

**XXXX XXXX,**

**STUDENT**

**v.**

**HOWARD COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE MARC NACHMAN,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH NO.: MSDE-HOWD-OT-14-15722**

**\* \* \* \* \***

**DECISION**

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

**STATEMENT OF THE CASE**

On May 6, 2014, XXXX XXXX and XXXX XXXX (Father and Mother respectively, and collectively Parents), on behalf of their son [Student] (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 Howard County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A.

§ 1415(f)(1)(A) (2010).

The HCPS had conducted Individualized Educational Program (IEP) team meetings which determined that the Student’s educational placement for the 2013-2014 school year should be in the [Program 1] ([PROGRAM 1]) Program at [School 1] ([School 1]). For reasons explained below, the Student did not attend [School 1] but continued to be educated at his then current placement, [School 2] ([School 2]). On January 9, 2014, the Parents advised HCPS that

on January 17, 2014, they were withdrawing the Student from [School 2] and enrolled him in the [School 3] ([School 3]), a nonpublic, special education school located in Baltimore City. The Parents are now seeking the Student's placement in [School 3] be funded by HCPS.

In their hearing request, the Parents waived mediation. In Parents' counsel's subsequent letter of May 6, 2014, they also waived the dispute resolution session. HCPS counsel did not oppose this waiver.

I held a telephone prehearing conference on May 22, 2014. The Parents were represented by Michael J. Eig, Esquire. Jeffery A. Krew, Esquire, represented the HCPS. By agreement of the parties, the hearing was scheduled to begin July 7, 2014. This starting date was chosen because it was the earliest date available to the parties' representatives. An Amended Pre-Hearing Conference Report was issued on June 10, 2014, correcting an inaccurately reported date.

I held the hearing beginning on July 7, 8, 9, 10, 15, 21, 28, 30 and 31, August 21 and 22, September 11, 15, 18 and 22, 2014 at HCPS offices, primarily at 5451 Beaverkill Road, Columbia, Maryland.<sup>1</sup> Michael J. Eig, Esquire, and Megan Probert, Esquire, represented the Parents. Jeffrey A. Krew, Esquire, represented the HCPS. The scheduling and duration of the hearing was dictated by the availability of the ALJ, parties, counsel and witnesses.

The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). The parties waived their

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<sup>1</sup> The hearing was also conducted at the HCPS Headquarters Building at 10910 Clarksville Road, Route 108, Columbia, Maryland.

right to have the hearing within the forty-five-day period and agreed that the decision in this case would be issued no later than thirty days after the record closed.<sup>2</sup> 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2008). At the close of the hearing, the Parties again agreed that the decision could be issued outside that forty-five day period, but no more than thirty days from the close of the hearing.

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 Office of Administrative Hearings (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**

The issues in this case are as follows:

1. Was IEP and placement developed by the HCPS reasonably calculated to provide the Student with a free appropriate public education (FAPE) for the 2013-2014 school year?
2. If FAPE was denied for the 2013-2014 school year, is tuition reimbursement (and related expenses and costs) for the 2013-2014 school

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<sup>2</sup> Forty-five days from the date the parties waived their right to a resolution session was Friday, June 20, 2014. As neither of the parties could begin the hearing prior to June 20, 2014, the decision could not have been rendered by that date.

year at [School 3], the Parents' unilaterally chosen private school placement, appropriate?<sup>3</sup>

## **SUMMARY OF THE EVIDENCE**

### **Exhibits**

Unless otherwise noted, I admitted the following exhibits on behalf of the Parents:

- XX-1. Request for Due Process, 5/2/14
- XX-2. County Diagnostic Center Interdisciplinary Collaborative Report of Assessments, 5/9/07
- XX-3. [School 4] Evaluation Report, 4/21/10
- XX-4. HCPS IEP, 5/31/12
- XX-5. Emails between XXXX XXXX, XXXX XXXX and Mother, 1/16/13
- XX-6. HCPS IEP, 1/24/13
- XX-7. HCPS Reevaluation Report, 1/24/13
- XX-8. HCPS IEP Team Meeting Report, 2/5/13
- XX-9. Progress Report-Motor Planning/Speech Production by XXXX XXXX, Jan. 2013
- XX-10. Parental Consent for Reevaluation, 3/14/13
- XX-11. Letter to Parents from County Diagnostic Center, 2/20/13
- XX-12. Student Support Worksheet, 2/27/13
- XX-13. HCPS Grade Four Interim Progress Report, 2/28/13
- XX-13A. Email from Mother to XXXX XXXX, 3/20/13
- XX-13B. Emails between XXXX XXXX and Mother, 4/23/13
- XX-14. HCPS IEP, 4/26/13

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<sup>3</sup> The school year is identified herein as the "2013-2014" school year, even though the reimbursement is only sought for the second half of the school year from January through June 2014, the part of the school year during which the student was enrolled at [School 3]. If the Parents met their burden of proof in this matter, they argue that this placement would also be appropriate for the 2014-2015 school year.

- XX-15. HCPS IEP Team Meeting Report, 4/26/13
- XX-15A. Email from Mother to XXXX XXXX, 5/7/13
- XX-16. Maryland School Assessment, Spring 2013
- XX-17. Echoic Sounds Data Sheet, 10/26/12 to 5/24/13
- XX-18. HCPS IEP Team Meeting Report, 6/10/13
- XX-19. HCPS IEP, 6/10/13
- XX-20. FBA/BIP,<sup>4</sup> 6/10/13
- XX-21. Annual Goals Progress Report, 6/14/13
- XX-22. HCPS Grade 4 Report Card, 6/14/13
- XX-23. Email from XXXX XXXX to Mother with adjusted school schedule, 9/12/12
- XX-24. Letter to XXXX XXXX from Michael J. Eig, Esq., 7/23/13
- XX-25. Letter to XXXX XXXX from Michael J. Eig, Esq., 8/19/13
- XX-26. Letter to Jeffrey A. Krew, Esq. from Michael J. Eig, Esq., 9/3/13
- XX-27. Letter to XXXX XXXX from Michael J. Eig, Esq., 9/3/13
- XX-28. Letter to Michael J. Eig, Esq. from Jeffrey A. Krew, Esq., 9/4/13
- XX-29. Email to XXXX XXXX from Mother, 9/9/13
- XX-30. Email to Meghan M. Probert from Mother, 9/20/13
- XX-31. [Not Admitted]
- XX-31A. Letter to Parents from XXXX XXXX, 9/24/13
- XX-32. Report to Parent/Guardian of Probable Head Injury, 9/25/13
- XX/33. [Not Admitted]
- XX-34. Adapted Physical Education (APE) Assessment Report, 9/30/13

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<sup>4</sup> “Functional Behavior Assessment/Behavior Intervention Plan.”

- XX-35. County Diagnostic Center Interdisciplinary Collaborative Report of Assessments, 10/1/13
- XX-35A. Letter to Parents from XXXX XXXX, 10/1/13
- XX-36. Letter to Parents from XXXX XXXX with school schedule, 10/7/13
- XX-37. HCPS IEP Team Meeting Report, 10/9/13
- XX-38. HCPS Evaluation Report - Autism Supplement, 10/9/13
- XX-39. County Diagnostic Center Interdisciplinary Collaborative Report of Assessments Revised, 10/15/13
- XX-40. Letter to Jeffrey A. Krew, Esq. from Michael J. Eig, Esq., 10/21/13
- XX-41. Letter to Michael J. Eig, Esq. from Jeffrey A. Krew, Esq., 10/21/13
- XX-42. HCPS IEP & inclusion data, 10/22/13
- XX-43. Letter to Michael J. Eig, Esq. from Jeffrey A. Krew, Esq., 10/23/13
- XX-44. [Not Admitted]
- XX-45. HCPS IEP Team Meeting Report, 10/28/13
- XX-46. HCPS IEP, 10/28/13
- XX-47. Email to Meghan Probert from Mother, 10/29/13
- XX-48. Letter to XXXX XXXX from Michael J. Eig, Esq., 11/1/13
- XX-49. Email to XXXX XXXX and Meghan M. Probert, Esq. from Mother, 11/5/13 (Page 1 of the exhibit was withdrawn)
- XX-50. Email to Meghan M. Probert, Esq. and XXXX XXXX from Mother, 11/14/13 (Page 1 of the exhibit was withdrawn)
- XX-51. Speech Plan, 11/20/13
- XX-52. Email to Meghan M. Probert, Esq. from Mother, 11/20/13 (Page 1 of the exhibit was withdrawn)
- XX-53. Email to Meghan M. Probert, Esq. and Michael J. Eig, Esq. from Mother, 11/21/13
- XX-54. Email to Dr. XXXX from Mother, 11/25/13

- XX-55. Email to Meghan M. Probert, Esq. from Mother enclosing Acute Concussion Evaluation Care Plan, 11/26/13
- XX-56. Emails between XXXX XXXX, XXXX XXXX and Mother, 11/27/13
- XX-57. Email to Meghan M. Probert, Esq. from Mother, 12/3/13 (Page 1 of the exhibit was withdrawn)
- XX-58. Email to Meghan M. Probert, Esq. from Mother, 12/3/13
- XX-59. Letter to Jeffrey A. Krew, Esq. from Michael J. Eig, Esq., 12/4/13
- XX-60. Letter to Michael J. Eig, Esq. from Jeffrey A. Krew, Esq., 12/4/13
- XX-61. [Not Admitted]
- XX-62. Emails between Meghan M. Probert, Esq. and Mother, 12/10/13
- XX-63. Email to Meghan M. Probert, Esq. and XXXX XXXX from Mother 12/12/13
- XX-64. Email to Meghan M. Probert, Esq. from Mother, 12/12/13 (Page 1 of the exhibit was withdrawn)
- XX-65. Email to Meghan M. Probert, Esq. from Mother, 12/13/13 (Page 1 of the exhibit was withdrawn)
- XX-66. Email to Meghan M. Probert, Esq. and XXXX XXXX from Mother, 12/19/13 (Page 1 of the exhibit was withdrawn)
- XX-67. Email to XXXX XXXX from Mother enclosing parental input to FBA, 12/22/13
- XX-68. Letter to Michael J. Eig, Esq. from XXXX XXXX with FBA/BIP and draft IEP pages, 12/20/13
- XX-69. Letter to XXXX XXXX from Michael J. Eig, Esq., 12/24/13
- XX-70. Email to Meghan M. Probert, Esq. from Mother, 1/2/14
- XX-71. [Not Admitted]
- XX-72. [Not Admitted]
- XX-73. Letter to XXXX XXXX from Michael J. Eig, Esq., 1/9/14
- XX-74. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 1/9/14

- XX-75. Letter to Michael J. Eig, Esq. from Jeffrey Krew, Esq., 1/10/14
- XX-76. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 1/10/14
- XX-77. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 1/13/14
- XX-78. Letter to Michael J. Eig, Esq. from Jeffrey Krew, Esq., 1/14/14
- XX-79. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 1/15/14
- XX-80. XXXX Medical Center MRI Report, 1/21/14
- XX-81. [School 3] Admission Summary and Tuition Contract, January 2014
- XX-82. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 3/5/14
- XX-83. Letter to Michael J. Eig, Esq. from Jeffrey Krew, Esq., 3/6/14
- XX-84. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 3/6/14
- XX-85. Letter to Michael J. Eig, Esq. from Jeffrey Krew, Esq., 3/14/14
- XX-86. Letter to Jeffrey Krew, Esq. from Michael J. Eig, Esq., 3/18/14
- XX-87. [School 3] Team Meeting Notes, 3/19/14
- XX-88. [School 3] FBA, 3/31/14
- XX-89. [School 3] Annual Educational Update and Progress Reports, April 2014
- XX-90. [School 3] IEP, 4/15/14
- XX-91. [School 3] IEP Close Out Progress Reports, 4/15/14
- XX-92. [School 3] Schedule, 4/22/14
- XX-93. [School 3] Updated Schedule, 5/22/14
- XX-94. School Observation Report by Dr. XXXX XXXX, 5/28/14
- XX-95. [School 3] Daily Take Home Forms, January - June 2014
- XX-96. [School 3] SWIS Data on Behaviors, January - June 2014
- XX-97. [School 3] Behavior Support Referral Forms, January - June 2014



- XX-98. [School 3] Speech/Language Progress Documentation Log, January - June 2014
- XX-99. [School 3] Counseling Progress Documentation Log, April - June 2014
- XX-100. Emails between Parents and [School 3] staff, January - June 2014
- XX-101. [School 3] Daily Behavior Charts, February - June 2014
- XX-102. [School 3] Nurse's Log and Notes, January - May 2014
- XX-103. [School 3] Final Report Card, June 2014
- XX-104. [School 3] Student Work Samples
- XX-105. Resume of XXXX XXXX
- XX-106. Resume of XXXX XXXX
- XX-107. Resume of XXXX XXXX
- XX-108. Resume of XXXX XXXX
- XX-109. Resume of XXXX XXXX
- XX-110. Resume of Dr. XXXX XXXX
- XX-111. Resume of XXXX XXXX
- XX-112. [School 3] Progress Reports, June 2014
- XX-113. Emails between XXXX XXXX and XXXX XXXX, 6/13/14
- XX-114. Email to Mother from XXXX XXXX, 7/1/14
- XX-115. [Not Admitted]
- XX-116. [Not Admitted]
- XX-117. Speech/Language Therapy Progress Notes by XXXX XXXX, 6/21/14, 6/28/14, and 7/1/14
- XX-118. Videos of Student, Spring 2014
- XX-119. Emails between parents and HCPS, October 2011-January 2013
- XX-120. Videos of Student, 7/12/14

- XX-121. Email to Meghan Probert, Esq. from Mother with picture attachment, 7/15/14 (Page 1 of the exhibit was withdrawn)
- XX- 122. HCPS IEP, 10/28/10
- XX- 123. HCPS IEP, 5/3/12
- XX- 124. [Not admitted]
- XX- 125. Sample Maryland IEP Progress Codes (only pages 1 and 2)
- XX- 126. Doll used by Student
- XX- 127. [Not admitted]
- XX- 128. [Not admitted]
- XX- 129. HCPS IEP Team Meeting Report, 10/28/10
- XX- 130. [Not admitted]
- XX- 131. [Not admitted]
- XX- 132. Emails between Parents and HCPS, May 2012- January 2013
- XX- 133. HCPS Behavioral Data, November 2012- December 2013
- XX- 134. [Not admitted]
- XX- 135. Progress Report by XXXX XXXX, September 2014
- XX- 136. Behavior Data Summary by XXXX XXXX, 9/12/14

I admitted the following exhibits on the HCPS behalf:

- BD - 1 Documents regarding communications with Parent, 11/1/11 - 5/3/12
- BD - 2 Email to Mother from XXXX XXXX, 5/30/12
- BD - 3 IEP, 5/31/12
- BD - 4 Email to Mother, XXXX XXXX, XXXX XXXX from XXXX XXXX, 9/12/12
- BD - 5 IEP Team Meeting Report, 1/24/13
- BD - 6 Email to XXXX XXXX and XXXX XXXX from Mother, 2/4/13
- BD - 7 IEP Team Meeting Report, 2/5/13
- BD - 8 Email to Mother from XXXX XXXX, 2/5/13

- BD - 15 MSDE Complaint, 2/6/13
- BD - 9 Email to Mother from XXXX XXXX, 2/7/13
- BD - 10 Letter to Parents from County Diagnostic Center, 2/20/13
- BD - 11 Assessment Consent Forms, 3/14/13
- BD - 12 Letter to Mother from XXXX XXXX, 3/21/13
- BD - 13 Email to XXXX XXXX from Mother, 3/28/13
- BD - 14 Letter to Mother from XXXX XXXX, 4/2/13
- BD - 15 Letter to Mother and XXXX XXXX from XXXX XXXX, MSDE, 4/5/13
- BD - 16 Letter to Mother from XXXX XXXX, 4/5/13
- BD - 17 IEP Team Meeting Report, 4/26/13
- BD - 18 XXXX XXXX Observation Notes, 5/29/13 - 5/30/13
- BD - 19 IEP & IEP Team Meeting Report, 6/10/13
- BD - 20 Email to Mother from XXXX XXXX, 6/12/13
- BD - 21 Email to XXXX XXXX from Mother, 6/14/13
- BD - 22 Letter to Mother and XXXX XXXX from XXXX XXXX, MSDE, 7/15/13
- BD - 23 Letter to Michael Eig from XXXX XXXX, 7/26/13
- BD - 24 Parental Consents for Evaluations, 7/29/13
- BD - 25 Email to XXXX XXXX from Meghan Probert, 8/5/13
- BD - 26 Letter to XXXX XXXX from Michael Eig, 8/19/13
- BD - 27 Due Process Hearing Complaint, 8/19/13
- BD - 28 Letter to Parents from XXXX XXXX, 8/22/13
- BD - 29 Letter to XXXX XXXX from Michael Eig, 8/22/13
- BD - 30 Letter to Michael Eig from XXXX XXXX, 8/26/13
- BD - 31 Letter to XXXX XXXX from Michael Eig, 8/30/13
- BD - 32 FBA/BIP, Sept. 2013
- BD - 33 Letter to Jeffrey Krew from Michael Eig, 9/3/13
- BD - 34 Letter to XXXX XXXX from Michael Eig, 9/16/13
- BD - 35 Letter to XXXX XXXX from Michael Eig, 9/16/13
- BD - 36 Letter to Michael Eig from XXXX XXXX, 9/19/13
- BD - 37 APE Assessment Report - XXXX XXXX, APE Program Head (HCPS), 9/30/13
- BD - 38 Memos to Parents and School from XXXX XXXX, 10/3/13
- BD - 39 Letter to Mother from XXXX XXXX, 10/7/13

- BD - 40 Email to XXXX XXXX from Mother, 10/8/13
- BD - 41 Letter to Mother from XXXX XXXX, 10/8/13
- BD - 42 IEP Team Meeting Report, 10/9/13
- BD - 43 Letter to Michael Eig from XXXX XXXX, 10/11/13
- BD - 44 Inclusion Data, 9/3/13 - 10/15/13
- BD - 45 Collaborative Report of Assessments - XXXX XXXX, APE; XXXX XXXX, CCC/SLP<sup>5</sup>; XXXX XXXX, Special Educator; XXXX XXXX, OTR/L; XXXX XXXX, Ed.S., NCSP; XXXX XXXX, CCC/SLP; XXXX XXXX, M.S., M.Ed., CCC/SLP (HCPS), 10/15/13
- BD - 46 Memos to Parents from XXXX XXXX, 10/15/13
- BD - 47 IEP and IEP Team Meeting Report, 10/28/13
- BD - 48 Letter to Michael Eig from Jeffrey Krew, 10/31/13
- BD - 49 Letter to XXXX XXXX from Michael Eig, 11/1/13
- BD - 50 Due Process Hearing Complaint, 11/1/13
- BD - 51 Letter to Jeffrey Krew from Michael Eig, 11/7/13
- BD - 52 Letter to XXXX XXXX from Jeffrey Krew, 11/8/13
- BD - 53 Grade Report/Progress Summary Chart, 11/1/12 - 11/8/13
- BD - 54 Fifth Grade Report Card, 11/8/13
- BD - 55 Letter to Michael Eig from Jeffrey Krew, 11/12/13
- BD - 56 Speech Plan, 11/20/13
- BD - 57 Letter to Michael Eig from XXXX XXXX, 12/6/13
- BD - 58 XXXX XXXX Observation Notes, 12/17/13
- BD - 59 Letter to Michael Eig from XXXX XXXX, 12/20/13
- BD - 60 Letter to XXXX XXXX from Michael Eig, 12/24/13
- BD - 61 FBA/BIP, January 2014
- BD - 62 Classroom Observation - XXXX XXXX, 1/2/14
- BD - 63 Inclusion Opportunities Data Chart, 1/2/14
- BD - 64 Email to XXXX XXXX from XXXX XXXX, 1/8/14
- BD - 65 Email to XXXX XXXX from Mother, 1/8/14
- BD - 66 Letter to XXXX XXXX from Michael Eig, 1/9/14
- BD - 67 Letter to Jeffrey Krew from Michael Eig, 1/9/14

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<sup>5</sup> “CCC/SLP” stands for “Certificate of Clinical Competence in Speech/Language Pathology.” “SLP” alone stands for “Speech/Language Pathologist.”

- BD - 68 Letter to Michael Eig from Jeffrey Krew, 1/10/14
- BD - 69 Letter to Jeffrey Krew from Michael Eig, 1/10/14
- BD - 70 Email string between XXXX XXXX and Michael Eig, 1/10/14 - 1/13/14
- BD - 71 [School 3] Private Pay Tuition Contract 2013-2014 School Year, 1/13/14
- BD - 72 Letter to Jeffrey Krew from Michael Eig, 1/13/14
- BD - 73 Letter to Michael Eig from Jeffrey Krew, 1/14/14
- BD - 74 HCPS Draft FBA/BIP, 1/14/14
- BD - 75 Letter to Jeffrey Krew from Michael Eig, 1/15/14
- BD - 76 Email to XXXX XXXX, [School 3], from Mother, 1/15/14
- BD - 77 Emails to Parents from [School 3] staff, 1/24/14 - 5/28/14
- BD - 78 Email to Parents from XXXX XXXX, [School 3], 1/31/14
- BD - 79 Email to XXXX XXXX and XXXX XXXX from Mother, 2/3/14
- BD - 80 Email string between Mother and XXXX XXXX, XX. XXXXX, 3/7/14
- BD - 81 Email to Parents from XXXX XXXX, [School 3], 4/7/14
- BD - 82 Email to Parents from XXXX XXXX, [School 3], 4/8/14
- BD - 83 Email to Parents, Michael Eig and Meghan Probert from XXXX XXXX, [School 3], 4/15/14
- BD - 84 Letter to XXXX XXXX from Michael Eig, 5/2/14
- BD - 85 Due Process Hearing Complaint, 5/2/14
- BD - 86 Letter to XXXX XXXX from Michael Eig, 5/6/14
- BD - 87 Letter to Michael Eig from Jeffrey Krew, 5/12/14
- BD - 88 Email to Parents, Michael Eig and Meghan Probert from XXXX XXXX, [School 3], 6/6/14
- BD - 89 [School 3] Visit/Observation - XXXX XXXX, 6/12/14
- BD - 90 XXXX XXXX Curriculum Vitae
- BD - 91 XXXX XXXX Curriculum Vitae
- BD - 92 XXXX XXXX Curriculum Vitae
- BD - 93 XXXX XXXX Curriculum Vitae
- BD - 94 XXXX XXXX Curriculum Vitae
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BD - 97 XXXX XXXX Curriculum Vitae  
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BD - 99 XXXX XXXX Curriculum Vitae  
BD - 100 XXXX XXXX Curriculum Vitae  
BD - 101 XXXX XXXX Curriculum Vitae  
BD - 102 XXXX XXXX Curriculum Vitae  
BD - 103 XXXX XXXX Curriculum Vitae  
BD - 104 XXXX XXXX Curriculum Vitae  
BD - A FBA/BIP – [School 4], 6/11/10

### Witnesses

The Parents presented the following witnesses:.

- The Father;
  - Dr. XXXX XXXX, who was accepted as an expert in Pediatric Neuropsychology;
  - XXXX XXXX, who was accepted as an expert in Special Education;
  - XXXX XXXX, who was accepted as an expert in social work with an emphasis in programming for special education students;
  - XXXX XXXX, who was accepted as an expert in Speech/Language Pathology
  - XXXX XXXX, who was accepted as an expert in Speech/Language Pathology;
- and
- XXXX XXXX, who was accepted as an expert in special education.<sup>6</sup>

HCPS presented the following witnesses:

- XXXX XXXX;
- XXXX XXXX, who was accepted as an expert in special education , with an emphasis on teaching children with Autism;<sup>7</sup>

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<sup>6</sup> Because there are two witnesses named “Ms. XXXX,” this witness will be referred to as “Ms. XXXX XXXX.”

- XXXX XXXX, who was accepted as an expert in Speech/Language Pathology with an emphasis on children with Autism and Assistive Technology (AT);
- XXXX XXXX, who was accepted as an expert in Speech/Language Pathology with an emphasis on the inclusion of special needs children and [THERAPY] training;
- XXXX XXXX, who was accepted as an expert in expert in school psychology;
- XXXX XXXX, who was accepted as an expert in special education with an emphasis working with children with Autism and with an emphasis on behavioral programming for children with Autism;
- XXXX XXXX, who was accepted as an expert in special education with an emphasis on the nonpublic placement of special-needs students;
- XXXX XXXX, who was accepted as an expert in special education and school administration; and
- XXXX XXXX, who was accepted as an expert in special education with an emphasis on the education of children with Autism.

### **FINDINGS OF FACT**

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

#### **The Student**

1. The Student was born on XXXX, 2001. He is currently thirteen years of age.
2. The Student and his family are residents of Howard County, Maryland.
3. The Student is identified as a student with multiple disabilities under IDEA: Autism and Intellectually Disabled (ID).
4. The Student is diagnosed with [Disorder] as well which limits his expressive speech

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<sup>7</sup> See, fn 5. This witness will be referred to as “Ms. XXXX XXXX.”

abilities. He is unable to organize, plan and execute motor movements necessary for speech volitionally, on his own volition. He also has difficulty with receptive speech and pragmatics.

5. The Student's disability became apparent before he was eighteen month of age.
6. The Student has been educated in both separate and inclusive school settings. He successfully participated and socialized with his non-disabled peers, who socialized well with him.
7. The Student has had private as well as public school speech/language therapy. His private SLP's use [THERAPY] therapy ([THERAPY]), a speech/language therapy concerning the mechanics of speech.

#### **Educational History Prior to the 2013-2014 School Year**

8. Prior to the second grade, the Student attended public schools ([School 5] and [School 6]), both HCPS schools, as well as private self-contained special education schools ([School 7] and the [School 4]) ([School 7] and [School 4], respectively), all at public expense.
9. At the time that the Student attended [School 4], it generally taught students with Autism through the second grade. The Student aged out of [School 4] at the end of second grade.
10. For the 2010-2011 school year, the Student's IEP team determined that he could be educated at [School 2] ([School 2]), a self-contained special education school that also offered inclusion opportunities for its students at the nearby [School 9] ([School 9]), another HCPS school for generally non-disabled students. The Student restarted the second grade at [School 2] with Ms. XXXX as his teacher.
11. At [School 2], the Student was in both self-contained special education classes as well as



inclusion classes with non-disabled peers at [School 9].

12. During the 2011-2012 school year, the Student attended the third grade at [School 2].

His teacher was again Ms. XXXX, and he attended some classes with non-disabled [School 9] students, either at [School 9] or at [School 2].

13. During the 2012-2013 school year, the Student attended the fourth grade at [School 2].

His teacher was Ms. XXXX, and he again attended some classes with non-disabled [School 9] students, either at [School 9] or at [School 2].

14. During the 2012-2013 school year, tensions built up between the Parents and Ms. XXXX,

as well as between the Parents and other HCPS staff, including XXXX XXXX, the Principal at [School 2], and the [School 2] school nurse. The Parents filed complaints with HCPS, which were determined to be unfounded.

15. The Student returned to [School 2] at the start of the 2013-2014 school year, even though

his IEP team determined that the Student should be placed in the [PROGRAM 1] Program at the [School 1]. His teacher was Ms. XXXX XXXX, who had previously been his inclusion coordinator for classes at [School 9].

### **IEP Team Meetings in January, February, April and June 2013**

16. An IEP team meeting was set for January 24, 2013, for the Student's IEP team to discuss his educational program and placement for the 2013-2014 school year, during which year the Student would enter the fifth grade. The meeting was postponed until February 5, 2013.

17. On February 5, 2013, the Student's IEP team met again. The team consisted of HCPS teachers, service providers, the Parents and their representative.

18. The IEP team could not make any program or placement decisions because it did not

have sufficient information about the Student. The IEP team posed a dozen questions that it felt could only be answered after the Student underwent a collaborative and comprehensive multi-disciplinary assessment, which was going to be done by HCPS personnel. Among the questions to be answered, the IEP team sought information about the Student's disabling condition(s), his strengths and weaknesses in various categories (e.g., informational processing, attention, memory, fine and gross motor, self care, behavior, etc.), his present levels of communication (expressive, receptive and pragmatic), and his behavior and his cognitive abilities.

19. The IEP team presented the Parents with a consent to evaluations in the following areas:

- a. Educational Assessments (Reading Skills, Reading Comprehension, Mathematics Calculation, Mathematics Reasoning, and Written Expression);
- b. APE Assessment;
- c. AT Consultation;
- d. Classroom Observation;
- e. FBA;
- f. Speech Assessment (Articulation, Voice, Fluency);
- g. Language Assessment (Receptive Language, Expressive Language, Other (Pragmatics));
- h. Occupational Therapy (OT) Assessment; and
- i. Other (APE).

20. The Parents were vehemently opposed to any evaluation which would determine the Student's Intelligence Quotient (IQ) or which might identify him as Intellectually Disabled (ID), which they referred under its prior nomenclature, Mentally Retarded, or

MR.

21. Because the Parents were opposed to testing in this area, the Parents did not sign the consent form allowing the testing to take place.
22. On March 14, 2013, more than a month after she was provided the consent form, the Mother returned the signed form to HCPS, but limited her consent to prevent any testing that could give any indication of the Student's IQ.
23. Even though the Mother communicated with HCPS about the consent form, she steadfastly refused to sign an unconditional consent.
24. Another IEP meeting was scheduled for April 26, 2013, to again discuss the need for evaluations and to decide on a program and placement for the 2013-2014 school year. The meeting adjourned with no action, as the team required the evaluations to complete its assignment.
25. Another IEP team meeting was scheduled for June 10, 2014. At that meeting, the evaluations could still be not started, as the Parents continued to withhold their consent to testing.
26. Nevertheless, at the June 10, 2013 IEP team meeting, the IEP team determined that the Student should continue to be educated in a self-contained special education setting with inclusion for approximately half of the school day. The Student also required speech-language therapy five times per week, OT and APE.
27. The Parents were in agreement with the goals and objectives in the IEP, as well as the related services. They had consistently requested more inclusionary opportunities for the Student to be educated with his non-disabled peers.
28. The IEP team also heard from XXXX XXXX, a special education teacher in the

[PROGRAM 1] ([PROGRAM 1]) Program at [School 1]; HCPS invited her to attend the meeting. Ms. XXXX explained how her program operated and how it would benefit the Student.

29. In the [PROGRAM 1] Program at [School 1], the Student would again spend approximately half of his school day in a self-contained special education setting, and would spend the remainder of his day in classes with his non-disabled peers. He would continue to have the related services that he had previously had been assigned.
30. The Parents opposed the Student's enrollment at [School 1], having had unfavorable experiences at that school when their daughter attended the school three years before.

#### **Collaborative Evaluation**

31. The Parents withdrew their opposition to having the evaluations completed and signed a consent without conditions. The authorization for the testing was returned to HCPS on July 29, 2013.
32. School personnel from various educational disciplines were consulted and collaborated in an multi-disciplinary assessment of the Student, including:
  - a. XXXX XXXX, APE Program Head, assessed the Student for APE;
  - b. XXXX XXXX, CCC/SLP, assessed the Student for AT Resources;
  - c. XXXX XXXX, M.S., Special Educator, performed an educational assessment;
  - d. XXXX XXXX, ORT/L, Occupational Therapist assessed the Student for OT;
  - e. XXXX XXXX, Ed.S., NCSP, School Psychologist, performed a psychological assessment
  - f. XXXX XXXX, M.S., M./Ed., CCC/SLP, performed a speech/language assessment; and

- g. XXXX XXXX, M.S., M. Ed., CCC/SLP, also provided a speech/language assessment.
33. Ms. XXXX conducted psychological testing, which took into account the Student's communication deficits. She determined that the Student's IQ was 48, which was significantly below his age-level expectations.
34. The Student's teachers and parents completed the Adaptive Behavior Assessment System, Second Edition (ABAS II), a battery of questions which provides a comprehensive, standardized assessment of the Student's adaptive behaviors and skills across a variety of skills. Testing determined that the Student's General Adaptive Composite score was less than 1%, indicating that the Student functioned in the extremely low range. The test confirmed that the Student met the criteria for having an educational disability of ID.
35. The Student's teachers and parents completed the Autism Spectrum Ratings Scale (ASRS) and the Behavior Assessment for Children, Second Edition (BASC-2). The tester found that the most appropriate educational disability continued to be Autism.
36. The speech/language assessment showed that the Student continued to have severe deficits in speech, secondary to severe [Disorder], as well as deficits in his receptive and expressive language and his functional communication skills. Speech/language therapy was again indicated.
37. The Kaufman Speech Praxis Test (KPST) assessed deficits in the speech motor planning skills. The Student speech was determined have an equivalent score of less than two years of age, confirming the continued diagnosis of severe [Disorder].
38. The Goldman-Fristoe Test of Articulation- 2 (GFTA-2) found continuing deficits in the

Student's intelligibility.

39. The Student was also evaluated for [THERAPY]. The test showed deficits in speech subsystem parameters, including structure (skeletal), function (neuromotor control), and integration (all speech subsystems, timing and prosody, all of which are important to [THERAPY] therapy.
40. The Student was also determined be unintelligible to familiar and unfamiliar listeners.
41. The Student was assessed with the Peabody Picture Vocabulary Test-Fourth Edition (PPVT-4), the Expressive Vocabulary Test-Second Edition (EVT-2), and the Evaluating Acquired Skills in Communication – Third Edition (EASIC-3). The Student's performance and expressive vocabulary were found to be in the "extremely low" range, with emergent and undemonstrated skills.
42. The Student used AT for communications and would also benefit from OT and APE.
43. The Student also had deficits in reading, writing and mathematics.
44. The Student read on the kindergarten level, although his sight reading skills were in the third grade level. The Student's comprehension was on the primer reading level.
45. The Student was performing on the pre-kindergarten mathematic levels, requiring one-on-one instruction.
46. The Student spelled at the pre-kindergarten/kindergarten level, using writing instruments to make marks on the page; he was able to trace his name.
47. The Collaborative Assessments were completed in early October 2013 and reported to the IEP team, including the Parents, on October 15, 2013.

#### **IEP of October 28, 2014**

48. The collaborative assessments were reviewed by the IEP team when it met on October

28, 2014.

49. After reviewing the evaluative data, the Student's performance toward achieving the annual goals and anecdotal information shared by the Parents, the IEP team essentially reaffirmed its programming and placement decision from the June 2013 IEP team meeting, save for adding a more hours of inclusion to his program.
50. The IEP continued to identify the Student as a student with Autism under IDEA; he was not identified as a student with an ID.
51. The Parents wanted the Student to remain in the diploma-bound track as opposed to receiving a certificate of completion. The HCPS members of the IEP team opposed this track, but acceded to the Parents' desire.
52. The IEP team determined that the Student should attend half of his school day in a self-contained special education setting with half of his school day in an inclusion setting with educational staff supports.
53. The IEP team determined goals and objectives in academic classes, with which the Parents were in agreement.
54. The Student continued to have the required AT, interventions and accommodations he had previously received without objection by the Parents.
55. The IEP team continued the related services in the Student's programming. The Parents wanted the Student to have speech/language therapy with a [THERAPY] trained SLP. HCPS sent one of its two SLP's to be trained in [THERAPY] in anticipation of the Student's entering its program; a second SLP was scheduled to attend [THERAPY] training. Because the Student did not enter [School 1], the second SLP never went for [THERAPY] training.

56. Despite agreeing to the goals and objectives, related services, and degree of inclusion with non-disabled peers in the IEP, the Parents rejected the location the Student was to receive his services, *i.e.*, the [PROGRAM 1] Program at [School 1], which was to commence on November 5, 2013.

### **The Parents' Prior Experience at [School 1]**

57. The Parents have a daughter older who is older than the Student and does not have a disability.

58. The Parents' daughter attended the first and second grade at [School 1].

59. Tension grew between the Parents (particularly the Mother) and the school administration and teachers.

60. The Mother repeatedly complained about the daughter's teacher to the school principal by sending emails, visiting the school and filing complaints with the HCPS. After investigation, the complaints were determined to be unfounded.

61. The Mother's behavior towards and communications with the teachers became so abusive that the school began to limit the manner and frequency of the Mother's emails and visits. After the Father inappropriately raised his voice at a teacher on one of his visits, the Parents were restricted from entering the school without an escort.

62. None of the daughter's teachers would be the Student's teachers had he attended [School 1].

63. Ms. XXXX had met the Mother on one occasion at [School 1], but her interaction would not have affected the Student's education.

64. Because of the Parents' previous experience at [School 1], they did not want the Student to attend that school.



## **The Stay Put Placement at [School 2] for the 2013-2014 School Year**

65. Because the collaborative assessments could not be completed until after the Parents signed an unconditional consent to testing, the testing could not be accomplished before the beginning of the 2013-2014 school year.
66. Accordingly, the stay put placement was the separate special education school at [School 2]; the Student was still able to participate in his program with non-disabled students in the general education environment at [School 9].
67. However, the Student's fellow students with disabilities had moved on from the program, leaving him as a class of one. Ms. XXXX XXXX was assigned to be the student's special education teacher in the self-contained classroom. The Student still participated in inclusion classes at [School 9].
68. The Student did not have significant behavioral problems in the 2012-2013 school year. His behavior began to deteriorate during the 2013-2014 school year when he was the only Student in his self-contained special education class at [School 2].
69. When the IEP team met on October 28, 2013, it reaffirmed that the Student's program and placement would be in the [PROGRAM 1] Program at [School 1] starting on November 1, 2014.
70. The Parents filed their second Request for Hearing on November 1, 2013, challenging the October 28, 2013 IEP team decision. By filing the request, the Student's stay put placement continued to be at [School 2].
71. The Student's behavior improved when he attended the inclusion classes at [School 9].
72. The Student continued to participate in his related service activities: speech/language therapy, OT, and APE.

### **Disenrollment in HCPS and Enrollment in the [School 3] ([School 3])**

73. The Parents withdrew their Request for Hearing on January 9, 2014.
74. Contemporaneously with the withdrawal of the Request for Hearing, the Parents advised HCPS that they were disenrolling the Student from HCPS and enrolling him at [School 3].
75. The Student did not have to attend the [PROGRAM 1] Program at [School 1], even though the stay put placement at [School 2] expired when the hearing request was withdrawn. HCPS agreed to allow the Student to remain at [School 2] and not attend [School 1] from that date until his last day he attended [School 2], January 17, 2014.
76. The Student has attended [School 3] since January 24, 2014.. .
77. [School 3] is a nonpublic, special education school that serves students 6 to 21-years-old, either seeking a certificate of completion or a Maryland High School diploma, along with related services (speech-language, physical therapy (PT) and OT and behavior therapy).
78. The [School 3] program is approved as a nonpublic facility for special needs students by the MSDE.
79. All of the Students at [School 3] have some degree of educational disability. The school does not have and has no opportunity for inclusion with non-disabled peers.
80. The Student is educated in a self-contained special education classroom with no interaction with non-disabled peers.
81. [School 3] is a highly restrictive environment due to the lack of inclusionary programming and education with non-disabled peers.
82. When the Parents enrolled the Student at [School 3], they provided the school with the October 2013 draft IEP as well as the [School 4] FBA/BIP from June 2010. The Parents

did not provide any more recent documents nor did [School 3] request any more recent documents from HCPS when enrolling the Student.

83. [School 3] initially based its programming on the October 28, 2013 IEP from HCPS provided to it by the Parents. [School 3] prepared its own draft IIP<sup>8</sup> on or about April 15, 2014.

84. The IIP was to be finalized in May 2014 after input from the Parents, but it had not been removed from “draft” status.

85. At [School 3], the Student was not participating in the Maryland School Assessments ((MSA) testing, which is a requirement for diploma-based students. Thus, the Student cannot presently be a diploma-bound student.

#### **The IEP and Placement in the [PROGRAM 1] Program at [School 1]**

86. The Student’s IEP offered by the HCPS was reasonably calculated to offer the Student with a meaningful educational benefit for the 2013-2014 school year.

87. The placement proposed by HCPS for the 2013-2014 school year in the [PROGRAM 1] Program at [School 1] was reasonably calculated to offer the Student a FAPE in the least restrictive environment.

### **DISCUSSION**

#### **I. The Legal Framework**

##### **A. FAPE**

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2014), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008 & Supp. 2013) and COMAR 13A.05.01. The IDEA

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<sup>8</sup> Private schools use the acronym “IIP” for its “Individualized Instructional Plan.” They do not use call their plan an “IEP.”

provides that all students with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412 (2010). Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306 (4th Cir. 1991).

In *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court defined a FAPE as follows:

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

458 U.S. at 200-01. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA; second, there must be a determination as to whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. 458 U.S. at 206-07. The Parents did not allege nor produce any evidence to support a finding that the HCPS failed to comply with procedures. As there were no procedural compliance issues, the following analyses will turn on whether the IEP, as developed, is reasonably calculated to enable the Student to receive educational benefit.

To provide a FAPE, the student’s educational program must be tailored to the student’s

particular needs and take into account:

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

20 U.S.C.A. § 1414(d)(3)(A) (2010).

Among other things, an IEP depicts a student's current educational performance, sets forth annual goals and short-term objectives and measurement of improvements in that performance, describes the specifically-designed instruction and services that will assist a student in meeting those objectives, and indicates the extent to which a student will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A) (2010). See also *M.M. v. School District of Greenville County*, 303 F.3d. 523, 527 (4th Cir. 2002).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "the best education, public or non-public, that money can buy" or "all the services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. The IEP is not required to "maximize" educational benefit; it does not require the "ideal." *A.B. ex rel B.B. v. Lawson*, 354 F.3d 315, 327,330 (4th Cir. 2004).

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

927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991).<sup>9</sup>

## **B. LRE**

In addition to the IDEA's requirement that a disabled child receive some educational benefit, a student must be placed in the least restrictive environment (LRE) to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). Yet, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. *Id.* and 34 C.F.R. § 300.114(a)(2) (2013). In such a case, a FAPE might require placement of a child in a private school setting that would be fully funded by the child's public school district. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

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

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

20 U.S.C. § 1412(a)(5)(A) (2010).

However, this "mainstreaming" requirement is "not an inflexible federal mandate."

*Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

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<sup>9</sup> The IDEA is not intended to deprive educators of the right to apply their "professional judgment." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F. 3rd Cir. 996, 1001 (4th Cir. 1997).

### **C. Unilateral placement**

The IDEA does not require a local educational agency to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a) (2013). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (citing *Burlington* at 373-74). Parents may recover the cost of private education only if they satisfy a two pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs.

### **D. Burden of Proof**

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, in this matter, the Parents have the burden of proving that the Student's IEP, specifically as it pertains to the Student's proposed placement for school year 2013-2014 in the [PROGRAM 1] Program at [School 1], is not reasonably calculated to provide educational benefit to the Student. If I determine that a FAPE was not afforded to the Student, then the Parents have the burden of showing that [School 3] is an appropriate private school placement.<sup>10</sup>

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<sup>10</sup> Whether the Student makes progress under the prior HCPS IEP is immaterial, as long as the Student's proposed IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *In Re Conklin, supra*. I am mindful of the distinction between the actual program at [School 2] and the proposed program at [School 1] for the purposes of this decision. Ms. XXXX explained the difference between the progress the Student made at [School 2] in a less than appropriate program (where the Student was placed due to the stay-put which resulted from the Parents' hearing request and subsequent placement agreement) and placement in the program at [School 1] that HCPS maintained better suited the Student's educational needs, but which the Student never attended due to the Parents' Requests for Hearing (making [School 2] the Student's stay put placement) and their unilateral private placement of the Student outside the school system:

Q. There you go. All right. If, indeed,

## II. Position of the Parties

### A. The Parents

The Parents contend that the Student would not reasonably be expected to make the necessary educational progress under the October 28, 2013, HCPS IEP and that the Student's placement in the [PROGRAM 1] Program at [School 1] would not be an appropriate educational placement. The Parents contend that the program at [School 1] is a part-time special education program and the Student needs a full-time, self-contained special education program such as that presently being provided the Student at [School 3]. They aver that the proof of this deficiency was the Student's lack of progress in the HCPS schools. The Parents also contend that the related services – and in particular speech therapy – was ineffective at HCPS.

The Parents further maintain that the Student has made significant progress in verbal and academic skills while at [School 3], proving that this program is the more appropriate one for the Student. The Parents contend that the Student is better behaved, more verbal and more manageable since his enrollment at [School 3] in January 2014, further evidencing the appropriateness of the [School 3] educational and social program. The Father questioned whether he could trust HCPS personnel.

Accordingly, the Parents are seeking tuition reimbursement for the Student's placement

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Ms. XXXX, he is achieving goals at [School 3] in such a short period of time, we're talking about your goals, and once again I understand your reservation without, you want more specific --

A. Uh-huh.

Q. -- data as to why they say that --

A. Right.

Q. -- but if he's achieving them in two to three months, that's a good thing, of course, for [Student]?

A. Yes, and we may have achieved it, too, if he was here [at [School 1]].

Q. Exactly, okay.

T. Vol. 9, (Page 2004:1 to 2004:14)(emphasis added).



at [School 3], which is detailed in the [School 3] bill for January through June 2014 (BD-71). If it is determined that the program at [School 3] is appropriate, they are seeking a prospective placement at [School 3] for the 2014-2015 school year

**B. HCPS**

HCPS contends that the IEP team correctly determined that the Student would have been provided with FAPE in the least restricted environment in the [PROGRAM 1] Program at [School 1] for the school year 2013-2014. That program would have provided the Student FAPE in a self-contained special education program in a small classes while still having the opportunity to be in a comprehensive elementary school where the Student could interact with his non-disabled peers, satisfying the LRE requirement. It contends that the IEP was reasonably calculated for the Student to achieve meaningful educational progress.

To that end, HCPS maintains that [School 1] would have been well equipped and well staffed in order to meet the Student's educational and related service needs in the least restrictive environment. Even the Parents sought greater inclusion for the Student with his non-disabled peers. In fact, HCPS contends that the Parents had no objections to the appropriateness of the goals and objectives of the last several HCPS IEPs or to the amount of service and supplementary aids and service called for in those documents. HCPS maintains that the Parents' objection to the Student's placement at [School 1] was without foundation, nor could this objection be a valid basis for concluding that [School 1] was not an appropriate placement for the Student. HCPS maintains that under the applicable law, the analysis ends on the first test under the two-prong analysis of *Burlington* and *Carter*.

However, if the second prong of the analysis needs to be considered, HCPS contends that the Student is not receiving any services at [School 3] that would not have been provided more

abundantly and by more skilled and experienced individuals at [School 1].

### **III. The Student and his Educational History in Private and Public Schools**

#### **A. The Student**

The Student is currently thirteen years of age and has always been in a special education setting in and out of the public school system. The Student lives with the Parents, who have an older child - a daughter - who does not have a disability. The Parents became aware of the Student's disabilities after he reached eighteen months of age (T. Vol. 2, Page 320:12 to 321:5). Although all of the expert witnesses agree that the Student has a disability under IDEA, his disabling condition was best described by Dr. XXXX, who was accepted as an expert in Pediatric Neuropsychology, which is "the study of brain behavior encompassing neurosciences, neuroanatomy, neurochemistry in children with neurodevelopmental disorders." T. Vol. 1, (Page 32:2 to 32:7).

Dr. XXXX studies the biological basis for behavior. Although Dr. XXXX has not examined the Student, from his review of the documentation submitted to him and his observation, he concluded that the child is in the severe range of the Autism spectrum, which in this instance is characterized by the Student's deficit in his capacity for social communication or social reciprocity and a tendency towards repetitive or ritualized behaviors. With regard to the former, Dr. XXXX opined that the Student has "significant difficulty with language and speech" with deficits in "the ability to use language to communicate wants and needs, the ability to use language as a tool to socialize, the ability to use language to understand himself." Dr. XXXX stated that the Student has "intensive needs," and his reported hitting, running, elopement and off-task behavior interferes with his learning. Dr. XXXX places the Student in the "intellectually limited range." T. Vol. 1, (Pages 46:22 to 47:23).

The Student has also been diagnosed with [Disorder], which Ms. XXXX defined as “the difficulty in organizing, planning and executing those motor movements for speech volitionally, on demand.” T. Vol. 9, (Page 1830:1 to 1830:3).

**B. Educational history**

**1. Identification of Disability through Second Grade**

The Student was initially found eligible for special education services by HCPS prior to his formal school enrollment. He was initially educated in a contained classroom at [School 5], a public HCPS school (T. Vol. 2, Page 321:17 to 321:23). He then attended a similar program [School 6], another HCPS school. He was then placed in a private placement, funded by HCPS, at the [School 7], where he remained for a year and three quarters. T. Vol. 2, (Pages 322:24 to 323:18). When the Parents felt that the Student was not making progress at [School 7], they asked for and received funding for the Student to attend first grade at the [School 4],<sup>11</sup> another self-contained private school located in Baltimore County, where he received one-on-one education and related services; he remained at the [School 4] for one and a half years starting in the Spring of 2009. T. Vol. 2, (Page 323:22 to 323:24 and Pages 327:1 to 327:3). When he aged out of the [School 4] program, the Student returned to HCPS at the [School 2] for the 2010-2011 school year, where the Student repeated the second grade. T. Vol. 2, (Page 327:8 to 327:11).

**2. [School 2] under the prior IEP**

[School 2] had self-contained special education classrooms similar to [School 4], but also had opportunities for inclusion with non-disabled peers T. Vol. 2, (Page 328:1 to 328:19). The Student returned to the second grade for the 2010-2011 school year with Ms. XXXX as his teacher. He remained at [School 2] for third grade (the 2011-2012 school year) with Ms. XXXX

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<sup>11</sup> When the Student was enrolled at [School 4], the only grades were kindergarten through second grade; it specially programmed for autistic children. T. Vol. 6, (Page 1241:8 to 1241:11)

as his teacher again. The Student made some educational progress in those year and enjoyed inclusion with his non-disabled peers at [School 9], another HCPS general education school.

In the 2012-2013 school year, the Student returned to [School 2] for his fourth grade year with Ms. XXXX as his teacher. T. Vol. 2, (Pages 336:25 to 337:8). Tensions rose during that year between the Parents and Ms. XXXX and during that year, the Student's behavior worsened. T. Vol. 2, (Page 337:9 to 337:23). The relation between the Parents and HCPS continued to sour during that school year after Ms. XXXX began teaching the Student in 2013 and after the Parents questioned Mr. XXXX, [School 2]'s principal, as well as school nurse, about injuries they claimed that the Student sustained in school (XX-13A and 13B).

### **3. [School 2] under the Stay-Put Provisions of the IDEA**

The June 10, 2013 IEP called for the Student to attend the [PROGRAM 1] Program at [School 1]. The Parents were opposed to this placement. To avoid the Student's placement at [School 1] (discussed below), on August 19, 2013, the parents filed the first of three Requests for a Due Process Hearing concerning the 2013-2014 fifth grade school year, effectively keeping the Student at [School 2] under the Stay Put provisions of the IDEA (XX-25). T. Vol. 2, (Pages 353:20 to 354:8). An agreement was reached to continue the Student at [School 2] for fifth grade (the 2013-2014 school year) pending the evaluations and the continued IEP team meeting to review those evaluations (XX-26); in exchange for this stay-put agreement, the Parents withdrew their hearing request on September 3, 2014 (BD-33); the school set two IEP meetings – one to go over the collaborative evaluation on October 9, 2013 (BD-34), and one on October 28, 2014 to revisit their placement decision (BD-47).

Ms. XXXX XXXX, who had worked with the Student's in the 3<sup>rd</sup> and 4<sup>th</sup> grade (the 2011-2012 and 2012-2013 school year), was the Student's special education teacher and had

worked with the Student regarding inclusion at [School 9]. She became the Student's special education teacher in the first half of the 2013-2014 school year after the Student's stay-put placement caused him to remain at [School 2], even though there was no other students with whom he could be in a class; in the 2013-2014 school year, the Student was Ms. XXXX XXXX's only student, and his interactions with other students was primarily with the non-disabled students in [School 9]. T. Vol. 6, (Pages 1243:17 to 1244:2).

Ms. XXXX succinctly compared the Student's program in the 2012-2013 school year to the 2013-2014 stay-put program:

Q. Where was he in school in '12-'13?

A. He was at [School 2]. The location was -- I'm sorry.

Q. Completely?

A. No. He did a split between [School 2] and [School 9].

Q. Okay. Now go on.

A. And in the school year, 2013-2014, he was doing a split; his programming looked very different. In 2012-2013, he was in a class of -- with other children participating in classroom routines, whole group instruction, if that's what you want to call it. He was also doing one-on-ones.

In the 2013-2014 school year, his programming looked very different. He did not have a group of peers or a class that he was participating in at [School 2].

T. Vol. 11, (Page 2273:10 to 2273:25).

Mr. XXXX assigned Ms. XXXX XXXX to be the Student's teacher because he anticipated that, due to the stay-put and hearing requests, the year would be a difficult one for the Student and for the Parents; he testified that he did not want to subject a new teacher to the anticipated litigation or to the Parents' abusive attitude, which he -- as well as other HCPS witnesses - described in detail during the fifteen-day hearing.<sup>12</sup> T. Vol. 13, (Pages 2685:22 to

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<sup>12</sup> Counsel for HCPS wants me to apply the "missing witness" rule to the Mother's failure to testify even though she was present every day of the hearing. Under that rule, "the unexplained failure of a party litigant to call a material witness to give evidence in his behalf supports an inference that such witness, if permitted to testify, would testify

2686:5).

Unfortunately, the Student's interest in school waned and his behavior worsened during the 2013-2014 school year at [School 2]. T. Vol. 2, (Pages 356:11 to 357:7). Ms. XXXX XXXX attributed this phenomena to the Student's "lack of access to rigorous environment or academic match in his last semester at [School 2]." T. Vol. 7, (Pages 1484:22 to 1485:5).

#### **4. Disenrollment in HCPS; Enrollment at [School 3]**

At the IEP team meeting on October 28, 2013 (XX-45), the team wrote the Student's IEP and determined that his placement should be in the [PROGRAM 1] Program at [School 1] (XX-46). HCPS sent the Parents' counsel a letter indicating that the prior stay-put agreement ended (XX-48). The Parents, who were part of the IEP team, disagreed with its placement decision and, in the face of the Student's enrollment at [School 1] on November 5, 2013, filed their second Request for a Due Process Hearing on November 1, 2013 (XX-50), again maintaining the Student's stay-put placement at [School 2].

The second hearing request was withdrawn January 9, 2014 when the Parents decided to disenroll the Student from HCPS and enroll him at [School 3] (BD-66, XX-73).<sup>13</sup> On January 10, 2014, HCPS, through its counsel, denied funding for the Student's private placement at [School 3]. By agreement, the Student remained at [School 2] through January 17, 2014. T. Vol. 12, (Page 2515:13 to 2515:15). The Student started at [School 3] on January 24, 2014.

The Parents enrolled the Student as a private pay student at [School 3]. Accordingly,

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against the interests of the party failing to present this testimony." *Blow v. Compagnie Mar. Belge (Lloyd Royal) S. A.*, 395 F.2d 74, 79 (4th Cir. 1968). The Mother was certainly a material witness, having been directly involved with the HCPS staff who testified about her abusive actions and statements, and she certainly did not testify even though she was present at the hearing and could have done so. As I have accepted the uncontradicted and credible testimony of the HCPS faculty and staff who communicated directly with the Mother, and the Mother's written correspondence is already in evidence for my review, I need not apply this rule in making my findings.

<sup>13</sup> I did not assign any significance to the Parents' seeking private placement at [School 3] while the IEP process was ongoing. Therefore, the Parents' citation of *Sara M. v. West*, 240 F. Supp. 2d 426 (D. Md. 2003) is inapposite.

there were no documents that came directly from HCPS, although the parents did provide the Admissions Director at the school with an IEP from HCPS<sup>14</sup> and the June 11, 2010 FBA/BIP<sup>15</sup> from [School 4], which was referred to in the IIP that was written by [School 3]. T. Vol. 1, (Page 167:6 to 167:16)<sup>16</sup> and T. Vol. 3, (Page 553:20 to 553:25).<sup>17</sup> [School 3] based its program on the October 2013 IEP, providing the Student with approximately the same related services, but reducing the speech/language therapy from five down to four 30 minute sessions in May 2014.<sup>18</sup> T. Vol. 1 (Pages 170:21 to 171:4 and 267:21 to 268:7).<sup>19</sup> [School 3] used the 2010

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<sup>14</sup> Ms. XXXX erroneously testified that the Parents had provided [School 3] the April 2013 draft IEP from which [School 3] drafted its IIP in April 2014. "... So in [Student]'s case, we got what the family provided, which was an IEP from Howard County, and I believe it was in draft form, but maybe it was finalized at that point, from April of 2013, that was the IEP that we were given." T. Vol. 1, (Page 167:6 to 167:16). Although Ms. XXXX referenced the April 2013 IEP, the IIP quotes extensively and verbatim from the October 2013 IEP indicating that the latter IEP was considered.

<sup>15</sup> An FBA is defined as follows:

(5) Functional Behavior Assessment.

(a) "Functional behavior assessment" means the systematic process of gathering information to guide the development of an effective and efficient behavior intervention plan for the problem behavior.

(b) "Functional behavior assessment" includes the:

(i) Identification of the functions of the problem behavior for the student;

(ii) Description of the problem behavior exhibited in the educational setting; and

(iii) Identification of environmental and other factors and settings that contribute to or predict the occurrence, nonoccurrence, and maintenance of the behavior over time.

COMAR 13A.08.04.02B(5). The resulting BIP is defined as a "means a proactive plan designed to address problem behaviors exhibited by a student in the educational setting through the use of positive behavioral interventions, strategies, and supports" COMAR 13A.08.04.02B(1).

<sup>16</sup> The IIP makes reference to the Collaborative Report of October 2013, but there is little evidence to support that the Parents provided that document to [School 3] staff. Moreover, references to that document in the IIP seem to be taken verbatim from the October 28, 2013 IEP prepared by the IEP team at [School 2] rather than making any independent evaluation of that document. The Parents also did not provide [School 3] with the FBA and the FBA/BIP prepared for HCPS by Ms. XXXX in September and December 2013, respectively. T. Vol. 1, (Page 255:5 to 255:10). HCPS mailed the latter document to the Parents on December 6, 2014, but, although an IEP team meeting was scheduled to review it, the Parents were unavailable to meet (BD-57). Accordingly, [School 3] did not have the most recent FBA/BIP for the Student, and had to rely on one prepared by the [School 4] in June 2010, which was almost four years out of date when the Student started at [School 3].

<sup>17</sup> Ms. XXXX recalled the receipt and review of the Collaborative Assessment T. Vol. 3, (Pages 553:20 to 554:2); Ms. XXXX did not, and neither did Ms. XXXX XXXX see it until the hearing. T. Vol. 5, (Page 1070:6 to 1070:17).

<sup>18</sup> The staff at [School 3] was not aware that the April (or even the October) 2013 IEP had never been implemented because the Parent's prior hearing requests. T. Vol. 1, (Page 263:1 to 263:10).

[School 4] BIP until April 15, 2014, when the new FBA/BIP (XX-88) was completed by Ms. XXXX and a draft IIP<sup>20</sup> was prepared (XX-90) and emailed to the Parents (BD-82). T. Vol. 1, (Page 172:4 to 172:15 and Page 177:17 to 177:25).

[School 3] was not provided the HCPS FBA or BIP written by Ms. XXXX in December 2013. This FBA was challenged by the Parents, but due to timing of that document and the fact that it was never approved by the Parents at a trice scheduled IEP team meeting in January 2014 or otherwise put into effect, it need not be seriously addressed.<sup>21</sup>

The third and present hearing request was filed on May 2, 2014, claiming a lack of FAPE and inappropriate placement at [School 1], and sought reimbursement for the Student's unilateral private placement at [School 3] (BD-84 and 85).

#### **IV. Collaborative Report**

##### **A. The Need for Evaluative Testing**

Before the IEP team could produce an IEP, it needed additional information that was not then available about the Student. An IEP team meeting was scheduled for January 24, 2013, to make a triennial evaluation (BD-5, XX-6). At the meeting, the Parents were represented by counsel other than Mr. Eig; they requested and were granted a postponement of the meeting so that they could review the Student's present levels of performance. T. Vol. 12, (Pages 2432:22 to 2433:3). The meeting was rescheduled for February 5, 2013, and notices were sent (BD-7, XX-8).

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<sup>19</sup> Ms. XXXX explained the reduction – due to the integrated approach, the services could also be delivered in the classroom. T. Vol. 1, (Page 268:8 to 268:17).

<sup>20</sup> Ms. XXXX testified that the inclusion of the word “draft “ was a typographical error that should have been removed in May 2014. To the date of the hearing, however, it had not been changed. T. Vol. 1, (Pages 177:21 to 178:15).

<sup>21</sup> At HCPS, an initial FBA did not reveal a need for a BIP, but the need became apparent after the October 18, 2013 IEP team meeting and an FBA was again started. The resulting BIP was to be reviewed at the January 7, 2014 IEP team meeting, but the Parents were not available for the meeting, the issue having become moot when the Student left HCPS and enrolled at [School 3] (XX -59 and 61).



At the rescheduled meeting, the IEP team, which consisted of HCPS educators and the Parents and their representatives, proposed new evaluations for the Student (XX-10). The team posed the following questions which they felt could be answered if the Student were assessed:

- Does [the Student] continue to qualify as a student with educational Autism under IDEA?
- Does [the Student] qualify for Special Education as a student with Other Health Impairments due to a history of Severe [Disorder] secondary to vaccine encephalopathy?
- Does [the Student] qualify for [APE] due to gross motor?
- Does [the Student] qualify for special education (sic) as a student with intellectual disability?
- What are [the Student's] informational processing, attention, memory strengths and weaknesses?
- What are his strengths and weaknesses for attention and behavior?
- What are his strengths and weaknesses for fine motor, self care, adaptive and sensory needs?
- Does the team have enough information in the areas of reading, writing and math?
- What are his present levels in communication (receptive, expressive and pragmatics)?
- What are [the Student's] cognitive abilities?
- What are his adaptive behaviors?
- What are the functions of his current behavior?

(BD-7-7). The IEP team determined that it could not make appropriate programming or placement decisions without this information.

## **B. Consent for testing**

After the February 5, 2013 meeting, the Parents were given two forms to sign which would authorize the assessments (BD-10 and 11). The Parents were asked to sign consent forms for the evaluations by letter dated February 20, 2013, but they declined to do so,<sup>22</sup> adding conditions to the consent form (BD-11).<sup>23</sup> T. Vol. 2, (Page 341:4 to 341:8).<sup>24</sup> The Father

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<sup>22</sup> The Parents put up several roadblocks to the drafting of an IEP. They severely restricted communication between XXXX XXXX, the Student's private SLP, and the school SLP's, who wanted to communicate with her. BD-5; T. Vol. 6, (Page 1262:10 to 1262:23). Meetings were consumed by parental complaints, leaving little time to discuss the IEP. T. Vol. 6, (Pages 1263:19 to 1264:9).

<sup>23</sup> The present term is "Intellectually Disabled," or ID as it has been abbreviated in this decision.

<sup>24</sup> The Father testified about his fears if the cognitive testing found an ID: "... his education gets drastically reduced

explained that this was done to prevent HCPS from conducting evaluations that “ would ... allow them to label [the Student] as mentally retarded.” T. Vol. 2, (Page 341:4 to 341:8).

The first form, entitled “Informed Consent for Psychological Assessment,” read as follows:

Your child is being referred by the [IEP] team for psychological assessment. The results of this assessment will be used to assist the IEP team in determining the existence of an educational disability, instructional implications for participation in the general education curriculum, eligibility for Special Education al related services, and or [IEP] goals, as appropriate. The IEP team suspects, or is reevaluating the presence of, the following educational disability(ies) which require psychological assessments: Autism...Intellectual Disability...Multiple Disabilities...Other Health Impairment....

Before you consent to have a school psychologist assess your child, the law requires that you be fully informed as to what the assessment will involve. Depending on the information needed to make appropriate educational decisions for your child, one or more the following areas will be assessed: Adaptive Behavior...Cognitive Ability...Attention/Behavior...Information Processing/Memory...Specific Learning Strengths and Weaknesses....

The format of the psychological assessment may include one or more of the following: individual standardized assessment, curriculum-based assessment, school observation, interviews and/or rating scales from student, parent and/or teachers, and record review....

The Mother signed the first form, dating it March 14, 2013, but not before typing the following conditions before her signature at the bottom of the form:

Please note parents do not approve of any cognitive assessments to be done on [the Student] especially assessments that would give any indication of IQ. We do not give our permission to the full list of assessments listed above, but we do approve of only the following assessments as long as none of the assessments would result with any form of an IQ score or to be used in any way to determine or suggest level of IQ: Autism Assessment...Adaptive behavior...Specific Learning Strengths and Weaknesses... [emphasis from original].

The second, accompanying form, entitled “Parental Consent for Evaluation or Reevaluation,”

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and it’s more focused on treating him how to get into society. You stop educating in math, science, et cetera down the line and you focus on the vocations and I didn’t want to give up on my son at this point.” T. Vol. 2, (Page 420:3 to 420:9). The Parents never confirmed their fears with HCPS personnel. T. Vol. 2, (Page 421:15 to 421:20).

stated the following:

To better understand the educational needs of your child, the [IEP] team has recommended that individual evaluation of your child be completed to determine the presence or absence of a disability that requires Special Education . If your child is eligible, or continues to be eligible for Special Education and related services, the evaluation will assist the IEP team in developing an [IEP]. Evaluations include assessment procedures used with an individual student in all areas of concern, whether or not related to a primary suspected disability....

The following assessments were recommended:<sup>25</sup>

Educational Assessments (Reading Skills, Reading Comprehension, Mathematics Calculation, Mathematics Reasoning, and Written Expression);  
APE Assessment;  
Assistive Technology Consultation;  
Classroom Observation;  
FBA;  
Speech Assessment (Articulation, Voice, Fluency);  
Language Assessment (Receptive Language, Expressive Language, Other (Pragmatics));  
OT Assessment; and  
Other (APE)....

After specifying the specific speech/language tests they wanted completed, the Mother added additional conditions to the first form:

Please note parents do not approve of any cognitive assessments to be done on [the Student] especially assessments that would give any indication of IQ. It is our understanding none of the above assessments will include in any form any indication of IQ. Parents are requesting the school contact the parents in writing as soon as possible if any of the assessments are not able to be given with an explanation provided to the parents as to why [HCPS] Diagnostic Center was not able to complete the assessment(s) and include any options available to the parents [emphasis in original].

BD-11.

Due to the limitations on testing, HCPS determined that it could not perform any evaluations, having considered the consent to have been revoked.<sup>26</sup> Ms. XXXX wrote to the

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<sup>25</sup> The list is complete as to its content, but the format in which the individual items are displayed has been altered for a clearer presentation.

<sup>26</sup> The IEP team meeting notes of April 26, 2013 (BD-17), contained the following discussion about the testing:

Mother explain that the testing was necessary for the IEP process (BD-12). Ms. XXXX explained that HCPS needed the assessments to answer specific questions posed by the IEP team, and that it could not do the testing unless it was done in its entirety: “[S]o there was really no point in doing just a piece of this and a piece of that when you needed a full and comprehensive evaluation in all areas of suspected disability.” T. Vol. 12, (Page 2438:9 to 2438:19). She felt that, without cognitive assessment – even if it leads to an IQ result – specific inquiries that need to be made under the IDEA could not be answered. T. Vol. 12, (Pages 2438:23 to 2439:18). The Mother responded to Ms. XXXX by email on March 28, 2013, but still withheld her unconditional consent for testing (BD-13); Ms. XXXX countered by letter dated April 2, 2013 (BD-14), advising the Parents that the IEP team meeting would take place on April 26, 2013, even though the evaluations could not be completed.<sup>27</sup>

In her testimony, Ms. XXXX, the school psychologist explained at the hearing that the team “couldn’t answer the referral questions that had been determined by the [School 2] team without doing cognitive testing because one of the referral questions was whether [the Student] met criteria for ID, and you have to have cognitive results to be able to really address that question.” T. Vol. 10, (Page 2057:10 to 2057:18). Ms. XXXX XXXX explained that, although the Parents did not want any cognitive testing that might lead to a code for ID, that testing was still important to so that a true picture of the Student can be obtained so that his program could

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“Parents placed conditions on the psychological and re-evaluation form. Due to the conditions placed on the assessment frame work, it was determined that the diagnostic questions generated by the IEP team could not be answered appropriately. For this reason, parent consent was considered revoked, and none of the formal assessments will be conducted.” Whether the consent was rescinded, revoked or just not given is immaterial – the Parents severely limited the scope of the testing, which the school personnel did not think could go forward under those broad constraints.

<sup>27</sup> Ms. XXXX XXXX testified that in April 2013, the IEP team met to prepare an IEP, but could only use “the anecdotal notes and progress report that was provided by the service providers” because they could not do the full testing they had proposed in the February 2013 meeting because the parents refused to sign for permission to do so. T. Vol. 6, (Page 1288:10 to 1288:18). The same approach had to be used for the June 10, 2013 annual review. T. - Vol. 6, (Pages 1294:22 to 1295:10).

be appropriately planned. T. Vol. 6, (Pages 1281:13 to 1282:7). Ms. XXXX explained that cognition affected his speech – receptive, expressive and pragmatic. T. Vol. 8, (Pages 1594:5 to 1595:25). Therefore, knowledge of the Student’s cognitive abilities would be essential to understanding his speech language deficits and give the team valuable information about how to address those deficits. T. Vol. 8, (Page 1596:7 to 1596:20). Ms. XXXX agreed. T. Vol. 9, (Pages 1879:23 to 1880:21). Ms. XXXX agreed. T. Vol. 10, (Page 2138:7 to 2138:13). Even Ms. XXXX agreed that cognitive function affected speech. T. Vol. 5, (Pages 946:23 to 947:17). Ms. XXXX tied cognitive abilities to whether [THERAPY] therapy was appropriate for some children. T. Vol. 9, (Pages 1825:17 to 1826:21). The team could therefore not go forward without the cognitive testing it sought. T. Vol. 8, (Page 1597:10 to 1597:19).

On July 23, 2013, Mr. Eig wrote to Ms. XXXX, advising her that the Parents have withdrawn their conditions for testing, allowing the evaluations to be completed (XX-24). The evaluations went forward after the start of the 2013-2014 school year.

### **C. Contents of the Collaborative Assessments**

The most recent assessments of the Student took place in 2004 and 2008; the [School 4] performed evaluations in 2010. This assessment recommended that the Student would still be eligible for special education and related services under the Autism disability code, which it found more appropriate than that of ID or Other Health Impairment (OHI) (BD-45-37). After reviewing the Student’s strengths and needs, the report did not make any more specific recommendations, other than that the report should be shared with the IEP team in order to craft appropriate educational recommendations.

HCPS school personnel from various educational disciplines collaborated in an interdisciplinary assessment of the Student:

- XXXX XXXX, APE Program Head, assessed the Student for APE;
- XXXX XXXX, CCC/SLP, Speech/Language Pathologist, assessed the Student for AT Resources;
- XXXX XXXX, M.S., Special Educator, performed an Educational assessment;
- XXXX XXXX, ORT/L, Occupational Therapist assessed the Student for OT;
- XXXX XXXX, Ed.S., NCSP, School Psychologist, performed a Psychological assessment
- XXXX XXXX, M.S., M./Ed., CCC/SLP, Speech/Language Pathologist, performed a Speech-Language assessment; and
- XXXX XXXX, M.S., M. Ed., CCC/SLP, also provided a Speech-Language assessment.

The areas of assessment were in adaptive behavior, nonverbal cognitive skill levels, social/emotional, speech/language/communication, gross motor, fine motor, self-care, sensory and academic performance. Several of the individuals making these assessments testified at the hearing. Testing was generally performed at [School 2] (BD 45-1 to 4).

The assessments indicated that the Student was performing “significantly below his age peers across academic areas.” BD 45-37. Ms. XXXX testified generally, but extensively, about her confidence in the various test results. The scores and evaluations were not seriously contested by the Parents.

### **1. Cognitive Skills**

Because the Student was largely non-verbal, cognitive testing requiring verbal responses was inappropriate. Ms. XXXX, the school psychologist, administered the Comprehensive Test of Nonverbal Intelligence (CTONI-2), a standardized intelligence test for nonverbal subjects. According to the CTONI-2, the Student had a standard score of 48 (with a confidence interval between 45 and 51), indicating the Student performed significantly below age-level expectations (BD 45-6 to 7).<sup>28</sup>

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<sup>28</sup> Ms. XXXX had no concerns about the validity of those results. T. Vol. 10, (Pages 2065:11 to 2066:3). Ms. XXXX XXXX believed that the score was consistent with the Student’s abilities and performance. T. - Vol. 6, (Page 1326:14 to 1326:22).

## 2. Adaptive Behavior

The Student’s teachers and parents completed the Adaptive Behavior Assessment System, Second Edition (ABAS II), a battery of questions which provides a comprehensive, standardized assessment of the Student’s adaptive behaviors and skills across a variety of skills and situations to evaluate. For each area of functioning, the ABAS II assesses the Student’s strengths and weaknesses in order to specify educational goals (BD-45-7). The teacher and Parents’ assessment were quite disparate:<sup>29</sup>

Adaptive Skill Area	Standard Score – Teacher form (BD-45-8)	Standard Score – Parent form (BD-45-9)
Communication	1	1
Community Use	1	8
Functional Academics	1	3
School Living/Home Living	8 (School)	7
Health and Safety	1	5
Leisure	2	7
Self-Care	1	1
Self-direction	1	4
Social	1	6

These scores were compiled into clusters:

	Standard Score – Teacher form 95% C.I. / Percentile (BD-45-8)	Standard Score – Parent form 95% C.I. / Percentile (BD-45-9)
Conceptual Cluster	50 (46-54) / <0.1%	59 (54-64) / 0.3%
Social Cluster	58 (53-63) / 0.3%	84 (78-90) / 14%
Practical Cluster	59 (55-63) / 0.3 %	78 (73-83) / 7 %
General Adaptive Composite	49 (46-52) / <0.1 %	67 (64-70) / 1%

The scores indicated that the Student has significant difficulties in the areas assessed, resulting in

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<sup>29</sup> The significance of these results goes beyond the particular assessment tool; it goes to the disparity between the Parents’ evaluation and expectation and those of interested, but more dispassionate, educators. As the Parents’ counsel expressed in his opening, closing and throughout the hearing, the Parents are hoping and looking for “miraculous” results that move the Student towards the norm. I believe that Ms. XXXX attributes the difference to perhaps the Parents’ expectations and seeing their child in a more optimistic way: “It makes me wonder if they’re being completely honest about what they’re seeing at home, to be honest.” T. Vol. 10, (Page 2091:7 to 2091:17); *see also* T. Vol. 10, (Pages 2101:25 to 2102:16). Ms. XXXX said that this was just one theory for the different results, the other possibilities being the difference in settings and expectations. T. Vol. 10, (Pages 2133:21 to 2134:19).

a General Adaptive Composite score between .1 and 1%, both of which are in the extremely low range. The results of these assessments were consistent with the earlier testing. Despite the higher scores from the Parents, the Student met the criteria for the educational disability of ID (BD-45-10). *See* T. Vol. 10, (Page 2107:7 to 2107:23)( Ms. XXXX's explanation).

### **3. Social Emotional and Behavioral Skills**

Both teachers and Parents completed separate forms for both the Autism Spectrum Ratings Scale (ASRS) and the Behavior Assessment for Children, Second Edition (BASC-2). Of the eleven scales evaluated by the ASRS, the teachers' scales showed slightly elevated, elevated and very elevated indicia of Autism in 1, 3, and 7 scales respectively; the Parents' scales only showed one slightly elevated scale and one elevated scale; the Parents scored the remaining scales as "average." BD-45-10 to 12. On the BASC-2, the teachers' and Parents' ratings were again disparate, with the Parents' scores on none of the fourteen Clinical scales evaluated to indicate that the Student met the "at-risk" or "clinical significant" criteria. Of the 9 teacher's ratings completed (5 were not completed), all but one placed the Student "at risk" (5) or "clinically significant" (4) (BD-45-13 to 15). Although the Student's other testing was positive for an ID, analyzing the ASRS and BASC-2 scale scores, "the most appropriate educational disability continues to be Autism." BD-45-15.

### **4. Speech/Language/Communication**

The evaluations conducted showed that the Student had severe deficits in speech, secondary to severe [Disorder], as well as deficits in his receptive and expressive language and his functional communication skills (BD-45-28).<sup>30</sup>

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<sup>30</sup> Ms. XXXX, the SLP at [School 3], had no criticism of the speech/language portion of this report, being "very extensive and very well-written." T. Vol. 5, (Pages 947:18 to 948:4).



**a. Speech**

Previous assessments in 2007 and 2010 used the Preschool Language Scale Fourth Edition (PLS-4). As the Student is no longer in a pre-school program or at a pre-school age, those assessments gave way to other assessments performed in 2013. The Kaufman Speech Praxis Test (KPST) is used to assess speech motor planning skills. In 2010, the KPST showed that the Student had an age equivalent score of “< 2 years” which was consistent with a diagnosis of Childhood [Disorder] of Speech (BD-45-15). The KPST performed in 2013 generally confirmed the Student’s age equivalence of less than 2 years and specifically confirmed the continued diagnosis of [Disorder] in the severe range (BD-45-16).

The results of the Goldman-Fristoe Test of Articulation- 2 (GFTA-2) also confirmed that the Student’s “spontaneous production (of sounds) often did not closely match the target responses” significantly affecting his intelligibility to other listening to him (BD-45-18).

The Student was also evaluated under the System Analysis Observation and Motor-Speech Hierarchy, an evaluation from the [THERAPY] Institute to assess the Student’s “speech subsystem parameters, which include structure (skeletal), function (neuromotor control), and integration (all speech subsystems, timing and prosody) in order to determine adequate or inadequate functioning.” BD-45-19. The Student exhibited deficits in the areas evaluated, indicating the further need for speech/language therapy.

Both the Parents and the Student’s teachers completed a survey rating the Student’s speech. The Parents declared that the Student was understood by those outside the family, on the telephone, and by peers and his speech was accepted as normal by peers, who do not comment on his speech (BD-45-20). This evaluation was distinctly at odds with the Student’s speech displayed on the video recording admitted into evidence, which was largely difficult to

understand by at least unfamiliar listeners (*e.g.*, the ALJ),<sup>31</sup> and some familiar listeners as well (XX-118). It was also at odds with the teacher survey evidencing anecdotal evidence showing the Student to be unintelligible to his teachers and peers without gestures, cues or context; his peers “sometimes” accepted his speech, which was never at an “appropriate” rate, causing the Student frustration (BD-45-20). This result was echoed by the Student’s school-based SLP.

On an informal measure of speech intelligibility, a familiar listener correctly identified 20% of his words without context cues, but 60% with such cues; unfamiliar listeners had lesser results at 10% and 30%, respectively. This measure falls short of the 90% to 100% intelligibility expected for children 5 years or older (BD-45-21).

Deficits in motor control were addressed in prior IEP’s, and would continue to be addressed in the proposed IEP for the 2013-2014 school year (BD-45-22).

#### **b. Receptive/Expressive Language/Communication**

The Student’s receptive/expressive language and communications skills were assessed by the Peabody Picture Vocabulary Test-Fourth Edition (PPVT-4), the Expressive Vocabulary Test-Second Edition (EVT-2), and the Evaluating Acquired Skills in Communication – Third Edition (EASIC-3). In the first two tests, the Student’s performance and expressive vocabulary were in the “extremely low” range (BD-45-24). In the EASIC-3, the Student had some successes (*e.g.*, identifying and comparing attributes of items in pictures), but also had emergent skills (*e.g.*, comprehending possessive nouns, spatial relationships and identifying plurals and other attributes) and skills that he did not demonstrate (*e.g.*, comprehending personal nouns and pronouns as well as relational qualities)(BD-45-25).

The data to conduct the Functional Communication Profile-R, an informal guide to assess

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<sup>31</sup> The Student cannot be faulted for the lack of trying to be understood, although his attempts at articulation painfully showed his frustration, particularly when the playback sound was muted and the Student’s pained and exasperated expressions were visibly evident.

communication skills, was gathered from the special education team at [School 2]. The Student had skills in receptive and expressive language and was able to demonstrate some pragmatic skills (BD-45-26).

## **5. AT**

The Student used AT to communicate with his teachers and his peers. He used a combination of emerging speech and technology (*i.e.*, his iPad) to communicate. Nevertheless, HCPS determined that the Student's "needs/areas of concern" involve his significant [Disorder] and the need to "expand [his] functional communication in an appropriate and efficient manner" so he can communicate with a variety of people across environments; HCPS believes that the use of his iPad is key to this goal (BD-45-26 to 27).

HCPS also described the environment of the Student's instruction time at [School 2] as "one on one instruction with a classroom teacher/paraprofessional in a separate learning environment," with inclusion at [School 9] for a third of his school day, with a goal to expand that inclusion to half of the school day (BD-45-27 to 28). Per Mr. XXXX, the principal at [School 2], the Parents were unwavering in supporting this goal and sought more inclusion opportunities. T. Vol. 13, (Page 2636:19 to 2636:22).<sup>32</sup>

## **6. OT**

In 2007, the Student had been assessed with "the lowest possible standard scores" in OT, ranking below the first percentile against the population (BD-45-29). Current assessments place him in the same "very low" percentile (BD-45-29 to 31). The OT evaluation indicated that these services should continue to be provided to "enhance [the Student's] functional performance [ ]

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<sup>32</sup> Mr. XXXX recalled that the Parents wanted *so much* inclusion that they suggested that the Student return to [School 9] after his day ended at [School 2] in order to get more inclusion at [School 9]. HCPS rejected this suggestion as it would have meant that the Student had an eight hour school day, when only a six and a half hour day was required and there was no programming available during that extended day. T. Vol. 13, (Pages 2666:1 to 2667:10).

and engagement in learning.” BD 45-32.

## **7. APE**

Due to the Student’s gross motor skills in the “very poor” range, the IEP team recommended APE in its 2007 IEP. The current assessment reiterates the need to address the Student’s deficit (BD-45-33).

### **C. Educational/Academics**

The Student has also had prior educational assessments in 2007 and 2010. The current assessment utilized selected tests from the Brigance Inventory of Early Development II and teacher observations.

#### **1. Reading**

The Student is currently reading on the kindergarten level. His abilities at sight word recognition (independently through the third grade level) outpace his reading comprehension skills which lacked functional independence at even the first (primer) level of reading (BD-45-35).

#### **2. Math**

The Student is performing in the pre-kindergarten level counting up to 15, but not to 19. He cannot recognize three place numbers and does not yet have a functional understanding of use of a calendar or can measure with a ruler. As a result of these deficits, the Student requires one on one instruction in math (BD-45-35 to 36).

#### **3. Written expression**

The Student’s lack of written expression was evaluated by teacher report, spelling at the pre-kindergarten/kindergarten level. He is interested in using writing instruments to make marks on the page, but can only trace his first name. However, the Student does not draw pictures,

write labels or write responses (BD-45-36 to 37).

## **V. The Resulting IEP of October 28, 2013<sup>33</sup>**

After the collaborative assessment was completed, the IEP team met again on October 9, 2015 to review the assessment. A second IEP team meeting was scheduled for October 28, 2014 to write the IEP.

### **A. “Meeting and Identifying Information”**

#### **1. Identifying information**

The Student’s primary disability was determined by the team to be Autism (XX 46-1),<sup>34</sup> with which the Parents disagreed; they did not, however, want a code of ID on the Student’s record. Accordingly, the primary disability code was continued as Autism (XX46-6).<sup>35</sup> The areas of affected by the Student’s disability were Math, Behavior, Basic Reading Skills, Expressive/Receptive Language, and Gross Motor. The areas previously identified for re-evaluation were Writing, Reading, Math, Communication, Behavior, Gross Motor (APE), Cognitive, OT (fine motor) (XX-46-4).<sup>36</sup> The collaborative assessments were referenced in the discussion to support the eligibility decision, as was the delayed lack of consent (XX-46-4).<sup>37</sup>

The documented basis for the IEP team decision was the “[HCPS]Interdisciplinary Collaborative

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<sup>33</sup> For reasons stated below, the IIP drafted by [School 3] staff is not material to this decision. Nevertheless, I will draw distinctions between the IEP and the IIP where applicable or otherwise relevant to this decision.

<sup>34</sup> This document was also at BD-47. Because this document was first presented by the Parents, the “XX” reference will be the only reference used in this discussion.

<sup>35</sup> Glaring errors in the IIP leads me to question the accuracy and reliability of its authors at [School 3]. In the IIP, the primary disability was determined to be ID (XX 90-1). This code was what the Parents were vociferously avoiding throughout their interactions with HCPS staff. Despite the Parents’ stated disagreement with the ID diagnosis having been repeated essentially verbatim from notes pertaining to the October 2013 IEP (which rejected the ID code), the diagnosis of ID appears prominently on page 1 of the IIP (XX-90-1), although the primary disability was Autism at the bottom of page 3 (XX-90-3), parroting the last words on the corresponding page of the HCPS IEP (XX-46-6).

<sup>36</sup> The IIP contained the identical wording, although no assessments were performed at [School 3] before the IIP was drafted..

<sup>37</sup> Interestingly, it appeared that the IIP had repeated the verbiage of the IEP verbatim, even referencing the Collaborative Report that the Parents never provided the school, and quoting individuals who were clearly not present at the IIP team meeting.

Report of Assessment” dated October 15, 2013, stating that the Student was “communicated nonverbally and verbally with single word approximations” and had “significant difficulty sustaining attention,” the details of which, as well as additional information, having been cited in the report (XX-46-4).<sup>38</sup> The results of the current assessment were reviewed. It recognized that the Student’s general nonverbal cognitive functioning and general adaptive behavior was below the first percentile and a CTONI-2 (non-verbal measurement) of 48, meeting the criteria for ID (XX-46-4). The IEP reported the team’s review of other assessments, including adaptive scale showing differences between the school scores and the Parents’ scores. Although the Student still met the criteria for ID, the IEP team determined that “appropriate educational disability continues to be Autism.” (XX-46-4 to 5).<sup>39</sup>

## **2. Participation in Statewide Assessments/Diploma track**

The IEP indicated that the Student was pursuing a high school diploma, rather than certificate of completion. The Parents wanted the Student to continue on the diploma track. T. Vol. 4, (Page 714:2 to 714:4). Both the HCPS school personnel and the Parents answered questions regarding the Student’s abilities to determine whether the Student would participate in MSA testing in Reading, Math and Science, the Parents’ negative response to one of the criteria questions in the (*i.e.*, that the Student does not “require extensive support to perform and participate meaningfully and productively in daily activities in school home, community and work environments,” indicated that the Student would be required to take the MSA testing.

A *positive* answer on any question posed in this worksheet would remove the Student from the diploma track. According to many of the schools’ witnesses present at the IEP team meeting, the Parents recounted a vastly different, more positive version of events at home and

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<sup>38</sup> See the previous footnote. The IIP contained identical wording to the earlier IEP (XX90-2).

<sup>39</sup> The IEP states that the FBA was reviewed, but it was unclear the date of that document, as Parents had not provided Ms. XXXX’s FBA to the school. This deficiency was repeated verbatim in the IIP (XX-90-3).

in the community than they did at the hearing.. T. Vol. 8, (Pages 1602:2 to 1603:5)(*e.g.*, Ms. XXXX). Because the Parents stated that the Student did not need even minimal support in the community, they answered the question in the *negative*, although, in fact, the Student needed a large amount of support because he was actually acting out at home *and* in the community. T. Vol. 4, (Pages 708:17 to 709:14).

The remainder of the IEP team disagreed with that conclusion, and found that the Student could not participate in the MSA testing “even with accommodations.” (XX 46-7 to 8). But Ms. XXXX XXXX testified that, although though the other team members did not agree with the Parents’ position, the Student remained on the diploma track. T. Vol. 6, (Pages 1329:10 to 1330:10).<sup>40</sup>

#### **B. Present level of academic achievement and functional performance**

The Student was assessed in reading (phonemic awareness, basic skills and fluency/comprehension) math (math reasoning and application, knowledge of number relationships and computation), speech (articulation), social interaction skills), written language (including OT), and physical education; the Parents’ input was also considered. No grade levels were assigned. The Student was found, however, to have had those areas impact the Student’s academic achievement and functional performance. XX-46-10 to 46-15.

#### **C. Special Considerations and Accommodations**

##### **1. AT**

The IEP team determined that the Student needed AT services and devices, such as

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<sup>40</sup> I question whether the IEP team was correct to keep the Student in a diploma-bound program; the Parents championed this direction, but it seems to run counter to the direction that the Student’s education is taking at [School 3]. Nevertheless, if the IEP team completed the graduation worksheet (XX 46-7 to 8) with accurate information about the Student’s challenges in the community presented by the Father at the hearing (T. Vol. 4, (Pages 708:17 to 709:14)), the Student might have made better progress trading the difficulties of academic programming for life skills programming due to his evaluated intellectual level.

supplemental aids, services, program modification and supports, instructional and testing accommodations and related services, in order to access his program (XX-46-16).

## **2. Behavioral intervention**

The IEP team reviewed the FBA performed on October 19, 2013 which determined that the Student did not need an FBA, as his behaviors did not warrant one. However, the team determined that it needed additional data to “target more recent behaviors”; the IEP team sought an updated FBA to review the need for a BIP (XX-46-16 to 46-17).

## **3. Instructional and test accommodations**

The IEP called for a human reader or audio recording of entire test due to the Student’s lack of fluency in reading. It also calls for a scribe, calculator, and visual and graphic organizer - in particular, the AT device he uses to communicate. The Student was also entitled to extended time (even if over multiple days), multiple or frequent breaks. With regard to the setting for instruction or testing, distractions (particularly for noise) were to be reduced (XX-46-19).

## **4. Supplementary aids, services, program modifications and supports**

The IEP called for the use of an AT device on a daily basis, provided by the special education teacher and an instructional assistant (XX-46-20).

## **5. Other Instructional supports**

The IEP called for one-to-one instruction during the day, teaching and reviewing mastered and acquisition tasks; specific skills were to be used in exercises, reading skills, comprehension, coin identification and math in a multisensory approach to move the student from concrete to abstract learning.

## **6. Supplemental Aids, Services, Program Modifications and Supports**

The Student would have the use of his AT device and small group instruction with close



adult supervision of a special education teacher and an instructional assistant, with the additional input of a SLP and an occupational therapist. A behavioral specialist would be consulted if necessary (XX-46-20 to XX46-23).

#### **D. Goals**

##### **a. Reading**

The IEP broke down reading skills to phonemic awareness (“the ability to hear, identify and manipulate individual sounds in spoken and written words”), comprehension and fundamental skills, comprising fluency and comprehension. For each of these areas, there were instructional components covering the skills (XX-46-25 to 30).

##### **b. Math**

The IEP covered Math Reasoning and Applications, involving measurements and manipulation of numbers (XX-46-31 to 33).

##### **c. Visual perceptual skills**

The IEP has goals for gross motor skills, such as galloping, hopping, leaping, jumping and sliding as well as catching and throwing different items (XX-49-40).

##### **d. Fine Motor Skills**

The IEP provided for fine motor control and eye-hand coordination in prewriting and “cutting” (XX-46-34 to 35).

##### **e. Communication**

The IEP contains a goal for the Student to make intelligible speech (XX-46-36 to 37) as well as pragmatics, or using “language to communicate feelings, information, needs and opinions, make requests, direct and answer questions using multiple modalities” through words and actions in order to be understood by familiar and unfamiliar listeners (XX-46-38-39). Ms.

XXXX believed that these goals were very appropriate to the Student. T. Vol. 8, (Pages 1633:2 to 1635:1 and Pages 1637:23 to 1638:1).<sup>41</sup>

**5. Services**

**a. Specialized Instruction**

The IEP team determined that the Student could not be educated in a general education setting, but would require specialized instruction and methods that could not be effectively delivered in the general education setting.

The breakdown of those services would be as follows: the Student would be exclusively with a special educator for 15 hours per week and in a general education setting for 17.5 hours per week, with instruction from a general education teacher assisted by a special education teacher and an instructional assistant (XX-46-41). The instruction of core courses would be primarily in the special education setting (6.25 hours in reading and 6.5 hours in math), with the balance (1.5 hours each) in a general education setting with supports. Inclusion would also call for 30 minutes of physical education (gym) with a physical education teacher, instructional assistant and an “other service provider.” XX-46-41.

The weekly related services are as follows: OT outside of general education – 2 sessions of 30 minutes; speech/language therapy outside of general education - 3 sessions of 30 minutes; and speech/language therapy in the general education setting – 2 sessions of 30 minutes. XX-46-41.<sup>42</sup>

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<sup>41</sup> Although the program described by the Parents’ witnesses did address pragmatics, there are no such goals in the IIP.

<sup>42</sup> The Student’s behavior was tied to his placement. When he was properly placed at [School 2] in a class of his peers with inclusion with non-disabled peers, he did well. When he was in his own class, he did not like school, and he did not do well. Ms. XXXX’s opinion is that the Student’s behavior was tied to the appropriateness of his placement:

- Q. Does [Student] need them? In your opinion.
- A. Based on what?

**b. Speech/language therapy**

Per Ms. XXXX's testimony, [THERAPY] training was written into the IEP goals. T. Vol. 9, (Pages 1841:5 to 1842:5). Ms. XXXX did not think that [THERAPY] training was necessarily the right program for the Student. Ms. XXXX wanted to limit [THERAPY] training, adding a greater emphasis on functional intelligibility, including the greater use of AT. T. Vol. 9, (Pages 1908:6 to 1910:2).

**6. Placement determination**

**a. [School 1]**

The Parents had no objection to the goals and objectives listed in the IEP. T. Vol. 2, (Page 442:5 to 442:21).<sup>43</sup> They did object, however, to the team's placement decision.

At the prior IEP team meeting taking place on June 10, 2013 (BD-19), the IEP team heard from Ms. XXXX, the [School 1] [PROGRAM 1] special education teacher who would have taught the Student, and who had already observed him in preparation for that meeting (BD-18). The HCPS team members believed that the Student's placement at [PROGRAM 1] program at [School 1] was appropriate for the Student. This placement was confirmed by the IEP team when it met again on October 28, 2014. Ms. XXXX XXXX thought the program and placement were "very appropriate." T. Vol. 6, (Page 1307:21 to 1307:24). Ms. XXXX concurred. T. Vol.

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Q. Your knowledge.

A. Well, my knowledge is related to the appropriateness of his placement. Because in the school year of 2012-2013 the data that I have showed that he was easily redirected and did not require self-management behavior goals. The data that I have from the 2013-2014, because of the contributing factors, I would say he would need them.

T. Vol. 11, (Pages 2281:19 to 2282:3).

<sup>43</sup> Ms. XXXX XXXX confirmed this for the June 2013 IEP as well. T. - Vol. 6, (Page 1297:18 to 1297:22). Ms. XXXX recalled, however, that the only objection that the Parents might have had to the IEP as the lack of [THERAPY] trained therapists at [School 1], which HCPS was going to address before the Student started by having two therapists [THERAPY] trained before the Student began his program there. T. Vol. 9, (Pages 1878:21 to 1879:8).

12, (Pages 2465:20 to 2466:5).

Ms. XXXX described the [PROGRAM 1] program at the high school where she has her office:

Q. Are you familiar with the model for the [PROGRAM 1] Program as it exists within the Howard County Public School System?

A. As it exists within Howard County I am because we have [PROGRAM 1] classrooms at my high school. I'm not familiar specifically with the [PROGRAM 1] classroom at [School 1], but I do know what an [PROGRAM 1] Program looks like.

Q. All right. And can you briefly tell His Honor your understanding as to what an [PROGRAM 1] Program looks like and what type of student it is designed to program for?

A. Students with significant disabilities. They typically receive some instruction in the [PROGRAM 1] classroom, but you try to include them as much as possible in the general education setting. And I'm speaking from the program at [School 10], the one I'm familiar with.

But they typically receive reading and math instruction in their [PROGRAM 1] classroom, but then they might go out to their general education setting for science, or for history, or -- so we try to include them as much as possible with their general education peers.

Q. All right. And the [PROGRAM 1] classroom, what does that look like?

A. It's a much smaller student-to-teacher ratio, so you might have, you know, six, seven students in the classroom. You typically have the special educator, but you also have para educators or other support staff, so the ratio is much smaller. Students are given material and instruction at their level, their performance level, based on their IEP. It's much more, you know -- it's individualized. All students obviously have an IEP.

T. Vol. 10, (Pages 2111:20 to 2112:24). Ms. XXXX described the school setting at [School 1]:

A. Okay. We, [School 1] is located near XXXX. It is XXXX. It houses about 300 students currently, anywhere from 10 to 12 percent are Special Education students. For the size of our school, that's a pretty high percentage of Special Education students.

We have a regional [PROGRAM 1] program and we have resource students and (inaudible) students. ...The,

they're just great kids. Our parents send us great kids and they score very high.

T. Vol. 6, (Page 1153:11 to 1153:22). Ms. XXXX further described the [PROGRAM 1] program and its opportunities for inclusion:

Q. All right. Now the [PROGRAM 1] program, can you tell us what the regional program consists of at the school?

A. Right. The regional program at [School 1] currently has four students. They have a variety of different disabilities and the teacher works, each child has whatever their instruction is guided by their IEP, but we include them. The children are in homerooms with the other children. They're part of their activities. They go to related arts with the children and sometimes they're with, self-contained within the [Program 1] classroom. There is a movement room there. They get physical therapy, occupational therapy, they get speech. Whatever their IEP asks for them to get.

T. Vol. 6, (Pages 1156:24 to 1157:13).<sup>44</sup> She also detailed the inclusionary opportunities in the program:

Q. So could you describe to us the inclusion opportunities at [School 1] that are available to Ms. XXXX's [PROGRAM 1] regional students?

A. Sure. In addition to being included during the related arts and in, you know, all large whole school activities, the children are also included some of the time during reading, during math class. The children were trying -- for example, last year in 4th grade one of the children would have part of her math instruction, I think it was 4th grade, during the same time the other children were having their math instruction.

Just, you know, kind of parallel learning, but then being there for like if they did a group activity and things like that, there's, we have student assistants, power educators. All our children

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<sup>44</sup> Ms. XXXX described how Ms. XXXX, who would have been the Student's teacher in the [PROGRAM 1] program, was so well received by her students' parents; that analysis, however, is as immaterial to my decision as the quality of teachers at [School 3] is perceived by their staff and students' parents. T. Vol. 6, (Pages 1157:14 to 1158:15).

have someone working with them the whole time.

T. Vol. 6, (Pages 1175:23 to 1176:14).

Ms. XXXX, who teaches the [PROGRAM 1] class at [School 1] where the Student would have been placed, further described it At the hearing. Last year, there were four students and five staff persons assigned: Ms. XXXX, two para-educators, one student assistant, and one temporary employee. T. Vol. 13, (Page 2726:20 to 2726:21). Two of the students had Autism, and all had minimal language skills; one of the four children was on the diploma track. T. Vol. 13, (Page 2727:4 to 2727:13 and Page 2730:14 to 2730:17).

Cognitively, the Student would be at the top of the class. T. Vol. 13, (Pages 2727:25 to 2728:7). Inclusion can be up to a half day, and the [PROGRAM 1] students are popular with their non-disabled peers. T. Vol. 13, (Pages 2729:16 to 2730:4). Ms. XXXX testified that she observed the Student at [School 2] and found him to be a good candidate for her program:

Q. And what did you observe of [the Student] that day?

A. He was more advanced than I anticipated. I didn't know much about him before I walked into that classroom and I was expecting to see a typical [School 2] kid who could possibly transition into my classroom. But he was significantly higher than I anticipated academically, socially, even behaviorally. He was wonderful. He was very interested in everything. He could focus on work longer than I ever thought that he would. He was fantastic.

Q. Could you give us an idea of some of the things you saw him doing?

A. I saw a one-on-one work session, which is something we do in my classroom, too, and he was working on skills that were pretty advanced, I think. And his transition from a break into an IST was seamless. It was beautiful. He was working on some reading skills, some math skills. I saw him on break. And I saw him do a language arts activity that was a lot of, like, vocabulary-based instruction.

T. Vol. 13, (Pages 2738:18 to 2739:11)

The convenience of inclusion was also considered in this placement. The Mother

previously complained to Ms. XXXX XXXX that instructional time was wasted traveling between [School 2] and [School 9]. T. Vol. 6, (Pages 1274:9 to 1275:5). Attending [School 1], inclusion would take place in the same building, eliminating the six minute transportation delay.<sup>45</sup> T. Vol. 6, (Page 1280:11 to 1280:15). As Ms. XXXX XXXX testified, at [School 1], the Mother's concerns were addressed: "being in an [PROGRAM 1] situation he could just walk down the hallway to the classroom that he needed," spending more time in his classroom or building relationships with his peers. T. Vol. 6, (Pages 1307:25 to 1308:16).

**b. Related Services at [School 1]**

**1. Speech/Language Therapy**

The Student's first encounter with [THERAPY] training was while he was enrolled at the [School 4]. T. Vol. 2, (Page 325:17 to 325:19). He was also provided private speech/language therapy by XXXX XXXX from the age of three or four; although she was not initially [THERAPY] trained, she became so trained. He also had private speech language therapy with XXXX XXXX, who had also been [THERAPY] trained. T. Vol. 2, (Page 334:1 to 334:15).

Ms. XXXX explained the acronym making up the letters in [THERAPY]: "[Therapy]." T. Vol. 4, (Page 776:20 to 776:23). She further explained what [THERAPY] therapy is:

Q. Okay. And is that a recognized kind of therapy?

A. It's not traditional speech/language therapy. It is a different kind of therapy in that it stresses working with muscles in terms of motions. In other words, [THERAPY] deals with, and I've counted them, about six different trajectories of movement or motion. And the mastery of those trajectories along with the integration and thinking about things and dealing with those levels and combining that with valving of this area, the larynx, the velia pharynx, and the lips.

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<sup>45</sup> Ms. XXXX XXXX estimated that it would have taken five minutes to transition from class to class anyway. T. Vol. 6, (Pages 1280:17 to 1281:3).

T. Vol. 4, (Pages 776:24 to 777:9). Ms. XXXX believes that the Student has made progress in his speech, which she attributes to [THERAPY] therapy.<sup>46</sup> The Student had another private speech therapists, XXXX XXXX.<sup>47</sup> Initially, Ms. XXXX communicated with the SLP's at [School 2] (T. Vol. 2, (Page 335:6 to 335:8)), although that collaboration was stopped by the Parents.

Although the vice principal at [School 1] told the IEP team on June 10, 2013, that her school did not have [THERAPY] trained therapists (T. Vol. 2, (Pages 350:20 to 351:1)), she did state that HCPS would accommodate the Parents and have a SLP trained in [THERAPY] (BD-19-40). In fact, after the IEP team determined that the Student should be placed at [School 1], one of the school's SLP took the [THERAPY] training in anticipation of the Student's arrival. T. Vol. 6, (Pages 1181:19 to 1182:14).<sup>48</sup>

Not all training called for, however, was [THERAPY] training. Ms. XXXX, who worked with the Student, believed that the speech-language program at [School 1] would have been appropriate and effective, had they been implemented at [School 1], and that XXXX XXXX, the SLP at [School 1] who was to have provided therapy for the Student was highly regarded and has had experience working with students with [Disorder]. T. Vol. 8, (Pages 1624:20 to 1625:4). But the Parents wanted greater [THERAPY] involvement.<sup>49</sup> Nevertheless, Ms. XXXX had no question about the quality of the HCPS proposal for speech/language therapy using a method

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<sup>46</sup> Ms. XXXX has been the Students SLP at [School 3] since Ms. XXXX left on or about April 4, 2014. T. Vol. 5, (Pages 911:12 to 912:4). Ms. XXXX was [THERAPY] II certified; Ms. XXXX was trained in [THERAPY] 1. T. Vol. 5, (Pages 958:24 to 959:4).

<sup>47</sup> The Student was getting over an hour and a half of private speech therapy per week.

<sup>48</sup> Only one of the two SLPs took [THERAPY] training; the second SLP's training was canceled after it was agreed that the Student would remain at [School 2] under the stay put provisions of the IDEA. T. Vol. 6, (Page 1184:6 to 1184:10).

<sup>49</sup> In many instances, the school acceded to the Parents' demand that it be included because, due to the manner in which the Parents belittled the staff, "it was just easier to accommodate and just do it." T. Vol. 9, (Pages 1849:17 to 1850:7). The choice of teaching and service methodology, however, is within the prerogative of the school professionals. *Rowley*, 458 U.S. at 208.



other than [THERAPY]. T. Vol. 5, (Page 958:15 to 958:23). Ms. XXXX, the Student's private SLP did not express to the Parents any objections to the Speech/Language programming under the IEP (BD-2). T. Vol. 2, (Page 453:4 to 453:7).<sup>50</sup>

## 2. AT

The Student began using AT to assist him to communicate while at [School 4]. He continued using the Vantage II, an AT device, when he came to [School 2]. Eventually, when he was unable to continue using the Vantage, his parents bought him an iPad, which was configured with the TouchChat program that he continues to use today. T. Vol. 2, (Page 331:5 to 331:17).

The Parents wanted the Student to have more speech/language therapy to bolster his verbal communication, but it faltered. Ms. XXXX believed that the Student should have more AT involvement in communication because she felt that, with as much speech/language therapy as the Student was being given, he was not making the progress that she felt he should have been making:

Q. At the time that this IEP was drafted on 5/31/12, in your opinion, were the speech/language goals appropriate to meet [the Student's] needs?

A. We were always looking at -- you know, his progress was slow, especially -- not in -- not in use of the device but in use of his speech production. He was getting a lot of speech. He was getting it privately from XXXX XXXX, which is I think was one session a week, 45 minutes, and then he was getting it from Ms. XXXX, I think for two sessions, one for 90 minutes and one for an hour a week. And then he was receiving six sessions at [School 2].

And if you're getting all that speech, even if you just receive it for the private speech, you should be making more progress than what he was making, and we wanted to move more in the direction of using assistive technology but the parents always became very upset when we broached that.

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<sup>50</sup> Ms. XXXX did not express any such objections directly to Ms. XXXX either. T. Vol. 7, (Pages 1537:6 to 1537:24).

T. Vol. 7, (Pages 1540:17 to 1541:9). Viewing the video of the Student speaking (XX-118), Ms.

XXXX agrees, but for another reason:

Q. And trying to follow up on the Judge's question yesterday, do you see communicative intent?

A. Yes.

Q. Do you see frustration or anxiety?

A. I think, well one thing is, I see is, you know, struggling to make those movements, yeah. Again, if you look at it without that voice like yesterday, you know, you felt like things, you know, somewhat of a struggle to say these things and maybe that was -- he was being, it's anxious because there's a high expectation for him to talk. He wants to please. Again, I see him, he sees himself as verbal and it takes a lot of effort for him to speak.

Q. Do you have an opinion whether that justifies pursuing verbal speech as his primary means of communication?

A. No, I still think that his best modality would be using the augmentative communication.

T. Vol. 9, (Page 1929:6 to 1929:23).

### **3. Diploma**

At [School 2], the Student was on the diploma-bound track. That track would have continued at [School 1]. However, due to his failing to take the MSA at [School 3], he may now be off that track.

Ms. XXXX testified that the Student was not assigned to a particular class because he came in the middle of the year and the group into which he would have properly fit, considering his grade level and cognitive functioning and behaviors, was at its capacity of nine students. He was therefore put in a "traveling group" with staff support. T. Vol. 1, (Pages 237:19 to 239:15). The student was being instructed as a "diploma-bound student," which is taught differently than the "certificate-bound" students populating the school because of the need

to teach the “diploma-bound core curriculum.” T. Vol. 1, (Pages 239:19 to 240:1). But although diploma-bound students are required to participate in the MSA testing, the Student was not doing so. T. Vol. 1, (Page 247:14 to 247:23); BD-80. At the hearing, Ms. XXXX expressed reservations that the Student was truly a diploma-bound student, although she had not yet discussed that change in status with the Parents. T. Vol. 1, (Pages 240:2 to 240:12). Ms. XXXX XXXX, the Student’s special education teacher, echoed this concern, stating that it would be “difficult, but not impossible” for the Student to earn a diploma. T. Vol. 5, (Page 1065:2 to 1065:8 and T. Vol. 6, (Pages 1293:25 to 1294:14)).<sup>51</sup>

The Student was the only diploma-bound student at [School 2]. Nevertheless, the Student was still on the diploma track at [School 2], and would be so at [School 1], solely a result of the Father’s assertions at the IEP team meetings that the Student did not need much support at home or in the community. However, based on the Father’s testimony about the Student’s need for support at home and in the community, as well as the failure to give timely assessments at [School 3], this aspect of the IEP might change.

Changing that status, however, is immaterial to this decision, as the MSA testing was still part of the October 2013 IEP; the Student was diploma-bound. Accordingly, as the Parents still wanted the Student to remain on the diploma-bound track, and as the IEP does not change that status, there is no controversy which is justiciable at this time.

**c. LRE**

The IEP team supported inclusion due to the successes of the Student in that setting. The Parents wanted more inclusion opportunities for the Student at [School 9] so that he would be involved in academic classes, as opposed to vocational training or life skill classes at [School 2].

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<sup>51</sup> Later, Ms. XXXX XXXX said that it would be “extremely difficult” for him to do so. T. Vol. 5, (Page 1065:16 to 1065:17).

T. Vol. 13, (Page 2635:8 to 2635:21).

The team determined that the Student should attend [School 1] exclusively with a special educator for 15 hours per week and in a general education setting for 17.5 hours per week, with instruction from a general education teacher assisted by a special education teacher and an instructional assistant (XX-46-41). The team determined that this would be the LRE. Although the Parents generally had no objections to the other salient aspects of the IEP, they strenuously challenged this portion of the IEP.

**VI. Analysis: The Appropriateness of the IEP at [School 1].**

The Parents contended that, pursuant to the first prong of analysis in *Burlington* and *Carter*, the proposed IEP was inadequate to offer the Student a FAPE. Specifically, the Parents contend that if the Student were placed in the [PROGRAM 1] program at [School 1], he would not reasonably be expected to make significant educational progress and therefore the Student's placement at [School 1] would not be an appropriate educational placement.<sup>52</sup> The HCPS witnesses disagreed. For the reasons expressed below, I find that the IEP was well reasoned and thoughtful, and was reasonably calculated to enable the Student to receive educational benefit. *Rowley*, 458 U.S. at 206-07. The Student's placement at [School 1] would have provided him with FAPE in the LRE.

**A. Dr. XXXX**

The first of the Parents' witnesses was Dr. XXXX XXXX, who the Parents presented to give his opinion challenging the IEP and placement decision and supporting the appropriateness of the Student's current educational placement at [School 3]. Dr. XXXX based his opinion with regard to the Student's educational programming on a review of the records provided to him, his

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<sup>52</sup> The Parents challenge the efficacy of the related services (*e.g.*, Speech and Language Therapy) which will be addressed elsewhere in this decision.

interview of the Parents on May 7, 2014, and his observation of the Student at [School 3] on May 28, 2014; he also spoke with staff at [School 3]. T. Vol. 1, (Pages 33:16 to 34:14). Other than the report of his observation of the Student at [School 3] (XX-94), he prepared no other written report. Nor did Dr. XXXX provide his opinion to HCPS or at any of the IEP team meetings, having not been asked to review the Student's programming until after the due process hearing was requested. T. Vol. 1, (Page 65:10 to 65:13).

Dr. XXXX described the [School 3] program as the appropriate placement because it would allow the Student to make progress in a small structured classroom with appropriate staffing and appropriate instructional methodologies; Dr. XXXX also favorably commented on the integration of the program, including its "great communication among the professionals and good communication between the staff and the [Student's] family" T. Vol. 1, (Page 50:6 to 50:17).

Regarding the education of the Student in an inclusive setting such as that being proposed in the HCPS IEP, Dr. XXXX questions the benefits of the Student being able to model after non-disabled peers in a more inclusive setting because the non-disabled peers' skills are "so far above" the Student's skills, he would not be able to get the intended benefits from the inclusion. T. Vol. 1, (Page 58:5 to 58:14 and Page 62:16 to 62:23). Accordingly, he champions the current placement at [School 3] because the Student needs full-time special education in a self-contained setting to allow him to be available for, and to make progress in, learning. T. Vol. 1, (Pages 57:20 to 58:4).

However, Dr. XXXX had no knowledge of the Student's program or his success at [School 9] to know whether the Student succeeded in that less restrictive setting, which is called for in the HCPS IEP. T. Vol. 1, (Page 122:5 to 122:13 and Pages 122:25 to 123:8 and Pages

131:22 to 132:5). On the contrary, Ms. XXXX XXXX witnessed the Student's modeling behavior and observed the Student as part of a social group, attempting to model their social cues and behaviors. T. Vol. 7, (Pages 1505:2 to 1506:1).<sup>53</sup> Ms. XXXX also observed successful modeling in speech and language when the Student interacted with more able students, even those in speech/language therapy themselves. T. Vol. 7, (Pages 1556:15 to 1558:18). She believed that the Student would have benefitted for those reasons. T. Vol. 8, (Page 1639:19 to 1639:25). Ms. XXXX devalues Dr. XXXX's report, as he had not done any testing or made any "multi-method, multi-source assessment" of the Student. T. Vol. 10, (Pages 2114:22 to 2115:14 and Pages 2116:23 to 2117:1).

With regard to the proposed placement, although Dr. XXXX reviewed the Student's IEP

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<sup>53</sup> Ms. XXXX XXXX testified:

Q. What, if anything, did you observe with regard to [the Student] modeling the age appropriate behaviors of his non-disabled peers from [School 9]?

A. During class time, [the Student] always looked to his peers to see what behaviors he should have. If they -- in the math class that I was instructing him in this past school year, the teacher would move into different small groups and he would go to those groups. He'd look for those peers, whether they were sitting on the floor, moving to a smaller back table.

He answered questions, raising his hand, modeling that -- his responses and we would have his device or use his -- his voice to have those responses.

T. Vol. 7, (Pages 1369:21 to 1370:8). The Mother realized this as well in her discussions as Ms. XXXX XXXX testified without contradiction:

...First, let me ask, to what extent was that consistent with your experience with [the Mother] while at [School 2]?

A. All the time.

Q. All the time?

A. She was requesting more inclusive opportunities because she felt he needed to be -- she said this many time to me -- that she felt he needed to be with typical peers so that she wasn't -- he wasn't exposed to maladaptive behaviors, so he could model the typical peer behavior.

T. Vol. 7, (Page 1375:15 to 1375:25).

from HCPS (T. Vol. 1, (Page 45:16 to 45:17)), he had no contact with any of the school personnel who taught the Student in any HCPS school, nor did he attempt to make any contact with school personnel. T. Vol. 1, (Pages 89:18 to 90:6). Nor did he have any communication with the Student's private SLP's XXXX XXXX or XXXX XXXX to assess their ability to integrate the home therapy with that provided in the school setting, which is the analysis he made regarding the [School 3] program, stated above. T. Vol. 1, (Page 127:4 to 127:9).

I discount Dr. XXXX's opinion because he did not adequately assess what HCPS was offering at [School 1], primarily because he made no inquiry about the program with the school system and had not visited the program to see how large the class was, the staff ratio or extent of support in the inclusion classes. T. Vol. 1, (Page 128:13 to 128:25, Page 130:7 to 130:18, and Page 133:8 to 133:24). Moreover, according to Dr. XXXX, his opinion regarding the Student's inclusion with non-disabled peers was made without regard to the specifics of the program that could have been gleaned from a more rigorous investigation. T. Vol. 1, (Page 150:12 to 150:25). Therefore, Dr. XXXX's opinion was of limited value challenging the appropriateness of the program and placement proposed in the HCPS IEP.

#### **B. Special Educators from [School 3]**

XXXX XXXX, the IIP and program coordinator at [School 3], testified as an expert in special education. She described [School 3] as an MSDE approved "nonpublic, special education school that serves students 6 to 21-years-old, either seeking a certificate of completion or a Maryland High School diploma," providing its students with speech/language therapy, OT, PT, and which employs behavior specialists. T. Vol. 1, (Page 161:3 to 161:10). At the time of the hearing, the school had 101 students. T. Vol. 1, (Page 162:11 to 162:14). The students served by [School 3] have single or multiple disabilities and are on the Autism spectrum, have

ID or a traumatic brain injury, are physically-challenged, are speech and language impaired, or are otherwise learning disabled T. Vol. 1, (Pages 162:17 to 163:1).

Ms. XXXX had no absolutely opinion on the appropriateness of the HCPS program. She testified that [School 3] could provide for the Student's needs, but she formed no opinion on the appropriateness of the HCPS program:

Q And let's just understand what you meant when you said "he's in your wheelhouse." That meant that you felt that your program could provide for him, right?

A Correct.

Q So this wheelhouse analysis does not take into consideration whether [HCPS] had an appropriate program for him, right?

A No. I had no position on that, no.

Q So you didn't even begin to consider whether [School 1] could provide [the Student] with an appropriate program, right?

A No, I didn't.

Q And similarly, you did not consider whether [the Student] could be programmed for in a less restrictive environment than [School 3], did you?

A No.

T. Vol. 1, (Pages 216:16 to 217:6; *see also* Pages 274:22 to 275:7 Pages 292:23 to 294:13).

When questioned, Ms. XXXX did not find the HCPS IEP provided to her by the Parents on the Student's admission to be inappropriate in any way. T. Vol. 1, (Page 264:12 to 264:16).<sup>54</sup>

Similarly, Ms. XXXX never considered whether the Student was successful (or if successful, how successful) the Student was while enrolled in HCPS. T. Vol. 1, (Page 218:13 to 218:16). The scope of her inquiry was whether [School 3] could serve the Student's needs; there was no comparison made to, or distinct opinion rendered regarding, the appropriateness of the

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<sup>54</sup> Ms. XXXX XXXX testified that she was required to use that older IEP due to the Parents' hearing request which implemented the stay put provisions of the IDEA and because the new IEP was delayed due to the Parents' failure to give consent to full testing which the IEP team required in order to draft the new IEP. However, Ms. XXXX XXXX was frustrated with the April 2013 IEP because the Student had mastered a number of goals that were not changeable until a new IEP were drafted. T. Vol. 6, (Pages 1247:22 to 1249:13).



HCPS program. T. Vol. 1, (Page 219:14 to 219:19).<sup>55</sup> Ms. XXXX did testify, however, that the Student did not have life skills taught to students that are not on the diploma-bound track; “to learn those skills ... will allow them to be safe, to travel, and to be as independent” [School 3] includes life skills training in its education for non-diploma-bound students, which Ms. XXXX candidly believed the Student to be. Although the Parents rejected that programming in favor of additional academics (T. Vol. 2, (Page 388:7 to 388:17)),<sup>56</sup> Ms. XXXX conceded that the Student did not have the requisite life skills needed to protect himself and he would benefit from that programming.<sup>57</sup>

Ms. XXXX testified about her concerns for a student in an inclusionary program, and especially concerning enrolling the Student in an inclusionary program. Although she defined LRE as a student being able to “*successfully* integrate into an environment with nondisabled peers,” she cautioning that

... sometimes, being in the same building as nondisabled peers, people use that as they’re included. And so often times, again, I know ... when students come to school and they have had an experience when they were supposed to be included and they weren’t, they began to make friends, they ran the dances, they were the people that ran the prom or they were on the cheerleading team or they were on the basketball team. And they were not just kind of a sidelight to the school, they were an integral member of the school setting.

She concluded that the Student was “included” at [School 3] with his *disabled* peers. T. Vol. 1, (Pages 190:15 to 192:4 and Pages 274:22 to 275:7). This definition, however does not fit the definition of LRE in the IDEA.

Moreover, Ms. XXXX knew nothing about the Student’s past success in the inclusionary

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<sup>55</sup> Ms. XXXX did favorably comment on the latest IEP from HCPS, and in fact incorporated the document into their program until the IIP was completed. T. Vol. 1, (Pages 173:21 to 174:5).

<sup>56</sup> Ms. XXXX XXXX testified that the Parents did not want vocational or functional life skills training because the Student needed academics more than he needed training in those areas. They also wanted the Student to be with his non-disabled peers as much as possible. T. Vol. 6, (Pages 1246:21 to 1247:3) and T. Vol. 7, (Pages 1376:11 to 1377:3).

<sup>57</sup> Coincidentally, the [School 3] “Life Skills of Daily Living” program was “actually based on the Howard County curriculum from some time ago.” T. Vol. 1, (Pages 242:12 to 244:6); *See* BD-78.

setting. She determined that the Student was successful at [School 3] without regard to whether he would have been successful in a more inclusive setting; she based her opinion on the fact that he was successful at [School 3], although she did concede that the data showed that the Student was successful at [School 2] in the inclusive setting. T. Vol. 2, (Pages 306:23 to 307:11 and Page 311:7 to 311:11). Ms. XXXX was asked about how she might determine success in inclusion, and she stated that it would require success a high percentage of the time; this success rate was supported, however, by the Student's success in 41 out of 42 opportunities for successful completion between September 3 and October 5, 2013, according to Ms. XXXX XXXX's data (BD-44, 63) .

I did not find that Ms. XXXX was in any way persuasive in challenging the HCPS IEP or placement decision.

The Parents' other witnesses from [School 3] did not effectively challenge the IEP either. They had no objection to the goals and objectives in the IEP. Ms. XXXX used the goals from the HCPS IEP in the IIP she helped prepare. T. Vol. 5, (Page 969:8 to 969:25). Ms. XXXX XXXX also complemented that document:

Q And the reason that you used the Howard County Public School System's IIP (sic) in the fashion in which you did is because it was a solid, competently prepared document that addressed [the Student's] needs and disabilities, correct?

A Yes.

Q It was a good IEP, correct?

A Yes.

T. Vol. 5, (Page 1081:13 to 1081:20). The [School 3] witnesses are in general agreement with the goals and objectives of the October 2013 IEP and the need for related services, having largely based their IIP on that document.

Because these educators were not provided sufficient information from the Parents on

which they could base their opinions, they have little knowledge of the Student's successes in HCPS or the Student's success in inclusion.

Ms. XXXX, the behaviorist at [School 3], was also asked about how well the Student would do in an inclusive environment. Her response was negative T. Vol. 3, (Page 630:18 to 630:24 and Page 538:8 to 538:9), but it was primarily based on her observations of the Student in the self-contained, restrictive environment at [School 3], and was not based on his ability to cope in the less restrictive environment of an inclusive public school setting. She did not have access to the data gathered from the Student's inclusionary activities at [School 9]. T. Vol. 3, (Page 539:19 to 539:20). Accordingly, I did not consider Ms. XXXX to be able to provide an opinion on whether the Student would be successful in a less restrictive environment.

Likewise, Ms. XXXX was unaware how successful the Student was with his non-disabled peers at [School 9], having not consulted with or even contacted his prior SLP's or teachers. In fact, she was not even aware that he was being educated with non-disabled peers. T. Vol. 5, (Pages 940:25 to 941:23). This lapse of knowledge detracts from her ability to give a cogent opinion about whether the Student would be successful in a less restrictive environment than [School 3].

Ms. XXXX XXXX, the Student's classroom special education teacher, also agreed that the Student needed full-time special education because his skills are "way below his average peers and [she thinks] that's a huge gap for him," so that if he were educated with his "general peers," his anxiety would increase. T. Vol. 5, (Pages 1033:15 to 1034:5).<sup>58</sup> However, she did

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<sup>58</sup> From the Student's time at [School 3], Ms. XXXX XXXX also gave another concern for educating the Student in an inclusive setting:

A Okay. You know, he had, from what we can gather, and I mean, this is all me hearing from another teacher who is currently teaching him, you know, he had an itch. And he pulled his pants down to access the

not know that the Student was successful in an inclusionary setting:

Q When did you first see the inclusion data about how [the Student] did at [School 9]?

A I looked at it over the weekend of July 4th, so probably the 5th or 6th.

Q Looks like he was doing pretty well with those nondisabled peers, doesn't it?

A It does.

T. Vol. 5, (Page 1072:13 to 1072:19). Ms. XXXX XXXX did not know how much support the Student was getting at [School 9]. T. Vol. 5, (Page 1074:7 to 1074:11). Ms. XXXX XXXX's lack of knowledge about the Student's inclusionary experiences brings the basis of her opinion into question. None of these witnesses were aware of how well the Student performed in inclusionary classes, and none were aware of Ms. XXXX XXXX's inclusionary data at [School 9] showing the Student's successes in the inclusionary setting (BD-44). T. Vol. 6, (Pages 1334:16 to 1335:7).

Accordingly, I do not find that the Parent's expert witnesses have credible opinions challenging the appropriateness of the October 28, 2013 IEP and the decision to place the Student in the [PROGRAM 1] Program at [School 1].

### **C. The Crux of the Parents' Complaint**

Having agreed with the balance of the IEP, the Parents' only objection seemed to be his placement at [School 1]. T. Vol. 2, (Page 447:1 to 447:4). The Parents opposed the Student's placement at [School 1] ostensibly because of bad experiences they had at that school involving

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part of his body that was itching him. I would be concerned about --

Q Did he do that in the classroom?

A He did that in the hallway.

Q Okay.

A So that would concern me in a larger setting.

T. Vol. 5, (Page 1036:16 to 1036:25). There was no evidence, however, that this behavior occurred in any more inclusive setting.

the Student's older sibling. T. Vol. 2, (Page 345:14 to 346:6). The truth of the matter is found in the IEP minutes which stated the Parents' objections to be twofold – they questioned the training of the SLP at [School 1], as well as the “past family history” at the school (XX-46-57).<sup>59</sup>

Through the Father's testimony, the Parents expanded their objections at the hearing. First, they believed that they could not directly communicate with the teachers due to a ban on such communication three years before. T. Vol. 2, (Page 448:7 to 448:17). Second, the SLP had not been [THERAPY] trained. T. Vol. 2, (Page 448:18 to 448:22). Third, the Parents stated that the principal told them that the school personnel did not want to teach the Student because they did not want to deal with the Mother. T. Vol. 2, (Page 449:11 to 449:17). Fourth, the Parents never observed the program at [School 1] (although they had not asked to see it). T. Vol. 2, (Page 450:12 to 450:15). Fifth, the Parents felt that they were not given an option for the Student to attend any school other than [School 1], as they had been so offered in prior years. T. Vol. 2, (Page 450:18 to 450:24). And lastly, the Father testified that he mistrusted the following HCPS faculty and staff including: Dr. XXXX, the HCPS Superintendent; XXXX XXXX, who directs special education for HCPS; unspecified HCPS Board members; XXXX XXXX, who is no longer the principal at [School 1] (T. Vol. 6, (Pages 1125:22 to 1126:3)); XXXX XXXX, principal at [School 2]; XXXX XXXX, assistant principal at [School 1]; the unnamed guidance counselor at [School 1]; XXXX XXXX, the Parents' daughter's former teacher; and other unnamed and unspecified individuals who work for HCPS. T. Vol. 4, (Pages 758:10 to 765:15).

The Father acknowledged that there was tension between his wife and the school personnel:

Q. So, the bad experience you referenced, who was that bad experience with?

A. My daughter.

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<sup>59</sup> The SLP issue was addressed earlier in this decision and found to be without foundation.

Q. Okay.

A. She attended kindergarten through second grade at [School 1]. And the reason why he, as I explained to Mr. XXXX, is that there was no -- the school restricted us from communicating with them. They -- the principal told me that the teachers don't want to teach your child because of your wife. Whenever we entered the building, they would have a staff member walk with us. We were not allowed to communicate directly with the teacher.

T. Vol. 2, (Page 346:4 to 346:15). Although the Father conceded that the Parents were not allowed to come into the school without an escort, he asserted that he and his wife got along well with the school personnel, although he also conceded that they were not allowed to communicate directly with the school staff.<sup>60</sup> T. Vol. 2, (Pages 439:12 to 441:2).<sup>61</sup> The Parents believed that

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<sup>60</sup> Ms. XXXX XXXX testified that HCPS restricted the Parents' email access to the teachers because they began to become abusive towards school staff again. T. Vol. 6, (Pages 1257:20 to 1258:5).

<sup>61</sup> Ms. XXXX disagreed with this characterization. The contention started in first grade when the Mother sent contentious emails to the school staff. T. Vol. 6, (Pages 1131:10 to 1132:4). The unrefuted evidence of this contention is shown in the following example provided by Ms. XXXX:

[The Mother] complained that Ms. XXXX was showing a birthmark on her leg, she said that [the daughter] saw Ms. XXXX's underwear when she sat down on the floor to work with the children. She said that she didn't understand why Ms. XXXX didn't use her married name. She disagreed with the fact that Ms. XXXX wore sunglasses on her head. She disagreed that Ms. XXXX wore Crocs.

I mean it, it never really got around to -- she felt that Ms. XXXX yelled at [the daughter] and she -- for example, Ms. XXXX told [the daughter] not to take a report home from school one time. They were writing reports on elephants and her report was on an elephant. They were doing I think animals and [the Mother] arrived at school and was very upset because we caused her daughter to sin because she had told [the daughter] to bring a report home and in their religion it's a sin to defy your parent and we caused her to sin and how would I like it if they brought the priest to school so that Ms. XXXX would have to hear [the daughter] make her confession because she sinned against her mother.

T. Vol. 6, (Pages 1132:18 to 1133:14). The Mother made these complaints "highly excited, highly excited, loud." T. Vol. 6, (Page 1134:4 to 1134:7). Her complaints proved unfounded. *See, e.g.*, Ms. XXXX's testimony that the birthmark she examined Ms. XXXX's leg to determine that the birthmark was just above Ms. XXXX's knee (T. Vol. 6, (Page 1135:8 to 1136:9). No other parents made similar complaints. The Mother declined to testify so she

the restrictions would still apply years after their daughter's disenrollment. T. Vol. 2, (Page 441:8 to 441:14). Ms. XXXX confirmed that this assertion was not accurate:

Q. Has anyone ever raised the parents' previous experiences at [School 1] as a possible impediment to [the Student] receiving a free and appropriate public education at [School 1]?

A. No.

T. Vol. 6, (Pages 1179:25 to 1180:5). Moreover, none of the daughter's teachers would have been the Student's teacher. T. Vol. 6, (Page 1188:10 to 1188:12).

The Father's testimony was challenged by specific refutations of the Father's stated concerns. Ms. XXXX testified that any prior poor impression she might have gotten of the Mother would have no effect on her ability to be the Student's teacher. T. Vol. 13, (Page 2749:19 to 2749:22).

None of the Parents' objections raised justiciable issues because they do not concern the program created in the IEP or the placement; it is merely raises objections to the location.

The term "placement," with regard to provision of FAPE pertains to the educational program designed for a student, *i.e.* the IEP, and not the physical location where the program is to be implemented. In *AW ex rel. Wilson v. Fairfax County School Bd.*, 372 F.3d 674 (4<sup>th</sup> Cir. 2004), the court wrote:

Although the foregoing indicates that the definition of "educational placement" should reflect the "mainstreaming" ideal of the LRE requirement, it does not appear that the term also includes the precise physical location where a disabled student is educated. The LRE requirement directs that the disabled student be assigned to a setting that resembles as closely as possible the setting to which he would be assigned if not disabled. *See Rowley*, 458 U.S. at 202-03 & n. 24, 102 S.Ct. 3034. The IDEA's concern with location thus focuses on the degree

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could not refute Ms. XXXX's testimony regarding her behavior. The Father yelled at a teacher after school, leading to the requirement that he needed to be escorted when on school property. T. Vol. 6, (Pages 1142:20 to 1143:9). They were never barred from the school. T. Vol. 6, (Page 1146:6 to 1146:8). Ms. XXXX's testimony was rife with recollections of conflicts created or perpetuated by the Mother. The Parents filed three complaints with MDSE, all of which were proven to be unsubstantiated. T. Vol. 6, (Pages 1287:15 to 1288:1).

to which any particular assignment segregates a disabled student from non-disabled students, rather than on the precise location of the assignment itself. Given the IDEA's concern with "mainstreaming" and appropriate educational content, we find little support in the IDEA's underlying principles for AW's assertion that "educational placement" should be construed to secure his right to attend school in a particular classroom at a particular location.

*Id.* at 681. The opinion further reads:

Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that *the touchstone of the term "educational placement" is not the location to which the student is assigned but rather the environment in which educational services are provided.*

*Id.* at 682 (emphasis added). Accordingly, the placement and not the location is what matters.

#### **D. HCPS Support of the IEP and Placement Determination**

As unpersuasive as the Parents' experts were, the HCPS experts were convincing. These witnesses testified about the benefits of the IEP and the Student's successful participation in inclusion.

The HCPS witnesses believed that the [School 1] [PROGRAM 1] program would be appropriate for the Student because all of his needs resulting from his identified deficits could be addressed. Additionally, because of the particular instructional model, the Student would be expected to make meaningful educational progress. Ms. XXXX thought so (T. Vol. 8, (Pages 1623:6 to 1625:4 and Page 1641:10 to 1641:23)) as did Ms. XXXX (T. Vol. 9, (Page 1875:2 to 1875:7 and Pages 1917:19 to 1918:7) and T. Vol. 10, (Pages 2185:4 to 2186:15)). Ms. XXXX did as well. T. Vol. 12, (Pages 2477:16 to 2478:23). As did Mr. XXXX. T. Vol. 13, (Pages 2675:16 to 2676:7).

Ms. XXXX conceded that there may be some instances when a less inclusive setting is appropriate for students who do not do well in more inclusive placements; she maintained, however, that the Student was not one of those students because the Student did well in the more



inclusive setting. T. Vol. 9, (Page 2030:10 to 2030:23). Ms. XXXX felt that modeling that takes place in an inclusive setting would be important because the Student needed to be with “non-disabled peers for appropriate behavioral, academic, and speech/language models and learning skills.” T. Vol. 10, (Page 2193:1 to 2193:14). Withdrawing this support would be expected to increase the Student’s poor behavior. T. Vol. 10, (Page 2193:10 to 2193:17).

Ms. XXXX, who would have been the Student’s teacher at [School 1], and who was familiar with the Student, having observed him and having spoken with his former teacher, and who was most familiar with what [School 1] had to offer, strongly concurred as well. T. Vol. 13, (Pages 2744:23 to 2745:5). Ms. XXXX added the following dimension of [School 1]’s regional school status regarding funding and resources:

JUDGE: Ms. XXXX, a couple questions I have. You had -- you -- you made a reference to the home school versus regional school resources. What do you mean by resources, because I’m not sure I -- I don’t know [if] this [is a] term of art or whether or not that’s something that you -- you -- you meant to say something else. I’m not sure what that meant.

THE WITNESS: Well, a regional [PROGRAM 1] program is one that draws students from surrounding schools generally because of behavioral challenges. And because of that, we are able to access our behavior specialists more frequently. We have more money to purchase sensory types of things. We have more assistance from people outside of our school....

T. Vol. 13, (Page 2774:3 to 2774:16).

Ms. XXXX also testified that she felt that inclusion was in the best interest of the Student for modeling behaviors of non-disabled peers. More so, however, she looked at the social aspect of educating the Student in his *home* school:

Q. What is the advantage to that?

A. The advantages that students with disabilities learn, they learn from their social models, they learn from their language models having

appropriately -- or age-appropriate typical language models. *They also learn to interact with, you know, their peers and possibly form friendships who they would sit, of students who they would see in the neighborhood.*

Q. So was there any reason that you knew of that [the Student] should not have been returned to his home school?

A. No.

T. Vol. 9, (Page 1877:6 to 1877:18)(emphasis added); *see also* T. Vol. 9, (Pages 2035:10 to 2036:2). Ms. XXXX concurred. T. Vol. 12, (Page 2611:6 to 2611:22).

The Parents initially asked Mr. XXXX for inclusion at lunch time with his non-disabled peers; the inclusion was successful. T. Vol. 2, (Pages 331:23 to 332:17). He was programmed to attend [School 9] for lunch, specials and recess with his non-disabled peers. T. Vol. 2, (Page 333:9 to 333:25). Eventually, the Student had homeroom at [School 9], which extended to specials and math class. T. Vol. 6, (Pages 1279:8 to 1280:10). In fact, the Parents had no objection to the amount of inclusion with non-disabled peers in the general education setting presented in the latest IEP. T. Vol. 2, (Page 442:5 to 442:21 and Pages 445:13 to 446:8) and T. Vol. 6, (Pages 1301:1 to 1302:24).

Ms. XXXX XXXX agreed that the Parents actively sought greater inclusion opportunities for the Student. T. Vol. 6, (Pages 1244:19 to 1245:3).<sup>62</sup> Ms. XXXX XXXX differentiated the June 2013 and October 2014 IEP in terms of inclusion: the IEP team increased the Student's

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<sup>62</sup> Ms. XXXX XXXX testified without contradiction that the Parents did not want the Student to even lunch with his disabled peers:

They requested that [the Student] not participate in swim, so his schedule was altered to accommodate that need. They wanted him not to have lunch within our cafeteria because they felt that it was not appropriate for [the Student] to be around students with maladaptive behaviors, so [the Student] ate lunch by himself at [School 2] and then he ate again at [School 9] with his peers.

T. Vol. 6, (Page 1245:18 to 1245:25).

hours in general education in the most recent IEP because he had demonstrated success in that area. T. Vol. 6, (Page 1332:9 to 1332:14). The team also realized the Student's ability to make and keep friends among the non-disabled student population, which Ms. XXXX XXXX and Ms. XXXX also observed. T. Vol. 7, (Pages 1368:16 to 1369:14) and T. Vol. 9, (Pages 1908:6 to 1910:2), respectively.

Mr. XXXX testified that the Parents' choice of a private, segregated school was inconsistent with what they had previously and consistently sought; [School 3] would not be the least restrictive environment for the Student, whose parents consistently sought greater inclusion opportunities for the Student. T. Vol. 13, (Pages 2694:17 to 2695:6).

According to Ms. XXXX XXXX, the impetus for the switch from [School 2] to [School 1] was twofold: to give the Student the same inclusion benefits he had at [School 2], but in an atmosphere where the program is tailored for the degree of inclusion that the Student needed and the Parents wanted (T. Vol. 6, (Pages 1305:2 to 1306:7)); and because the other students at [School 2] were well below the Student's capabilities, as those students who were similarly-abled had already "moved on." T. Vol. 6, (Pages 1315:21 to 1316:4)). Mr. XXXX concurred. T. Vol. 13, (Page 2673:7 to 2673:17). At [School 2], there were no other students remaining who were in a similar program, so the Student had no classmates in the separate classroom; at [School 1], his neighborhood school, the school was set up for this programming and there were other students with whom he could be educated in the self-contained setting, even as he had inclusion with his non-disabled peers.

Ms. XXXX XXXX testified about the nuts and bolts of the Student's inclusion in the [School 9] programming as well as the Student's success in that program.<sup>63</sup> When the Student

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<sup>63</sup> Ms. XXXX XXXX also testified about the [School 2] program the Student attended. Her testimony, however, is mainly relevant to the Student's progress in the inclusion program rather than his regular programming at [School

first attended [School 2], Ms. XXXX XXXX was not his teacher, but she was on staff at both [School 2] and [School 9] and she was in charge of the inclusion program. She described the program as one in which students from [School 9] come to [School 2] on a daily basis for specials, such as music and art, so that there are non-disabled peers among the disabled students at [School 2]. T. Vol. 6, (Pages 1228:17 to 1229:18). He enjoyed interacting with his non-disabled peers. T. Vol. 6, (Pages 1230:20 to 1231:1). His interactions were generally positive:

A. Within our building he was in a classroom, well until this past school year, he was in a classroom with similar like peers and he would interact, would attempt to interact with them. It was more parallel play and things like that.

When he was at [School 9], he started inclusion in 3rd grade and he stayed -- so in 3rd grade, 4th grade, 5th grade he had the same group of peers that he had lunch with, that he had recess with, that he was in class with, and I believe they develop relationships. And he would sit with this group of girls and one guy and he, it was eight of them and he would sit with them, they would tell, he used his iPad to tell jokes to them, they encouraged him to socialize within --

Q. These were children without disabilities?

A. Yes, they were [School 9] general ed peers. So then the next year he moved to 4th grade, he was with the same group of students. We purposely did that because he had built relationships with them and we wanted that to continue.

So in 4th grade he was with them and then in 5th grade he was with the same group again. And they, they sought him out at lunch and recess to come and sit with them. He looked for them, too.

So he would come and sit down with them and they would talk and they would really, I believe that children learn best from other children and this was

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2], as this is not the placement which is the subject of this hearing -- [School 1] is. However, Ms. XXXX XXXX described the [School 11] ESY program was similar to that of [School 1] because students from that school attend the [School 11] summer program. In the ESY program, the Student performed between 82 and 100% on his objectives. T. - Vol. 6, (Page 1300:1 to 1300:8). Ms. XXXX, who provided therapy to the Student at [School 11], also indicated that he was happy and did well with higher functioning students. T. Vol. 8, (Page 1620:1 to 1620:8). Further, per BD-53, the Student made meaningful educational progress while at [School 2] under a program similar to that which the student would be under at [School 1]. T. Vol. 6, (Page 1334:3 to 1334:8).

the way that he was going to learn speech through hearing it from his peers. And that it encouraged him to use his device, it encouraged him to use his words and he was socially engaging with them.

T. Vol. 6, (Pages 1236:19 to 1237:25). Ms. XXXX also observed this success. T. Vol. 12, (Page 2465:11 to 2465:19).

HCPS does not have the burden of proof in this matter. However, comparing the testimony of the parties' witnesses, I am more persuaded by the HCPS witnesses that the IEP was "appropriate" because they showed that the Student was afforded personalized instruction with sufficient support services to permit him to benefit educationally from that instruction.

In accordance with federal and State regulations, in developing the IEP for the 2013-2014 school year, the team first determined the Student's disability, present levels of academic achievement and functional performance, and need for related services. The meeting minutes and detailed notes from the IEP meetings indicate that the team then determined how the Student's needs could be met. Next, annual goals were reviewed and developed to meet the Student's needs.

The resulting IEP and placement determination were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin, supra*. The program and placement provide the Student with the "basic floor of opportunity" for him to access "specialized instruction and related services which are individually designed to provide [him] educational benefit." *Rowley*, 458 U.S. at 200-01.

The Parents challenge the progress recorded on the IEP. However, whatever that progress, it is not relevant to the Student's education at [School 1], the placement recommended by the IEP team, as the Student remained at [School 2]; he did not move to [School 1] because of the stay put agreement and provisions of the IDEA which kept him at [School 2], where he did

not receive the educational programming he would have received at [School 1].<sup>64</sup> The goals are those to be implemented at [School 1], and the issue is whether the program would be reasonably calculated to lead to the Student's academic progress. I find that, based on the evidence and the applicable law, it did.

In summary, after carefully reviewing all of the evidence presented by the Parents and HCPS, I find that HCPS developed an appropriate IEP and placement for the 2013-2014 school year, and that the IEP was reasonably calculated to provide a FAPE for the Student, if the Parents chose to have the Student access the program.

## **VII. The Student's IIP and Progress Thereunder at [School 3]**

The Parents' witnesses have largely testified about the progress the Student made at [School 3]. Nevertheless, progress at [School 3] is immaterial to the question of whether the IEP is reasonably calculated to lead to education progress and the placement is appropriate for the Student.<sup>65</sup> 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 the second prong of *Burlington* and *Carter* is inapplicable; the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision.<sup>66</sup>

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<sup>64</sup> The Parties agree that [School 2] was not the appropriate program for the Student – the Parents claiming that the Student did not make progress during his placement there (a claim disputed by HCPS) and HCPS claiming that the Student needed the programming and LRE offered in the [PROGRAM 1] Program at [School 1] in order to be successful (which is disputed by the Parents).

<sup>65</sup> The Parents presented much testimony on the appropriateness of the [School 3] program. In simple terms, when reviewing the evidence in this matter, it was essential that I parsed out the Parents' objections to the proposed IEP and placement recommended by the IEP team from the efficacy of the Parents' choice, the [School 3] program. The latter does not become an issue because the first prong of *Burlington* and *Carter* was decided in favor of the proposed IEP and placement. Because the Parents' case does not pass the first test in *Burlington* and *Carter*, I need not address the [School 3] program in detail.

<sup>66</sup> The Parents seem to argue that, if public funding of the [School 3] program and placement were necessary to provide the Student with FAPE, their staunch defense of the Student, including delaying the assessment consent for almost six months, should not be an impediment to their reimbursement. I do not reach that issue because I found the HCPS program and placement to be appropriate, contrary to the findings and procedural stance in *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F. Supp. 380, 393 (D. Mass. 1998) and *Justin G. ex rel. Gene R. v. Bd. of Educ. of Montgomery Cnty.*, 148 F. Supp. 2d 576, 585-86 (D. Md. 2001), in which the former case was cited.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parents have failed to establish that the IEP offered by the HCPS was not reasonably calculated to offer the Student with a meaningful educational benefit for the 2013-2014 school year. 20 U.S.C.A. §§ 1400- 1482 (2010 & Supp. 2014).

I further conclude that the IEP and placement proposed by HCPS for the 2013-2014 school year is reasonably calculated to offer the Student a FAPE in the least restrictive environment. *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, 15 (1993).

As I have concluded that the Student would have been provided a Free and Appropriate Public Education in the least restrictive environment in the in the [PROGRAM 1] Program at the [School 1], the Parents are not entitled to receive reimbursement as a result of their unilateral placement of the Student at the [School 3] for the 2013-2014 school year. 34 C.F.R. § 300.148 (2012).

## ORDER

I **ORDER** that the Parents' request to have their expenses reimbursed for the costs of the Student's attendance at the [School 3] for the 2013-2014 school is **DENIED**.

October 22, 2014  
Date Decision Issued

MN/lh

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Marc Nachman  
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.