

XXXX XXXX,

STUDENT

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE MICHAEL R. OSBORN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-14-28521**

*** * * * ***

DECISION

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ORDER

STATEMENT OF THE CASE

On August 13, 2014, [Father] and [Mother] (Parents), on behalf of their child, [Student] (Student),¹ 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 Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

The parties waived the resolution process on August 21, 2014. The OAH received a notice of the waiver of the resolution process on August 25, 2014.

I held a telephone prehearing conference on September 12, 2014. The Student was represented by Michael J. Eig, Esquire. Jeffery A. Krew, Esquire, represented the MCPS. By agreement of the parties, the hearing was scheduled for November 18-20, 2014.

¹ The Student and Parents will be referred to throughout as the Student. Both parents were present for all hearing days. The Student was not present and did not participate in the hearing.

On November 4, 2014, the Student filed a Motion for Continuance of the Due Process hearing. The Motion was denied on November 13, 2014.

On November 6, 2014, the Student filed a Motion to Amend the Due Process Complaint, which was withdrawn at the hearing on November 18, 2014.

I held the hearing on November 18, 2014 and December 1 and 2, 2014, at the MCPS Administration Building, Rockville, Maryland.² Michael J. Eig, Esquire, represented the Student. Jeffrey A. Krew, Esquire, represented the MCPS.

The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations that pertain to the date a decision is due under the IDEA. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2013). The Student requested an extension of time to issue a decision until thirty days after the close of the record, to which MCPS agreed. The record closed December 2, 2014, making the due date January 1, 2015. 34 C.F.R. 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

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 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

² The second and third days of the hearing, originally scheduled for November 19-20, 2014, were moved to December 1-2, 2014 at the request of the Student to accommodate a court scheduling conflict which required the Student's father to appear as a witness in a federal court in another State.

ISSUE

Will transfer of the Student to [School 1] ([School 1]), an elementary school within the MCPS other than [School 2] ([School 2]), deprive the Student of a Free Appropriate Public Education (FAPE)?

SUMMARY OF THE EVIDENCE

Exhibits

The parties offered a Joint Exhibit, which was admitted as evidence:

Jt. #1 - Proposed Stipulation of Fact

The Student offered the following Exhibits, which were admitted as evidence:³

- XX Ex. 1 – Request for Mediation/Due Process Hearing
- XX Ex. 2 – Report of School Psychologist, XXXX XXXX, Ed.S., April 5, 2012
- XX Ex. 3 – Individualized Education Program (IEP) with Sign in Sheet and 5 Day Document Verification, October 1, 2013
- XX Ex. 4 – IEP with Sign in Sheet and 5 Day Document Verification, February 25, 2014
- XX Ex. 5 – E-mail to XXXX XXXX from [Mother], September 16, 2014
- XX Ex. 6 – IEP with Sign in Sheet and 5 Day Document Verification, May 20, 2014
- XX Ex. 7 – Maryland School Assessment, Grade 3
- XX Ex. 8 – Progress Report, 2013-2014 4th Term
- XX Ex. 9 – E-mail from XXXX XXXX to [Mother], June 6, 2014
- XX Ex. 10 – Excerpt from IEP, May 20, 2014
- XX Ex. 11 – Letter from XXXX XXXX, M.D., M.Sc., to XXXX XXXX, June 13, 2014
- XX Ex. 13 – Letter from the Parents to XXXX XXXX, June 16, 2014
- XX Ex. 14 – E-mail, August 7, 2014
- XX Ex. 15 – Letter from XXXX XXXX to the Parents, June 30, 2014
- XX Ex. 16 – Memorandum from XXXX XXXX to XXXX XXXX, June 30, 2014
- XX Ex. 17 – Letter from Michael Eig, Esquire, to XXXX XXXX, faxed August 3, 2014
- XX Ex. 18 – Letter from XXXX XXXX to XXXX XXXX, August 21, 2014
- XX Ex. 19 – E-mail, September 18, 2014
- XX Ex. 20 – Letter from XXXX XXXX to XXXX XXXX, Principal, [School 2], September 23, 2014
- XX Ex. 21 – Elementary Teacher Report, Ms. XXXX
- XX Ex. 28 – E-mail, November 3, 2014
- XX Ex. 30 – Curriculum Vitae of XXXX XXXX, M.D., M.Sc.
- XX Ex. 33 – Excerpt from e-mail

³ The Student offered XX Exs. 12 and 31, which were not admitted into evidence. The Student withdrew XX Exs. 23-27 and 32.

- XX Ex. 34 – Grade 4 Progress Report Card, 2014-2015
- XX Ex. 35 – Excerpt from IEP, May 20, 2014
- XX Ex. 36 – IEP with Sign in Sheet and 5 Day Document Verification, May 20, 2014
- XX Ex. 37 – Change of School Assignment, 2014-2015

MCPS offered the following Exhibits, which were admitted as evidence:⁴

- Board Ex. 1 – Functional Behavioral Assessment, October 14, 2010
- Board Ex. 2 – IEP, November 5, 2010
- Board Ex. 3 – Functional Behavioral Assessment, January 10, 2012
- Board Ex. 4 – Report of School Psychologist by XXXX XXXX, Ed.S., April 5, 2014
- Board Ex. 5 – Occupational Therapy Evaluation, May 16, 2014
- Board Ex. 6 – Functional Behavioral Assessment, June 12, 2012
- Board Ex. 7 – IEP, October 23, 2012
- Board Ex. 8 – Educational Assessment Report, January 4, 2013
- Board Ex. 9 – Report of Speech/Language Assessment, January 8, 2013
- Board Ex. 10 – Functional Behavioral Assessment, March 12, 2013
- Board Ex. 11 – IEP, March 19, 2013
- Board Ex. 12 – IEP, October 1, 2013
- Board Ex. 13 – Elementary Teacher Report for Quarterly Progress by XXXX XXXX
- Board Ex. 14 – Functional Behavioral Assessment, February 19, 2014
- Board Ex. 15 – IEP, February 25, 2014
- Board Ex. 16 – Request for Change of School Assignment, received April 2, 2014
- Board Ex. 17 – Elementary Teacher Report for Quarterly Progress by XXXX XXXX
- Board Ex. 18 – Functional Behavioral Assessment, May 12, 2014
- Board Ex. 19 – IEP, May 20, 2014
- Board Ex. 20 – Elementary Teacher Report for Quarterly Progress by XXXX XXXX
- Board Ex. 21 – Grade 3 Progress Report Card, 2013-2014
- Board Ex. 22 – Memorandum from XXXX XXXX to XXXX XXXX, June 30, 2014
- Board Ex. 23 – Letter from XXXX XXXX to the Parents, June 30, 2014
- Board Ex. 24 – Request for Mediation/Due Process Hearing
- Board Ex. 25 – Letter to Michael Eig, Esquire, from Jeffrey Krew, Esquire, September 3, 2014
- Board Ex. 27 – Curriculum Vitae of XXXX XXXX
- Board Ex. 28 – Curriculum Vitae of XXXX XXXX
- Board Ex. 29 – Curriculum Vitae of XXXX XXXX, Ed.S
- Board Ex. 33 – Curriculum Vitae of XXXX XXXX

Testimony

The Student presented the following witnesses:

- [Mother]

⁴ The MCPS withdrew Board Exs. #26, 30-32, and 34.

- XXXX XXXX, M.D., M.Sc., admitted as an expert in child and adolescent psychiatry,⁵ who testified by telephone

The MCPS presented the following witnesses:

- XXXX XXXX, School Psychologist, admitted as an expert in School Psychology
- XXXX XXXX, Special Education Teacher, [School 2], admitted as an expert in Special Education
- XXXX XXXX, Principal, [School 2], admitted as an expert in School Administration
- XXXX XXXX, Special Education Supervisor, MCPS, admitted as an expert in Special Education

FINDINGS OF FACT

The parties stipulated to findings of fact 1-10.⁶

1. The Student was born XXXX, 2004.
2. In August 2010, the Student underwent a psychological evaluation completed at XXXX University's Center Clinic.
3. In September 2010, the student attended [School 3], a private school.
4. In October 2010, the Student attended [School 1], his home school.
5. During the 2010-2011 school year, the Student was in kindergarten and began attending the XXXX⁷ Program at [School 2] in November 2010.

⁵ Maryland Rule of Procedure 5-702, *Testimony by Experts*, provides:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Code Ann., Rule of Proc. 5-702 (2014).

⁶ The parties stipulated to findings of fact 1-10.

⁷ XXXX.

6. On April 1, 2014, the Parents filed a Change of School Assignment (COSA) request seeking the Student be permitted to attend [School 2] for the 2014-2015 school year.

7. On May 21, 2014, MCPS denied the COSA request.

8. The Parents appealed the COSA decision and provided letters from Dr. XXXX XXXX and XXXX XXXX in support of maintaining the Student's placement at [School 2].

9. The COSA appeal was denied on June 30, 2014.

10. Since the start of the 2014-2015 school year, the Student has attended [School 2] under "stay put" protection of the IDEA.

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

11. MCPS students are assigned to a home school based on residential addresses. [School 1] is the Student's home school, and is the location at which the Student would be attending if he was not disabled.

12. The Student has Attention Deficit Hyperactivity Disorder (ADHD) and anxiety disorder, which are addressed through psychotherapy, which includes medications, and at school, an IEP.

13. The Student attended [School 4] preschool, which specialized in working with students with emotional and sensory difficulties.

14. On August 27, 2010, the Student was evaluated at the XXXX University Center Clinic. Evaluators recommended the Student receive medical and counseling supports for Attention Deficit Disorder and ADHD, daily groups to assist with self-esteem and social skills, play therapy to assist with anger, frustration and anxiety, and occupational therapy to help with sensory needs. The evaluators noted that the Student's parents reported the Student has trouble with transitions, has auditory sensitivity, becomes easily frustrated, and has a lot of anxiety. The

Parents also reported the departure from his preschool program was devastating for the Student because the preschool program provided a safe, non-anxiety-producing environment.

15. In kindergarten at [School 1] the Student: ran from the classroom when presented with tasks he viewed as too difficult or wanted to avoid; hit, kicked, and threw objects at classmates, with varying levels of intensity; yelled, covered his ears, and sometimes ran when presented with noises, sounds, verbal instructions, or singing; hid under tables when anxious or fearful of a situation; responded to verbal instructions with responses such as “I hate this” or “this is lame”; and, stated “I’m ignoring you” when given verbal instruction. All of these behaviors occurred at random, without predictors.⁸

16. After attending [School 1] for less than a month, the [School 1] special education team and administration recommended to the Student’s parents that the Student be placed in a [Program] program at [School 2] based on a persistent pattern of disruptive behaviors and inability to remain focused on school work.

17. In November 2010, the Student was enrolled in [School 2] and assigned to the [Program] program, a program designed to assist students with behavioral and emotional challenges.

18. The Student attended kindergarten at [School 2] and upon returning to school for the 2011-2012 first grade school year, had regressed to the point where he was when he arrived at [School 2] in November 2010. [School 2] made efforts to transition the Student to a mainstream classroom. He became anxious, angry, and physically aggressive toward others very quickly. When angry or frustrated, the Student yelled and threw items at walls, or ripped items from walls. Episodes of anger lasted up to thirty minutes. The Student reacted physically and violently when he suspected others students were looking at him. The Student was unable to

⁸ See MCPS Ex. #1, Functional Behavioral Assessment, [School 1], October 14, 2010.

participate in mainstream classes, and the strategies that worked previously to address his behaviors no longer worked. If the mainstream classroom teacher removed the Student from the room to a quiet room, the Student yelled for up to thirty minutes. The Student also pulled his belt from his pants and used the belt to mark up classroom walls. When teachers tried to correct his behavior, the Student refused to acknowledge he had done anything wrong, and insisted he was the victim.⁹

19. Near the end of first grade (2011-2012 school year), [School 2] removed the Student from the [Program] program and placed him in a mainstream classroom with supports, including assistance from a para-educator.

20. After the 2011-2012 school year, the Student's family moved to Baltimore, where the Student was enrolled in a [BCPS School] area elementary school in the Baltimore City Public School System (BCPS). The Student ran away from the school by 11:00 a.m. on his first day. Unwanted behaviors were common, and the school called the Student's parents with frequency. An IEP put in place by BCPS included a full-time one-on-one aide. The BCPS enrollment was very unsuccessful.

21. In November 2012, the Student's family returned to Montgomery County. The family moved to a [School 1] home school address. The Student's mother contacted Ms. XXXX, [School 2] Principal, for guidance where to enroll the Student. After conferring with an MCPS [Program] program coordinator, Ms. XXXX instructed the Student's mother to reenroll the Student at [School 2].

22. [School 2] did not reassign the student to the [Program] program when he reenrolled at [School 2] in November of the 2012-2013 school year. He was placed in a general education classroom with supports, including a full-time one-on-one aide.

⁹ See MCPS Ex. #3, FBA, [School 2], October 10, 2012.

23. During second grade at [School 2], the Student demonstrated difficulty paying attention in the classroom. He was easily distracted and lost focus rapidly if the subject matter did not interest him. The Student behaved in ways designed to call attention to himself. Constant teacher redirection was required. The Student was very anxious when given a new challenge or a transition to material unfamiliar to him. His response to new material was inappropriate behavior, including growling, crumpling or ripping paper, screaming or crying. The Student was unable to keep his hands and feet to himself, and was unable to tell anyone else what was bothering him.¹⁰

24. In December 2012, the Student demonstrated strengths in math and reading comprehension, and struggled with memory concepts. He did not like writing and required reassurances. He had low writing stamina. The Student had the following academic test scores.¹¹

Subtest	Standard Score (Average = 100)	Description (range of achievement)
Brief reading	115	high average
Brief math	116	high average
Written expression	94	average
Letter Word Identification	113	high average
Reading fluency	111	high average
Passage comprehension	116	high average
Word attack	101	average
Reading vocabulary	114	high average
Spelling	104	average

¹⁰ See MCPS Ex. #7, [School 2] IEP of October 23, 2012, at Bates stamp page 000006.

¹¹ See MCPS Ex. #8, XXXX XXXX, [School 2] School Psychologist, report of January 4, 2013, which includes a summary and background of the Student's education and behaviors, and a description and analysis of a Woodcock-Johnson III Test of Achievement administered in December 2012.

Calculation	115	high average
Math fluency	101	average
Applied problems	116	high average
Writing fluency	80	low
Writing samples	103	average

25. The Student was successful academically in the 2012-2013 school year. He was placed in a mainstream classroom throughout the year. Though successful academically, he remained unfocused, required frequent redirection, and became frustrated at times.

26. The Student remained at [School 2] for the 2013-2014 school year.

27. In February 2014, the Student's disability impacted him in the areas of written language, self-management, and social emotional behavior. Academically, he understood the dynamics of fiction, which included stories, characters, and settings, better than non-fiction. He required assistance organizing his thoughts, and was not skilled at writing. In classes, he was easily distracted, and lost interest if the subject matter did not interest him. The Student became frustrated when he did not get his way. He needed an adult assistant to interact with peers. He had difficulty managing transitions and adapting to changes, and struggled with impulsivity and anxiety.¹²

28. Due to the Student's difficulty in complying with adult directions, controlling his body in a safe way, using appropriate language with peers and adults and controlling his emotions, a Behavior Intervention Plan (BIP) was implemented on March 12, 2013,¹³ and updated on February 17, 2014.¹⁴ These BIPs were incorporated into the Student's IEPs. The

¹² See XX Ex. #4, and MCPS Ex. #15, interim IEP, February 25, 2014, at pp. Bates stamp 000004-000006.

¹³ See MCPS Ex. #10, FBA March 12, 2013, and BIP of March 12, 2013.

¹⁴ See MCPS Ex. #14, FBA of February 19, 2014 and BIP of February 17, 2014.

reason for the BIPs was to assist the Student to manage his workload, and to access the curriculum without becoming frustrated or disrupting his peers. The BIPs required teachers to give the Student advance notice of any change in schedule or routine, and provided for adult intervention when the Student became visibly frustrated or upset, and breaks if needed.

29. The February 25, 2014 interim IEP¹⁵ included the following instructional and testing accommodations, services, and program modifications based upon the Student's extreme anxiety, frustration tolerance and attention difficulties:

- Human reader or audio recording for selected sections of tests
- Scribe
- Responses on test booklets
- Monitored test responses
- Mathematics tools and calculation devices
- Extended time
- Multiple or frequent breaks
- Changes of schedule or order of activities, extended over multiple days
- Reduced distractions to the Student and to other students
- 1:1 adult aide throughout the day, for support with social interactions during recess, for transition from structured to unstructured times throughout the day, for support in all academic activities, for support in art, music, PE, and media, and for prompting to refocus.

30. The February 25, 2014 interim IEP included the goals of reducing adult support over time, and adapting to changes without difficulty.

¹⁵ See MCPS Ex. #15, interim IEP, February 25, 2014.

31. The February 25, 2014 interim IEP included one hour of daily support in reading, writing, and math provided by the general education teacher in the general education classroom. It also included thirty minutes twice a week of pull-out time in math and reading, thirty minutes of pull-out time four times per week for writing, and thirty minutes four times per week of pull-out time for social skills instruction, all pull-out time with a special education teacher. The interim IEP also called for pull-out time once weekly for the Student to meet with a counselor.

32. On February 25, 2014, the Student was performing academically and behaviorally as follows:

- Reading – on grade level
- Oral language – on grade level
- Written language – on grade level
- Math – on grade level
- Behavior – Social/Emotional, below grade level, and Attention/Self-Management, below grade level

33. The February 25, 2014 interim IEP reflected “[School 1]” as the Student’s home school, and “[School 2]” as the Student’s service school.

34. [School 2] conducted a FBA on May 12, 2014,¹⁶ with results largely unchanged from the February 19, 2014 FBA. By May 2014, the Student was spending more time outside the general education classroom. He continued to have difficulty with focus, needed frequent redirection, and became frustrated at times. The Student’s BIP was updated May 21, 2014, without change from the February 17, 2014 BIP.

35. The May 20, 2014 IEP,¹⁷ composed in anticipation of transition to the

¹⁶ See MCPS Ex. #18, FBA, May 12, 2014.

¹⁷ See XX Ex. #36, and MCPS Ex. #19, IEP, May 20, 2014.

2014-2015 school year, included the following instructional and testing accommodations, services, and program modifications based upon the Student's extreme anxiety, frustration tolerance and attention difficulties:

- Human reader or audio recording for selected sections of tests
- Scribe
- Responses on test booklets
- Monitored test responses
- Mathematics tools and calculation devices
- Extended time
- Multiple or frequent breaks
- Changes of schedule or order of activities, extended over multiple days
- Reduced distractions to the Student and to other students
- 1:1 adult aide throughout the day, for support with social interactions during recess, for transition from structured to unstructured times throughout the day, for support in all academic activities, for support in art, music, PE and media, and for prompting to refocus.

36. [School 1] can provide all of the instructional and testing accommodations, services, and program modifications as described in the May 20, 2014 IEP.

37. There is no revision to the proposed educational program for the 2014-2015 school year, [School 1] and [School 2] offer identical supports to the Student, and the May 20, 2014 IEP for the 2014-2015 school year can be fully implemented at [School 1]. The May 20, 2014 IEP includes a required number of hours in special education, related services, and access to the general education curriculum. It includes support in the form of a full-time one-on-one

aide to assist the Student in maintaining his focus, limiting distractions, and assisting with social interaction both in and out of the classroom.

38. The May 20, 2014 IEP included the goals for the Student of reducing adult support over time, choosing strategies appropriately during whole class instruction to help remain focused on the teacher, recognizing what distracts him, verbally communicating the need to move to a quieter location to follow a task to completion, and shortening breaks to no more than five minutes. IEP goals also included managing feelings of frustration, anxiety, and sadness with adult support, and adapting to change without difficulty.

39. The May 20, 2014 IEP included one hour of daily support in reading, writing, and math provided by the general education teacher in the general education classroom. It also included thirty minutes twice a week of pull-out time in math and reading, thirty minutes of pull-out time four times per week for writing, and thirty minutes four times per week of pull-out time for social skills instruction, all pull-out time with a special education teacher. The IEP also called for pull-out time once weekly for the Student to meet with a counselor.

40. On May 20, 2014, the Student was performing academically and behaviorally as follows:

- Reading – on grade level
- Written language – on grade level
- Oral language – on grade level
- Math – on grade level
- Behavior – Social/Emotional, below grade level, and Attention/Self-Management, below grade level

41. The May 20, 2014 IEP reflected “[School 1]” as the Student’s home school, and “[School 1]” as the Student’s service school.

42. For the 2014-2015 school year [School 1] is the Student's home school and his assigned school.

DISCUSSION

Arguments of the Parties

The Student

The Student argues that transferring him to [School 1] is a change in educational placement that will deprive him of FAPE. He argues that he does not tolerate transitions well and that transfer to [School 1] will result in loss of educational progress. He also argues that the MCPS school assignment policy makes [School 2] his home school and that, under the IDEA, the Student must remain at his home school.

MCPS

MCPS argues that the Student was transferred to [School 2] to participate in an [Program] program and that he is no longer in that program. It argues that [School 1] is the Student's home school and the school identified in his IEP as the location at which special education services are to be provided. MCPS argued that transfer to [School 1] is not a change in educational placement, but merely a change of location at which the educational placement services will be provided. MCPS argues that the May 20, 2014 IEP is reasonably calculated to provide educational benefit to the Student, and that the Student has not met his burden of proof that transfer to [School 1] will deprive him of FAPE.

MCPS also argues that the OAH is without jurisdiction¹⁸ to entertain any issue the Student may have relating to denial of his COSA request.

¹⁸ MCPS did not file any prehearing Motion to Dismiss relating to the COSA issue. The Student argued, in part, that under MCPS policy, [School 2] was the Student's home school. I took Judicial Notice of MCPS Regulation JEE-RA, which governs the MCPS school location MCPS students will attend and admitted this Regulation as XX Ex. #37, over MCPS' objection. This resulted in later argument by MCPS that the OAH is without jurisdiction to entertain any appeal related to school assignment under the Regulation.

General Principles Applicable to IDEA Due Process Hearings

The IDEA provides an opportunity for Students to present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the Student, or the provision of FAPE. 20 U.S.C.A. § 1415(b)(6)(A) (2010); 34 C.F.R. § 300.507(a)(1).

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 (2005). Accordingly, the Student has the burden of proving, by a preponderance of the evidence, the allegations made against MCPS. Md. Code Ann., State Gov't § 10-217 (2014). To prove his case by a preponderance of the evidence, the Student must show that it is more likely than not that transferring him to his home school from [School 2] will result in the failure of the MCPS to provide a FAPE.

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, as supplemented by Maryland's Education Article, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008), and by COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The decision-maker must assess the evidence to determine whether the student's IEP and placement were reasonably calculated to enable the student to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

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

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to

which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . We therefore conclude that the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a Student to an IEP that is *reasonably calculated* to enable that Student to receive educational benefit. *Id.*

Under the IDEA, a disabled student is entitled to a “free appropriate public education,” which includes “special education and related services.” 20 U.S.C.A. § 1401(8). “Special education” is not limited strictly to academics and those “related services” which a child requires to learn academics. The IDEA defines “special education” as “specially designed instruction, at no cost to the parent or guardians, to meet the unique needs of a child with a disability.” 20 U.S.C.A. § 1401(25). The statutory term “unique needs” has been construed broadly to include “academic, social, health, emotional, communicative, physical and vocational needs.”

Seattle School District No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996).¹⁹

An IEP is defined as a “written statement” that includes “[a] statement of the child’s present level of academic and functional performance including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum” 34 C.F.R. § 300.320(a)(1)(i). “[T]he public agency must . . . [u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining . . . [w]hether the child is a child with a disability under §300.8; and . . . [t]he content of the child’s IEP” *Id.* § 300.304(b)(1). “The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence,

¹⁹ The notion that the requisite “special education” mandated under the IDEA is more than just academic progress is also found in the current regulations implementing the statute. 34 CFR § 300.26 (1999), *Special education*, provides.

- (a) *General.* (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—
 - (i) Instruction conducted in the class-room, in the home, in hospitals and institutions, and in other settings; and
 - (ii) Instruction in physical education.
- (2) The term includes each of the following, if it meets the requirements of paragraph (a)(1) of this section:
 - (i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;
 - (ii) Travel training; and
 - (iii) Vocational education.
- (b) *Individual terms defined.* The terms in this definition are defined as follows:
 -
 - (3) *Specially-designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
 - (i) To address the unique needs of the child that result from the child’s disability; and
 - (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.
 - (4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—
 - (i) Develop an awareness of the environment in which they live; and
 - (ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).
 - (5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

academic performance, communicative status, and motor abilities” *Id.* § 300.304(b)(4). “In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.” *Id.* § 300.304(b)(6).

Law Applicable to Issue Presented

Educational Placement

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that –

- (a) The placement decision –
 - (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation date, and the placement options; and
 - (2) Is made in conformity with the LRE²⁰ provisions of this subpart, including §§ 300.550 -300.554;
- (b) The child’s placement –
 - (1) Is determined at least annually;
 - (2) Is based on the child’s IEP; and
 - (3) Is as close as possible to the child’s home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services the he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

34 C.F.R. § 300.552 (2006).

²⁰ Least Restrictive Environment.

The term “placement” as used in 34 C.F.R. § 300.551²¹ means the educational setting in which the student is educated, rather than the precise location. “Section 300.551 describes different “placement” options a school must make available to a disabled student, including “regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” *A.W. ex rel. Wilson v. Alexandria Co. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004). Educational placement is not the educational location, but rather is the environment in which educational services are provided. *Id.*²²

The IDEA provides that an IEP must state “the projected date for the beginning of the services and modifications . . . , and the anticipated frequency, *location*, and duration of those services and modification.” *A.K. ex rel. J.K. and E.S. v. Alexandria City Sch. Bd.*, 484 F. 3d 672, 680 (4th Cir. 2007), *citing* 20 U.S.C.A. § 1414(d)(1)(A)(i)(VII) (*emphasis added in original*). If the IEP fails to identify a particular school at which the services will be provided, the IEP is not reasonably calculated to enable the student to receive educational benefits. *Id.* at 681. A change in location of the school where the services are to be provided is a change in placement only if the change results in a dilution of the quality of the student’s education or a departure from the student’s LRE-compliant setting. *Id.* at 681, *citing* *A.W. ex rel. S.W. and C.W. v. Fairfax Co, Sch. Bd.*, 372 F. 3d 674, 682 (4th Cir. 2004).

Educational placement, as used in the IDEA, means educational program – not the particular institution where the program is implemented. *White ex rel. White, v. Ascension*

²¹ Section 300.551 relates to the requirement for local educational agencies to provide a continuum of alternative placements for children with disabilities, such as regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions, and supplementary services such as resource room or itinerant instruction.

²² *A.W.* involved interpretation of the “stay put” provision of the IDEA. It held that to the extent that a new setting replicates the educational program contemplated by the student’s original assignment and is consistent with the principles of “mainstreaming” and affording access to FAPE, the goal of protecting the student’s “educational placement” served by the “stay-put” provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student’s education or a departure from the student’s LRE-compliant setting, a change in “educational placement” occurs. *A.K. ex rel. J.K. and E.S. v. Alexandria City Sch. Bd.*, 484 F. 3d at 682. In the instant case, the Student was not transferred to [School 1] over the Student’s objection, and was allowed to remain at [School 2] during this appeal. Thus, the Student made no allegation the IDEA’s stay-put provision was violated.

Parish Sch. Bd., 343 F. 3d 373, 379 (5th Cir. 2003), citing *Sherri A.D. v. Kirby*, 975 F. 2d 193 (5th Cir. 1992) (educational placement is not a place, but a program of services), and *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069, 1072 5th Cir. 1991) (both schools were under school board supervision, both provided substantially similar classes, and both implemented the same IEP. Under these circumstances the change of schools was not a change in “educational placement.”) Parents must be involved in educational placement, but must not necessarily be involved in site selection. *White*, 343 F.3rd at 379. If parent input is included in the site selection discussion, the input of parents cannot amount to the authority to veto the decision of the IEP team as the site at which special education services will be provided. *Id.* at 380.

A fundamental change in or elimination of a basic element of the educational program which adversely affects a child’s learning experience in a significant way constitutes a change in educational placement under the IDEA. *Cavanaugh v. Grasmick*, 75 F. Supp. 2d 446, 467-68 (D. Md. 1999). Whether a change in educational placement has occurred turns on whether the proposed change would substantially or materially alter the child’s educational program and is based on (a) whether the educational program set out in the IEP has been revised; (b) whether the child will be able to be educated with non-disabled children to the same extent; (c) whether the child will have the same opportunities to participate in non-academic and extracurricular services; and (d) whether the new placement option is the same option on the continuum of alternative placements. *Id.* at 468.

Under the Education for All Handicapped Children Act (EAHC),²³ a school district which falls under the aegis of the Act that proposes to move a handicapped child who is doing

²³ Predecessor to the IDEA, cited in *Burger* as 20 U.S.C.A. § 1400 *et seq.* See *Rowley*, which addressed the EAHC, not the IDEA. See also *Gadsby v. Grasmick*, 109 F. 3d 940, 942 n. 1 (4th Cir. 1997) (“Since the Education of the Handicapped Act and the IDEA are the same legislative act, however, we will refer only to the IDEA, even when discussing cases that interpreted the Act before this title was changed by the 1990 amendments.”)

well at one facility to a different facility has the burden of proof as to the propriety of the move. *Burger v. Murray County Sch. Dist.* 612 F. Supp. 434 (N.D. Ga. 1984).²⁴

On June 14, 2014, Judge Beryl A. Howard, U.S. District Court for the District of Columbia, issued a Memorandum Opinion in *R.E. v. District of Columbia*, Memorandum Opinion, Civil Action No. 14-319.²⁵ In *R.E.*, the school district notified the parents that the Student would be enrolled at a location where the student had never attended.²⁶ The Court addressed the effort by the Student to invoke the automatic injunction effect of 20 U.S.C.A. § 1415(j), the “stay-put” provision of the IDEA, to maintain his current educational placement, where he had been for the past four years, during the resolution of a due process complaint and appeal. The school district opposed the effort and argued “stay- put” did not apply because the school at which the student would be enrolled was a “location,” not an “educational placement,” and that the student would receive all of the special educational services detailed in the student’s IEP. The Court traced the rulings and decisions already issued in this student’s previous cases,²⁷ including a decision that directed the school to reevaluate the Student and to fund his private educational placement through the end of the 2012-2013 school year.

The *R.E.* Court recognized that the IDEA does not define “educational placement” as it appears over twenty times in the IDEA, or the term “then-current educational placement” of the

²⁴ *Burger* included a lengthy discussion on the issue of burdens of proof in challenges to the appropriateness of educational services, and the conflicting decisions of various Courts of Appeal relating to burden of proof. *Burger* was decided before *Schaffer v. Weast*, 546 U.S. 49 (2005). *Burger* also equated change of the *status quo* as a change of placement in reaching its decision that the school system, which proposed to move the student to a different location, had the burden of proof to demonstrate the change was appropriate. See *Burger*, 612 F. Supp. at 437.

²⁵ This Memorandum Opinion was provided by the Student.

²⁶ As directed by the District Court for the District of Columbia in a previous ruling relating to B.E., the school district IEP team met and crafted a revised IEP that provided for thirty-three hours of service per week, and included Extended School Year (ESY) services. However, the revised IEP did not identify the location at which those services would be provided. Later, a school district “Location of Services” team met, without the student or a representative of the student, and concluded the location at which the ESY services would be provided would be Eastern High School, which the student had never attended. The Student then filed a due process complaint challenging the sufficiency of the IEP for the 2013-2014 school year. In February 2014, just after the administrative hearing on the due process complaint, the school district sent a letter to the student informing him he was being transferred to High Road Academy in the District of Columbia.

²⁷ The student was before the Court seeking “stay-put” protection during the pendency of his fourth due process complaint.

stay-put provision of the IDEA, or define or explain how, or if, the two terms are intended to differ. The Court, after examining the language and legislative purposes of the IDEA, and cases from several federal circuit courts of appeal, concluded that removing the child from his private school - the private school which prior decisions of the Court had determined was appropriate - and moving him to High Road Academy, was a change in educational placement because the two schools were so different. The current private placement was an internet-only school with no campus or classrooms or access to peers, and the proposed placement was a traditional school setting with small-group classes led by a special education teacher. Under these circumstances, when the school the student was attending and the school the school district proposed to send the student were so different, the Court rejected the school district's "location is not educational placement" argument and concluded application of the stay-put provision of the IDEA was appropriate. The Court granted the student's petition to remain at his current location pending resolution of his due process complaint. *Id.* at 32.

OAH Jurisdiction over the COSA Issue

Subject matter jurisdiction is the court's ability to adjudicate a controversy of a particular kind. *John A., et ux., Next Friends of A.A. v. Bd. of Educ. for Howard County*, 400 Md. 363, 388 (2007), citing *Henderson v. United States*, 517 U.S. 654, 671 (1996). If, by the law that defines the authority of the court, a judicial body is given the power to render a judgment over that class of cases within which a particular case falls, the court has subject matter jurisdiction. *First Federated Commodity Trust Corp. v. Comm'r of Sec.*, 272 Md. 329, 335 (1974). The powers of the OAH and its ALJs are measured by the granting statute. *Boyd v. Supervisor of Assessments*, 57 Md.App. 603, 608 (1984). An ALJ cannot enlarge agency jurisdiction, nor may subject matter jurisdiction be conferred upon the agency by the courts or the parties before the OAH. *Boyd*, 57 Md.App. at 608. The scope of an administrative hearing is limited to the matters

contained in the “complaint” filed triggering the hearing. *John A*, 400 Md. at 389, *citing County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1465 (9th Cir.1996).

A county superintendent of schools shall decide controversies and disputes that involve the rules and regulations of the county board, and proper administration of the county public school system. Md. Code Ann., Educ. § 2-205(c)(2)(i) and (ii) (2014). A decision of the county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent, and may be further appealed to the State Board if taken in writing within 30 days of the decision of the county board. *Id.* at § (c)(3).

Under MCPS Regulation JEE-RA, students are expected to attend the school within the established attendance area in which they reside or are assigned in accordance with an IEP. MCPS Regulation JEE-RA, Para. II., effective February 22, 1980, with revisions.²⁸ The *home school* is the school to which the student is assigned based upon the Montgomery County Board of Education (Board) geographical boundary decision. *Id.* at para. III. A. (emphasis in original). The *assigned school* is the school to which the student has been assigned for a given school year. This is the home school in the absence of an approved Change of School Assignment (COSA). When a student is granted a COSA, the requested school becomes the assigned school. *Id.* at para. III. B. (emphasis in original). Students whose COSA’s were approved because they were attending a special/exempt program must return to their home school if they leave that program. *Id.* at para. D.1.(i).

If a COSA request is denied, the parent/guardian may appeal the decision to the superintendent of schools. The decision of the superintendent may be appealed to the Board within thirty days of the decision of the superintendent. *Id.* at E.1. and 2.

²⁸ Formerly Regulation 265-2, with revisions in 1992, 1994, 1997, 1998, 1999, 2000, 2002, 2003, 2006, 2010, 2011, 2012, and most recent revision December 13, 2013.

Testimony²⁹

The Student's Witnesses

XXXX XXXX, M.D., M.Sc.

Dr. XXXX has been the Student's treating psychiatrist since 2010. The Student's primary diagnoses are ADHD and anxiety disorder. Dr. XXXX believes the ADHD component is largely corrected. Dr. XXXX reviewed the IEPs in this matter and the current IEP for the 2014-2015 academic year and believes that current IEP is appropriate and that the Student is making academic progress and is meeting IEP goals. In his professional view, based on the Student's anxiety and difficulty navigating transitions, the Student should remain at [School 2] because of the potential he will regress academically if he is transferred. Dr. XXXX believes that the Student benefits from continuity, and there exists a genuine concern that progress will be lost if the Student is transferred.

His view is similar to the opinion he expressed to MCPS in a letter dated June 13, 2014, (Exhibit XX-11), which he authored in support of the Student's COSA appeal. In that letter, he opined that removing the Student from the familiarity of peers and trusted adults at [School 2] would likely have a detrimental impact upon (the Student's) emotional and developmental well-being and that, from his professional perspective, it would be preferable and appropriate for the Student to remain at [School 2].

Dr. XXXX relies upon the DSM-IV and DSM-V³⁰ when assessing his patients, and does not assign IDEA eligibility codes. He discussed a diagnosis of Oppositional Defiant Disorder (ODD) with both the Parents and the [School 2] school psychologist when the Student was transferred to [School 2] in 2010. ODD is usually captured under a broad IDEA category of ED. ODD is not the Student's primary medical diagnosis. Dr. XXXX uses a multi-disciplinary

²⁹ The testimony of each witness is in summary form unless a specific transcript page or exhibit page reference is made.

³⁰ Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), and Fifth Edition (DSM-V).

approach, taking into consideration what he learns about what happens at home, what he learns or observes about what happens at school, what he observes in his course of clinical sessions, and the Student's response to medication and other therapies to arrive at a treatment plan consistent with the best interests of the Student.

Dr. XXXX did not recall the specific educational test scores he reviewed or what specific test scores the Student's parents had provided. He was familiar with the school psychological test results and reports. He did not observe the Student in a classroom setting, and conceded that he is not and has never been an educator. He has visited both [School 2] and [School 1] on several occasions on behalf of other patients, and was most recently at [School 2] in 2008. He most recently observed a class at [School 1] in 2010. Dr. XXXX stated that both [School 2] and [School 1] are desirable schools.

[Mother], the Student's mother

The Student's first meeting with Dr. XXXX was also his first day of kindergarten at [School 3], a private school. Dr. XXXX's first impression was that the Student had ODD, but he made clear ODD was his impression, not his diagnosis. The Student was at [School 3] four days, after which [School 3] explained to her that it did not have the resources to deal with the Student's behavior issues. The Parents then enrolled the Student at [School 1], his home school. Within just over two weeks, the special education team and principal at [School 1] recommended the Student be enrolled in the [Program] program at [School 2], a program not available at [School 1]. [School 1] recommended the [Program] program, because the Student was not doing school work, was disruptive in class, was angry, and was running from the school building. After initial resistance because the Student had just transferred to [School 1], the parents agreed to transfer the Student to [School 2].

The Student spent two years in the [School 2] [Program] program, which did not go well initially. The transition to [School 2] and to the cluster program was traumatic for the Student. He regressed to early childhood and could not be managed at home. He physically attacked every adult assigned to the [Program] program on a regular basis. The Student developed strange habits such as spitting in his shirt, and his poor behaviors did not get better. However, by May 2012, near the end of first grade, several of the Student's behaviors got better, and he was removed from the [Program] program to the general student population. The Student's IEP did not include any pull-outs from the general classroom for special education,

The family moved to Baltimore in the summer before the 2013-2014 school year. The move was due, in part, to reports she received from [School 2] that one of the [Program] program aides had abused the Student by slapping or striking him on the face to show him what it felt like when he slapped others. She thought the Student needed a fresh start at a new school. The two months spent at a [BCPS School] area elementary school, a public school, were a disaster. She received a call from school administrators by 11:00 a.m. the Student's first day regarding disruptive behavior. The Student also ran away from the school, angry. The Student did not handle the transition to the new school well and had no classroom supports. After two months in Baltimore, the family moved back to Montgomery County. When the family returned, she e-mailed Ms. XXXX, then the principal at [School 2], for instructions as to where to enroll the Student because the family lived at a [School 1] home school address. Ms. XXXX told her that she consulted with XXXX XXXX, [Program] program administrator for the MCPS, and that she should reenroll the Student at [School 2].

On return to [School 2] the Student was placed in a XXXX Model Program (XXMP) with supports, and was not placed in the [Program] program. The Student was placed in the

general education classroom with a full-time one-on-one aide. The Student did well academically, though his behavior was inconsistent.

At a spring 2014 IEP meeting, the issue of geographic home school was brought up for the first time. Ms. XXXX, the [School 2] principal, told the parents that the Student's home school was [School 1] and that for the Student to remain at [School 2], the Parents would have to submit a COSA request at [School 1]. In April 2014, they did so, and the request was denied on May 21, 2014. Following the denial, the parents appealed to the County Superintendent of Schools, who denied the appeal. The parents did not appeal the County Superintendent's decision to the County Board of Education, and instead filed an IDEA due process complaint and invoked the IDEA's stay put provisions.

She talked to the Student about the potential that he will have to attend [School 1] instead of [School 2], and he does not want to transfer. The Student's response to school transfer in the past has been aggression, running, refusal to do school work, and non-compliance with school requirements. Although there remain some behavioral problems and social conflicts – especially with one student – the Student is doing well academically and she does not want to subject him to another transition which, she is concerned, will trigger the same aggressive, anti-social, and unwanted behaviors transitions have triggered in the past. She questioned the need for transfer when the Student is doing well where he is.

MCPS Witnesses

XXXX XXXX, School Psychologist, [School 2]

Ms. XXXX is in charge of the [Program] program at [School 2]. She provides assessment, counseling, and social skills training to [Program] program students, and consults with health care providers and crisis management teams. The purpose of the [Program] program is to provide intensive supports, including mental health supports, for [Program] program

students to access the school curriculum. The [School 2] [Program] program has two classes, depending on age, each staffed with two special educators, two para-educators, plus supports including a psychologist on call.

The Student's anxiety, impulsivity, refusal to work, and social withdrawal, as well as his defiant behaviors, were addressed in the [Program] program when he was assigned to it and where he remained until near the end of first grade. Part of the evaluation process included a Functional Behavior Assessment (FBA), designed to identify certain types of behaviors, and a Behavioral Intervention Plan (BIP), developed to address unwanted behaviors and to promote desired behaviors.

Exhibit Board #4 is Ms. XXXX's psychological assessment of April 5, 2012. The Student was referred to her to determine the Student's present levels of performance in areas of cognitive and social-emotional functioning. The Student exhibited impulsive and sometimes aggressive behaviors even before enrolling in kindergarten. Her overall impression as expressed in her assessment was that the Student has strong cognitive skills, in the high average range, overshadowed by behavior difficulties. (*See Exhibit Board #4, at p. 16*). Although the Student has strong nonverbal reasoning skills and verbal reasoning abilities, he has significant weaknesses in tasks that require sustained attention, paired with low frustration tolerance. This causes him to give up and act out. (*See Exhibit Board #4 at p. 17*).

In her evaluation, Ms. XXXX found the Student to demonstrate hyperactivity, impulsivity, and aggression, and have difficulty following rules and adapting to changes in situations. The Student was prone to displays of anxious and depressive behaviors, and was at times withdrawn. Her overall evaluation was that the Student had an emotional condition. He had an inability to learn that could not be explained by intellectual, sensory, or other health

factors, and his generally pervasive mood of unhappiness or depression and inappropriate behaviors had an adverse effect on his school performance. (*See* Exhibit Board #4, at p. 17).

[School 2] works with parents, and did so here, to arrive at a way to maximize access to the curriculum and maximize learning. The Parents were resistant to labels, especially labels such as XXXX, so the [School 2] IEP team used Other Health Impaired as an IDEA learning disability code because it most closely described the student's current executive functioning. The supports provided to a student are more important than what labels are used to warrant the supports. Currently, all supports provided to the Student are to address behavior issues, not learning disabilities.

XXXX XXXX, Special Education Teacher, [School 2]

Ms. XXXX does not work with the [Program] program. She is the Special Education Team Leader. She has known the Student since he was in first grade, where he was in a classroom adjacent to hers. After the Student left [School 2] after first grade, he returned in October 2012, in second grade. Ms. XXXX, the principal then, told Ms. XXXX that the Student was returning to [School 2] and would be assigned to her classroom.

The Student is on a XXMP IEP, which means, for most XXMP students, that the student attends a home school based on residential geography and all special education services are provided by the home school. At [School 2], the Student participates in a general education classroom with a one-on-one aide at all times, and is pulled out of general education to spend class time in her classroom. As the curriculum has become more challenging, the Student has spent more time in her classroom. The current year IEP and current FBA call for more time outside the general education classroom due to the Student's distractibility and anxiety, poor frustration tolerance, poor social skills, his tendencies to crumple paper, break items, throw

items, and to demonstrate high levels of dissatisfaction, and to comply with rules. (See Exhibit Board #15, Bates stamp pp. 00007, 000026, 000031, and 000032).

After the Student returned to [School 2] in October of the 2012-2013 school year, he was not returned to the [Program] program. The Student remained in [School 2] for the 2013-2014 school year as well. Ms. XXXX spoke to Principal XXXX about why the Student was at [School 2] when his home school was [School 1], but did not gain any insights into the decision that the Student remain at [School 2] other than that he seemed to be doing well at [School 2] and there was no good reason to make any changes when he was making progress. The Student's biggest challenges are navigating social situations and changes in routine.

Intellectually, the Student is very capable but he frequently refuses to do as he is told, has a negative attitude, and is intolerant of others.

Overall, the Student is making good progress. [School 2] has put several strategies and supports in place that seem to work. The approaches taken so that the Student has access to the general curriculum and learns what is being taught are a more-or-less constant process requiring frequent modification. Ms. XXXX is not familiar with what supports [School 1] may be able to offer, or if the supports would be less at [School 1] than at [School 2].

XXXX XXXX, Principal, [School 2]

Ms. XXXX was assigned as Principal at [School 2] on July 1, 2013, when the Student was in second grade. She succeeded Principal XXXX XXXX, who briefed her about the Student, generally, and told her the Student had a full-time one-on-one aide to address behavior issues. She assumed [School 2] was the Student's home school. In winter 2013-2014, the Student had a particularly bad day, was vocal that he hated school and had no friends, and was banging his head on his desk and could not be stopped or redirected. The Student was escorted to Ms. XXXX's room to cool off, but kept banging his head. This prompted a call for assistance

to the Montgomery County Crisis Intervention Team. Following this event, she examined the Student's records and discovered his home school was [School 1], and that no COSA request had ever been submitted or approved for his continued assignment to [School 2].

Ms. XXXX called her predecessor, Ms. XXXX, who told her that when the Student's family returned to Montgomery County from Baltimore, the Student's mother asked for guidance on where to enroll the Student. Ms. XXXX called the MCPS [Program] program coordinator, who told her to reenroll the Student at [School 2], as he had just left [School 2] at the end of his previous school year. Ms. XXXX told her that she never really considered the need for a COSA request, but probably should have.

Ms. XXXX's calls to Ms. XXXX and other administrators were made so that she could get a good understanding of the Student's history and of the proper method by which the Student could remain at [School 2].

The Student's one-on-one aide told her often that she thought the Student was miserable at school and that she (the aide) felt overwhelmed by the challenges of her assignment. The Student was assigned a one-on-one aide, because the IEP developed at the [BCPS School] school the Student attended before returning to [School 2] included a one-on-one aide.

In February 2014, at an interim IEP meeting, Ms. XXXX discussed the COSA issue with the Student's father and told him the Parents must submit a COSA request at [School 1] for the Student to remain at [School 2].

The Student presents many challenges, and requires constant supervision to prevent physical aggression against other students. Several measures have been put in place to prevent any face-to-face contact with one other student, in particular, with whom the Student has a love-hate relationship. The two students are drawn to one another, but when they are together teasing, arguments, and fighting follow. Despite the challenges the Student presents, she wants

all of the students at [School 2] to do well, including the Student. Ms. XXXX has discussed the Student several times with special education teachers, general education teachers, Ms. XXXX and Ms. XXXX. The general consensus is that the Student does not have a learning disability, and his progress is affected by poor personal interaction skills. Few behavioral goals have been met. Any recommendation that the Student return to the [Program] program has been met with strong resistance by the Parents, so IEP team meetings have steered away from that topic and the Student's current supports remain in place.

The February 2014 draft IEP recites “[School 1]” as the home school, and “[School 2]” as the service school. The May 20, 2014 IEP recites [School 1] as both home school and service school.

XXXX XXXX, Special Education Supervisor, MCPS

Ms. XXXX is the special education supervisor for thirty-seven schools in the MCPS. She attends IEP meetings at several MCPS schools. Montgomery County adopted a XXMP for students with learning disabilities approximately five years ago, and discontinued the learning center model. The XXMP is based on residential geography, with students assigned to schools based on their residential address. All special education supports are provided by the home school. Discrete programs, such as the [Program] program at [School 2], supplement the XXMP so that all MCPS students receive the supports needed to access school curriculum.

Special education supports at [School 1] and [School 2] are identical. Both schools can support up to thirty hours a week of special education services to a learning disabled student. Both schools provide occupational therapy and physical therapy, and both schools provide psychological support services. Services provided, including psychological supports, are tailored to individual students, based on assessment of need.

XXMP is a placement, not a location. Some students are not placed at a home school, because the home school does not have the necessary supports.

When initially enrolled in the MCPS, the Student was coded as Developmentally Delayed, a code that cannot be used after a student reaches seven years of age. The services the Student needed in Kindergarten were available in the [Program] at [School 2], but the Student is no longer in the cluster. The Student has never been assigned to [School 2] since his return to Montgomery County. He is not attending [School 2] because the services he needs are not available at [School 1].

Consideration is given to a student's best interests and welfare when a school assignment is made. For instance, if a student was assaulted at a particular school and the effects of the assault have a detrimental effect on learning, a school assignment change would be considered. The May 20, 2014 IEP describes the Student's then-current educational status, establishes annual educational goals, and details the specific supports and services that will be provided to the Student.

Analysis

The academic progress of the Student at [School 2] is not in issue. Both parties submitted testimony, IEPs, school progress reports, FBAs, BIPs, and various letters and emails. The Student submitted a Grade 4 Progress Report that reflects the Student meets the grade-level standard for proficiency in the topic in math, science, reading, and is making progress toward grade-level proficiency in writing.³¹ The Student's Grade 4 Progress Report also reflects the Student is progressing, but does not yet demonstrate, proficiency in work habits such as following rules and procedures, task completion, and collaboration. The testimony and exhibits point to academic progress, and academic performance at grade level.

³¹ See Exhibit XX #34-1, Grade 4 Progress Report.

The exhibits and testimony from both parties also contain numerous references to challenges faced by the Student when presented with change, unfamiliar material, or material of increasing complexity.

The COSA – Home School Issue

On April 14, 2014, the Student applied for a COSA to remain at [School 2]. On May 21, 2014, the request was denied. The Student appealed. On June 30, 2014, the MCPS superintendent denied the appeal. The Student did not file an appeal with the Board. The Board is the entity to which any issue relating to whether the Student’s COSA application was denied in error must be appealed. Md. Code Ann., Educ. § 4-205(c)(3), MCPS Regulation JEE-RA, para. E.

The scope of an administrative hearing is limited to the matters contained in the “complaint” filed triggering the hearing. *John A*, 400 Md. at 389, *citing County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1465 (9th Cir.1996). The due process complaint here alleges: “(The Student) has been denied a free, appropriate public education (“FAPE”) by MCPS due to its failure to offer an appropriate educational placement for him during the 2014-2015 school year.” At pages 6-7 of the due process complaint, the Student references the history of the COSA application, and its denial, and states: “Due to (the Student’s) complicated history of social/emotional problems and his inability to cope with unfamiliar people and surroundings, a change of placement would be detrimental to the meaningful progress he has made at [School 2] since kindergarten. The change of placement is not a COSA issue, but rather an IEP issue.”

The Student concedes in his Due Process Complaint that the issue before me has nothing to do with the COSA issue. While the COSA issue may be difficult to segregate from the IDEA issue, the fact remains that the denial of the COSA request and the reasons it was denied are not

before me, and I have no jurisdiction to entertain the issue. *John A., et ux., Next Friends of A.A. v. Bd. of Educ. for Howard County*, 400 Md. 363, 388 (2007), citing *Henderson v. United States*, 517 U.S. 654, 671 (1996).

The Student argued that under the IDEA he cannot be transferred from [School 2] because, for the past four years, [School 2] has been his assigned school, and thus his home school. The Student premises his argument on MCPS Regulation JEE-RA, para. III.B. which provides that “[t]he *assigned school* is the school to which the student has been assigned for a given school year. This is the home school in the absence of an approved Change of School Assignment (COSA),” paired with 34 C.F.R. § 300.552 (c), which provides that “[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” The Student’s argument ignores the fact that the May 20, 2014 IEP for the 2014-2015 school year states that “[School 1]” is the Student’s assigned school for provision of special education services for the 2014-2015 school year, and ignores that under MCPS policy, [School 1] is the Student’s home school. The Student also ignores the limiting language of the MCPS regulation that the “assigned school” is “for a given school year” and that the 2010-2011 through 2013-2014 school years, when the Student was attending [School 2], do not, under this limiting language, apply to the 2014-2015 school year. The Student also ignores the fact that but for his due process complaint, he would be attending [School 1], as his COSA request was denied and no further appeal was filed. I find the Student’s argument that he cannot be transferred under the IDEA because [School 2] is his “assigned school” and thus in the absence of an approved COSA, his “home school” and thus “the school that he or she would attend if nondisabled” under the IDEA, to be without merit.

The Location Issue

The term “placement” as used in 34 C.F.R. § 300.551³² means the educational setting in which the student is educated, rather than the precise location. Section 300.551 describes different “placement” options a school must make available to a disabled student, including “regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” *A.W.*, 372 F.3d at 682. Educational placement is not the educational location, but rather is the environment in which educational services are provided. *Id.* The IEP must identify a location at which educational services will be provided, and the May 20, 2014 did so here. *A.K.* 484 F. 3d at 680. A change in location of the school where the services are to be provided is a change in placement only if the change results in a dilution of the quality of the student’s education or a departure from the Student’s LRE-compliant setting. *Id.* at 681. Educational placement, as used in the IDEA, means educational program – not the particular institution where the program is implemented. *White*, 343 F. 3d at 379. Transfer of the Student to [School 1] is not a change in “educational placement” if [School 1] provides substantially similar supports to the Student as [School 2]. *Weil*, 931 F.2d at 1072. Here, the evidence is that [School 1] provides substantially similar supports.

A fundamental change in or elimination of a basic element of the educational program which adversely affects a child’s learning experience in a significant way constitutes a change in educational placement under the IDEA. *Cavanaugh*, 75 F. Supp. 2d at 467-68. Whether a change in educational placement has occurred turns on whether the proposed change would substantially or materially alter the child’s educational program and is based on (a) whether the educational program set out in the IEP has been revised; (b) whether the child will be able to be educated with non-disabled children to the same extent; (c) whether the child will have the same

³² Section 300.551 relates to the requirement for local educational agencies to provide a continuum of alternative placements for children with disabilities, such as regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions, and supplementary services such as resource room or itinerant instruction.

opportunities to participate in non-academic and extracurricular services; and (d) whether the new placement option is the same option on the continuum of alternative placements. *Id.* at 468.

No evidence has been presented to demonstrate that the Student's educational program would be adversely affected in a significant way by transfer to [School 1]. The February 2014 interim IEP has not been materially altered by the May 20, 2014 IEP, which anticipates the Student will attend [School 1]. The only change to the "[School 2]" IEP and the "[School 1]" IEP is a change of location. The Student did not demonstrate that he will not be educated with non-disabled children at [School 1]. The Student did not demonstrate that he will be deprived of opportunities to participate in non-academic and extracurricular services at [School 1], and did not present either proof or argument that he will be placed along a continuum of alternative placements to his detriment.

Under 34 C.F.R. § 300.552, the Student's placement is as close as possible to his home, and unless his disability requires some other arrangement, is the school that he would attend if nondisabled. Here, that is [School 1]. When the Student was initially enrolled at [School 2], he was in the [Program]. He has not been in the [Program] for over two years. His disability does not require some other arrangement than [School 1].

Here, the Student did not object to any of the goals or supports included in the May 20, 2014 IEP or allege that the IEP, as drafted, would deprive him of FAPE. The only objection by the Student to the IEP was the location at which the IEP would be implemented. Ms. XXXX, the MCPS special education supervisor with responsibility for services in thirty-seven county schools, testified that under the MCPS XXMP, the Student will receive identical educational supports at [School 1] as he receives at [School 2]. The Student's evidence, presented through Dr. XXXX and the Student's mother, was that the Student does not handle transitions well and may regress educationally if he is transferred to [School 1]. The May 20, 2014 IEP and all IEPs

that preceded it recognized the difficulty the Student has with transitions, and all of the IEPs included strategies to assist the student to manage and navigate them.

In the instant case, there is no revision to the proposed educational program for the 2014-2015 school year, [School 1] and [School 2] offer identical supports to the Student, and the May 20, 2014 IEP for the 2014-2015 school year can be fully implemented at [School 1]. The IEP includes a required number of hours in special education, related services, and access to the general education curriculum. It includes support in the form of a full-time one-on-one aide to assist the Student in maintaining his focus, limiting distractions, and assisting with social interaction both in and out of the classroom. The May 20, 2014 IEP is reasonably calculated to provide educational benefit to the Student, and it is thus appropriate. *Rowley*, 458 U.S. at 206-207; *A.B.* 354 F. 3d at 319.

The burden of proof that transfer to [School 1] will deprive the Student of FAPE is upon the Student. Both Dr. XXXX and [Mother] testified about their concern, given the Student's difficulty with coping with transitions, that transfer to [School 1] may cause the Student to regress educationally. However, merely suggesting the Student will be deprived of FAPE or raising doubts does not constitute proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). The Student has not met his burden. Thus, the Student's challenge to transfer to [School 1] because he will be deprived of FAPE must fail.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the decision of Montgomery County Public School System to transfer the Student to his home school for the 2014-2015 school year will not deny the Student a free, appropriate public education; and

I further conclude that the May 20, 2014 Individualized Education Plan developed by the Montgomery County Public School System, including the Student's home school, [School 1], for the 2014-2015 school year, was reasonably calculated to provide the Student educational benefit and a free, appropriate public education. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2014); COMAR 13A.05.01.07-09.

ORDER

I **ORDER** that the Student's request not to be transferred to [School 1] from [School 2] is **DENIED**.

December 29, 2014
Date Decision Issued

Michael R. Osborn
Administrative Law Judge

MRO/dlm

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.