

XXXX XXXX, IV

STUDENT

v.

FREDERICK COUNTY

PUBLIC SCHOOLS

*** BEFORE MARY R. CRAIG,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-FRED-OT-14-31192**

*** * * * ***

DECISION

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ORDER

STATEMENT OF THE CASE

On September 3, 2014, XXXX XXXX (Parent), on behalf of her son, XXXX XXXX, IV (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Frederick County Public Schools (FCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

The parties notified the OAH on September 18, 2014 that a resolution session was held on September 17, 2014, and the case was not resolved. The parties participated in a mediation session on October 3, 2014, which did not resolve the case.

I held a telephone prehearing conference on October 3, 2014. The Parent participated and represented herself. Andrew W. Nussbaum, Esquire, represented the FCPS. By agreement of the parties, the hearing was scheduled for October 24, 2014. Under the federal regulations, a hearing must be conducted and a decision is due within 45 days of certain triggering events. 34

C.F.R. § 300.510 (b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). In this case, the triggering event was the September 18, 2014 notice to the OAH of the resolution session outcome, which would require the hearing to be held and the decision to be issued on or before October 31, 2014.

I held the hearing on October 24, 2014. The Parent represented herself. Mr. Nussbaum represented the FCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Is the Student entitled to receive special education services at home through an online or other home-based program?
2. Does the Individualized Education Program (IEP) as amended July 9, 2014 with placement at a separate special education nonpublic school provide the Student with a free appropriate public education (FAPE)?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parent:

- Parent Ex. 1 – Letters from [School 1] informing the Parent that the Student had been subject to XXXX restraint or seclusion to prevent danger to self or others on the following dates for the reason specified:
- a. July 26, 2013/restraint/danger to others
 - b. June 12, 2013/restraint/danger to others
 - c. May 9, 2013/restraint/danger to others

- d. April 22, 2013/restraint/danger to others
- e. April 18, 2013/restraint/danger to others
- f. April 12, 2013/restraint/danger to others
- g. March 25, 2013/restraint/danger to others
- h. March 22, 2013/restraint/danger to others
- i. March 7, 2013/restraint/danger to self and others
- j. February 13, 2013/restraint/danger to others
- k. February 11, 2013/restraint/danger to self and others
- l. February 8, 2013/restraint/danger to others
- m. January 7, 2013/restraint/danger to others
- n. August 19, 2013/restraint/danger to others
- o. August 21, 2013/restraint and seclusion/danger to others
- p. August 22, 2013/restraint and seclusion/danger to others
- q. September 18, 2013/restraint/danger to others
- r. September 25, 2013/restraint and seclusion/danger to others
- s. October 17, 2013/restraint/danger to others
- t. October 23, 2013/restraint/danger to others
- u. October 24, 2013/restraint/danger to others
- v. December 13, 2013/restraint/danger to others
- w. January 10, 2014/restraint and seclusion/danger to others

Parent Ex. 2 – Letter from [School 1], December 20, 2013, enclosing revised Behavior Management Plan

Parent Ex. 3 - Correspondence regarding Parent’s complaint to MSDE:

- a. Letter from MSDE to Parent, October 18, 2013
- b. Letter from MSDE to Parent, November 26, 2013
- c. Letter from MSDE to Parent, February 10, 2014
- d. Letter from MSDE to Parent and Mr. XXXX XXXX, Director of Special Education and Psychological Services, FCPS, March 11, 2014

Parent Ex. 4 - Letter from XXXX XXXX to the Parent, September 26, 2013

Parent Ex. 5 - IEP Team Meeting Notes from the following dates:

- a. January 15, 2013
- b. March 4, 2013
- c. May 15, 2013
- d. September 24, 2013
- e. January 15, 2014
- f. February 19, 2014

Parent Ex. 6 - Assessments

- a. Emotional Update, November 13, 2012
- b. County Individualized Educational Program Referral, 8th grade (undated)
- c. Educational Update, November 13, 2012
- d. Social Emotional Update, August 27, 2012
- e. School Based Occupational Therapy Assessment, May 22, 2012

- f. [School 1] Occupational Therapy Screening Summary, April 30, 2013
- g. FCPS Confidential Educational Assessment, February 6, 2012

Parent Ex. 7 - Evaluations

- a. FCPS Notice of Documents for Review at IEP Meeting, September 30, 2014;
FCPS Psychological Evaluation, August 29, 2014
- b. FCPS Psychological Evaluation, February 24, 2012

Parent Ex. 8 - Emails and Email strings:

- a. Emails, July 11, 2013
- b. Emails, July 29, 2013
- c. Emails, July 31, 2013
- d. Emails, August 22, 2013
- e. Emails, September 2-3, 2013
- f. Email, September 8, 2013
- g. Emails, September 11-20, 2013
- h. Emails, October 22, 2013
- i. Emails, September 24, 2013 – April 16, 2014
- j. Emails, May 14, 2014
- k. Emails, May 14- 21, 2014
- l. Emails, March 12 – June 26, 2014

I admitted the following exhibits on behalf of FCPS, except the documents marked “not offered,” which FCPS did not offer for admission into evidence:

- FCPS Ex. 1 - IEP Team Meeting Notes, January 15, 2014
- FCPS Ex. 2 - IEP Team Meeting Notes, February 19, 2014
- FCPS Ex. 3 - IEP Team Meeting Notes, July 9, 2014
- FCPS Ex. 4 - IEP Team Meeting Notes, August 18, 2014
- FCPS Ex. 5 - Psychological Evaluation, August 29, 2014
- FCPS Ex. 6 - Educational Assessment, August 8, 2014
- FCPS Ex. 7 - IEP, February 19, 2014
- FCPS Ex. 8 - IEP, Amended July 9, 2014
- FCPS Ex. 9 - Secondary School Transcript
- FCPS Ex. 10 - MSDE Letter, November 26, 2013
- FCPS Ex. 11 - MSDE Letter, March 11, 2014
- FCPS Ex. 12 - Functional Behavioral Assessment Summary Report
- FCPS Ex. 13 - Behavioral Intervention Plans
- FCPS Ex. 14 - Treatment Plans – [School 1] (not offered)
- FCPS Ex. 15 - IEP Team Meeting Notes, October 13, 2014
- FCPS Ex. 16 - IEP Team Eligibility Report for Emotional Disability, October 13, 2014
- FCPS Ex. 17 - IEP Team Eligibility Report for Other Health Impairment, October 13, 2014
- FCPS Ex. 18 - FCPS Monthly Services Record – Therapist Services (not offered)
- FCPS Ex. 19 - IEP, October 13, 2014
- FCPS Ex. 20 - C.V. – XXXX XXXX (not offered)
- FCPS Ex. 21 - C.V. – XXXX XXXX, III

FCPS Ex. 22 - C.V. – XXXX XXXX
FCPS Ex. 23 - C.V. – XXXX XXXX (not offered)

Testimony

The Parent testified and presented the following witnesses: XXXX XXXX, LCSW-C; XXXX XXXX, Jr., LCSW-C; XXXX XXXX, III, M. S., School Psychologist, accepted as an expert in School Psychology; XXXX XXXX, Special Education Teacher; and XXXX XXXX, the Student's step-father.

FCPS presented the testimony of the following witness: Ms. XXXX XXXX, FCPS Special Education Coordinator for Nonpublic Placements. Ms. XXXX was accepted as an expert in Special Education.

FINDINGS OF FACT

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

1. The Student is currently sixteen years old (DOB XXXX/98).
2. He is enrolled in FCPS but is not currently attending school.
3. The Student has accumulated three and one half of the twenty-five credits required for a high school diploma.
4. The Student lives with his mother, step-father, and three younger siblings.
5. The Parent has been a constant, ardent advocate for the Student. She attends all IEP meetings, keeps in contact with the schools, and relentlessly seeks new medical treatments for the Student's conditions.
6. The Student has the diagnoses of Attention Deficit Hyperactivity Disorder (ADHD), Bipolar Disorder, not otherwise specified, and Generalized Anxiety Disorder.

7. The Student is extremely anxious most of the time. He is unable to sleep more than two or three hours a night. He worries about his health, and often feels that he may die. The Student relieves his anxiety in part by frequently texting his mother. At other times when the anxiety is intolerable, the Student will lie on the floor to calm himself.

8. The Student engages in rituals such as turning the lights on and off. When he enters a room, he walks in a set path every time.

9. The Student is identified as a student with Multiple Disabilities under the IDEA, including an Emotional Disability and Other Health Impairment related to ADHD.

10. The Student attended eighth grade at a public school within FCPS, located at [School 2] from July 7, 2011 until April 18, 2012.

11. The Student was enrolled in the XXXX Program at [School 3], a FCPS special education program, from April 18, 2012 through the end of the eighth grade. The XXXX Program provides special education services to students with the opportunity for inclusion with non-disabled peers in a comprehensive school.

12. The Student attended [School 4], a nonpublic, separate, special education school in the fall of 2012. The Student was placed at [School 4] by FCPS in accordance with his IEP.

13. The Student experienced significant behavioral difficulties at [School 4]. FCPS Ex. 4.

14. The Student attended [School 5], a nonpublic, separate special education school for approximately three to four weeks during the first semester of the 2012-2013 school year. The Student was placed at [School 5] by the FCPS in accordance with his IEP.

15. The Student experienced significant behavioral difficulties at [School 5]. FCPS Ex. 4.

16. The Student was enrolled in [School 1] ([School 1]), a nonpublic, separate, special education school operated by XXXX Hospital, from January 2013 until January 23, 2014. The Parent refused to send the Student to [School 1] after January 23, 2014.

17. The Student was placed at [School 1] by FCPS in accordance with his IEP.

18. At [School 1], due to his interfering behaviors, the Student was only able to access special education instruction in the classroom for approximately five to fifteen minutes per class. The Student was removed daily from the classroom setting to receive additional adult assistance from a one-to-one aide.

19. While at [School 1], the Student's behavior impeded his ability to learn and interfered with that of the other students. He was unable to control his behavior in the classroom for more than fifteen minutes during each class. He had frequent, inappropriate verbal outbursts, turned the lights on and off, threw classroom furniture, opened and closed the blinds, talked over the teacher, and made excuses to leave the class, refusing to return. FCPS. Ex. 7, p. 15.

20. While at [School 1], the Student persistently engaged in disruptive behaviors by yelling and banging on doors and lockers. The Student regularly left the classroom after five to fifteen minutes, at the request of staff.

21. When the Student was required to leave the classroom due to his behaviors, the Student was escorted to the Resource Room for staff to evaluate and de-escalate behaviors, and then taken to the Alternative Learning Program (ALP) room. While in the ALP room, the Student was provided with one-to-one staff support.

22. The Student received individual and group therapy from XXXX XXXX at [School 1]. Originally, the Student was engaged in therapy, but by November, he refused to participate in therapy.

23. The Student has poor social skills; he is unable to communicate with and respond to staff and peers appropriately.

24. Between July 26, 2013 and January 10, 2014, [School 1] placed the Student in restraints, using the XXXX Restraint,¹ and/or seclusion twenty-three times to prevent him from endangering the safety of himself and/or others.

25. The Student's shoulder was injured during an August 22, 2013 restraint at [School 1].

26. On September 24, 2013, the IEP team met to consider the Parent's concerns that the Student's inability to remain in the classroom was impacting his access to special education instruction. The IEP team decided that the IEP remained appropriate because, despite the failure of the behavioral interventions, the Student had the opportunity to complete his class work outside the classroom with one-to-one adult support.

27. FCPS prepared a Behavioral Intervention Plan (BIP) for the Student on May 15, 2013 which identified intervention strategies to be used to prevent the occurrence of the Student's aberrant behavior. FCPS Ex. 13.

28. FCPS revised the BIP on September 27, 2013 and January 15, 2014. FCPS Ex. 13.

29. At all relevant times, the Student's BIP contained strategies to prevent problem behaviors, prompts, supports, verbal and nonverbal instructions, and a reinforcement schedule to encourage the Student to replace problem behaviors with behaviors that will make him more accessible to learning. The BIP also included strategies for school staff to respond to the Student's problem behaviors when they manifest.

¹ In a XXXX restraint, staff members approach the student from behind and grab his arms, crossing them and holding the student so that he cannot move.

30. The BIP provides that, “[a]s a last resort, restraint and/or seclusion will be used when [the Student] becomes a danger to himself and/or others.” FCPS Ex. 13.

31. The BIP was revised on January 15, 2014 to explain that the unsafe behaviors which could lead to seclusion and/or restraint include, but are not limited to, “[p]hysical posturing; threatening; disruptive to the point of in-sighting (sic) peers; banging on doors; provoking others; breaking boundaries with peers and staff.” FCPS Ex. 13, p. 13L.

32. The IEP Team discussed the BIP on January 15, 2014 and decided that it was still appropriate for the Student. FCPS Ex. 1.

33. On February 19, 2014, the IEP Team met to review the Student’s progress. FCPS Ex. 7. The IEP Team noted that in the academic area, the Student continued to struggle in his classes and that he had not attended school for a majority of the term. In the area of social, emotional and behavioral goals, the Student was experiencing significant challenges in his interactions with others.

34. The IEP Team discussed the BIP on February 19, 2014, focusing on strategies that may be successful for the Student. FCPS. Ex. 2, FCPS Ex. 8, p. 13. The IEP Team agreed that the BIP required no modifications and continued to be appropriate to meet the Student’s needs.

35. The IEP Team documented its discussion and acceptance of the BIP in the Student’s IEP, amended February 19, 2014. FCPS Ex. 7, p. 15-16.

36. The Student’s IEP provides that, “Due to physical aggression, the use of restraint, seclusion and/or exclusion may be used as a last resort when [the Student] becomes a danger to himself and/or others.” FCPS Ex. 7, p. 15.

37. On October 2, 2013, the Parent filed a complaint with MSDE alleging that the FCPS did not ensure that the Student was provided with the behavior supports required by his IEP and that the FCPS did not ensure that all proper procedures were followed when behavioral interventions were used with the Student during the 2013-2014 school year.

38. On November 26, 2013, MSDE concluded its investigation and issued a Letter of Findings (#14-0XX) concluding that the FCPS had denied the Student a FAPE beginning on August 15, 2013. MSDE ordered the FCPS to meet with the Parent and agree to the amount and nature of compensatory services for the loss of a FAPE from August 15, 2013 until the date when there is documentation that the IEP had been reviewed and revised to address the Student's behavioral needs and the Student is receiving the amount of special education instruction required by the IEP.²

39. On January 15, 2014, the Parent filed a second complaint with MSDE alleging that FCPS did not ensure that the Student was provided with the behavioral supports required by his IEP from January 15, 2013 until the start of the 2013-2014 school year.

40. FCPS acknowledged that violations occurred during that time period and it agreed to provide the Student with 135 hours of compensatory special education services as a remedy. The services were provided in the Student's home by XXXX XXXX, a special educator employed by FCPS, three times a week in one or one and a half hour sessions. FCPS. Ex. 3.

41. The Student was approved for home and hospital treatment (HHT) on the order of his psychiatrist from May until August 2014. The Parent has not provided FCPS with an updated medical order for HHT or a treatment plan since that time.

² Compensatory services are "educational services ordered ... to be provided prospectively to compensate for a past deficient program...." *G ex rel. RG v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 308 (4th Cir. 2003).

42. The IEP Team discussed the amount of additional home teaching that the Student could tolerate once he was approved for HHT. FCPS Ex. 3. It was agreed that Ms. XXXX would provide one additional hour of HHT educational service to the Student.

43. The IEP Team also discussed the Student's need for counselling as part of the HHT services. The IEP Team agreed that the Student would receive 1.5 hours of counseling in his home per week. XXXX XXXX provided those services on behalf of FCPS.

44. At the July 9, 2014 IEP Team meeting, [School 1] informed the team that the school would not be able to provide further services to the Student after August 14, 2014.

45. FCPS paid [School 1] to provide special education services to the Student through August 14, 2014.

46. The IEP team decided at the July 9, 2014 meeting that the Student continued to need the services of a nonpublic special education school.

47. Ms. XXXX sent out referrals to possible nonpublic schools.

48. The Student has not been placed in an alternative placement because he has not been disciplinarily removed from school.

49. The IEP Team reviewed and revised the Student's IEP on July 9, 2014. After discussion about the Student's inability to access a school placement, the Team agreed that additional educational assessments should be conducted. FCPS Ex. 8.

50. On August 29, 2014, FCPS conducted a Psychological Evaluation of the Student. After testing and evaluation, XXXX XXXX, III, M.S., School Psychologist, prepared a comprehensive report with twenty-four recommendations. FCPS Ex. 5.

51. On August 8, 2014, FCPS conducted an Educational Assessment of the Student. After testing and evaluation, XXXX XXXX, a special education teacher, prepared a report and made six recommendations. FCPS Ex. 6.

52. The IEP Team met on August 18, 2014 to discuss the Student's progress in HHT and his placement, among other issues. FCPS Ex. 4. The IEP Team decided that the Student required placement in a nonpublic special education school. The Parent disagreed with the placement decision; she requested that FCPS provide the Student with online classes that he can access from home. The school-based members of the IEP Team did not agree with the Parent's request.

53. The Parent filed the Due Process Hearing request on September 3, 2014.

54. The Student's IEP, revised on July 9, 2014, contains the following information:

- a. The Student's academic achievement and functional performance were assessed based on his having failed to attend school since January 2014. FCPS. Ex. 8, p. 6
- b. The Student had a failing grade in all his academic classes. *Id.*
- c. The Student refused to complete his work in all academic areas, despite the options given him to enable him to do so with special education support. *Id.*
- d. In the Social/Emotional/Behavioral portion of the IEP, the IEP Team noted that the Student uses verbally abusive and inappropriate means to communicate with others. FCPS Ex. 8, p. 9.
- e. The IEP Team noted that the Student was refusing offered Occupational Therapy (OT) services. FCPS Ex. 8, p. 10.

55. The Student's IEP, revised on July 9, 2014, contains the following Behavioral/Social/Emotional annual goals and objectives:
- a. The Student has a goal that he accepts an assigned task and begins it for at least fifteen minutes. The Student did not make sufficient progress toward the goal. He remained at home with his mother and was not attempting academic tasks. FCPS Ex. 8, p. 27.
 - b. The Student has a goal that, in a school setting, he increases compliant behaviors by, among other things, following directions and refraining from threatening others. The Student did not make sufficient progress toward the goal. He remained home at his mother's request. FCPS Ex. 8, p. 27.
 - c. The Student has a goal that, in a school setting, he will use self-regulating skills to, among other things, gain positive attention. The Student did not make any progress toward the goal. FCPS Ex. 8, p. 28.
56. [School 6], a nonpublic special education school in Baltimore agreed to enroll the Student.
57. On October 19, 2014, the Student's IEP was amended to include placement at [School 6].
58. The Parent disagreed with the proposed placement.

DISCUSSION

I. Background

The events involving the Student's education during the period of time immediately preceding the filing of the Due Process Complaint in this case are complicated by matters which,

although they do not directly affect the outcome in this case, require an explanation if the procedural history is to be understood.

The Student has had an IEP and has been receiving special education services from FCPS at all relevant times. The last placement, with the Parent's consent, was at [School 1], a nonpublic special education school. However, the Student experienced behavioral difficulties at [School 1] and the Parent has not allowed him to attend since January 2014.³ The Student has been receiving special education services from FCPS at home for two reasons: FCPS agreed to provide compensatory education services as a result of a finding by MSDE that FCPS denied the Student a FAPE; and FCPS provided HHT services based on a certification by the Student's psychiatrist that he required HHT through August 2014.

The Parent filed two complaints with MSDE on behalf of the Student. After an investigation, MSDE issued a Letter of Findings as to the first complaint. The Parent filed a second complaint with MSDE, and FCPS agreed that there had been violations of IDEA. The Parent and FCPS met and agreed that FCPS would provide the Student with compensatory services as a remedy for the violations at issue in the two MSDE complaints. FCPS has been providing the Student with compensatory education at home through Ms. XXXX, a special educator.⁴

In May 2014, FCPS approved the Student for HHT, based on an order signed by his psychiatrist. The precise dates of HHT services are unclear, but it appears that the HHT services were provided from June through August 2014. The record is confused because the compensatory service hours were also provided in the Student's home. In any event, the

³ Eventually, [School 1] notified FCPS and the Parents in July 2014 that it was unable to provide the Student with special education services after August 14, 2014.

⁴ The propriety of at-home compensatory services for a student who does not have a medical order for home teaching and who has not been removed from school for disciplinary issues is not before me.

adequacy of the number of hours of compensatory services and HHT hours is not the issue in this case. This information about the MSDE complaints and HHT is included to provide context to the Decision and to explain why FCPS has provided in-home instruction to the Student for a prolonged time.

Since January 2014 when the Student stopped attending school, IEP team meetings were held on January 15, 2014, February 19, 2014, July 19, 2014, August 18, 2014, and October 13, 2014. The Student's IEP was revised on July 9, 2014 and October 13, 2014. The IEP calls for the Student to receive education at a nonpublic special education school. FCPS sent information about the Student and his IEP to numerous qualified nonpublic schools. The Parent refuses to permit the Student to enroll in any nonpublic placement.

The Parent filed a Due Process Complaint on September 3, 2014, requesting a hearing to determine whether a nonpublic special education school is the proper placement for the Student.⁵ She requested that I order FCPS to provide the Student with special education services at home in some form, including through an online program offered by FCPS to students who have been placed in the online program as an alternative to public schools due to disciplinary infractions. The Parent argued that, as a result of the Student's emotional trauma suffered at [School 1] from numerous restraints and several seclusions, he is too anxious to attend school. While the Parent hopes that the Student will eventually be able to transition to a school setting, she is unwilling to permit him to do so at the present time.

FCPS argued that the law does not permit the remedies the Parents requests. It is undisputed that the Parent has not provided FCPS with any order from a licensed psychiatrist or licensed psychologist stating that the Student currently requires HHT to treat a physical or

⁵ After the Parent requested the Due Process hearing, FCPS sent inquiries to a number of nonpublic schools. One of them, [School 6], responded, indicating that it was able to implement the Student's IEP. The IEP was then amended to specify [School 6] as the Student's placement. FCPS Ex. 19.

emotional condition. Although FCPS did not specifically argue the point, it argued broadly that the law does not permit FCPS to place the Student in an alternative program for which online learning is one component, since the Student has not been removed from school due to discipline issues. Absent a medical order, FCPS argued, the law does not allow it to provide the Student with instruction at home, once the compensatory education services end.

Having considered the law and the relevant evidence, I agree with FCPS that the law does not allow me to order the relief requested by the Parent.

II. Legal Framework

The IDEA provides every disabled child the right to a FAPE, which is defined as special education and related services that: are provided at public expense, under public supervision; meet the standards of the State educational agency; include appropriate education; and are provided in conformity with the child's IEP. 20 U.S.C.A. § 1401(9) (2010). An IEP is substantively satisfactory if it is "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

An educational agency is required to have an IEP in effect for each disabled child by the beginning of the school year. 20 U.S.C. § 1414(d)(2)(A). The IEP must include a statement of the special education and related services, and supplemental aids and services to be provided a student. The IEP must also include a statement of the program modifications or supports for school personnel that will be provided for the child. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

Additionally, the IEP must state the projected date for the beginning of the services and modifications described, and the anticipated frequency, location, and duration of those services and modifications. 20 U.S.C. § 1414(d)(1)(A)(i)(VII).

In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. Expanding the scope of a school district's offer to include what is not stated, for example, the location of services, undermines the important policies served by the requirement of a formal written offer, namely, creating a clear record of the educational placement and other services offered to the parents. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007) (IEP must include location of services).

There is no allegation that FCPS committed any procedural violation of IDEA.

III. The Availability of the Requested Remedy

The Parent asked that I order FCPS to provide the Student with a FAPE through enrollment in an online class so that he can complete the requirements for a high school diploma without attending a bricks and mortar school. The Student is sixteen years old, but he has accumulated only 3.5 credits toward the 25 credits required for a Maryland high school diploma. Two of those credits were awarded while he was receiving home instruction from FCPS with the assistance of XXXX XXXX, a special educator.

The only Maryland regulations that permit a public school system to deliver secondary education at a student's home apply when the student has a documented medical need. COMAR 13a.03.05 governs HHT in Maryland. COMAR 13a.03.05.01A provides that "These regulations, which establish a minimum requirement, apply to the provision of instructional services to public school students who are unable to participate in their school of enrollment due to a physical or mental condition." The following verification provisions are *mandatory* under the regulations:

Verification Procedures.

A. Initial service need is determined by:

(1) Verification of the physical condition, including drug and alcohol dependency, by a licensed physician, or verification of emotional condition by a certified school, or licensed psychologist or licensed psychiatrist; and

(2) A statement by the physician or psychologist verifying that the current physical or emotional condition prevents the student from participating in the student's school of enrollment.

B. Service need is subject to review:

(1) 60 calendar days after the initial determination of eligibility; or

(2) Sooner at the request of the parent, guardian, or local school system.

C. Continuation of this service beyond 60 calendar days requires reverification of service need, in accordance with §A of this regulation.

COMAR 13a.03.05.04.

In summary, in order to qualify for HHT services, the Parent must provide FCPS with verification of the Student's emotional condition, signed by a licensed psychologist or psychiatrist. A public school system simply cannot continue to provide HHT services for more than 60 days without the required documentation. *See* COMAR 13a.05.01.10C(5)(d) ("Educational placement in the home, for a student with an emotional condition, may not exceed 60 consecutive school days.") The Parent has not provided verification of the need for HHT since August 2014. Therefore, FCPS cannot lawfully continue providing such services to the Student.

There is no provision in Maryland law permitting or requiring FCPS to pay for online education for the Student. Ms. XXXX explained that students who are removed from school due to disciplinary issues are placed in an alternative program with an online component. *See* COMAR 13a.08.03.06. Such students take online classes and then report to an alternative school placement two evenings a week. The Student cannot receive instruction in the alternative placement because he has not been removed from school by FCPS due to any disciplinary problem. I conclude that the law precludes the Parent's request that the Student be allowed to receive his education at home.

IV. Does the Student's July 9, 2014 IEP with placement at a nonpublic special education school provide the Student with a FAPE?⁶

Although the Parent did not explicitly challenge the sufficiency of the Student's IEP, for completeness I shall address the issue of whether the IEP is reasonably calculated to provide the Student with some educational benefit.

The Parent is concerned that the Student has been enrolled in five special education schools, starting with the eighth grade. She is also very upset that he was restrained and placed in seclusion twenty-three times at [School 1], his last special education school. The Parent believes that the Student has been traumatized by his treatment at [School 1], and she does not feel that he is emotionally stable enough to make another transition. This is especially troubling to the Parent because the Student experienced extreme difficulties relating to peer and staff at every school he has attended. Transitions to new schools are very difficult for the Student.

At the end of his eighth grade school year, the IEP Team met and discussed the Student's progress toward his goals, particularly the behavioral goals. Because the Student was not making progress toward any of his goals in either of the public schools where he was enrolled for eighth grade, the IEP Team concluded that he should be placed in a nonpublic special education school for ninth grade. At that time, the Parent concurred with the IEP Team's decision that the Student be placed in a nonpublic school.

However, after the Student's experiences with [School 4], [School 5], and [School 1], the Parent has lost faith in the ability of all nonpublic schools to implement her son's IEP without using seclusion or restraints and without imposing stress on him which may worsen his current

⁶ The Student's IEP was revised on October 13, 2014, after the Parent requested the Due Process hearing. FCPS Ex. 19. I have not considered this IEP in reaching my decision in this case because it was not the basis for the Parent's hearing request. I assume since the Parent chose to go forward with the hearing that her concerns were not addressed in the amendments made to the IEP.

unstable condition. She wants to protect him from being anxious, restrained, and placed in seclusion by having him enroll in an online class at home where she feels he will be safe.

Ms. XXXX testified very frankly for FCPS about the likelihood that a new nonpublic special education school will succeed in making progress toward the Student's goals where all others have failed. She acknowledged that the next school may have no more success than the previous ones, but she is committed to continuing to try to find a school that can help the Student make progress toward the goals in his IEP.

The law is settled that the IDEA does not require the public schools to *guarantee progress* toward a student's IEP goals.

Under the [IDEA], the state must provide children with "meaningful access" to public education. *Bd. of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 192. The FAPE must only be "calculated to confer *some* educational benefit on a disabled child." *MM*, 303 F.3d at 526 (citing *Rowley*, 458 U.S. at 207)(emphasis added). The Supreme Court has held that under IDEA Congress intended to provide a satisfactory level of educational opportunity, not the best education that money could buy. *See Rowley*, 458 U.S. at 189. The Court noted that "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n. 21; *see also Hartmann v. Loudoun County Bd. of Ed.*, 118 F.3d 996, 1001 (4th Cir.1997) ("States must ... confer some educational benefit upon the handicapped child, but the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential.") (internal citations and quotation marks omitted).

A.B. v. Lawson, 354 F. 3d 315, 319 (4th Cir. 2004).

I conclude that the Student's IEP is calculated to confer some education benefit on him. The annual goals reviewed and determined to be appropriate by the IEP team reflect the areas of deficits identified on the IEP. The Parent agreed with the annual goals developed to address the Student's deficits.

More importantly, the IEP contains goals for the Student's social, emotional and behavioral needs. These goals are overarching; they affect the Student's availability to access all

of the other special education services described in the IEP. Unfortunately for the Student, his emotional disability has impacted every aspect of his educational career and has impeded his ability to make progress toward achieving the goals in his IEP.

The IEP Team recognized the Student's lack of progress. It did not sugar-coat the difficulties that the Student's inability to remain in class and to give his attention to school work, wherever it is offered, have had on his overall educational progress. Many strategies have been attempted, with little or no success. It appears that FCPS has tried everything, but nothing has worked well or for very long.

The Parent's position that the Student should be granted the exceptional remedy of online classes or other home education is not supported by qualified medical evidence. The Parent did not offer evidence from a licensed health care professional to show that the Student's mental health requires him to be educated away from all peers, disabled and non-disabled. The Parent is familiar with the process for obtaining HHT because she has done it in the past. Her request is akin to HHT, without the verifications required by the law. Even if I were not constrained by the Maryland regulations discussed above, I would not order what she requests because the Parent has not shown that the IEP violated IDEA by failing to offer the Student a FAPE.

Ms. XXXX testified that FCPS permitted the Student to enroll in one online class in order to assist him in the transition to [School 6]. FCPS has provided the Student with at-home counseling from XXXX XXXX, LCSW-C. Mr. XXXX testified that his original goal was to convince the Student to go back to [School 1]. Over time, the goal changed to encouraging the Student to return to a nonpublic special education school other than [School 1].

Mr. XXXX explained that the Student is very anxious and engages in rituals, e.g., turning the lights on and off, to relieve his anxiety. The Student told Mr. XXXX that he would not object

to returning to a “normal school,” but does not want to go to a special education school. Mr. XXXX testified that he is concerned that the Student needs to go to school. In his view, secluding the Student at home will make it increasingly difficult for the Student to transition into a school.

XXXX XXXX, III, M.S. Ed., testified and was accepted as an expert in the field of school psychology. Mr. XXXX performed a 2014 assessment of the Student for FCPS. Ex.5. He found that the Student’s obsessive/compulsive tendencies were highly elevated from the last assessment. The Student’s cognitive scores were much lower than during the previous assessment. The Student’s cognitive scores are now in the borderline range.

Mr. XXXX testified that, in his opinion, the Student would benefit from attending school. The Student has experienced great difficulty in social settings with peers and school staff in every school he has attended. However, as Mr. XXXX explained, adaptive social behaviors cannot be replicated at home. The Student needs to develop good personal strategies for managing his emotional needs in order to move forward and be a productive member of society.

The Parent and her husband, XXXX XXXX, testified that the Student is much calmer and easier to live with since he stopped attending [School 1]. They obviously care deeply for the Student and are his most ardent supporters. The Parent is very knowledgeable about the Student’s health and emotional needs. She has been actively involved in all aspects of his education, through attending meetings, calling and emailing school personnel, and seeking outside sources for treatment. The Parent’s viewpoint, which arises from her devotion to the Student, must be considered.

However, the Parent’s request amounts to a withdrawal of the Student from the educational system. If the Student were permitted to complete his studies online, he would be

deprived of the opportunity to improve his ability to interact with others. Ms. XXXX candidly expressed her concern that the Student has not been successful at any of the nonpublic placements tried to date. She explained, nonetheless, that the Student needs to attend school, and she testified that, in her opinion, a nonpublic special education school can implement the Student's IEP.

The IDEA requires “great deference to the views of the school system rather than those of even the most well-meaning parent.” *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 328; *See also MM ex rel. DM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir.1991).

There is nothing in the Parent's evidence that convinces me that I should disregard the opinions of the FCPS officials that the Student must enroll in a nonpublic special education school in order to provide him with a FAPE.

Furthermore, in addition to the IDEA's requirement that a disabled child receive educational benefit, the law mandates that the child be placed in the “least restrictive environment” (LRE). This means that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). The Parent argued that home teaching or online classes, which are more restrictive than a special education school, is necessary to enable the Student to receive educational benefit. I am not convinced by the Parent's argument.

Many of the witnesses testified that the Student must practice strategies and behaviors in a school setting in order to be successful in school and to be prepared for real life situations, which involve interaction with others. Mr. XXXX explained his interactions with the Student, who was very anxious, even at home. Mr. XXXX testified that he is concerned that the Student's

rituals, e.g., turning the lights on and off, may make the Student a target of abuse from his peers. Mr. XXXX thinks the Student needs more outside therapy to prepare him to go to school.

However, when the Student is ready, Mr. XXXX believes that he needs to go to school, and the school the Student attends must put strategies in place to deal with the rituals.

Mr. XXXX testified that, during his assessment of the Student in August 2104, he found the Student to have high anxiety. He explained that anxiety can manifest in many ways. He suggested that the Student might precipitate incidents in the classroom in order to get removed to a smaller, quieter place where he is not so anxious.

In Mr. XXXX's opinion, the Student would benefit from enrollment in school. He opined that the Student must learn adaptive social behaviors, which cannot be replicated at home. The Student has to learn good strategies which he can use for the rest of his life. A special education school would tailor a program for the Student that will allow the Student to find his strengths, establish relationships, and find things that he is comfortable talking about. Mr. XXXX related that there are many other students with high anxiety enrolled in special education schools who are working on strategies for coping with their anxiety.

Ms. XXXX also testified, and I found her to be a very conscientious, honest witness. She did not temper her opinion about the likelihood of the Student's success at another nonpublic special education school. However, even though she acknowledged that the transition back to school will be a struggle for the Student, she testified that, in her opinion, he should be enrolled in school. She explained that school can be a safe place for the Student to gain the confidence he will need to move forward in life. Any special education school that accepts the Student is capable of implementing his IEP and BIP. If, after he enrolls, the placement finds that changes are required, an IEP Team meeting can be convened to make changes to the IEP.

In short, the Student's undisputed lack of progress toward his goals did not result from any deficiency in the IEP or from a lack of diligence on the part of either the Parent or FCPS. The parties met six times between January 16 and August 29, 2014. I am certain there have been many other meetings prior to that time. The IEP team considered all of the available information about the Student's longstanding difficulties accessing education. The IEP contains the shared wisdom of all of the participants that the goals and objectives in the IEP will offer the student meaningful access to a public education. Although the Parent disagrees with the proposed placement, the FCPS officials made professional judgments in accord with federal and Maryland regulations. I must conclude that the IEP does not violate the IDEA.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the July 19, 2014 IEP with placement in a nonpublic special education school at public expense provides the Student with a FAPE. *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); 20 U.S.C. § 1414.

I further conclude as a matter of law that the FCPS cannot lawfully provide special education services to the Student through home hospital teaching absent a required verification or through online classes. COMAR 13a.03.05.

ORDER

I **ORDER** that the Parent's request that the Student's IEP be implemented through home education, including home hospital teaching or online classes, is **DENIED**.

October 30, 2014
Date Decision Issued

Mary R. Craig
Administrative Law Judge

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) (2014). 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.