program offered and provided by CCPS.

Ms. XXXX, special educator, Ms. XXXX, Supervisor of Special Education and Ms. XXXX, Principal at [School 2], testified credibly with regard to their understanding of the Student's deficits and how they impact his ability to progress in the general curriculum. I find them to be credible because the evaluative data indicates that the Student's executive functioning, communication and social/emotional deficits significantly impact his performance at school. Ms. XXXX opined that behavioral and executive functioning supports are the two most important components of the Student's educational program because without these, it is difficult to gauge the Student's progress or lack thereof. The Parent does not disagree with this assertion, and neither did any of her witnesses presented at the hearing.

Given the Student's profound executive functioning, social/emotional and communication deficits, he requires a program designed to enhance his functioning in these areas. Under the IEP in effect for the 2013-2014 and 2014-2015 school years, the Student would receive direct speech/language services to assist him with his communication needs and extensive behavioral supports, including counseling, to address his social/emotional needs.

The evidence establishes that the Student requires a special education setting that incorporates a high level of structure, support, and small group instruction. This is the type of program that is being implemented at the [School 2]. As discussed previously, the Student's disability primarily has impacted his speech/ language, social/emotional, executive functioning and academic skills. These deficits, when not addressed, significantly hinder his progress in the general curriculum. Because of these deficits, the Student requires a milieu in which behavioral, academic and executive functioning supports are heavily integrated into his program. The Student was assessed by various evaluators who recommended that he receive accommodations

and supports and direct speech/language, and behavioral intervention services as part of his curriculum and integrated in the program. This is exactly what CCPS offered for both school years.

Ms. XXXX, the special educator at [School 2], also testified extensively regarding her consultation with school staff about the Student's performance and monitoring his organizational and behavioral supports. She provided specific examples of meetings with the school psychologist to ensure that the Student remained focused and did not engage in problematic behaviors that would interfere with his progress. Ms. XXXX's testimony made it even clearer that the Student's program is significantly individualized and meets his unique needs.

It is important to note that even though formalized assessments were conducted to assist in ascertaining the Student's strengths and weaknesses, the formalized assessments were not the sole source of the evaluative data used to determine the Student's strengths, weaknesses and levels of performance. The record indicates that the IEP team drew from many sources in addition to formalized assessments, including observations and the Parent's ratings, to accurately determine the Student's present levels of performance.

The record is replete with credible evidence that when the team developed the Student's program, they considered the Student's strengths, the Parent's concerns for enhancing the Student's education, the most recent assessments, and the Student's deficits as determined by his past and present levels of academic performance.

When developing the Student's program, including the numerous accommodations, behavioral supports, supplementary aids and services, the team considered the fact that the Student requires extensive behavioral interventions and regimented structure during the Student's entire school day, to ensure that the Student will not put his head down, engage other students inappropriately, and would not succumb to attentional distractions.

In accordance with federal and State regulations, in developing the IEP for the 2013-2014 and 2014-2015 school years, the team first determined the Student's present levels of academic achievement and functional performance. The meeting minutes and detailed notes from the IEP meetings conducted for both school years indicate that the team then determined how the Student's disability impacts involvement and progression in the general curriculum. Next, annual goals were reviewed and developed to meet the Student's needs.

In this case, the evidence supports the fact that all of the annual goals address the Student's deficits and the IEP is reasonably calculated to meet the individualized needs of the Student. For example, the goals directly address the areas of deficits, and the IEP indicates how progress on the goals will be measured.

Least Restrictive Environment is appropriate

Under IDEA, the Student must be placed in the least restrictive environment to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.* and 34 C.F.R. § 300.114(a)(2). That does not mean, however, that in such a case, placement of a child in a non-public school setting, at the public school district's expense, is the only option available that would allow a child to receive a FAPE. If a public school setting has a self-contained special education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment would be accomplished by placement in the public school program. "To the maximum extent appropriate, children with disabilities . . . 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 aid and services cannot be achieved satisfactorily.” 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2). However, this “mainstreaming” requirement is “not an inflexible federal mandate.” *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997). CCPS was obligated to provide the Student with a placement that affords him at least an opportunity to interact with nondisabled peers, if he will receive educational benefit in that placement.

2013-2014 School Year IEP Placement

At the April 18, 2013 and the June 11, 2013 IEP team meetings, when developing the Student’s IEP for the 2013-2014 school year, the IEP team discussed the Student’s progress toward achieving the annual goals as a ninth-grade student at [School 3]. The parties agree that the team determined the Student required a more structured setting than a typical high school because of the Student’s disruptive behaviors displayed during the 2012-2013 school year. Additionally, with regard to the least restrictive environment in which the Student would receive his program, the team discussed various placements along the continuum of placements. The team determined the Student could receive his specialized instruction both in and outside of the general education classroom. Specifically, the Student could receive specialized instruction in the general education classroom, with nondisabled peers, but that the setting needed to be smaller.

As indicated above, in determining the educational placement of a student with a disability, the public agency must ensure that the placement decision is made by the IEP team in conformity with the least restrictive environment provisions, determined at least annually, be based on the student’s IEP, and be as close as possible to the student’s home. 34 CFR §300.116. In selecting

the LRE, the public agency must consider any potential harmful effect on the student or on the quality of services that the student needs. 34 CFR §300.116. This is exactly what the IEP team did. Specifically, the team determined that the Student could receive his services both in and out of the general education classroom. However, the team also recognized that with regard to location and setting, the Student's IEP needed to be revised because a large school like [School 3] was too overwhelming for him as evidenced by disruptive behaviors exhibited during the school day. The team discussed that the [School 2] could meet the Student's need for receiving his academic program in a smaller, more structured environment.

The United States Department of Education, Office of Special Education Programs (OSEP) has indicated that the location where special education services will be provided, including the particular school and classroom, is an administrative determination, provided that it is consistent with the IEP team's educational placement decision. The OSEP explained that the determination of whether a change in location constitutes a change in educational placement should be made on a case-by-case basis considering factors such as whether it results in a change in the education program. *Letter to Fisher*, 21 IDELR 992, OSEP, 1994. Additionally, in *Letter to Trigg*, 50 IDELR 48, OSEP, 2007, OSEP determined that when two or more equally appropriate locations are available, a district may assign a child with disabilities to the school or classroom of its choosing. While OSEP opinions are not legally binding, courts have deferred to OSEP guidance in resolving issues where the IDEA is ambiguous, and the United States Supreme Court has also been guided by OSEP policy.

In this case, the change in location i.e. ([School 3], the school the Student would attend if nondisabled to [School 2]) did not result in a more restrictive change in placement with regard to the LRE. In short, this was a change in location of services, not a change in placement. A change in placement would have meant a fundamental change in the Student's program that significantly

affected the Student's learning experience specifically changes in the services he was receiving as opposed to some other inconsequential modification. Prior to the Student's assignment to [School 2], the IEP required that the Student receive sixty minutes per week of speech/language therapy services to address his communication skills needs, six hours and forty minutes of specialized instruction outside of the general education classroom and three hours per week of specialized instruction in the general education classroom to address his academic and executive functioning deficits. After the assignment to [School 2], the Parent and the school-based members of the IEP team determined that the Student's special education instruction needs could be met in the general education classroom in the small structured classroom environment at [School 2]. The Student would continue to receive speech/language and counseling services outside of the general education classroom as well as the supplementary aids, and modifications. The Student would continue to remain in the general education classroom for at least eighty percent of the school day. Moreover, because of the small, structured environment at [School 2], the Student no longer required six hours and forty minutes of special education services per week outside of the general education classroom, with a special education teacher as the service provider. Additionally, the Student did not require three hours per week of specialized instruction in the general education classroom with a special education teacher as the service provider. The IEP was appropriately amended so that all specialized instruction in the academic areas would be provided in the general education classroom with the general education teachers as the service providers, and special education teacher, instructional assistant and other staff as secondary service providers. This change was essentially done because the Student was no longer in a class with approximately twenty-five students, but would be in a class with approximately six students, allowing for the Student to receive more one-to-one direct attention and supervision from the general education teacher by virtue of the fact that the class had fewer students.

The Parent's witness Ms. XXXX, the Director of Admissions at [School 1], testified that at [School 1], the Student would be in a class with approximately five students. This is very important because the Student's needs could be met in the CCPS program without requiring him to attend a separate day school. Quite simply, [School 2] provides the same small class structure with supports.

Even though the change in location of services was presented to the Parent as a "voluntary change," the fact is, the Parent agreed to it and believed, as the school-based members of the team believed, that this change would offer the Student the opportunity to benefit from his program. Although the Parent expressed that she had "reservations" regarding the change, her letter to the pupil personnel worker indicates that she believed attendance at the School would result in success for the Student. Prior to the start of the 2013-2014 school year, the Parent wrote in her letter to the PPW regarding [School 2], "as per your request, please accept this letter as a combined request from [the Student] and myself for his placement at [School 2]. After touring the facility and speaking with Ms. XXXX and Mr. XXXX [Assistant Principal], we feel that [the Student] has a better chance at academic success at [School 2]." CCPS Ex. 27. The Parent agreed with the modification to the Student's program and provided written consent to amend the IEP.

The witnesses presented by both parties essentially agree that the Student can become overly stimulated, inattentive, disruptive and experience difficulty staying on task. These behaviors are precisely why the Student requires a small, structured program that also includes a token economy or rewards system to address the Student's problematic behaviors. CCPS conducted an FBA and developed a BIP to assist the Student with controlling and eliminating his problematic behaviors. The documentary evidence (i.e., the assessment results) supports the opinions rendered by CCPS staff. Again, there is no dispute in this case regarding the Student's strengths and weaknesses. The dispute is mainly over what kind of placement along the

continuum of placements the Student should attend. CCPS staff who have worked with the Student believe that the Student's IEP can continue to be effectively implemented at [School 2], and I agree. The judgment of educational professionals such as these is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002). Where appropriate, I have given deference to CCPS staff, where the assertions are supported by concrete evaluative data regarding the Student's needs, including observations and the Student's performance. For the reasons cited above, I find that the Student's IEP can be implemented in the general education classroom for at least eighty percent of the school day and the separate classroom for related services. In fact, a review of the Student's progress reports, behavioral reports and class assignments indicate that the Student is achieving and benefitting from his program. The Student's grades have significantly increased and he is making progress on all of the annual goals. This is why I agree with CCPS staff that the Student should remain in his program, implemented at [School 2]. Additionally, the Parent asserted that the work at [School 2] was somehow watered down and that is why the Student is doing well. I do not find this assertion credible. Numerous samples of the Student's classroom work were provided in Math and English that speak to the contrary. Additionally, the Student passed the Maryland High School Assessments in the areas of English and Government and is working toward receiving a regular high school diploma. In addition, I also find that the CCPS placement offers the Student the opportunity to receive educational benefit in the least restrictive environment. The Parent testified that the Student experimented with drugs and engaged in self-injurious behavior but these problematic behaviors were never exhibited at [School 2]. Although I am sensitive to the Parent's concerns regarding the Student's interaction with some peers at [School 2] who may have used drugs with the Student, the Parent has failed to prove that the Student can only receive

a FAPE if his program is implemented in a school where he will not come in contact with nondisabled peers.

2014-2015 School Year IEP Placement

With regard to the IEP development for the 2014-2015 school year, the IEP team convened and reviewed the Student's progress toward achieving the annual goals, parental concerns, teacher information and the Student's grades. The school-based members of the team determined that the Student was receiving benefit from his program and that the Student should remain at [School 2]. The Student's report card, progress notes, progress reports and behavior reports indicate that the Student was performing well at [School 2]. He made significant progress toward achieving the annual goals and his grades increased.

Here, the record is clear that since the Student began attending [School 2], his problematic behaviors have lessened, his grades have increased and he has achieved objectives regarding the annual goals. This is exactly what the Parent had hoped for when she agreed that the Student should be placed at [School 2].

The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of the CCPS witnesses, I agree with CCPS that the IEP and placement developed by the public agency is appropriate and reasonably calculated to meet the individualized needs of the Student.

The evidence supports CCPS' conclusion that the Student requires a special education setting that incorporates a high level of structure, individualized instruction and support and small group instruction, exactly the type of program that can be implemented at [School 2]. Consequently, as with the 2013-2014 school year, the team, when developing the IEP for the

2014-2015 school year, considered the continuum of alternative placements identified in 34 C.F.R. section 300.39, as required.

With regard to the appropriateness of the Student's program, in order to prevail, the Parent must prove that the placement determined by the public agency will amount to a denial of a FAPE and that the identified private school is an appropriate placement. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

In *Carter*, the Supreme Court upheld a lower court's decision to order reimbursement to the parents for private tuition, after the court's determination that the IEP was inappropriate and that the private school selected by the parents would offer the child an appropriate education. Specifically, the Supreme Court concluded that parents are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Carter*, 510 U.S. at 15 (emphasis added). Here, the Parent has the burden of proof and, unlike in *Carter*, she has failed to establish that CCPS did not develop an appropriate IEP and placement for the school years in question. To the contrary, with regard to the IEP team meetings where the IEP was reviewed and revised, the public agency ensured that the IEP team developed an IEP that included special education and related services designed to meet the unique needs of the Student that arose from the Student's disability.

Through the course of the hearing, it became evident that the Parent had concerns regarding the Student's drug experimentation and self-injurious behaviors (none of which happened at school). The evidence presented by the Parent demonstrates that the primary demand for a separate day placement in this case is primarily to address the safety needs of the student as a result of his mental health needs, and not his educational needs. Consequently, there is nothing in IDEA that would mandate that a public agency pay for a separate day school under these circumstances. Additionally, when the Student exhibited behavior that interfered with his

learning, the IEP team convened and developed strategies and supports to address the problematic behaviors. The parties would certainly agree that CCPS staff were aware that at times, especially at [School 3], the Student's problematic behaviors interfered with his learning and the education of other students. For that reason, the IEP lists several interventions and special educational support services recommended to address the Student's problematic behaviors including attentional deficits. The IEP contains numerous accommodations and strategies to prevent and assuage any problematic behaviors demonstrated at school. In short, there is no reason why the Student needs to attend a separate day school, one of the most restrictive placements on the LRE continuum.

ESY Services and the Student's Participation at the IEP Team Meeting on April 10, 2014

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.’” *Dibuo*, 309 F.3d at 190.

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).

The question of ESY for summer 2014 was discussed at the April 10, 2014 IEP team meeting after the Parent left the meeting. I find that the IEP team properly determined the Student did not require ESY services. The IEP indicates that each qualifying factor was considered. The team decided that that the Student did not qualify and the IEP stated that conclusion.

Even though the Parent believes that the Student qualified for ESY because of the nature and severity of his disability, she offered no expert testimony and no evidence that showed the Student regressed during breaks. Nevertheless, even if regression did occur, regression is a reality for most or all students and the idea that a student might regress is insufficient to mandate ESY to provide FAPE. The Parent has failed to meet her burden of proof on this issue.

With regard to the Student’s participation at the IEP team meeting on April 10, 2014, the Parent and her attorney left the meeting because they were dissatisfied with the placement and location of services determined by the school-based members of the team. However, prior to the

Parent leaving, she expressed that she did not want the Student to participate. With regard to CCPS *inviting* the Student to the meeting, they were correct to do that. The public agency is required to invite a student with a disability under IDEA to an IEP team meeting when the student's postsecondary goals and the services needed to assist the student in achieving those goals are to be discussed. If the student does not attend the meeting, the public agency must take other steps to ensure that the student's preferences and interests are considered. 34 C.F.R. § 300.321.

While the public agency was correct in inviting the Student to participate at the meeting because he is sixteen years old and transition services were to be discussed, the Parent clearly indicated that she did not want the Student to participate. The Parent is the one who has educational decision making rights, and those rights were not transferred to the Student. Additionally, I do not find CCPS to be credible when it asserts that school staff believed that the Parent had provided consent for the Student to remain for the discussion regarding transition services. In Ms. Eisenberg's letter to Ms. Parker, she states, "when you said you do not want him at the meeting, at the start of the meeting, you said you would *consider* his attendance when the team addressed transition." CCPS Ex 36. This is why I do not find the public agency credible with regard to this issue. The school-based members of the team were aware that the Parent did not want the Student to participate. She never gave her consent. The fact that the Parent left the team meeting did not change the fact that she retained educational decision making authority, and her wishes to keep the Student from attending the meeting should have been honored. Under the IDEA, only the Parent has the authority to make educational decisions for the Student, including whether the Student should attend an IEP team meeting, unless the Parent's rights have transferred to the Student under State law, or unless the Parent's rights have been extinguished or limited. 34 C.F.R. § 300.520 and *Analysis of Comments and Changes to*

the IDEA, Federal Register, Vol. 71 No. 156, p 46671.

The fact that the Student attended the meeting over the Parent's objection is a procedural violation. However, this does not end the inquiry. This particular procedural violation did not in any way impact the Parent's ability to fully participate in the meeting and the IEP process. It in no way impacted the Student's FAPE. As the Fourth Circuit observed:

We now turn to the threshold question presented in this appeal: Whether a procedural violation of the IDEA can support a finding that a school district failed to provide a disabled child with a FAPE when the procedural violation did not actually interfere with the provision of a FAPE to that child. The answer to this question, under well-established circuit precedent, is no.

Dibuo, 309 F.3d at 190.

The Parent was already aware of the Student's program and placement. The Student merely shared what his culinary and career interests are. There was no harm or any deprivation of FAPE that resulted from the Student's participation at the meeting. I find that overall the Parent proved one procedural violation on the part of CCPS, but no denial of the Parent's ability to participate in the process and no denial of FAPE as a result of that violation.

The Student is not Entitled to Placement at [School 1]

When a FAPE has been offered that meets the special education and related services needs of a student with a disability, and the parents elect not to accept the program offered to their child by the public agency and instead choose to enroll their child in an independent school facility or residential setting, the public agency is not required to pay for that student's education.

Finally, both parties argued regarding the appropriateness of [School 1] as a private placement for the Student. Pursuant to *Carter*, 510 U.S. 7 the appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Burlington*, 471 U.S. 359. In this matter, I have concluded that the IEP and placement offered by the public agency offers the Student a FAPE. Accordingly, an analysis pursuant *Burlington* and *Carter* is

inapplicable and the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision.

In conclusion, after carefully reviewing all of the evidence presented by the Parent and CCPS, I find that CCPS developed an appropriate IEP and placement for the 2013-2014 and 2014-2015 school years, and that the IEPs were reasonably calculated to provide a FAPE for the Student. Additionally, I find that CCPS properly determined the Student did not require ESY services at conclusion of the 2013-2014 school year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that the Parent has failed to establish that the IEPs offered by the Carroll County Public Schools for the 2013-2014 and 2014-2015 school years were not reasonably calculated to offer the Student educational benefit. 20 U.S.C.A. §§ 1400 - 1487 (2010).

I further conclude that the IEPs and placement proposed by Carroll County Public Schools for the 2013-2014 and 2014-2015 school years were reasonably calculated to offer the Student a free and appropriate public education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

I further conclude as a matter of law that the Student was not entitled to ESY services for the summer of 2014. COMAR 13A.05.01.08B; *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002).

I further conclude as a matter of law that CCPS committed one procedural violation; however, there was no resulting harm to the Parent's ability to participate in the IEP process and no denial of FAPE. *Dibuo v. Bd. of Educ. of Worcester Cnty.*, 309 F.3d 184, 189-90 (4th Cir. 2002).

ORDER

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

September 25, 2014
Date Decision Mailed

Jerome Woods, II
Administrative Law Judge

JW/cj

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.