

XXXX XXXX,

STUDENT

v.

PRINCE GEORGE'S COUNTY

PUBLIC SCHOOLS

*** BEFORE JOY L. PHILLIPS,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No.: MSDE-PGEO-OT-14-22633**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On June 26, 2014,¹ XXXX XXXX (Parent), on behalf of her son, XXXX XXXX (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 Prince George's County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on July 31, 2014. The delay in scheduling the telephone prehearing conference resulted from the following events: A Due Process Complaint was filed by the Parent earlier in the 2013-2014 school year, with a resolution meeting being scheduled as part of that complaint process. The parties reached an agreement on April 10, 2014 and as part of that agreement, the parties agreed to waive any future resolution meeting should a

¹ An Amended Due Process Complaint was filed on August 8, 2014, ultimately with permission of PGCPS. It corrected the school year dates to reflect requested relief from the 2013-2014 school year to the 2014-2015 school year.

new due process complaint be filed. A new due process complaint was filed on June 26, 2014, but the waiver was not brought to the attention of the OAH until July 18, 2014.

A telephone prehearing conference was then scheduled for July 31, 2014. Jeffrey A. Krew, Esquire, participated on behalf of PGCPS. Michael J. Eig, Esquire, and Benjamin Massarsky, Esquire, participated on behalf of the Student. Mr. Massarsky is licensed to practice law in the states of New York and the District of Columbia. He had moved for special admission in the Circuit Court for Prince George's County in order to represent the Parent and was awaiting a ruling by that court. By agreement of the parties, the hearing was scheduled for August 26, 28 and 29, 2014. Given the schedules of the attorneys, these were the earliest possible dates we could schedule the hearing. The parties waived the forty-five-day rule.

On August 21, 2014, the Parent requested that the hearing be postponed, because she had received word from the Circuit Court for Prince George's County that Mr. Massarsky's Motion for Special Admission had been denied. Mr. Eig appeared by telephone prehearing conference, along with Mr. Krew, to request a postponement to permit his associate, Paula A. Rosenstock, Esquire, an opportunity to prepare for the hearing. Mr. Krew did not object. I granted the postponement request. We agreed on new hearing dates of September 29 and 30 and October 1 and 2, 2014. Given the schedules of the attorneys, these were the earliest possible dates we could schedule the hearing.

I convened the hearing on September 29, 2014 at 9:30 a.m. in the Largo Government Center in Largo, Maryland. Ms. Rosenstock represented the Parent.² Mr. Krew represented the PGCPS. The hearing continued to September 30, 2014, October 1, 2014, October 2, 2014, October 6, 2014, October 24, 2014, October 29, 2014, November 10, 2014 and concluded on

² On September 29, 2014, Ms. Rosenstock informed me that Mr. Massarsky's motion to reconsider the denial was denied. Accordingly, Mr. Massarsky was permitted to assist trial counsel in this matter, but was not permitted to appear as counsel of record. Mr. Massarsky was present on several, but not all, of the hearing days.

November 12, 2014. The location of the hearing also included the PGCPS Board of Education Building on School Lane in Upper Marlboro, Maryland and the Prince George's County Government Building on McCormick Drive in Largo, Maryland.

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), (c), 300.515(a), (c) (2014). Due to the scheduling issue outlined above, the parties requested an extension of time until December 12, 2014 for me to issue a decision. 34 C.F.R. § 300.515(c) (2014); 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) (2014); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

ISSUES

1. Did the decision by the PGCPS to find the Student not eligible for an Individualized Education Program (IEP) until the end of the 2013-2014 school year deny him a free appropriate public education (FAPE)?
2. Was the IEP and placement developed by the PGCPS for the Student's 2014-2015 school year reasonably calculated to provide the Student with FAPE?
3. If there was a denial of FAPE, is placement at the [School 1], a separate nonpublic day school, at the expense of PGCPS, appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete exhibit list to this decision. (See Appendix II.)

Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Executive Director of XXXX (XXXX)
- XXXX XXXX, Certified Academic Language Therapist
- XXXX XXXX, Executive Director of XXXX Education Group; admitted as an expert in special education
- XXXX XXXX, Director of Education, [School 1]; admitted as an expert in special education

The PGCPs presented the following witnesses:

- XXXX XXXX, [School 2] Principal
- XXXX XXXX, Teacher at [School 3]; admitted as an expert in special education
- XXXX XXXX, Ph.D., PGCPs school psychologist; admitted as an expert in neuropsychology, psychopharmacology and school psychology
- XXXX XXXX, Special Education Department Chair, [School 4]; admitted as an expert in special education
- XXXX XXXX, Ph.D., PGCPs Special Education Instructional Specialist; admitted as an expert in special education

FINDINGS OF FACT

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

1. The Student was born on XXXX, 2002 and is currently twelve years old.
2. The Student attended a private school for the first two years of his elementary schooling. In the fall of 2010, he became a third grader at [School 5] ([School 5]) in Prince

George's County.

3. In the spring of 2011, the Student participated in the third grade Maryland State Assessment (MSA).³ His scores showed that he was at a basic level in reading and a proficient level in math.

4. Since July 11, 2011, the Student has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He was prescribed XXXX, a medication used in the treatment of ADHD symptoms.

5. The Parent discontinued the medication on or about September 5, 2012.

6. On September 14, 2011, a 504 Plan was developed for the Student when he began the fourth grade at [School 5]. He completed the fourth and fifth grades at [School 5] under his 504 Plan.

7. In the spring of 2012, the Student participated in the fourth grade MSA. His scores placed him in the proficient level in both reading and math.

8. At the request of the Parent, PGCPs arranged for psychological testing of the Student. XXXX XXXX, M.A., administered the tests on March 7, 2012 (XXXX Report).

9. The Wechsler Intelligence Scale for Children, Fourth Edition (WISC IV) showed the Student to have a consistent profile of a child performing average work in the areas of verbal comprehension, working memory and processing speed and, in the area of perceptual reasoning, performing high average work. The Student obtained a Full Scale IQ of 99, which is in the average range. Assuming a normal level of effort, a child with his scores should be able to read.

10. The Beery Visual-Motor Integration (Beery V-MI) showed the Student to have superior visual-motor integration skills.

³ I have attached Appendix I containing the results of all of the relevant tests, and they are hereby incorporated by reference.

11. On the Behavior Rating Inventory of Executive Function (BRIEF), which the Parent and two teachers completed, the Student was shown by the teachers to have scores within normal limits with the exception of the working memory scale, which was elevated.

12. The XXXX Report showed the Student to have deficits in the area of attention and executive functioning skills but showed a strong ability to learn. There was no support in the XXXX Report for segregating the Student in a special education school. Certain accommodations were recommended to assist the Student's learning in school.

13. On April 23, 2012, the Student underwent Woodcock-Johnson III (W-J III) achievement testing administered by PGCPS Special Education Chairperson XXXX XXXX (XXXX Report).

14. The W-J III showed the Student's oral language skills to be in the high average range. His academic skills were in the average range. His fluency with academic tasks and academic knowledge were in the high average range. His ability to apply academic skills was within the average range.

15. The W-J III showed the Student to be solidly average. Ms. XXXX recommended a continuation of the accommodations offered by the Student's 504 Plan.

16. In the spring of 2013, the Student participated in the fifth grade MSA. His MSA scores showed him to be proficient in both reading and math.

17. The Student's final grades from fifth grade at [School 5] were:

- | | |
|-------------------------------------------------------------|-------------|
| • Reading level | Below Level |
| • Reading | C |
| • Math | B |
| • Science | B |
| • Social Studies | C |
| • Social Skills | A |
| • Oral & Written Communication | B |
| • Physical Education, Work Habits, Art, Music and Health | A |

18. The Student's fifth grade academic work was commensurate with his test scores.

19. In the spring of 2013, the Parent entered the Student into a school lottery to attend the [School 2] ([School 2]), a new, innovative, "[Program]" charter school where students do virtually all of their learning on computer.

20. [School 2] has a unique curriculum: it uses what was called a blended approach using an online Web portal called XXXX. In some classes at [School 2], teachers are present in the classrooms to assist the students, but many of the classes have only virtual teachers, appearing via computer. Each student works his or her way through each lesson independently at his or her own pace. This allows motivated students to move more quickly through the curriculum than they could in a traditional environment; there is a minimum pace required. Lessons can be completed either at school or at home, if the lessons were not finished during the school day. Prior to a lesson, the student is required to complete preparatory work online. An online planner allows students to move through the curriculum as they master each step, and a separate log-in screen permits the parents to keep tabs on the child's progress.

21. At [School 2], a success coach works in the building to interact with and mentor students, organized into smaller groups called cohorts.

22. Educational success at [School 2] requires each student to be highly motivated and disciplined and a self-starter. It is helpful for the student to have a high reading level. Parents are called on to be actively involved with their child's education. Orientations are held for parents before the school year begins to provide information about the curriculum and the parental involvement that the program requires.

23. There is an online quiz children can take to help the parents gauge whether [School 2] would be a good fit for their child. The Parent did not have the Student take that quiz.

24. [School 2] accepts students with 504 Plans and IEPs.

25. In July 2013, before beginning the sixth grade at [School 2], the Student participated in a three-week educational program at XXXX (XXXX).

26. In August 2013, the Student began sixth grade at [School 2] under his 504 Plan and within weeks fell behind in his work and never caught up.

27. On October 2, 2013, the Student underwent psychological testing at the XXXX (XXXX), administered by XXXX XXXX, Ph.D. (XXXX Report).

28. One test administered by Dr. XXXX was the WISC IV, which had been administered by Ms. XXXX in March 2012. The Student scored as follows on the WISC IV:

| | March 2012 XXXX Report | October 2013 XXXX Report |
|-------------------------|---------------------------|-----------------------------|
| Verbal Comprehension | 93 | 83 |
| Perceptual Reasoning | 110 | 112 |
| Working Memory | 91 | 97 |
| Processing Speed | 103 | 100 |
| Full Scale IQ | 99 | 97 |

29. Dr. XXXX had the Parent complete the Adaptive Behavioral Assessment System, Second Edition (ABAS II), a test used to measure adaptive skills in someone suspected of having a low IQ. The ABAS II measures communication skills, such as saying hello and good-bye; community use, such as a crossing street; and social cues, such as asking for what you want and saying please and thank you. The Parent's composite score showed impairment in the Student.

30. Dr. XXXX had the Parent complete the Behavior Assessment System for Children, Second Edition (BASC II). The results showed a clinically significant level of behavioral symptoms, including withdrawal, atypicality and attention problems. Scores were in the normal limits for anxiety.

31. On the Wechsler Individual Achievement Test, Third Edition (WIAT III), the Student scored in the average range for understanding math concepts and performing math calculations. He scored in the low average to average range for math fluency. He scored in the average range for phonological awareness. He scored in the below average range for his ability to use phonetic strategies to decode non-words. He was in the low average range for reading single words and reading comprehension. In a test predicting the Student's reading fluency, he ranged from borderline to average range.

32. During the XXXX testing, the Student was no longer medicated for ADHD.

33. Dr. XXXX diagnosed the Student primarily with ADHD, followed by chronic vocal tic and specific learning disability in reading.

34. Dr. XXXX did not recommend a segregated special education school.

35. The Student underwent a speech and language test, the Clinical Evaluation of Language Fundamentals-4 (CELF-4), at XXXX, administered by XXXX XXXX, M.S., and XXXX XXXX, Ph.D., on November 12, 2013. His scores showed a mixed receptive/expressive language disorder regarding communication skills.

36. In August 2013, the Parent met with the [School 2] Principal, XXXX XXXX. The Parent told Ms. XXXX that the Student has a 504 Plan, has ADHD and was not medicated for the disorder. Ms. XXXX unsuccessfully tried to discourage the Parent from placing the Student at [School 2].

37. At a meeting held in September 2013, XXXX XXXX, the Student's success coach, joined Ms. XXXX and the Parent. Again they discussed the Student's ADHD. The Parent expressed little confidence in the Student's ability to do the school work. She appeared to be very negative.

38. On October 29, 2013, Ms. XXXX again met with the Parent, this time joined by XXXX XXXX, from XXXX. Ms. XXXX talked about the Student having dyslexia, something that did not appear in any previous report. At this meeting, the Parent said several times that the Student “can’t read” and “can’t read the school materials.” (Tr. at 181, Oct. 6, 2014.)

39. The Parent asked to remove content from the Student’s classes in an effort to allow him to catch up, but the XXXX program does not allow for that. Ms. XXXX and the Parent decided to remove electives from the Student’s schedule, to give him more time to work on his coursework.

40. The Parent was aware of the difficulties the Student was having in school. Two weeks after school started, the Parent began receiving emails from the Student’s teachers at [School 2], who expressed concern regarding the Student’s lack of attention to class and his unfinished work:

- On September 8, 2013, the math teacher, XXXX XXXX, told the Parent the Student was playing games on the computer rather than doing his math lessons.
- On September 20, 2013, the science teacher, XXXX XXXX, said that the Student had not prepared or completed any of the items that were required of him. She asked for a conference with the Parent.
- On October 9, 2013, XXXX XXXX, the language arts teacher, told the Parent that the Student was being disciplined for being off task. The Parent responded that she knew he was behind in his work, that he had ADHD and a 504 Plan and that she was worried about him. Ms. XXXX responded that she had been giving him preferential seating and extra time on tasks.
- On October 29, 2013, Mr. XXXX told the Parent about the Student’s off task behavior. He noted that the Student had improved during the month of October, but had returned to his earlier behavior of task avoidance and not completing academic assignments.
- On November 29, 2013, Mr. XXXX, the success coach, emailed to say that the Student had been disciplined for playing video games during the elective period. He added that the Student was getting further behind and was spending too much time walking around, talking to friends.
- On December 16, 2013, Mr. XXXX emailed to say that the Student was two

months behind in math class. To catch up, he would have to do his work in the evenings.

41. The Student was able to perform grade level work when he focused and actually started the work. When he completed the assigned work, he showed mastery of the lesson. Instead of doing actual school work, he often played video games or looked at internet images.

42. On December 17, 2013, [School 2] convened an IEP meeting. XXXX XXXX, Ph.D., school psychologist, was in attendance. Dr. XXXX reviewed the various psychological tests that were available to the IEP Team, including the XXXX Report and the results of the CELF-4.

43. In December 2013, the evaluative data and information shared by the Parent and teachers, did not support a conclusion that the Student qualified for special education services under IDEA.

44. On November 11, 2013, while the Student was enrolled in [School 2], the Parent applied for the Student's admission into the [School 1] ([School 1]), a nonpublic, special education school, for the following school year.

45. By January 2, 2014, the Student had completed the work at [School 2] as follows (assignments completed/assignments):

| | |
|---------------------------|-------------|
| Language Arts | (22/50) 44% |
| Math | (32/72) 44% |
| Science | (20/44) 45% |
| Social Studies | (9/41) 22% |
| Intro to Entrepreneurship | (17/52) 33% |
| Health | (14/30) 47% |
| Business Keyboarding | (22/43) 51% |

46. In the second semester, the Student's cohort was changed, allowing the Special Education Chairperson, XXXX XXXX, to be in the Student's math and language arts classes with him. The Student read the sixth grade level XXXX material aloud.

47. The emails from [School 2] to the Parent continued:

- On January 31, 2014, XXXX XXXX, the Student's new success coach, emailed the Parent with the Student's conference sheet. The Student was only passing math, business keyboarding and health at that point. He was behind in all other classes.
- On February 3, 2014, Ms. XXXX emailed the Parent to say that the Student had not even completed enough lessons in language arts to allow him to have a grade. She said that he has demonstrated ability but simply did not do the work.
- On February 26, 2014, Ms. XXXX emailed the Parent with his conference sheet. He was noted to be in danger of failing science, and he was failing language arts, math and social studies. He was passing business keyboarding and health. He was on track in home life.
- On March 16, 2014, Ms. XXXX emailed the Parent to express her concern about the number of overdue lessons the Student had and included the conference sheet. The Student was passing business keyboarding and health. He was in danger of failing home life. He was failing language arts, math, science and social studies.
- On March 26, 2014, Ms. XXXX emailed the Parent to express concern because the Student had seventy overdue lessons. She noted that "he makes good grades on the assignments that he completes, but the fact that he is not completing his work on time brings down his averages in his courses." (P. Ex. 87.)

48. By June 3, 2014, the Student had completed only 55% of his lessons from throughout the year.

49. The Student's ability to focus on his assigned sixth grade work improved when the computers were not used and the course material was presented in a more traditional format. On April 4 and 7, 2014, the Student was evaluated by school psychologist XXXX XXXX, Ph.D. Dr. XXXX observed the Student in the classroom. He administered the Process Assessment of the Learner II test (PAL II), a test that measures achievement with a focus on attention and executive functioning. He also administered the Gray Oral Reading Test (GORT 5) and the Gray Silent Reading Test (GLST). (XXXX Report)

50. Dr. XXXX's testing revealed that when reading silently, the Student's comprehension was extremely low. It was below average even when the Student was given additional time to read.

51. When reading aloud, the Student scored in the low average or average range. Two scores in the GORT 5 were low but were raised to low average when the Student was given accommodations, such as extra time, to complete the subtests.

52. The Student was able to decode pseudowords at an average rate. His working memory for letters and words was extremely low.

53. Reading tasks that require greater executive demands and control result in a low average score. The Student can read, but attention problems affect his reading, causing it to appear at times that he cannot decode. The Student is not diagnosed with dyslexia.

54. Dr. XXXX also had the Student's success coach complete the ABAS II. The Student scored in the upper end of the low average range for overall adaptive functioning, in the low average range for conceptual and social adaptive behaviors, and in the average range for practical adaptive behaviors.

55. Dr. XXXX considered all of the test results that had been compiled on the Student as well as his observations of the Student and the feedback from the Student's teachers.

56. On April 10, 2014, an IEP Team meeting was convened, with Dr. XXXX in attendance instead of Dr. XXXX. With the additional data from Dr. XXXX's testing, the IEP Team reviewed all of the evaluative data, and information shared by the Parent and teachers and identified the Student with a specific learning disability, making him eligible for special education services under IDEA.

57. The April IEP Team developed an IEP, placing the Student in co-taught classes at his local middle school, [School 4] ([School 4]), representing the least restrictive environment. Mr. XXXX was given an opportunity to respond to the draft IEP.

58. At the follow-up IEP meeting on May 7, 2014, the changes requested by Mr. XXXX were discussed and either incorporated into the IEP or rejected by the Team. A new version of the IEP was developed. The Student's placement at [School 4] in co-taught classes remained the same.

59. The IEP developed for the 2014-2015 school year identified the following areas of academic deficits:

- Reading fluency
- Reading comprehension
- Math problem solving
- Written language mechanics
- Written language expression
- Speech and language-receptive
- Speech and language-expressive
- Executive functioning
- Self-Management

60. The following accommodations, supplementary aids and services are provided in the IEP:

- Visual cues
- Visual organizer
- Graphic organizer
- Extended time
- Multiple or frequent breaks
- Setting accommodation to reduce distractions to the student on assessments
- Use of word processor
- Frequent and/or immediate feedback
- Build routines
- Use one direction at a time
- Use visual presentations
- Repetition of directions
- Check for understanding
- Allow use of organizational aids

- Use of word bank to reinforce vocabulary and/or when extended writing is required
- Altered/modified assignments
- Chunking of text(s)
- Reinforce positive behavior through non-verbal/verbal communication

61. Goals were developed for the following areas:

- Reading comprehension
- Math problem solving
- Written language expression
- Self-Management

62. The IEP provides for the Student to receive 23 hours, 45 minutes of special education services per week in the core content areas inside a co-taught, general education classroom in his local, public middle school.

63. On June 11, 2014, PGCPs notified the Parent that the Student would have to repeat the sixth grade due to his failing grades at [School 2]. The Student entered [School 4] as a sixth grader in August 2014, and he remains a student there.

64. The IEP was signed by the Parent on August 21, 2014 and the IEP has been implemented at [School 4].⁴

65. [School 4] is a general education middle school that allows students with IEPs to be educated in the general population with non-disabled peers. [School 4] also offers intensive, segregated special education classes within the same building.

66. The Student attends all co-taught classes for his core classes, which means that a special educator (co-teacher) is present in each of his classes to assist all special education students, including the Student, with staying on task and getting their class work done. The co-teacher accompanies the students from class to class, providing continuity.

⁴ The draft IEP called for the Student to finish the 2013-2014 school year at [School 2], receiving special education services inside the general education classroom in reading and math. It was thought this would be better for the Student than transferring to [School 4] so close to the end of the school year. (Bd. Ex. 24 at p. 30.) Because the Parent did not sign the IEP, the Student received no special education services while at [School 2].

67. The Student began the 2014-2015 school year slowly. In September 2014, less than four weeks after school started, he performed as follows:

- In science, the Student was not fully completing assignments, had failed to turn in any work relating to a STEM Fair project, and needed reminders to get back on task. The reminders were not very successful. The science teacher recommended that the Student be placed in an intensive class. His grade in September was D/E.
- In social studies (also called world cultures/geography), the Student required constant redirection. He often struggled with getting work completed, and he did poorly on tests and quizzes. He made friends easily and was not a behavioral problem. His grade in social studies was an E.
- In reading/language arts, the Student needed reminders to get started with his work. He had difficulty focusing and required one to one assistance to keep up. He required extra time to complete his classwork and assistance with writing information in his journal and completing homework. His grade in reading/language arts was a C.
- In math, he appeared able to grasp the concepts, though he needed redirection sometimes. He required extra time to do the work. His grade in math was a B.

68. The Student's [School 4] grades at the end of the first quarter, on approximately November 10, 2014, were as follows:

| | |
|--------------------------|---|
| a. Reading/language arts | C |
| b. Math | B |
| c. Science | D |
| d. Social studies | D |
| e. Music | A |
| f. Physical education | C |

69. The Student is making friends at [School 4] and seems to like the school. He is quiet and at ease and there is no sign that he is experiencing anxiety at [School 4].

70. The IEP for the 2014-2015 school year, placing the Student in co-taught classes in his local middle school, with the supplemental aids and accommodations listed, provides the

student with a free, appropriate public education in the least restrictive environment.⁵

DISCUSSION

Applicable Law⁶

The identification, assessment, and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010 & Supp. 2014), 34 C.F.R. Pt. 300 (2014); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a free appropriate public education (FAPE). 20 U.S.C.A. § 1412(a)(1)(A) (2010).

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

Implicit in the congressional purpose of providing access to [FAPE] 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.

Id. at 200-01. *See also In re: Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

Students with disabilities have the right to FAPE. The IDEA defines FAPE as follows:

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

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

⁵ One area was agreed upon by the Team, but it was omitted from the Services page of the IEP: 45 minutes weekly of speech and language services. This was included in the Prior Written Notice dated May 13, 2014. (Bd. Ex. 24 at p. 41.) The Student’s need for speech and language services was mentioned in passing in the background section of the due process request, but it was not raised as an error in the IEP and was not identified specifically at the pre-hearing conference as an issue, and so I have not addressed it. *See, Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F. Supp. 2d 547 (N.D. Ohio 2009); 20 U.S.C.A. §1415(f)(3)(B) (2010). Based upon a couple of comments made during the hearing, I concluded the error resulted from a simple oversight and that no one picked it up until after the hearing started, including the Parent’s attorneys. I presume PGCPs will, if it has not done so already, correct the IEP to include those services.

⁶ As part of their closing arguments, the parties submitted lists of case law and statutes for my review. I have reviewed every source and have included those sources in my discussion that I found relevant, reported, and helpful.

- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). Maryland law defines FAPE similarly. Md. Code Ann., Educ. § 8-401(a)(3) (2014).

To provide 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).

The question of whether a student is receiving FAPE has a procedural and a substantive component. The Supreme Court set out a two-part inquiry to determine if a local education agency, such as PGCPS, satisfied its obligation to provide FAPE to a student with disabilities. The Supreme Court noted that the first inquiry is whether a school district complied with the procedures set forth in IDEA. The second inquiry is whether the IEP, developed through the IDEA's procedures, was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit. *Rowley*, 458 U.S. at 206-07.

In this case there is no allegation that the IDEA's procedural safeguards were violated. The question presented here is whether PGCPS failed to identify the Student as eligible for special education services during the 2013-2014 school year and whether the Student's IEP and placement for the 2014-2015 school year are reasonably calculated to enable him to receive an

appropriate educational benefit.

While FAPE does not require “the best possible education that a school could provide if given access to unlimited funds,” *Barnett v. Fairfax County School Board*, 927 F.2d 146, 154 (4th Cir. 1991), it does require the state to provide personalized instruction with sufficient support services to permit the disabled child to benefit educationally. In turn, “educational benefit” has been construed to mean more than “trivial or *de minimis*” educational progress. *See, e.g., Conklin*, 946 F. 2d at 313; *Polk v. Ctrl. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988); *Alexis v. Bd. of Educ. for Balt. Cnty. Pub. Sch.*, 286 F. Supp. 2d 551, 559 (D. Md. 2003); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 328 (4th Cir. 2009).

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 nonpublic, that money can buy” or “all services necessary” to maximize educational benefit. *Hessler v. State Bd. of Educ. of Md.*, 700 F.2d 134, 139 (4th Cir. 1983) (citing *Rowley*, 458 U.S. at 200). Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207. *See also, D.B. v. Bedford Cnty. Sch. Bd.*, 708 F. Supp. 2d 564, 568 (W.D. Va. 2010).

“Educational benefit” requires that “the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child.” *Rowley*, 458 U.S. at 200 (emphasis added). *See also M.M. ex rel. D.M. v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 526 (4th Cir. 2002) (citing *Rowley*, 458 U.S. at 192); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a ““basic floor of opportunity that access to special education and related services provides.”” *Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (quoting *Rowley*, 458 U.S. at 201).

An “appropriate” education, however, does not mean that a student is able to maximize

his potential or to receive optimal services. *Rowley*, 458 U.S. at 200; *Burke Cnty. Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990). Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. *Conklin*, 946 F.2d at 313. 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 an appropriate educational benefit. *See also, Cnty. Sch. Bd. of Henrico Cnty. v. R.T.*, 433 F. Supp. 2d 657 (E.D. Va. 2006).

The Supreme Court has placed the burden of proof in an administrative hearing under the IDEA upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005). The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). In this case, the Parent must show (1) that PGCPS failed to find the Student eligible for special education services during the 2013-2014 school year; (2) that the Student's IEP for the 2014-2015 school year does not provide him with FAPE; and (3) that the proposed nonpublic placement at the [School 1] is appropriate. *See, School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985).

The IEP

An IEP is the "primary vehicle" through which a school provides a student with FAPE. *Simchick*, 553 F.3d at 319. The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *Greenville Cnty.*, 303 F.3d at 527; *see also*, 20 U.S.C.A. § 1414(d)(1)(A) (2010). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents, and their representatives, discuss the child's abilities and needs with school staff. The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant

indeed to second-guess the judgment of education professionals.” *Tice*, 908 F.2d at 1207.

In evaluating the IEP in this case, I have given due deference to the professional educators who know the Student in the classroom and developed the IEP for the Student.

Hartmann v. Loudon Cnty. Bd. of Educ., 118 F.3d 996, 1000-01 (4th Cir. 2001).

The IDEA and Maryland regulations require that parents have an opportunity to participate in the formulation of IEPs. 20 U.S.C.A. § 1414(d)(1)(B) (2010); COMAR 13A.05.01.07A(1)(a). This is a procedural requirement. *K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 1006 (N.D. Cal. 2008). The Parent cited the *K.S.* case in closing, but failed to raise any procedural error in this case. Presumably, she cited to the case in response to the IEP Team’s rejection of some of the Parent’s demands for the IEP, as discussed below.

Least Restrictive Environment

Under IDEA, the Student must be placed in the least restrictive environment to achieve 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). Mainstreaming disabled children in a general education setting where they have the opportunity to study and socialize with non-disabled peers is both “laudable” and required. *DeVries v. Fairfax Cnty Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989).

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

20 U.S.C.A. §1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2) (2014). *See also, Hartmann*, 118 F.3d at 1001.

As indicated above, in determining the educational placement of a student with a disability, the public agency must ensure that the placement decision is made by the IEP team in conformity with the least restrictive environment provisions, determined at least annually, be based on the student's IEP, and be as close as possible to the student's home. 34 C.F.R. § 300.116 (2014). The IDEA requires "great deference to the views of the school system rather than those of even the most well-meaning parent." *Lawson*, 354 F. 3d at 328; *see also*, *Greenville Cnty.*, 303 F.3d at 532-33; *Barnett*, 927 F.2d at 152.

The Parent argues that the mainstreaming requirements applicable to the public school system do not apply to private placements, and she is correct. *C.L. v. Scarsdale Union Free School Dist.*, 744 F.3d 826, 837 (2d Cir. 2014). However, it is a requirement for the school system under the IDEA and is a consideration bearing on the appropriateness of the parent's choice. *Simchick*, 553 F.3d at 327; *Sumter Cnty. Sch. Dist. v. Heffernan*, 642 F.3d 478, 487-88 (4th Cir. 2011).

Overview of this case

The Student is currently twelve years old. He attended a private school for the first two years of his elementary schooling. In the fall of 2010, the Student became a third grader at [School 5] in Prince George's County. On July 11, 2011, the Student was diagnosed with ADHD. On September 14, 2011, a 504 Plan was developed for the Student when he began the fourth grade at [School 5]. He completed the fourth (2011-2012) and fifth (2012-2013) grades at [School 5] under his 504 Plan.

At the request of the Parent, PGCPS arranged for the Student to undergo psychological testing administered by a PGCPS school psychologist, XXXX XXXX, on March 7, 2012 and achievement testing administered by PGCPS Special Education Chairperson XXXX XXXX on April 23, 2012.

In the spring of 2013, the Parent entered the Student into a school lottery to attend the [School 2], a new, innovative, “[Program]” charter school where students do virtually all of their learning on computer. In some classes, teachers are present in the classrooms to assist the students, but many of the classes have only virtual teachers, appearing via computer. [School 2] draws highly motivated students who work at their own pace. In the fall of 2013, the Student began sixth grade at [School 2] under his 504 Plan and within weeks, fell behind in his work and never caught up.

On October 2, 2013, the Parent arranged for the Student to undergo further psychological testing at the XXXX, administered by XXXX XXXX, Ph.D. On November 11, 2013, while the Student was enrolled in [School 2], the Parent applied for the Student’s admission into [School 1], a private, special education school.

On December 17, 2013, an IEP Team meeting was convened, with the Team determining that the existing 504 Plan was sufficient to accommodate the Student’s needs. In making that decision, it considered all of the available data, including the XXXX Report.

On April 4 and 7, 2014, at the request of the Parent, XXXX XXXX, Ph.D., a PGCPs school psychologist, conducted further psychological testing on the Student. On April 10, 2014, an IEP Team meeting was convened, and the Student was found to have a specific learning disability. At the follow-up IEP meeting on May 7, 2014, the Student was provided with an IEP placing him in co-taught classes at his local middle school, [School 4]. The Parent and her advocate disagreed with many aspects of the IEP, as well as the placement of the Student at [School 4]. They asked that the Student be placed in a small, segregated special education school, namely, [School 1]. The IEP included special education services for the remainder of the school year at [School 2], but those were not implemented because the Parent refused to sign the IEP.

On June 11, 2014, the Parent was notified that the Student would have to repeat the sixth grade due to his failing grades at [School 2]. The Student entered [School 4] as a sixth grader in August 2014, and he remains a student there. The IEP was signed by the Parent on August 21, 2014, and the IEP has been implemented at [School 4].

The Parent's Evidence and the IEP Meetings

The Parent presented the testimony of her educational advocate, XXXX XXXX. He is the Executive Director of the XXXX Group and an educational consultant. His many years in the field of special education provided him with a wealth of knowledge and experience.

Mr. XXXX was hired by the Parent on November 22, 2013 at the recommendation of someone at [School 1] in order to assist the Parent in having the Student placed there. Mr. XXXX reviewed a number of the relevant psychological reports, school reports, correspondence between the Parent and [School 2], and the 504 Plan. He spoke with two teachers at [School 2] and the then-Special Education Chairperson from [School 2], XXXX XXXX. Mr. XXXX observed the Student one time in his sixth grade class at [School 2], on December 11, 2013, for less than one and one-half hours, on the same day he spoke to the teachers. He attended three IEP meetings, first on December 17, 2013, which is the first time he met with the Parent, and again on April 10 and May 7, 2014. He never spoke personally with the Student until September 25, 2014, when he met with him in his home office to prepare for the hearing.

In his observations of the Student at [School 2] on December 11, 2013, where he was accompanied by Dr. XXXX XXXX from PGCPS, Mr. XXXX noticed that in the math class the Student was not engaged in the lessons on his computer, that he merely retyped certain numbers on his screen until the teacher was done with that lesson, or that he simply highlighted and unhighlighted words on the screen to look as though he were working while the teacher roamed the classroom. In the language arts class, the Student did not engage in the warm up exercise

(writing about one's favorite food), and his name was listed on the board as being extremely behind on his work at that point in the semester. When the students were told to work independently on their computers, the Student did no work. It was clear to Mr. XXXX that in general, the Student was not focused on his work and was not accomplishing any meaningful work at [School 2]. Notably, he never heard the Student read aloud.

Mr. XXXX testified that, based upon his review of all the documentation and his observations, he agreed with the existing diagnosis of ADHD. He said the Student has difficulties with reading, specifically in decoding, fluency and comprehension and has problems with written expression and grammar. He found the Student to be relatively strong in math, unless the math problem solving involves reading. Mr. XXXX emphasized that the Student has problems with working memory, anxiety and attention. He noted the Student's area of strength is perceptual reasoning.

Mr. XXXX advocated for an IEP at the December 17, 2013 IEP meeting, requesting that the Student be identified under IDEA as a student with an Other Health Impairment (OHI) for ADHD and as a student with a specific learning disability . His opinion was based on numerous data points, as he called them, but he seemed to give extra weight to the XXXX Report. He and Dr. XXXX clashed at the IEP meeting, with Dr. XXXX placing great weight on the 2012 XXXX and XXXX Reports and finding that the XXXX Report test results were generally consistent with the prior test results, but revealed only a few "splinter scores" in the sub-tests. Dr. XXXX did not agree that the XXXX Report made the Student eligible for special education services.

At the December 17, 2013 IEP meeting, the Team took into consideration the information from the Student's teachers that, in fact, the Student could read and otherwise do grade-level work, but chose not to, whether through a lack of interest or due to attention problems. The Team concluded that the 504 Plan was sufficient to accommodate his attention problems and

decided against an IEP.

Mr. XXXX left the IEP meeting believing that Dr. XXXX failed to thoroughly read the XXXX Report and give it due consideration, but I find otherwise, given Dr. XXXX's convincing testimony that he did read it just prior to the IEP meeting and that he did digest and consider the scores. In addition, Mr. XXXX and Dr. XXXX, who were both at all of the IEP meetings, confirmed that Dr. XXXX considered the XXXX Report.

There were two more IEP Team meetings, on April 10 and May 7, 2014. By this time, Dr. XXXX had also evaluated the Student, so the Team had additional evidence to review. Dr. XXXX attended the Spring 2014 IEP meetings in place of Dr. XXXX. Based upon his additional findings, which are set forth in detail below, the Team concluded that the Student could be coded with a specific learning disability in the area of executive functioning, and agreed to provide him with an IEP.

After the April 10 meeting, a proposed IEP was generated, and Mr. XXXX was given the opportunity to critique it. He presented a list of his criticisms and suggestions to PGCPS. That list was admitted into evidence and exhaustively discussed at the hearing. Many of his criticisms and suggestions were incorporated into an amended draft IEP. Some were rejected. I have summarized his points here and included the responses of the PGCPS in each item in an effort to show the extent to which PGCPS was responsive to the Parent's objections to the proposed IEP.⁷

1. To the section on areas affected by disability on page one of the IEP, at Mr. XXXX's request, the IEP Team added math problem solving, reading fluency, written expression, and executive functioning. The Team did not add reading decoding, attention to

⁷ Board Ex. 47 is a copy of Mr. XXXX's notes on the IEP that he marked up during the IEP meeting. Parent Ex. 93 is a clean copy of Mr. XXXX's notes, with each paragraph having been numbered during the hearing to assist in the taking of testimony and for clarity in this decision.

tasks, memory and dealing with anxiety. The Team did not believe there was enough data to support adding reading decoding as an affected area. Information regarding attention and memory was embedded in the executive functioning section of the IEP. The Team found no evidence of anxiety and thus, did not include that in the IEP.

2. Mr. XXXX objected to the present levels of performance included in the IEP, specifically that the instructional grade level performance showed the Student at the sixth grade level when the levels should have reflected his actual grade performance, which was lower. By contrast, the Team found that the Student could perform at grade level if he would just do the work. Dr. XXXX testified that the Team did reduce the grade level reflecting his executive functioning (“Self-management”) to fifth grade.

3. Mr. XXXX asked that reading decoding and comprehension be added to the section on reading fluency and that certain XXXX scores be included. Mr. XXXX and Dr. XXXX responded that the XXXX scores were considered by the Team, but they were not sufficiently statistically important to be included in the IEP. Dr. XXXX concurred. Reading comprehension comprised its own section.

4. He asked that math problem solving should be listed as an area of need, and this was done.

5. He complained that there was no “narrative describing self-management” in the four-page section on Executive Functioning. He asked that the Team describe “his need for improved attention, organizational and study skills, as well as self-advocacy.” This complaint was not clear to me based on the four-page narrative on executive functioning and the section on self-management included in the IEP. There are seven pages of accommodations and supplementary aids and services included in the IEP. There are two goals associated with self-management.

6. Mr. XXXX asked for a present level that included the Student's "weak working memory." Mr. XXXX testified that memory was included under executive functioning. Dr. XXXX added that PGCPs does not include working memory as a separate section in its IEPs. I do not believe the words "working memory" were included under executive functioning, but the issues related to working memory were addressed under supplementary aids and services.

7. He asked for a present level that included dealing with anxiety. The issue of anxiety seems to have been identified only by the Parent as she discussed the Student with various professionals. The educators who worked with the Student daily did not see signs of anxiety. They did acknowledge the possibility of frustration when he got so far behind in his work, but overall, he seemed to them to be a happy, calm child. For the same reasons outlined in paragraph one, the request to add a present level regarding anxiety was rightfully denied.

8. Mr. XXXX asked for assistive technology (AT)⁸ because he believes the Student requires access to a computer for writing, text-to-speech software, spelling and grammar software and a calculator. The Team did complete the Verbatim Reading Accommodation IEP Team Decision-Making Process Eligibility Tool (AT Tool). The AT Tool must be used by IEP teams before providing AT to any student. PGCPs requires AT specialists to complete certain assessments before AT could be provided to the Student.

9. He asked for verbatim reading of text to be added to Presentation Accommodations. This was a second AT issue. Mr. XXXX responded that verbatim reading would only have helped the Student to focus, but the Student did not require the material to be read because he could have read it himself. Dr. XXXX testified that the Student did not qualify for this service.

⁸ In his memo (P. Ex. 93), Mr. XXXX referred to page numbers 14 and 15 in discussing AT, reflecting the page numbers of the original IEP he was working from. In the amended IEP, that section is found on page 19 of Bd. Ex. 24.

10. In the section on Supplemental Aids and Services, Mr. XXXX asked for the following:

Preferential seating, small group and one to one instruction, support for initiation of tasks, model multistep problem solving, frequent cueing and prompting, checklist of steps for common routines, assisted note taking, support for use of daily agenda, adjusted workload (remove word “modified”), chunking of assignments with work checked after each part.

(P. Ex. 93.)

The amended IEP contains the following supplemental aids and services: use of word processor; frequent and/or immediate feedback; build routines; one direction at a time; visual presentations; repetition of directions; check for understanding; allow use of organizational aids; use of word bank to reinforce vocabulary and/or when extended writing is required; altered/modified assignments; chunking of text(s); reinforce positive behavior through non-verbal/verbal communication. The Team considered each of Mr. XXXX’s requests and provided the Student with the aids and services that were supported by the data.

11. He asked that the phrase “with evidence based instruction provided with fidelity” be added to each goal and that “formal and curriculum based assessment[s]” be added as evaluation methods to each academic goal instead of “informal procedures” as called for in the IEP. (Tr. at 140-142, Sept. 30, 2014; Tr. at 19, Oct. 1, 2014.) Another term for this is “method based instruction.” (Bd. Ex. 41.) Dr. XXXX explained that the PGCPS does not include the phrase “with evidence” in its IEPs. (Tr. at 183, Nov. 10, 2014.)

12. Mr. XXXX asked that reading decoding and reading fluency goals be added to the IEP, but they were not. Mr. XXXX and Dr. XXXX responded that the Team found no real evidence of this need. Dr. XXXX explained that reading was a weakness for the Student, but not to the extent that it should be included in the IEP, given the Student’s proven ability to read. Rather, the Team believed the reading issues stemmed from attention deficits.

13. To the math goal, Mr. XXXX asked that the title “math calculation” be changed to “math problem solving” and that was done. He also asked that the words “and solve the problem” be added to the end of the math goal and that a grade level be added to the math goal. Neither of these was done by the Team.

14. He asked that a goal in written mechanics be added to the IEP. Dr. XXXX explained that the goal was embedded and that they do not include a goal for every present level in the IEP. In his cross-examination, Mr. XXXX conceded that goals do not have to be written for every present level and that supplementary aids and services could be used to address an affected area.

15. Under the self-management goals, he asked that the words “with instruction, cueing, and prompting in a small group or one to one” be added. He asked that evaluation methods should include observation record and checklist. He asked that the objectives in the self-management goal be included in a different goal addressing self-advocacy. Finally, he asked for a new goal on initiating and sustaining attention to task. Mr. XXXX testified that attention issues were included under executive functioning. Dr. XXXX testified that the data did not support providing the Student with one-to-one instruction.

16. He asked that goals in demonstrating the understanding of strategies related to memory and in choosing strategies to deal with anxiety be added. Mr. XXXX and Dr. XXXX testified that memory issues were included under executive functioning and that goals related to anxiety were not warranted.

17. He asked for goals for expressive and receptive speech. This was not done, although the Team agreed to provide the Student with forty-five minutes per week of speech and language services.⁹

⁹ See *supra* note 5.

Mr. XXXX testified that he was surprised during the April 2014 meeting that the Team believed the Student could do grade level work and simply was not motivated to do the work, which explained why he was doing so poorly at [School 2]. Mr. XXXX believed this to be “new” information. (Tr. at 89-92, Sept. 30, 2014.) I find that difficult to understand given the discussion that took place at the December 2013 IEP meeting, as well as the number of emails sent from the [School 2] staff to the Parent throughout the school year informing her that the Student was playing computer games instead of doing his work and that he was capable of doing the work but simply refused. Those emails are discussed in more detail below.

In his testimony, Mr. XXXX, pointing to the XXXX Report, emphasized some of the low scores on the Gray Silent Reading Test as evidence of the Student’s learning disability. He asked at the April and May 2014 IEP meetings that the Student be placed in a “small class with a special education instructor who can give him direct instruction in reading, decoding, fluency, and comprehension, written mechanics and expression, math problem solving as well as the skills related to strategies for memory, strategies for improving attention to tasks, strategies for improving his handling of his anxiety.” (Tr. at 161, Sept. 30, 2014.) As I have illustrated, the IEP Team made many substantive changes in the IEP based upon Mr. XXXX’s input. The IEP Team coded the Student as learning disabled and developed an IEP but disagreed with Mr. XXXX and the Parent on the issue of placement of the Student. Dr. XXXX agreed with the Team that co-taught classes in a general education setting would provide the Student with FAPE.

The Parent provided perspective on the lengths to which she has gone to get the help she deemed necessary for her son. There is no doubt that she loves her son, is well-intentioned and wants him to do well in school. Since the Student was in the second grade she has taken him to various doctors and professionals to have him tested. Apparently on her own initiative and without any advice from an educational consultant, she applied for his admission to [School 2] in

hopes that working on the computers there would inspire him to study. Realizing immediately that the school was not a good fit for the Student, the Parent kept the Student in that school, continued to request an IEP, sought private testing at XXXX, applied to a private, special education school, hired an educational advocate and finally, hired an attorney. In the meantime, the Student failed the sixth grade and had to be held back one year.

It was clear from her testimony that the Parent did not understand how to help her son study or succeed at [School 2]. When asked about her involvement in helping the Student get his [School 2] work done in the evenings, she testified, “I’d sit with him. I’d try to work with him so he would try to get his work done... It was very hard for him to read at that level.” And, “I said I do help him, but it’s hard for him to learn and it’s hard for him to do his work.” (Tr. at 156, 176, Oct. 1, 2014.) When asked how he was “trying” at [School 2], she said, “He goes to school. He gets there. He tries. He comes home. He attempts to go on the computer and do the work.” (Tr. at 191, Oct. 1, 2014.) This is no criticism of the Parent. The [School 2] approach was unique and required different strengths than the Student possessed. But there was a disconnect between the school’s requirement that each student do his work independently and the Student’s inability to focus on and complete his work without constant supervision and prompting.

PGCPS suggested during the hearing that the Parent encourages “learned helplessness” on the part of the Student and that she does not believe he is as capable as his teachers believe. Indeed, the scores she provided on the ABAS II, showing that she believed the Student’s basic communication and adaptive skills were impaired, might support that theory. She testified that she did not like [School 4] because it was so big and too crowded and that the Student would be confused and unhappy there, yet the [School 4] teachers are reporting that although shy, the Student is making friends. She has told every professional who has tested the Student that he is

anxious, yet his teachers at [School 5], [School 2] and [School 4], see no anxiety in him and he has never been diagnosed with anxiety disorder. She said that he is “not normal” and believes that the Student would only be comfortable in school around other children who have similar disabilities as he has. (Tr. at 46, Oct. 6, 2014; Tr. at 180, Oct. 24, 2014.)

The Parent seems to cast a negative light on what the various educators have told her. For example, when the Student was still in [School 5], he did not do well on his MSA pre-test, so he was kept in during recess for several weeks in an effort to get him adequately prepared for the MSA. Instead of understanding that the school kept him in to help him prepare for the MSA, the Parent accepted the Student’s explanation that he was being punished. After speaking with Ms. XXXX about [School 2], instead of taking her advice and transferring the Student to a more traditional school, she took offense at what the principal had told her about the school not being a good fit. A third example is her interaction with Dr. XXXX at the December 17, 2013 IEP meeting. When he indicated that the Student could, in fact, read and that, barring a head injury or other traumatic event, a child does not become learning disabled in the sixth grade when he was not learning disabled in the third grade, the Parent took that as an insult to her son when no insult was intended.

The Parent testified that as of May 2012, she told her doctor that the ADHD medication was having a positive effect on the Student in school. By September 5, 2012, she reported to her doctor that she did not like the side effects of the medication and she discontinued it, with her doctor’s agreement. After that, she began treating her son’s ADHD with vitamins and removing sugar and certain kinds of bread from his diet, although she admitted that she does not know about treating ADHD. I noted that on September 5, 2012, when it was decided to take the Student off of his medications, the Parent informed the Student’s pediatrician that he was “not receiving any accommodations or interventions through the school system.” (P. Ex. 30.) In

fact, the Student had had a 504 Plan for over a year by that time and was under a 504 Plan at the time of that appointment.

The Parent came across as a pleasant if somewhat nervous woman. She is very supportive of the advice of her educational advocate, but discounts the advice from the professional educators. She was obviously well-intentioned and wants only the best for her son. But her biases, inaccuracies and lack of educational experience must be taken into account when weighing both her testimony at the hearing and what she reported to the professionals who evaluated the Student.

2013-2014 School year

In spring or summer of 2013, the Parent submitted a lottery application for the Student's admission into the new charter school, [School 2], for the 2013-2014 school year. This was the first year [School 2] was open, and it had only sixth and seventh grade students. The intention was that each year, another class would be added, to eventually include four years of high school. The staff at [School 2] was quite small at the beginning of the 2013-2014 school year.

XXXX XXXX, the principal of [School 2], testified that [School 2] has a unique curriculum: it uses what is called a blended approach using an online Web portal called XXXX. Each student works his or her way through each lesson and takes tests following each lesson before progressing to the next lesson. Lessons can be completed either at school or at home, if the lessons were not finished during the school day. Prior to each lesson, the student should complete preparatory work online. An online planner allows students to move through the curriculum as they master each step and a separate log-in screen permits the parents to keep tabs on the child's progress. Students at [School 2] have the opportunity to take college level classes and receive college credit during their high school years.

Teachers at [School 2] do not teach in the traditional sense. Rather, they facilitate

students' use of the online curriculum. Only some classes have "live" teachers in the classrooms with the students. For instance, during the 2013-2014 school year, live teachers were present in the math, language arts and science classes. The online curriculum is still used in those classes, but the live teachers are present in the school building to check students' work and act as facilitators. Virtual teachers are used in social studies and foreign languages, among other classes. Virtual teachers meet with students online a few times a month and are not in the students' building. A success coach works in the building to interact with and mentor students, who are organized into smaller groups called cohorts. Students work at their own pace, but there is a minimum pace required.

Educational success at [School 2] requires each student to be highly motivated and disciplined and a self-starter. It is helpful for the student to have a high reading level. Parents are called on to be actively involved with their child's education. Orientations are held for parents before the school year begins to provide information about the rigorous curriculum and the parental involvement that the program requires.¹⁰ There is an online quiz students can take to help the parents gauge whether [School 2] would be a good fit for their child. There is no indication the Parent had the Student take that quiz before applying for his admission to [School 2]. The Parent did email the school in March 2013 to ask about children with ADHD and an IEP and she was assured that "the school can readily accommodate unique learning requirements. Any student with special needs who has an [IEP] will benefit from the modifications and accommodations required by that IEP." (P. Ex. 35.)

¹⁰ A considerable amount of time was spent during the hearing attempting to discern whether the word "rigorous" appeared in the promotional materials of the [School 2] that would have been available to the Parent at the time she entered the lottery to have the Student admitted to [School 2]. Regardless of whether that one word appeared in the literature, it was clear from the testimony presented that [School 2] was billing itself as a school for exceptionally motivated students, which the Student was not. When she met with Ms. XXXX at the beginning of the school year, instead of realizing that the school was not a good fit, the Parent was offended by Ms. XXXX's suggestion that it was not. The Parent could at any time have requested that the Student be transferred to a more traditional school, but she did not, even though she applied to [School 1] on November 11, 2013 and told Mr. XXXX on December 27, 2013 that she wanted him "out of [School 2] as soon as possible." (P. Ex. 67.)

[School 2] is a “[Program]” school, which means it is up to the parent to decide whether to apply for their child’s admission, not up to the school system. The school system does not look at the child’s educational information from prior years until after the child has been accepted by lottery method. [School 2] does accommodate children with 504 Plans and IEPs.

In August 2014, the Parent met with Ms. XXXX. She told Ms. XXXX that the Student has a 504 Plan, has ADHD and was not medicated for the disorder. After talking to the Parent, Ms. XXXX tried unsuccessfully to discourage the Parent from enrolling the Student at [School 2]. At a meeting held in September 2013, XXXX XXXX, the success coach, joined Ms. XXXX and the Parent. Again they discussed the Student’s ADHD. The Parent expressed little confidence in the Student’s ability to do the school work. She appeared to be very negative, which concerned Ms. XXXX. On October 29, 2013, Ms. XXXX again met with the Parent, this time joined by XXXX XXXX, from XXXX. Ms. XXXX talked about the Student having dyslexia, something that did not appear in any previous report. At this meeting, the Parent said several times that the Student “can’t read” and “can’t read the school materials.” (Tr. at 181, Oct. 6, 2014.) Ms. XXXX responded that the Student’s teachers said he was capable and able to do the work if he would simply choose to do it. The Parent asked to remove content from the Student’s classes in an effort to allow him to catch up, but the XXXX program does not allow for that. They decided to remove electives from the Student’s schedule, to give him more time to work on his coursework.

Beginning only a few weeks after the semester had begun, the Parent began receiving emails from the Student’s teachers, who expressed concern regarding the Student’s lack of attention to class and his unfinished work. Due to the fast pace of the curriculum, the Student was already lagging behind.

- On September 8, 2013, the math teacher, XXXX XXXX, told the Parent the Student was playing games on the computer rather than doing his math lessons.

- On September 20, 2013, the science teacher, XXXX XXXX, said that the Student had not prepared or completed any of the items that were required of him. She asked for a conference with the Parent.
- On October 9, 2013, XXXX XXXX, the language arts teacher, told the Parent that the Student was being disciplined for being off task. The Parent responded that she knew he was behind in his work, that he had ADHD and a 504 Plan and that she was worried about him. Ms. XXXX responded that she did not yet have his 504 Plan, which is quite concerning. However, she noted that she had been giving him preferential seating and extra time on tasks.
- On October 29, 2013, Mr. XXXX told the Parent about the Student's off task behavior. He noted that the Student had improved during the month of October, but had returned to his earlier behavior of task avoidance and not completing academic assignments.
- On November 29, 2013, Mr. XXXX emailed to say that the Student had been disciplined for playing video games during the elective period. He added that the Student was getting further behind and was spending too much time walking around, talking to friends.
- On December 16, 2013, Mr. XXXX emailed to say the Parent that the Student was two months behind in math class. To catch up, he would have to do his work in the evenings.

By January 2, 2014, the Student had completed the work at [School 2] as follows:

| | |
|---------------------------|-------------|
| Language Arts | (22/50) 44% |
| Math | (32/72) 44% |
| Science | (20/44) 45% |
| Social Studies | (9/41) 22% |
| Intro to Entrepreneurship | (17/52) 33% |
| Health | (14/30) 47% |
| Business Keyboarding | (22/43) 51% |

In the second semester, the Student's cohort was changed, allowing the Special Education Chairperson, XXXX XXXX, to be in the Student's math and language arts classes with him.

The Student also received a new success coach, XXXX XXXX. The emails from the school continued:

- On January 31, 2014, Ms. XXXX emailed the Parent with the Student's conference sheet. The Student was only passing math, business keyboarding and health at that point. He was behind in all other classes.
- On February 3, 2014, Ms. XXXX emailed the Parent to say that the Student had not even completed enough lessons in language arts to allow him to have a grade. She said that he has demonstrated ability, but simply did not do the work.

- On February 26, 2014, Ms. XXXX emailed the Parent with his conference sheet. He was noted to be in danger of failing science, he was failing language arts, math and social studies. He was passing business keyboarding and health. He was on track in home life.
- On March 16, 2014, Ms. XXXX emailed the Parent to express her concern about the number of overdue lessons the Student had and included the conference sheet. The Student was passing business keyboarding and health. He was in danger of failing home life. He was failing language arts, math, science and social studies.
- On March 26, 2014, Ms. XXXX emailed the Parent to express concern because the Student had seventy overdue lessons. She noted that “he makes good grades on the assignments that he completes, but the fact that he is not completing his work on time brings down his averages in his courses.” (P. Ex. 87.)

By June 3, 2014, the Student had completed a total of only 55% of his lessons from throughout the year.

As shown in the above timeline, XXXX XXXX, the Special Education Chairperson at [School 2], became one of the Student’s teachers in the second semester. He was with the Student in math and language arts classes. He wanted to see firsthand how the Student performed in the classroom and he spent a great deal of time teaching and interacting with the Student. Mr. XXXX witnessed the Student reading the sixth grade level XXXX material aloud. Because of his personal knowledge of the Student’s actual abilities in the classroom, I place great weight on his testimony. Mr. XXXX concluded that the Student could do the assigned work if he simply focused on it, which occurred more when the computers were taken away and the material was presented in a more traditional way, something some of the [School 2] teachers began doing in response to parental requests. Mr. XXXX concluded that the failing grades the Student received at [School 2] did not reflect his ability, but rather his failure to complete the work.

While at [School 2], the Student talked to Mr. XXXX about his school work and told him that in the evenings, he liked to ride on his scooter instead of completing his work. He did not seem particularly concerned about being so far behind in his work. Mr. XXXX’s impression

from talking with the Student and the Parent was that the Parent did not work with the Student in the evenings or insist that he do his schoolwork. Instead, she simply said that “he can’t read” and that he was not capable of doing the work. (Tr. at 67, Oct. 24, 2014.)

Mr. XXXX was the primary writer of the Student’s IEP. He testified that the coding for learning disability was based solely on the extremely low silent reading score the Student earned when Dr. XXXX tested him. Mr. XXXX did not agree with the Team’s finding because he believed that, overall, there was insufficient data to conclude the Student had a learning disability, given the Student’s MSA scores and ability to do the work when focused. He believed the Student’s failure in school was reflective more of the inappropriateness of [School 2] for the Student than to a learning disability. Nevertheless, he helped develop an IEP in line with the Team’s decision.

Dr. XXXX XXXX, school psychologist, testified regarding the IEP meeting he attended in December 2013 and at the hearing, he helped to interpret the various test results. I found his testimony to be thorough and helpful, particularly because none of the psychologists who tested the Student was called to testify at the hearing.

Dr. XXXX explained that on tests featuring numerous sub-tests, such as the WISC IV, administered by Ms. XXXX and Dr. XXXX, the full scale score is the most reliable and the best predictor of achievement. In the Student’s case, the WISC IV showed the Student to have a consistent profile of a child performing average or, in the area of perceptual reasoning, above average work. In response to the Parent’s contention that the Student could not read, Dr. XXXX said that, assuming a normal level of effort, a child with his scores should be able to read. Two other tests were included in the XXXX Report, the BRIEF and the Beery V-MI, which showed the Student to have superior visual-motor integration skills. On the BRIEF, which the Parent and two teachers completed, the Student was shown by the teachers to have scores within normal

limits with the exception of the working memory scale, which was elevated, signaling a deficit in that area. In evaluating the results of the BRIEF, Dr. XXXX placed greater weight on the scores from the teachers' assessments as they reflected the Student in the classroom setting. In the main, Dr. XXXX found that the XXXX Report, conducted while the Student was being medicated for ADHD, showed the Student to have deficits in the area of attention and executive functioning but showed a strong ability to learn. There was no support in the XXXX Report for segregating the Student in a special education school, but certain accommodations were recommended to assist the Student's learning in school.

Dr. XXXX addressed the W-J III achievement test administered to the Student by XXXX XXXX on April 23, 2012. Dr. XXXX explained that these results show the Student's achievement to be "solidly average." (T. 10/29/14, p. 45.) Ms. XXXX recommended a continuation of the Student's 504 Plan's accommodations.

Dr. XXXX reviewed the Student's results on his fifth grade MSA, conducted in the spring of 2013. The scores showed the Student to be proficient in reading and math. Dr. XXXX also reviewed the Student's final grades from fifth grade, as follows:

- | | |
|-------------------------------------------------------------|-------------|
| • Reading level | Below Level |
| • Reading | C |
| • Math | B |
| • Science | B |
| • Social Studies | C |
| • Social Skills | A |
| • Oral & Written Communication | B |
| • Physical Education, Work Habits, Art, Music and Health | A |

Dr. XXXX found these grades to be commensurate with his test scores and emphasized

that a child would have to be able to read in order to get these grades.

On the morning of the December 17, 2013 IEP meeting, Dr. XXXX also reviewed the XXXX Report and the CELF-4. Dr. XXXX had administered an exhaustive number of tests on the Student, including the WISC IV, which had been administered by Ms. XXXX in March 2012. During the XXXX testing, the Student was no longer medicated for ADHD. Dr. XXXX concluded that the Student had ADHD as his primary diagnosis, followed by chronic vocal tic and specific learning disability in reading.

Dr. XXXX compared the scores on the WISC IV:

| | March 2012 XXXX Report | October 2013 XXXX Report |
|----------------------|---------------------------|-----------------------------|
| Verbal Comprehension | 93 | 83 |
| Perceptual Reasoning | 110 | 112 |
| Working Memory | 91 | 97 |
| Processing Speed | 103 | 100 |
| Full Scale IQ | 99 | 97 |

Dr. XXXX was not overly concerned about the drop in the Student's full scale IQ score from 99 to 97 for a couple of reasons. Unlike the XXXX Report, which included a confidence interval of 95%, the XXXX Report does not include a confidence interval, which would have provided a range within which the scores might actually fall and still be considered reliable. In fact, he said, the similarities of the scores enhance the reliability of the earlier results.

Additionally, he considered that the Student was no longer medicated at the time of the XXXX Report.

Dr. XXXX did not understand why Dr. XXXX had the Parent complete the Adaptive Behavioral Assessment System, II (ABAS II) because that test is used to measure adaptive skills in someone suspected of having a low IQ, which did not fit the Student's profile at all. The ABAS II measures communication, such as saying hello and good-bye; community use, such as crossing the street; and social cues, such as asking for what you want and saying please and

thank you. The Parent's composite score showed impairment. Dr. XXXX surmised that perhaps the Parent was "overpathologizing [the Student's] adaptive functions." (Tr. at 100, Oct. 29, 2014.)

Dr. XXXX also had the Parent complete the BASC II. The results showed clinically significant level of behavioral symptoms, including withdrawal, atypicality and attention problems. Scores were in the normal limits for anxiety.

On the WIAT III, the Student scored in the average range for understanding math concepts and performing math calculations. He scored in the low average to average range for math fluency. He scored in the average range for phonological awareness. He scored in the below average range for his ability to use phonetic strategies to decode non-words. He was in the low average range for reading single words and reading comprehension. In a test predicting the Student's reading fluency, he ranged from borderline to average range.

Regarding the WIAT III administered by Dr. XXXX, Dr. XXXX said that the scores were somewhat lower than those on the W-J III administered in March 2012, but not alarmingly so. Specifically, he was asked to look at the scores for Pseudoword decoding, 82 (12th percentile), and reading comprehension, 81 (10th percentile) and Dr. XXXX's conclusion that these scores indicated the Student could only read at a 2.2 or 2.0 grade level, respectively. The Parent argued that these scores show the Student cannot read at grade level. Dr. XXXX explained that educational professionals focus on the grade level where the child is actually working in school and that grade levels given as a result of a clinical test outside of the context of the school environment are not as reliable. He attributed the Student's lower scores to a lack of attention, the possibility that Dr. XXXX used the Diagnostic and Statistical Manual-4 (DSM-4th ed.) standards rather than the newer DSM-5 standards, which provides clinicians with more flexibility in interpreting scores, and the Student not being medicated. He said that under the current edition

of the DSM, the Student's scores would not categorize him as learning disabled and nothing in the XXXX Report convinced him otherwise.

In general, Dr. XXXX testified persuasively that the Parent and her advocate were placing too much emphasis on a few low scores from the XXXX Report rather than looking at all of the data that was available, including prior tests, work samples, MSA results, grades and observations of the Student in the classroom by the teachers who knew him best and believed that he was fully capable of doing grade level work. Although he considered the XXXX Report in developing an IEP recommendation at the December 2013 IEP meeting, he did not conclude the Report added anything new to the universe of information the Team already had. Dr. XXXX concluded that the Student did not have a learning disability. Accordingly, he did not change his opinion that the Student was best served by a 504 Plan and that identifying the Student as a student with a specific learning disability was inappropriate.

Dr. XXXX noted that in the XXXX Report, educational recommendations were made, even though, he said, such recommendations are outside the purview of the expertise of clinicians. Specific note was made of Dr. XXXX's use of the words "ideally" and "maximal" on page 11 of the Report when describing the Student's desirable educational placement. (Tr. at 127, Oct. 28, 2014; P. Ex. 49.) I noticed that Dr. XXXX did not have any information from the Student's teachers in writing her Report, other than Ms. XXXX and Ms. XXXX, from XXXX. I have discussed their testimony at the end of the decision.

Dr. XXXX found that the Student has ADHD and vocal tic which might qualify him for an IEP under the OHI classification and which place him at "substantial risk" for anxiety, social problems and learning disabilities. (P. Ex. 49, at 10.) In her narrative, she did not conclude that the Student had a learning disability, and on page fourteen of her report, she did not list learning disability as a diagnosis. On page ten of her report, however, she listed it as an Axis III

diagnosis. She did not recommend a segregated special education school. Instead, she wrote, in pertinent part:

- It is recommended that [the Student's] mother request an IEP meeting to review the results of this assessment and discuss his qualification for an IEP. Given the teacher and administration report of significant concerns related to academic skills and progress, there appears to be evidence of an educational disability and it is my belief that [the Student] qualifies for an IEP under the Other Health Impaired disability classification (ADHD and tics).
- Ideally, [the Student's] academic setting should include the following characteristics for maximal academic progress:
 - Reduced class size to limit distractions and allow for increased one-to-one instruction when needed.
 - Integrated special education support for language and reading.
 - A teacher with experience managing ADHD, reading disorders, and a willingness to learn about tic disorders.
 - If the family wishes to pursue recommendations related to the [School 1], it is recommended that they contact the school and visit to learn more about their services. It may also be helpful to share this report in order to determine if the services are a good match for [the Student.]
- It is recommended that [the Student] receive special education services targeting reading.
 - Given his difficulty with attention, [the Student] would obtain maximum benefit from having a portion of special education services administered in a quiet, one-to-one or small group setting.

(Id.)

At the December 2013 IEP meeting, Dr. XXXX got the impression that Mr. XXXX was convinced that the Student should be coded as learning disabled and that he was not interested in a coding of Other Health Impaired (OHI), as suggested by Dr. XXXX. Apparently, the IEP meeting became heated when Mr. XXXX insisted that the Student needs an IEP because “he needs to learn how to read.” (Tr. at 143, Oct. 29, 2014.) Dr. XXXX responded that the Student could read; he just was not a good fit in [School 2] due to his attention issues. He explained that

lack of motivation is not a symptom of ADHD, but that attention issues only make the temptation to play games or look at images on the computer more difficult to resist; the Student had difficulty starting work but not an inability to do the work. Plenty of children with ADHD are motivated to work hard in school and are able to do well, he said.

In his testimony, Dr. XXXX also interpreted the psychoeducational test conducted by Dr. XXXX XXXX on April 4 and 7, 2014.¹¹ Dr. XXXX was not called to testify. Dr. XXXX reviewed all of the data previously collected on the Student, observed the Student in a classroom at [School 2] and administered the PAL II, a test that measures achievement with a focus on attention and executive functioning. He also administered the GORT 5 and the GLST. These tests revealed that when reading silently, the Student's comprehension was extremely low. It was below average even when the Student was given additional time to read. I found Dr. XXXX's opinion that silent reading measures attention more than reading ability to be informative. When reading aloud, the Student scored in the low average or average range. Two scores in the GORT 5 were low, but were raised to low average when the Student was given accommodations, such as extra time, to complete the subtests. The Student was able to decode pseudowords at an average rate. His working memory for letters and words was extremely low. Dr. XXXX did not find that the Student has dyslexia. He found that the Student can read, but that attention problems affect his reading, causing it to appear at times that he cannot decode.

Dr. XXXX also asked the Student's [School 2] success coach, Ms. XXXX, to complete the ABAS II test, to compare a teacher's observations to the Parent's. Ms. XXXX placed the Student in the upper end of the low average range for overall adaptive functioning, the low average range for conceptual and social adaptive behaviors and in the average range for practical adaptive behaviors.

¹¹ Within this report, Dr. XXXX erroneously used the dates of May 5 and 7, 2014, but the actual testing dates were April 4 and 7, 2014. (Bd. Ex. 22. at 2.)

In sum, Dr. XXXX wrote that,

[The Student's] inattention and lack of initiation may be the result of inefficient processing of written information. Conversely, his diagnosed ADHD/Primarily Inattentive Type may interfere with his ability to follow through on the processing of information, especially written text.

(Bd. Ex. 22, at 5.) Dr. XXXX testified that the results demonstrated an attention problem and that Dr. XXXX concluded the issue was either executive functioning or attention.

Dr. XXXX made a number of recommendations based upon his evaluation of the Student, including:

- [The Student] will need support in the classroom while attempting to decode and comprehend while reading.
- If left to his own initiative, it is unlikely that [the Student] will complete an average amount of work. He will benefit from encouragement to stay focused and continue to work.
- [The Student] appears to comprehend better when he reads aloud, and whenever possible, he should be allowed to do so.
- [The Student] will likely benefit from accommodations designed for children with attention difficulties such as, preferential seating, reduced distractions in the classroom, and frequent encouragement/reinforcement.

(Bd. Ex. 22, at 5.) He did not recommend a nonpublic, segregated special education school.

Dr. XXXX's findings were ultimately used by the IEP Team in determining that the Student has a specific learning disability under IDEA and was thus eligible to receive special education services through an IEP. Dr. XXXX was not present at the April 2014 IEP meeting when Dr. XXXX's report was used by the Team. He spoke with Dr. XXXX after the meeting to understand the reasoning behind finding that the Student had a learning disability even though he can read. Dr. XXXX told him that the focus was on individualized instruction, which could have been provided under either a 504 Plan or an IEP, but that the Team decided to go with the IEP because the Student might require additional assistance as he entered high school, when executive functioning becomes more of an issue. Likewise, the Team believed that the Student

should be identified as a student with an OHI or a specific learning disability for executive functioning, but they decided on specific learning disability. The Parent agrees with this identification.

Dr. XXXX XXXX, Special Education Instructional Specialist, supervises the special education programs in eleven Schools in Prince George's County, including [School 2]. She attended the December 2013 IEP as well as the April and May 2014 IEP meetings. She was also present on December 11, 2013 when Mr. XXXX observed the Student at [School 2] and observed the Student informally in April and June 2014. She testified that both Mr. XXXX and she felt [School 2] was not a good fit for the Student after observing him on December 11, 2013.

Dr. XXXX disagreed with Mr. XXXX's opinion in December 2013 that the Student qualified for an IEP. In part, she said, she did not want to find that the Student qualified for special education services based on his performance in a non-traditional environment, namely, [School 2]. She also listened to the Student's teachers, who said he could do the work, but did not act interested in school and instead of working, played games on the computer. She reviewed his MSA scores and his grades from his more traditional elementary school and decided that the Team did not have sufficient data to support a finding that he was eligible for special education services. By the time of the April IEP meeting, the Team had the additional scores from Dr. XXXX's testing and the Student was failing at [School 2], so she agreed that something different had to be done.

I found Dr. XXXX's testimony to be helpful and persuasive. At each step in this case, she considered all of the data the Team had in reaching her conclusions, not just one piece of it- "multi-confirming data," in her words. (Tr. at 191, Nov. 10, 2014.) She knew the Student and observed him in school. She was familiar with [School 4] and, in April 2014, was able to tell the Team that the Student's needs could be met in the co-taught classes there. After the

Team found that the data supported a finding that the Student qualified for special education services, she persisted in her opinion that the nature of his disability did not warrant self-contained classrooms. She also indicated a willingness to modify her opinion once she had seen the Student function in a traditional setting with the services provided by the IEP.

Contrary to the Parent's argument, I do not conclude that just because PGCPs ultimately found the Student eligible for special education services in April 2014, its decision in December 2013 finding him not eligible was necessarily wrong. The April IEP Team had additional information that was not available to the Team in December. Dr. XXXX and the December Team carefully reviewed all of the existing information and reached a considered conclusion that the Student could be served by the accommodations offered by the 504 Plan. In April, the Team's composition had changed, with Dr. XXXX taking the role as school psychologist. The Team had the benefit of additional tests that provided the basis for a finding of learning disabled. By that point, the Student had been in the non-traditional school for a significant period of time, giving the Team more information about how he performs in that environment. The Team acceded to the Parent's request, provided a solid foundation for its decision, and found the Student to be learning disabled. This decision, however, does not negate the IEP Team's December 2013 conclusions. A School system has to have the latitude to change and update its educational programs based on new information. *See Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990). And while I found Mr. XXXX extremely experienced and knowledgeable, his role in this case was to advocate for the Parent and the Student. The Parent wants the Student to be placed in [School 1] and she hired the advocate to help her accomplish that.

The only educational professional who believes that the Student requires a nonpublic special education placement is the Parent's educational advocate, Mr. XXXX. Neither Ms.

XXXX in 2012 nor Dr. XXXX in 2014 recommended placement in small, self-contained classrooms. Dr. XXXX recommended small class size and one-to-one instruction where possible, with integrated special education support for language and reading, but was clear that this recommendation constituted the “ideal” situation that would maximize his academic progress, a standard out of line with the legal standard imposed on PGCPS. (P. Ex. 49, at 11.)

[School 4], 2014-2015 School year

The Student is currently enrolled in [School 4], in the sixth grade, under the May 7, 2014 IEP, which the Parent signed on August 21, 2014. XXXX XXXX, Special Education Department Chairperson at [School 4], testified that [School 4] is a general education middle school that permits students with IEPs to be educated in the general population with non-disabled peers. [School 4] also offers intensive, segregated special education classes within the same building. [School 4] was built a few years ago and is considered in Prince George’s County to be a state of the art facility. The halls for each grade are separated. The Student could be transferred to self-contained special education classes by the IEP Team if it deemed the transfer warranted.

The Student attends all co-taught classes for his core classes, which means that a special educator (co-teacher) is present in each of his classes to assist all special education students, including the Student, with staying on task and getting their class work done.¹² The co-teacher accompanies the students from class to class, providing continuity.

¹² On the last day of the hearing, during the rebuttal phase, the Parent testified that on the previous day, November 11, 2014, at a parent-teacher conference, XXXX XXXX, the Student’s co-teacher, told the Parent that she was getting her own classroom and thus, would no longer be co-teaching the social studies class. This information did not impact my decision, as there was no evidence PGCPS would not provide a substitute co-teacher and the testimony from the Parent was not particularly clear on what Ms. XXXX said. For instance, the Parent failed to explain how Ms. XXXX could be taken away from only one class when she was required to accompany the students from class to class throughout the day. In surrebuttal, Dr. XXXX testified that she had not heard about any staff change but that if there were, a substitute co-teacher would be provided.

The Student began the 2014-2015 school year slowly. In September 2014, less than four weeks after school started, his teachers provided the following assessments of his work:

- In science, the Student was not fully completing assignments, had failed to turn in any work relating to a STEM Fair project and needed reminders to get back on task. The reminders were not very successful. The science teacher recommended that the Student be placed in an intensive class. His grade in September was D/E.
- In social studies (also called world cultures/geography), the Student required constant redirection. He often struggled with getting work completed and he did poorly on tests and quizzes. He made friends easily and was not a behavioral problem. His grade in social studies was an E.
- In reading/language arts, the Student needed reminders to get started with his work. He had difficulty focusing and required one to one assistance to keep up. He required extra time to complete his classwork and assistance with writing information in his journal and completing homework. His grade in reading/language arts was a C.
- In math, he appeared able to grasp the concepts, though he needed redirection sometimes. He required extra time to do the work. His grade in math was a B.

The Student's grades at the end of the first quarter, on approximately November 10, 2014, were as follows:

- Reading/language arts C
- Math B
- Science D
- Social studies D¹³
- Music A
- Physical Education C

(P. Ex. 137.)

¹³ The Parent testified that at the parent-teacher conference held on November 11, 2014, the social studies teacher told her that the Student should have received an E, not a D and that she had increased his grade to keep him from failing. Again, Dr. XXXX testified that there might be many reasons why a teacher might increase a student's grade, including that she was grading on a curve. The teacher was not present at the hearing to explain the Parent's comment, and I give no weight to it.

The Student is making friends at [School 4] and is quiet, but at ease. There is no sign of the Student experiencing anxiety at [School 4]. Dr. XXXX described him as “shy, but pleasant.” (Tr. at 197, Nov. 10, 2014.) The Parent agreed at the hearing that the Student likes [School 4] “okay.” (Tr. at 113, Oct. 6, 2014.) Ms. XXXX knows the Student and testified that he is soft-spoken, and well-behaved. The Student told Ms. XXXX that he likes being at [School 4]. Having observed the Student since the beginning of the school year, Ms. XXXX does not believe the Student requires self-contained classes.

The test of an IEP is its appropriateness at the time it was developed, not in hindsight. *See, e.g., Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 983 (3d Cir. 1993); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315 (4th Cir. 2009.) But I have reviewed the evidence regarding the current placement because the parties introduced it and because it is useful to see that the Student is adjusting to the placement, contrary to the Parent’s strong concerns that he would not. Although it appears the Student is making some progress, the PGCPS has had so little time to implement the Student’s IEP during this school year that it cannot be judged solely on the basis of these two months.

The IEP provides the Student with a free, appropriate education

The Parent has failed to show by a preponderance of the evidence that the Student should have been found eligible for special education services at the December 2013 IEP meeting or that the IEP developed at the April and May 2014 IEP meetings was not reasonably calculated to provide the Student with a free, appropriate education. Furthermore, PGCPS has shown that the IEP that was developed was reasonably calculated to provide the Student with a free, appropriate public education in the least restrictive environment.

The Student’s attention deficits were well known to the Parent and to PGCPS from 2011 forward. The 504 Plan, which is not in debate at this hearing, was designed to address those

deficits. The evaluative data considered by the IEP Team in December 2013 supported its decision to keep the Student on the 504 Plan. The new test results available to the IEP Team in April and May 2014, along with additional observations from the non-traditional school provided the Team with sufficient data on which to find that the Student has a specific learning disability, thus making him eligible for special education services. The IEP that was developed addressed the Student's deficits by identifying his affected areas, providing him with 23 hours, 45 minutes per week of special education services and supplying numerous supplementary aids and services. The Student receives special education services in all of his core classes. He is now in a traditional learning environment, which should help him focus. His executive functioning deficits are outlined and addressed at length. There are a host of supplementary aids and services designed to help the Student make educational progress. Overall, I find the IEP is reasonably calculated to enable the Student to receive appropriate educational benefits.

In closing argument, the Parent complained that PGCPSS should have found the Student eligible for special education services in December and changed his placement at that time. However, given that the Parent is objecting to the placement that was identified as appropriate at the April 2014 IEP meeting, I do not understand how an earlier identification would have satisfied her. It is clear that the IEP Team would not have agreed to a non-public special education school for the Student even if they had found the Student eligible for services in December 2013. Additionally, even after an IEP was written, the Parent refused to sign it, resulting in the Student not receiving any special education services at the end of the [School 2] school year. This argument has no merit.

Additional Issues

A. There was some discussion at the hearing regarding the Parent's choosing to discontinue the use of medication to treat the Student's ADHD. The Parent argued that it is

within her prerogative to medicate or not and she is correct. 20 U.S.C.A. § 1412(a)(25)(A) (2010) (“The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act... as a condition of attending school...”). PGCPS did not make medication a condition of the Student attending school, however. Despite evidence from psychological tests that medication seemed to help the Student in school, and despite her acknowledgement to her own doctor that the Student did better in school on medication, and despite the recommendation of doctors at XXXX’s Medication Management Clinic that medication be considered,¹⁴ she chose to discontinue its use. That does not make the IEP created to address the Student’s deficits insufficient, however, nor does that require the PGCPS to assign the Student to the most restrictive placement, namely, [School 1].

B. I want to address the testimony of two witnesses who knew the Student through the XXXX program. XXXX XXXX is the Executive Director of XXXX, a privately funded, not-for-profit agency that uses a multi-sensory educational approach to assist students who work at grade level but are struggling in school and works to raise awareness about dyslexia. It offers a three-week summer program for struggling students. XXXX is certified by the Academic Language Therapist Association (ALTA) and accredited by the International Multi-Sensory Structured Language Education Council. ALTA certifies academic language therapists who use the methods espoused by XXXX. The methods used by XXXX are not recognized or certified

¹⁴ The Parent introduced into evidence a Medication Management Clinic Consultation Report, from the XXXX Center for Development and Learning, dated February 27, 2014. (XXXX Report) (P. Ex. 80.) I have not considered the XXXX Report for the following reasons: The Report was electronically signed by two persons, XXXX XXXX, C.R.N.P. and XXXX XXXX, M.D. It is very difficult to ascertain who wrote what part of the XXXX Report, although it appears Ms. XXXX wrote it and Dr. XXXX reviewed it. There is no indication in the XXXX Report of what information the evaluator was using, except for one reference to a XXXX report. The evaluator recommends a dyslexia tutoring program, although there is no evidence the Student has been diagnosed with dyslexia. Interestingly, and contrary to the Parent’s approach, one of the evaluators suggested that the Student might “benefit from stimulant medication management to improve attention and academic performance.” (P. Ex. 80, at 4.)

by the State of Maryland.

The Parent enrolled the Student in the XXXX summer program in July 2013. In working with the Student during that three-week summer program, the therapists considered the Student to have dyslexia even though he has never been diagnosed with dyslexia. They did not know that he had been diagnosed with ADHD.

Ms. XXXX's educational background is not as an educator.¹⁵ In her capacity as Executive Director, she maintains the budgets and reports to the board of directors. She also recruits students for the summer program and meets with the students' parents. Ms. XXXX knew the Student when he was enrolled in the July 2013 summer program and kept up with the Student's progress during the summer program by talking to the Student's teachers.

Ms. XXXX attended a parent-teacher conference in October 2013 with the Parent and Ms. XXXX. Ms. XXXX was given the opportunity to make suggestions for the Student's educational program at that meeting. Neither the mother nor Ms. XXXX suggested at that meeting that [School 2]'s unique educational methodology was inappropriate for the Student. Neither requested that the Student be evaluated for an IEP or special education services.

XXXX XXXX, who has been affiliated with XXXX for many years, also testified for the Parent. Ms. XXXX had a nursing background before becoming trained as an academic therapist. During the three-week summer program, Ms. XXXX provided direct assistance to the Student, helping him to stay focused on his work and to understand the material. At the end of the program, Ms. XXXX wrote that "for [the Student] to produce a proper and well-written paragraph, *it required a one-to-one teaching situation* to talk him through each step and to offer him prompts in order to formulate language and complete any task." (P. Ex. 44, p.4.) (emphasis

¹⁵ When asked about her expertise in the field of reading, Ms. XXXX responded, "I am involved in education and I have been my whole life[.]" and "I am also a parent of two dyslexic children." (Tr. at 63, Sept. 29, 2014.)

original.) Ms. XXXX and another academic therapist who worked with the Student, XXXX XXXX, recommended that the Student “continue with individual XXXX, as well as receiving very close individual monitoring when in classroom situations.” (P. Ex. 44, at 4.)

Ms. XXXX was not offered as an expert in any educational field and with good reason. No doubt she does a fine job as Executive Director of XXXX, but her opinions regarding the Student were not particularly helpful given her lack of expertise in the area. For instance, she testified about the Student’s “inability to read,” which was significantly at odds with the other evidence from educational experts. (Tr. at 55, Sept. 29, 2014.) Nor was Ms. XXXX admitted as an expert in the area of special education. I gave due consideration to Ms. XXXX’s testimony because she had been a certified academic language therapist for so many years. However, her area of certification is not recognized by the State of Maryland. Her final recommendation, that the Student be given virtually one-to-one instruction, was out of line both with the opinions of the educators who either testified or whose reports were introduced into evidence and with the psychological testing results in evidence.

[School 1]

The Parent asks that I order the Student to be placed in [School 1]. [School 1] is a nonpublic, segregated school of approximately sixty students, all of whom are disabled. The Director of Education at [School 1], XXXX XXXX, testified about the program. He said [School 1] would be a good program for the Student, but agreed that nothing in the [School 1] admissions summary suggested a segregated special education program is required by the Student’s profile. He also acknowledged there was no indication in the Student’s profile that anxiety was an issue or something [School 1] would address with the Student.

With regard to the appropriateness of the Student’s program, in order to prevail, the Parent first must prove that the placement determined by the public agency will amount to a

denial of FAPE and that the identified private school is an appropriate placement. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). The appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of FAPE. *Burlington, supra*. In this matter, I have concluded that the Student was not eligible for services until the end of the 2013-2014 school year and that the IEP and placement offered by PGCPSS for the 2014-2015 school year offers the Student FAPE. Accordingly, an analysis pursuant to *Burlington* and *Carter* is inapplicable and the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the decision of Prince George's County Public School System that the Student was not eligible for special education services pursuant to an Individualized Education Program until the end of the 2013-2014 school year did not deny the Student a free, appropriate public education; and

I further conclude that Prince George's County Public School System developed an Individualized Education Program and made a placement determination for the Student for the 2014-2015 school year that was reasonably calculated to provide the Student with a free, appropriate public education. *Sch. Comm. of Burlington v. Dep't. of Educ. of Mass.*, 471 U.S. 359 (1985); *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 Parent's request to have the Student placed at [School 1] at the expense of Prince George's County Public Schools is **DENIED**.

December 9, 2014
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/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.