

XXXX XXXX

STUDENT

v.

TALBOT COUNTY

PUBLIC SCHOOLS

* BEFORE LORRAINE E. FRASER,
 * AN ADMINISTRATIVE LAW JUDGE
 * OF THE MARYLAND OFFICE
 * OF ADMINISTRATIVE HEARINGS
 * OAH NO.: MSDE-TALB-OT-14-27705

* * * * *

DECISION

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STATEMENT OF THE CASE

On August 6, 2014, XXXX XXXX (Parent), on behalf of her child, [Student] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Talbot County Public Schools (TCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010). A resolution meeting was held on September 24, 2014, but did not successfully resolve the dispute between the parties.

I held a telephone prehearing conference on October 22, 2014. The Parent was represented by Caitlin E. McAndrews, Esquire. Rochelle S. Eisenberg, Esquire, represented TCPS. Counsel for TCPS offered dates that she and her witnesses were available in November and December. Counsel for the Parent stated that she and her witnesses were available on December 8, 9, and 12, 2014. By agreement of the parties, the hearing was scheduled for December 8, 9, and 12, 2014, based upon the availability of the witnesses.

I held the hearing on December 8, 9, and 12, 2014. Ms. McAndrews and Heidi Konkler-Goldsmith, Esquire, represented the Parent. Ms. Eisenberg represented TCPS. By agreement of the parties, at the close of the originally scheduled hearing dates, the hearing was continued to and concluded on January 21, 2015.

The hearing dates requested by the parties fell more than forty-five (45) days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014). The Parties requested an extension of time until February 20, 2015 for me to issue a decision, expressly waiving the forty-five day requirement. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

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

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

ISSUES

The issues are whether the Student was denied a free appropriate public education (FAPE) during the 2012-2013 and 2013-2014 school years and; if so, what, if any, compensatory education should be provided to the Student to remedy that denial.

SUMMARY OF THE EVIDENCE

Exhibits¹

I admitted the following exhibits on behalf of the Parent:

Parent # 1	PreKindergarten Progress Report, 2011-2012
Parent # 2	Discipline Referrals, September 16 & 28, 2011
Parent # 3	Email from XXXX XXXX to XXXX XXXX, September 28, 2011; Email from XXXX XXXX to XXXX XXXX, September 28, 2011; Email from XXXX XXXX to XXXX XXXX, April 25, 2012
Parent # 5	Vanderbilt Assessment Scales, February 5-6, 2013
Parent # 8	Physical Restraint Documentation, February 8, 2013
Parent # 9	Child Study Team Teacher Form, February 8, 2013
Parent # 10	Child Study Team Parent Questionnaire, February 20, 2013
Parent # 20	Notes, April 17, 2013
Parent # 28	Physical Restraint Documentation, May 14, 2013
Parent # 30	Kindergarten Progress Report, 2012-2013
Parent # 31	XXXX XXXX's notes, March 7-20, 2013; May 3-8, 2013
Parent # 32	Discipline Referrals, February 4, 2013 – May 3, 2013
Parent # 33-1	Email from XXXX XXXX to Parent, August 23, 2012
Parent # 33-2	Email from XXXX XXXX to XXXX XXXX, September 12, 2012
Parent # 33-3	Email from XXXX XXXX to XXXX XXXX, September 12, 2012
Parent # 33-4	Email from XXXX XXXX and XXXX XXXX to XXXX XXXX and XXXX XXXX, October 4, 2012
Parent # 33-7	Email from XXXX XXXX to XXXX XXXX and XXXX XXXX, December 6, 2012
Parent # 33-8	Email from XXXX XXXX to XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX, December 10, 2012
Parent # 33-9	Daily Success Plan
Parent # 33-10	Email from XXXX XXXX to XXXX XXXX, January 28, 2013
Parent # 33-11	Email from XXXX XXXX to XXXX XXXX, January 29, 2013
Parent # 33-12	Email from XXXX XXXX to XXXX XXXX, January 30, 2013
Parent # 33-15	Email from XXXX XXXX to XXXX XXXX, February 25, 2013
Parent # 33-16,-17	Email from Archive Services to XXXX XXXX and XXXX XXXX, March 6, 2013
Parent # 33-18	Email from XXXX XXXX to XXXX XXXX, March 29, 2013
Parent # 33-19	Email from XXXX XXXX to XXXX XXXX, XXXX XXXX, XXXX XXXX, April 8, 2013
Parent # 33-21 to -22	Email from XXXX XXXX, XXXX XXXX, DHR, to XXXX XXXX, XXXX XXXX, June 18, 2014
Parent # 33-27	Email from XXXX XXXX to XXXX XXXX, May 3, 2013
Parent # 33-30	Email from XXXX XXXX to XXXX XXXX, May 22, 2013
Parent # 34-1 to -117	Success Plans, Daily Progress Notes, and Daily Schedule, March 7, 2013 – June 7, 2013
Parent # 36-1 to -2	Staff Response and Crisis Plan

¹ The parties pre-marked their exhibits. Only the exhibits that were admitted into evidence are listed here.

Parent # 38 Quarter 1 Interim Report, October 4, 2013
 Parent # 39 XXXX XXXX, Teacher Notes, September 30, 2013 – October 11, 2013
 Parent # 40 Individualized Education Program (IEP), July 31, 2013, October 21, 2013
 Parent # 43 IEP, July 31, 2013, January 15, 2014
 Parent # 45 Functional Assessment Interview Form
 Parent # 46 Motivation Assessment Scale, April 1, 2014
 Parent # 47 Physical Restraint Documentation, April 4, 2014
 Parent # 49 Progress Report on IEP Goals, July 31, 2013
 Parent # 55 Behavior Intervention Plan, April 23, 2014
 Parent # 56 Discipline Alerts, September 16, 2011 - May 5, 2014
 Parent # 59 Report of Developmental-Neuropsychological-Educational Evaluation, Dr. XXXX, evaluation dates: May 12, 14, and 19, 2014

 Parent # 61 BIP Data Collection Chart, April 30, 2014
 Parent # 63-3,-5,-6,-7 Student work samples
 Parent # 63-4 Student word decoding
 Parent # 64-3 Notes, September 19, 2013
 Parent # 64-4,-5,-8,-9 Notes, October 2, 2013
 Parent # 64-10,-11 Notes, October 3, 2013
 Parent # 64-13 Notes, October 14, 2013
 Parent # 64-14 Notes, October 16, 2013
 Parent # 64-20 Notes, November 20, 2013
 Parent # 64-24 Notes, December 13, 2013
 Parent # 64-28 Notes, January 15, 2014
 Parent # 65 Discipline Referrals, August 30, 2013 to May, 5, 2014
 Parent # 66-1 Email from XXXX XXXX to XXXX XXXX, August 7, 2013
 Parent # 66-2 Email from XXXX XXXX to XXXX XXXX, August 14, 2013
 Parent # 66-3,-4 Email from XXXX XXXX to XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX, September 8, 2013
 Parent # 66-7,-8 Email from XXXX XXXX and XXXX XXXX to XXXX XXXX and XXXX XXXX, September 19, 2013
 Parent # 66-9 Email from XXXX XXXX to XXXX XXXX, September 25, 2013
 Parent # 66-10,-11 Email from XXXX XXXX to XXXX XXXX, October 6, 2013
 Parent # 66-12 Email from XXXX XXXX to XXXX XXXX, XXXX XXXX, XXXX XXXX, October 7, 2013
 Parent # 66-13 Email from XXXX XXXX to XXXX XXXX, October 9, 2013
 Parent # 66-14 Email from XXXX XXXX to XXXX XXXX, October 11, 2013
 Parent # 66-15,-16 Email from XXXX XXXX to XXXX XXXX, October 24, 2013
 Parent # 66-19 Email from XXXX XXXX and XXXX XXXX to XXXX XXXX, November 24, 2013
 Parent # 66-22 Email from XXXX XXXX to XXXX XXXX, January 21, 2014
 Parent # 66-23 Email from XXXX XXXX to XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, February 26, 2014
 Parent # 66-24 Attachment to Parent 66-23
 Parent # 66-30 Email from XXXX XXXX to XXXX XXXX, April 11, 2014
 Parent # 66-31 Email from XXXX XXXX to Parent, April 17, 2014
 Parent # 66-32 to -34 Email from XXXX XXXX to XXXX XXXX, April 18, 2014
 Parent # 66-35 Email from XXXX XXXX to Parent, April, 23, 2014
 Parent # 66-38 Email from XXXX XXXX to Parent, May 22, 2014

Parent # 67-15 to -22 Behavior Data, March 26, 2014 to April 22, 2014
Parent # 67-23 to -53 Daily Schedule, September 5, 2013 – May 1, 2014
Parent # 69 Résumé for XXXX XXXX, Ph.D.

I admitted the following exhibits on behalf of TCPS:

- TCPS # 1 Level I Request for Assistance
- TCPS # 2 Intervention/Action Planning Document, December 3, 2012
- TCPS # 3 Parent's request for a special education evaluation, February 7, 2013
- TCPS # 4 IEP Team Minutes, March 4, 2013
- TCPS # 5 Notice and Consent for Assessment, February 3, 2013
- TCPS # 7 Crisis Plan, March 6, 2013
- TCPS # 10 Crisis Plan, April 5, 2013
- TCPS # 11 Educational Assessment, XXXX XXXX, Special Education Teacher, April 17, 2013
- TCPS # 12 Speech/Language Assessment, XXXX XXXX, Speech Language Pathologist, April 17, 2013
- TCPS # 13 Cognitive Assessment, XXXX XXXX, School Psychologist, MA, CAS, NCSP, April 17, 2013
- TCPS # 14 IEP Team Minutes, April 17, 2013
- TCPS # 15 Other Health Impairment (OHI) Eligibility Documentation Form, April 17, 2013
- TCPS # 16 Functional Behavioral Assessment Report Form, April 17, 2013
- TCPS # 20 Crisis Plan, April 22, 2013
- TCPS # 22 Section 504 Accommodation Plan, April 23, 2013
- TCPS # 23 Occupational Therapy Evaluation, XXXX XXXX, MS, OTR/L, Occupational Therapist, XXXX Special Education Consortium, May 31, 2013
- TCPS # 24 Emotional/Social/Behavior Assessment, XXXX XXXX, School Psychologist, MA, CAS, NCSP, June 10, 2013
- TCPS # 25 IEP Team Minutes, June 10, 2013
- TCPS # 29 Report of Neuropsychological Evaluation, XXXX XXXX, Ph.D., September 12, 2013
- TCPS # 30 Tables and Graphs Report for WISC-IV, September 28, 2013
- TCPS # 31 IEP Team Minutes, September 30, 2013
- TCPS # 33 IEP Team Minutes, October 14, 2013
- TCPS # 37 Occupational Therapy Evaluation, XXXX XXXX, MS, OTR/L, November 22, 2013
- TCPS # 40 Email from XXXX XXXX to XXXX XXXX and XXXX XXXX, January 12, 2014
- TCPS # 41 IEP Team Minutes, January 15, 2014
- TCPS # 43 IEP Team Minutes, April 14, 2014
- TCPS # 44 Discipline Alerts, September 16, 2011 – April 4, 2014
- TCPS # 45 Staff Response and Crisis Intervention Plan, April 16, 2014
- TCPS # 46 Functional Behavioral Assessment Report Form, April 23, 2014
- TCPS # 47 Behavior Intervention Plan, April 23, 2014
- TCPS # 48 IEP Team Minutes, April 24, 2014
- TCPS # 55 Dr. XXXX's phone Interviews with XXXX XXXX, Crisis Management therapist; XXXX XXXX, Behavioral Therapist; XXXX XXXX, Special Education Teacher
- TCPS # 56 IEP Team Minutes, June 20, 2014

- TCPS # 57 Individualized Education Program, June 20, 2014
 TCPS # 60 Individualized Education Program, September 24, 2014
 TCPS # 61 IEP Team Minutes, September 24, 2014
 TCPS # 62 Résumés of XXXX XXXX, Special Education Teacher; XXXX XXXX, Supervisor, Special Education; [School 1], First Grade Teacher; XXXX XXXX, Assistant Principal; XXXX XXXX, LCSW-C, Behavior Counselor; XXXX XXXX, School Psychologist
 TCPS # 63 IEP Team Minutes, June 12, 2014

Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Ph.D., Psychologist, admitted as an expert in neuropsychological and educational evaluations
- XXXX XXXX, Media Instructional Assistant, [School 1]
- XXXX XXXX, LCSW-C, Family Liaison, [School 1], admitted as an expert in social work
- XXXX XXXX, Special Education Teacher, [School 1], admitted as an expert in special education
- XXXX XXXX, General Educator, First Grade, [School 1], admitted as an expert in elementary education
- XXXX XXXX, School Counselor, admitted as an expert in guidance counseling
- XXXX XXXX, Instructional Assistant, [School 1]
- XXXX XXXX, Supervisor, Special Education, admitted as an expert in special education
- XXXX XXXX, Director of Education and Program Director, [School 2]

TCPS presented the following witnesses:

- XXXX XXXX, General Educator, First Grade, [School 1], admitted as an expert in elementary education

- XXXX XXXX, Assistant Principal, [School 1], admitted as an expert in educational administration
- XXXX XXXX, Special Education Teacher, [School 1], admitted as an expert in special education
- XXXX XXXX, LCSW-C, Behavior Counselor, Talbot County, admitted as an expert in social work
- XXXX XXXX, C.A.S., School Psychologist, admitted as an expert in school psychology
- XXXX XXXX Supervisor, Special Education, admitted as an expert in special education

FINDINGS OF FACT

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

1. The Student was born in XXXX 2007. She attended TCPS for prekindergarten (2011-2012), kindergarten (2012-2013), and first grade (2013-2014) at [School 1], XXXX building. She currently attends second grade at the [School 2], paid for by TCPS.
2. During her prekindergarten year, the Student had two discipline referrals. On September 16, 2011, the Student became upset when she was not chosen as “friend of the day.” The Student was asked to sit in a chair. She kicked the chair and her instructor and hit the instructor in the face. On September 28, 2011, the Student became upset because she wanted to play at the rice table but had to wait because two other children were playing there. The instructor talked to the Student, and the Student kicked the instructor three times. The Parent was notified of each incident. The Student did not have any additional discipline referrals for the remainder of her prekindergarten year.

3. By spring of her prekindergarten year, the Student had a thorough understanding of all the prekindergarten skills in phonemic awareness, comprehension, oral and written communication, mathematical and scientific thinking, physical development, and personal/social development, with the exception that she was still developing skills in identifying words that rhyme and words that do not rhyme and producing rhyming words.
4. On the Student's first day of kindergarten, August 23, 2012, the Student had an overall satisfactory day. However, she would not line up with the class to go outside for recess. The school guidance counselor talked to the Student.
5. On September 12, 2012, the Student began a group reading intervention with XXXX XXXX.
6. As of December 3, 2012, the following interventions were being used with the Student:
E & I reading instruction in class with her classroom teacher, behavior plan with the guidance counselor, preferential seating in the classroom, and the Why Try program with the guidance counselor.
7. On December 6, 2012, XXXX XXXX, Assistant Principal, emailed XXXX XXXX, the Student's kindergarten teacher, XXXX XXXX, and XXXX XXXX, noting that the Student's behaviors were escalating and asking if she were on a behavior plan.
8. On December 10, 2012, XXXX XXXX designed a Daily Success Plan for the Student focusing on the Student's ability to follow directions from adults.
9. During winter break, the Student experienced a traumatic event: while visiting with her father, the Student's father attempted to XXXX the Student.
10. At the end of January 2013, Ms. XXXX completed a Level I Request for Assistance form for the Student on which she noted that the Student was having difficulty adjusting to new situations, following directions, "keeping self to self,"² staying on task, and transitioning.

² TCPS # 1.

Ms. XXXX also noted that the Student's homework was not consistent. Ms. XXXX described the interventions used with the Student, including a behavior plan, preferential seating, daily schedule, cool off time, and a class job. She noted that the interventions worked sometimes, but other times the Student would not move on her own.

11. On January 29, 2013, Ms. XXXX noted that the Student was having a very hard time following directions, keeping self to self, and staying on task, and often crawled under the lunch table and classroom table. Ms. XXXX emailed Ms. XXXX and Ms. XXXX saying that she was going to "put in the ESPS referral today"³ for the Student. Ms. XXXX responded that that covered her concerns in the social/emotional behavior area, noting the Student had a difficult time with transitions and adjusting to new situations and teachers.
12. On January 30, 2013, Ms. XXXX emailed Ms. XXXX suggesting that the Student would benefit from some small group practice with social skills and making friends.
13. On February 4, 2013, the Student was running around the cafeteria table bothering other students. When a staff person was able to catch the Student, the Student bit her hand and left deep teeth marks.
14. On February 7, 2013, the Parent picked the Student up from school early for an appointment. Instead of getting in the car, the Student ran to the back of the school. Two staff members assisted the Parent in getting the Student into the car.
15. Also on February 7, 2013, the Parent requested that the Student be evaluated for special education services.
16. On February 8, 2013, the Student was removed from class, because she was not listening and not following directions. While walking toward the main office, the Student started walking

³ Parent # 33. ESPS referral is not explained.

toward the front door. Ms. XXXX carried the Student into the office, where she climbed on tables, threw papers and bit an administrator.

17. As a result of the February 8th incident, the Student was suspended beginning February 11, 2013.
18. On February 19, 2013, the Parent called the school and stated that the Student had met with her therapist. The therapist was unsure about the Student returning to school until she knew what the school had in place for emergencies.
19. On February 21, 2013, the Student began attending the XXXX Learning Center (XLC) an alternative setting within TCPS. After approximately ten days the Student returned to her kindergarten classroom at [School 1].
20. On March 4, 2013, an IEP meeting was held to review the need for assessments. The Parent relayed there was an incident with the Student's father over winter break and stated that the Student had been seeing a psychologist, Dr. XXXX, who had diagnosed the Student with Attention Deficit Hyperactivity Disorder (ADHD), Behavior Disorder Not Otherwise Specified (NOS), and Anxiety Disorder NOS. Ms. XXXX explained that the behavior plan was originally designed to address the Student's difficulty transitioning out of the classroom to specials and lunch – the Student would refuse to leave the room and hide in the cubby area. Then the Student began having difficulty transitioning between activities within the classroom. After winter break, the Student's refusals included some physical acting out. The Parent stated that she felt the Student's difficulties in the lunch room were due to the noise level. An alternative placement had been set up in the office for the Student to eat lunch. The Student's academic skills were average, but the Student required a lot of redirection and her behavior interfered with her ability to complete work and stay on task. However, if the task were one the Student wanted to do, she had little difficulty. There were some concerns

in the areas of expressive language and pragmatic skills. The IEP Team agreed and the Parent consented to the following assessments: expressive language, pragmatic skills, educational, cognitive, social, emotional, behavior, and a Functional Behavioral Assessment.

21. On March 6, 2013, a crisis plan was developed for the Student, which included a quiet break area in the classroom, ten minute checks to see if the Student was ready to rejoin the class, use of a buddy classroom, removal to the main office, the use of CPI techniques⁴ if the Student was engaging in unsafe behaviors, and, finally, a call to mobile crisis.
22. On March 8, 2013, the Student would not stay in line for the bathroom and went around the corner out of the teacher's sight. She then refused to go to Music class or her buddy classroom. She eventually went to music but refused to follow the teacher's directions and crawled and rolled around on the ground.
23. On March 15, 2013, the Student was rolling on the floor in the classroom, wandering around the classroom, and not participating with the class. After sitting on her cool off beanbag chair for ten minutes, she crawled under a table and clawed the furniture. The Student was taken to the office where she crawled under her chair and lifted the chair overhead with her feet. She then crawled out of the office on her hands and knees into the hallway. Once back in the office, she colored briefly but started crawling on the floor and furniture.
24. On March 18, 2013, the Student refused to join her physical education class and began crawling on the floor and climbing on poles. XXXX XXXX took the Student to the office where she began crawling on tables and ledges and trying to jump off, throwing books, and running around.
25. On March 19, 2013, the Student refused to join her physical education class or go to her buddy teacher. After twenty minutes, the Student agreed to go to physical education. Once

⁴ Crisis Prevention Institute restraint techniques.

in the cafeteria, the Student refused to sit and toss bean bag animals, which was the activity the other children were doing. Instead, the Student ran around the cafeteria, crawled under stacked cafeteria tables, and climbed on top of a cafeteria table. The Student was taken to the office where she ripped all the art work off the walls and scattered papers from a desk onto the floor. The Student crawled under a desk and made animal noises, then took off her shoes and tried to hit a staff member with them. She eventually calmed down and returned to her classroom. Later the same day, the Student was making animal sounds again and climbing under and over chairs.

26. On March 21, 2013, on the way to recess, the Student began rolling down the hall, kicking her feet and refusing to follow directions. In the office, the Student threw books, crayons, and glue sticks and knocked over chairs.
27. On March 22, 2013, the Student refused to follow her plan and was brought to the office to complete her school work. She refused to do her work, and instead threw books, crayons, and the incentive basket. She also threw the door stop at Ms. XXXX, bit Ms. XXXX, knocked over furniture, and ripped up testing materials.
28. On March 27, 2013, the Student refused to leave her classroom because she was sad that she did not get a golden egg during the egg hunt. After she was taken from her classroom, the Student crawled down the hall, knocked over a trash can, and ripped papers. Once in the office, the Student kicked, hit, and bit staff.
29. On April 3, 2013, the Student was crawling on the table in her classroom and putting her hands on other students. She then crawled under the table, kicked over chairs, and attempted to kick over the table. When Ms. XXXX removed the Student from the classroom, she tried to bite Ms. XXXX, and threw books and other items at Ms. XXXX.

30. On April 4, 2013, Ms. XXXX was supervising the Student during a cool off break. The Student crossed the room and kicked Ms. XXXX.
31. On April 5, 2013, the Student's crisis plan was amended to include five minute checks, stickers and other incentives for rejoining her class activities and going to her specials and removal to a designated cool off area. Removal to the office and calls to mobile crisis were discontinued.
32. On April 9, 2013, the Student was taking a cool-off break. Without provocation, she walked across the room and kicked a staff member in the leg.
33. On April 12, 2013, while on a break from her classroom, the Student repeatedly kicked, scratched, and hit Ms. XXXX, and attempted to bite her. The Student then tried to scratch Ms. XXXX and kicked her.
34. On April 17, 2013, XXXX XXXX completed her Educational Assessment of the Student. Ms. XXXX assessed the Student on March 19, 20, 21, 25, 26, and 27, 2013. The Student's reading composite score was average, with one above average subtest; her math score was average; and her overall writing score was average, although her contextual writing was below average. Ms. XXXX recommended frequent breaks in the Student's activities, visual supports to promote understanding of expectations, use of a timer to anticipate changes and promote her time on task, reminders and warnings of upcoming transitions, explicit directions, positive reinforcement for desired behaviors, and breaks as needed to prevent frustration.
35. On April 17, 2013, XXXX XXXX completed her Speech/Language Assessment of the Student. Ms. XXXX assessed the Student on March 22 and 26 and April 5, 2013. The Student had overall average receptive, expressive, and pragmatic language skills. Ms. XXXX recommended verbal and nonverbal clues to prepare the Student for listening,

repeating and rephrasing directions and frequent checks for understanding, visual aids for directions and verbal tasks, chunking and other wait-time techniques to allow for processing, alternating auditory activities with quiet, visual, or hands-on work, and facilitating opportunities for the Student to interact with a variety of adults and peers.

36. On April 17, 2013, XXXX XXXX completed her Cognitive Assessment of the Student. Ms. XXXX assessed the Student on March 19, and April 8 and 9, 2013. The Student had relatively evenly developed average skills across all areas and did not have a specific processing disorder. She had mild difficulties sustaining attention to task but did not have difficulty inhibiting her responses. She had adequate social perception skills. She had a high level of hyperactivity, verbal aggression, and depressive symptoms. She displayed hyperactive, oppositional, and attention-seeking behaviors and her level of cooperation highly correlated with the level of attention she received, her interest in the task, and the availability of a desired incentive. She was highly and easily motivated by incentives. If she perceived a task as too difficult or she did not like the task, she refused to attempt the task unless offered an incentive. Individual adult attention was a rewarding reinforcer for her. Ms. XXXX recommended a highly structured and routine classroom setting with clear expectations that were reviewed with the Student on a daily basis and continued use of an incentive plan to reinforce and reward desirable behaviors. Ms. XXXX also recommended breaking down tasks in to smaller parts, frequent breaks with opportunities for movement, access to fidget items, visual and verbal prompts to task, seating away from distractions, small group setting for testing, visuals to look at while listening, repeated and frequent positive attention, teaching listening and direction following skills, and the use of modeling techniques. Finally, Ms. XXXX recommended the IEP team discuss further the Student's

high level of depressive behavioral symptoms and determine whether those symptoms were impacting the Student in the school setting.

37. On April 17, 2013, the Functional Behavioral Assessment was completed. The Student's significant behavioral problems began in early December and escalated in February but her negative behaviors decreased in the beginning of April after the behavior incentives and modified crisis plan were implemented. When teachers and other staff asked the Student to engage in a non-preferred activity, there was a greater likelihood that she would refuse to comply. When teachers and other staff gave the Student high levels of individual attention, her negative behaviors decreased significantly. When teachers and other staff did not give attention, the Student's negative behaviors increased and became more physical and defiant.
38. On April 17, 2013, the IEP team met and reviewed the assessments. Ms. XXXX agreed that the assessments were consistent with the academic skills the Student displayed in the classroom. Ms. XXXX noted that since April 4th, the Student was willingly attending specials. The team determined that the Student's ADHD impacted her education but that the Student did not require specialized instruction for her ADHD, only accommodations. The Parent questioned why TCPS did not perform sensory or emotional assessments. The Parent and Dr. XXXX stated that the Student needed specialized instruction for an emotional disability. The team agreed to perform additional assessments to look at emotional concerns and a sensory profile. The team also agreed to hold a 504 Plan meeting.
39. On April 18, 2013, the Student tried to run out of the building. Ms. XXXX stopped the Student, who then ran into her cool-down area. The Student ran a second time toward the exterior doors and Ms. XXXX stopped her again. The Student then scratched Ms. XXXX's arms, kicked her shins, and tried to rip off her bracelet.

40. On April 22, 2013, the Student's crisis plan was amended to include calls to mobile crisis prior to calling the Parent.
41. On April 23, 2013, a 504 Accommodation Plan was developed for the Student. The accommodations included: adjusted/modified workload with extended time to complete assignments, preferential seating near the teacher, clear/simple comprehension checks for clarity and understanding of directions, on-task reminders, expected work completion, gentle cues and reminders five minutes before transitions, chunking/breaking down of classwork assignments, short breaks as necessary, verbal praise when on task, access to physical education in an alternative setting if the Student was refusing to enter the gym, small group access in the classroom, daily visual schedule, and referring to the success plan and the crisis plan.
42. On April 30, 2013, while on a break from her classroom, the Student continually refused to follow directions. She then removed her clothing and urinated on the floor. She slid on the floor through her XXXXXX while laughing and shouting.
43. On May 1, 2013, the Student was crawling under the furniture and shouting, disrupting the other students. The Student was removed from the classroom for a break. The Student stated, "I'm going to pee," removed her clothing and urinated on the floor, and said "I'm peeing, ha ha." She then slid through her XXXXXX laughing and saying "whee I'm skating."
44. On May 3, 2013, the Student hit, kicked, and spit on staff members, and undressed and urinated twice.
45. Based on the escalation in the Student's behavior, she was placed at the XLC in the beginning of May 2013 with a 1:1 teacher.

46. On May 14, 2013, the Student did not want to come inside after outdoor activities and did not want to participate in academic activities. She was banging on a glass window, throwing things, climbing and trying to jump off decks, kicking and biting the teacher, and spitting. Mr. XXXX physically restrained the Student for five minutes using CPI techniques. The Parent was called after the incident.
47. On May 31, 2013, XXXX XXXX completed her Occupational Therapy Evaluation. Ms. XXXX assessed the Student on April 26, and May 1 and 10, 2013. The Student had significant differences compared to her peers regarding her behavioral responses and avoidance behaviors. She was able to attend to classroom instruction in a typical manner. She sought out auditory input such as quiet singing, humming, and self-talk to self-soothe when she was tired, hungry, or not interested in an activity. When she was interested in an activity, she was able to perform fine motor and academic tasks in a typical manner. Ms. XXXX recommended breaks throughout the school day, snacks mid-morning and mid-afternoon, a visual timer during work time and break time, colorful and/or visually interesting materials/worksheets for academic tasks, and visually interesting, bright, colorful rewards for appropriate behavior such as stickers and stamps.
48. On June 10, 2013, Ms. XXXX completed her Emotional/Social/Behavior Assessment. Ms. XXXX assessed the Student on May 3, 8, 9, and 21, 2013. Ms. XXXX's findings were consistent with the prior assessments that found the Student had ADHD and a behavior disorder but also showed the Student had underlying depression and attachment issues, feelings of rejection, and a perception that her needs and wants were not being met by the adults in her life. The Student had an emotional condition that was marked and pervasive and existed over time. The Student displayed inappropriate behavior under normal circumstances and was unable to effectively regulate and manage her feelings, becoming

verbally and physically aggressive and undressing, urinating, and playing in her XXXXXX.

The Student's inability to regulate and control her behavior adversely impacted her education in the general education setting. Ms. XXXX recommended a therapeutic educational setting in order to build the Student's self-management and self-regulation strategies and develop coping skills. In addition to her April 17, 2013 recommendations, Ms. XXXX recommended a designated cool-off or break area when feeling distressed or displaying behavior difficulties, adult assistance in verbalizing distressing thoughts/feelings, mental health collaboration with school personnel, and participation in a social skills curriculum designed to teach feeling identification, self-management, self-regulation, and coping skills.

49. On June 10, 2013, the IEP team met to review the assessments. Ms. XXXX noted that the Student was on track with her kindergarten skills and that she was promoted to first grade. The team agreed the Student needed specialized instruction for an emotional disability. The Parent stated that the Student had an appointment with a psychiatrist in July. The team agreed to draft an IEP and review it within thirty days. The team scheduled the next IEP meeting on July 17, 2013, the date requested by the Parent.⁵
50. In August 2013, the Student began the first grade at [School 1] and was receiving special education services under the July 2013 IEP. She was pulled out of the general education classroom two hours per day for specialized instruction. She had an Instructional Assistant in her general education classroom.
51. On August 30, 2013, the Student ran through hallways and attempted to exit several doors. She refused to follow directions, crawled under tables, refused to go to cool-down room, jumped up on desks and tables, tried to bite the assistant principal and kicked her.

⁵ An IEP team meeting appears to have been held on July 31, 2013; however, the parties did not move the minutes of that meeting into evidence so I shall not discuss it here.

52. On September 12, 2013, XXXX XXXX, Ph.D., Clinical Neuropsychologist, completed a Neuropsychological Evaluation of the Student. On September 9, 2013, Dr. XXXX administered the WISC-IV and three achievement tests from the Woodcock-Johnson III to the Student. The Student had a high average verbal comprehension score, average perceptual reasoning and full scale IQ scores, a low average processing speed score, and a borderline working memory score. She scored on grade level on the letter-word identification and calculation tests and below grade level on spelling, with a grade equivalent of kindergarten three months. On the basis of this limited testing, Dr. XXXX diagnosed the Student with Dyslexic Disorder and Executive Dysfunction symptoms. He also diagnosed the Student with ADHD – combined type, Adjustment Disorder with Mixed Anxiety and Depressed Mood, and Posttraumatic Stress Disorder (PTSD) as a result of the incident with her father. He claimed the Student’s ADHD was undiagnosed and untreated. He recommended a small, self-contained classroom setting with a special education teacher and paraprofessional aide.
53. On September 30, 2013, the IEP team met to review Dr. XXXX’s evaluation and the July IEP. The Student was reading above grade level and performing on grade level in math. She had difficulty putting her thoughts into words and with her writing skills. The Student also disliked writing. She received specialized instruction in reading, writing, math, and social/emotional coping strategies. The Student was doing well in the general education setting: at the beginning of the school year she displayed her target behaviors with 50% accuracy but after five weeks displayed her target behaviors with 90% accuracy. The team recommended an Occupational Therapy Assessment to look at the Student’s fine motor skills. TCPS team members agreed the Student had ADHD and an Emotional Disability; however, they disagreed that she had a learning disability because there was no discrepancy between her cognitive skills and academic skills. The Parent wanted the Student’s primary

disability identified as a learning disability. The Parent requested an Independent Educational Evaluation. The Parent wanted the Student to receive more than the two hours per day of specialized instruction, wanted a 1:1 aide with her all day, and wanted her to be with children who have the same problems.

54. On October 1, 2013, the Student's behavior began to deteriorate. On that day, the Student came to school with a balloon. She disrupted the class by yanking the balloon up and down and the balloon was removed. She became upset, put marker caps in her mouth and spit them at Ms. XXXX (her special education teacher), slapped and clawed Ms. XXXX' arms, pulled off Ms. XXXX' shoes and threw them, and made hissing noises.
55. On October 2, 2013, the Student came to school with a rose. She attacked Ms. XXXX, the principal, and Ms. XXXX, urinated on the floor, played in her XXXXXX, and spit on the windows. She was suspended for half a day.
56. On October 3, 2013, when the guidance counselor brought the Student back to the classroom, she clung to the guidance counselor and climbed up her. When told computer was not on her schedule, the Student lunged at Ms. XXXX, made a hissing noise, and scratched her.
57. On October 4, 2013, the Student threw carpet squares and buzzed the office from the classroom.
58. On October 7, 2013, the Student pushed a chair into another student's legs, bruising them.
59. On October 8, 2013, when the Student reentered the general education classroom after pull out she would not join the group. She threw cubes, crawled on the floor, ripped another student's pants, and made cat noises. Administration was called. When the Student returned to the room, she buzzed the office and pushed a metal trash can around the room. Administration was called again. She went outside for recess but refused to come back inside. Administration was called a third time. She returned to the classroom and clung to

Ms. XXXX's leg (her general education teacher). Administration was called a fourth time. She ran after Ms. XXXX in the hallway and clung to her leg again.

60. On October 11, 2013, the Student made noises and hung on Ms. XXXX. She crawled on the floor and pretended to draw on Ms. XXXX's pant leg. Administration was called and the Student went to her calm down room. She returned to the classroom. When it was time for her to go with Ms. XXXX, she hissed at other students and crawled on the floor.

Administration was called and she was escorted from the room.

61. On October 14, 2013, the Student threw a seat cushion at Ms. XXXX and hit her in the head.

62. On October 14, 2013, the IEP team met and discussed the Student's recent behavior. The team noted it had granted the Parent's request for an independent educational evaluation, and that the Parent had also requested an independent cognitive assessment and social/emotional testing. The Parent stated that she disagreed with TCPS's refusal to accept Dr. XXXX's learning disability diagnosis. The team agreed to increase the Student's hours in special education by one hour twenty minutes per day, placing her in special education all afternoon. The Parent wanted the Student to receive art therapy in school. TCPS informed the Parent that outside therapies are not provided during school. The Parent wanted the Mobile Crisis Unit to be in the Student's IEP as part of her crisis plan. TCPS explained that Mobile Crisis is not a TCPS service and it takes them too long to get to the school. TCPS noted that the Student misbehaves in order to get attention so bringing Mobile Crisis into the school would have a negative impact. TCPS noted that the Student had started running away from her Instructional Assistant because she did not want to come in from recess. The team agreed the Student will have indoor recess if she continues to run away. The team discussed a scheduled field trip and agreed the Student would be allowed to attend if she stopped running away and stopped attacking staff and students.

63. On October 22, 2013, the Student screamed in other students' faces, approached a teacher working with a small group of students and spit in her face and hair. The Student then jumped on chairs and shelves and screamed. Administration was called.
64. On November 22, 2013, Ms. XXXX completed her Occupational Therapy Evaluation. Ms. XXXX assessed the Student on October 14, and November 15 and 22, 2013. The Student had average fine-motor precision and fine-motor integration skills, average visual motor integration skills, and average to above average neurosensory processing for handwriting skills. The Student had a tendency to rush through tasks and not always listen to instruction prior to tasks and was distracted by auditory and visual stimuli, although she was easily redirected back to tasks. Ms. XXXX recommended gaining the Student's full attention prior to instruction, checking-in to ensure she is taking her time, allowing motor/rest breaks throughout the day, being aware of distracting stimuli and redirecting her to tasks, instructing her to cut with scissors in a more efficient direction, and instructing her to self-correct errors by marking out and rewriting next to mistakes for increased readability or ensure that mistakes were completely erased.
65. On January 15, 2014, the IEP team met and discussed the need for an updated functional behavior assessment, reviewed the IEP, and discussed the request for additional funding for an independent Neuropsychological Assessment. The Student had been very successful since returning from winter break and had no major behavioral incidents. The Student wanted to spend more time with her general education classmates and was making friendships. She had a great time on a field trip the prior week. The Student was doing well academically and with her social skills. The team agreed to modify the IEP, gradually increasing the Student's time in general education by five hours. The Student would receive twelve hours and fifty-five minutes per week of special education outside of general education and fifteen hours per week

of special education inside the general education classroom. After the previous IEP meeting, the Parent and her attorney requested that TCPS pay for an independent Functional Behavior Assessment. The team agreed a new Functional Behavior Assessment should be performed. TCPS asked the Parent if she would allow a Behavior Specialist who contracts with TCPS to observe the Student. The Parent did not sign the authorization for the Functional Behavior Assessment, saying she wanted to hold off. The Parent's attorney had asked for additional funding for an independent Neuropsychological Assessment, a total of \$3,000.00. TCPS agreed to provide \$2,500.00, which was \$500.00 more than provided in its policy and procedure manual, and refused to pay more than \$2,500.00.

66. On February 27, 2014, the Student hit another student in the arm with a ruler. She then kicked Mr. XXXX and ran away from staff down the hall, threw items all around her break space, dumped sanitizer on the floor, began eating paper trash, put spitballs into Mrs. XXXX's shoe, smashed Ms. XXXX's personal phone, intentionally urinated on the rug, and crawled around on the floor.

67. On March 7, 2014, the Student knocked things over in the classroom, ran around the room singing and yelling, refused to use her calm-down box, shoved pipe cleaners in her mouth and wrapped the saliva soaked items around the door handle, jumped from table to table, laughing and yelling, knocked all of the chairs over, destroyed materials around the room, ripped Ms. XXXX's papers, ripped her own papers, ate several pieces of paper, urinated on the carpet and on the heating vent, wiped XXXXXX all over the floors, chairs and window sills, licked the window screens, and tore holes in the screens. The Student's behavior persisted for two hours.

68. On March 14, 2014, the Student spit on Ms. XXXX, hit her in the face with a magnet, punched her several times, and kicked Ms. XXXX and Ms. XXXX.

69. On March 19, 2014, the Student ran in the media center, jumped over other students, took off her shoes, and climbed on furniture. Ms. XXXX and Ms. XXXX tried to get the Student to her break room but she ran through the halls, crawled under rugs, opened students' lockers, and tried to run out of the school twice. Once in her break room, the Student jumped in the sink and turned on the water. She soaked herself with water and soap and stated that she was taking a bath. She put paper towels in the drain to clog it and splashed water all over the floor. The sink overflowed and water poured onto the counter. When reminded to use her break bin, the Student said "make me" and "never." She ran around the room slipping and falling, and grabbed Ms. XXXX' water bottle and poured it over her head, and said "ahhh, nice and clean."
70. On April 4, 2014, the Student hit three staff members, threw objects at staff, spit on desks and the floor, ran on the wet floor, and jumped off of tables covered in saliva. XXXX XXXX and XXXX XXXX physically restrained the Student.
71. On April 14, 2014, the IEP team met and noted that the Student's behaviors had deteriorated since February. The Student and her family moved in January and there were a number of snow days in February. The Student also changed therapists in January and again prior to the IEP meeting. The team recommended the Student receive Extended School Year services: three hours per week of special education classroom instruction for six weeks. The team agreed to increase the Student's hours of special education instruction outside of general education to seventeen hours and fifty-five minutes per week.
72. On April 16, 2014, the Student's Crisis Intervention Plan was amended to include a more detailed script for staff responses.
73. On April 16, 2014, the Student took papers out of the trash, stated she was not following her schedule, ran around the room waving papers in the faces of staff, tried to slam the door on

the teacher and instructional assistant, hit staff members, rammed into Ms. XXXX with her head repeatedly, got on the counter, pulled down the window shades, and dumped out her social skills box on the floor.

74. On April 17, 2014, the Student rammed into Ms. XXXX while trying to exit the classroom without permission, hit and pinched Ms. XXXX' arms, and climbed up Ms. XXXX' legs.

75. On April 23, 2014, a Functional Behavioral Assessment was complete. Multiple factors precipitated the Student's negative behaviors, including being told no, not getting what she wanted, having to engage in non-preferred activities (academic or non-academic), seeing another student get attention, changes in routines, transitions, and unstructured environments. The likely functions of the Student's behaviors were attention, avoidance, sensory needs, and control.

76. On April 23, 2014, a Behavior Intervention Plan was developed based on the Functional Behavioral Assessment with the following goals: use strategies to accept inhibitory demands, censor/control responses, and comply with teacher directives without demonstrating negative behaviors; use replacement strategies and coping skills in order to decrease destructive behaviors, regulate emotional states, and appropriately gain adult attention; and use strategies to appropriately express needs, maintain boundaries, and seek attention, with a decrease in regressive behaviors.

77. On April 24, 2014, the IEP team met and reviewed the Functional Behavioral Assessment, Behavioral Intervention Plan, and the Crisis Plan.

78. On May 1, 2014, the Student became upset because she said she did not know if her mother would bring her cupcakes. The Student spit in other students' mailboxes, XXXX her XXXXX and XXXX her XXXXX and squeezed her abscess⁶ on chairs, ripped the eyes off of

⁶ Apparently the Student had a sore on the XXXX XXX.

puppets, spit on tables, threw materials, ripped papers, ate paper, destroyed classroom materials, jumped on Ms. XXXX's back, kicked Ms. XXXX and Ms. XXXX, scratched, punched, threw her shoes, took off her socks and filled them with water and spread the water on the floor, wrapped her legs around Ms. XXXX' and Ms. XXXX's legs, tried to scratch their legs, stood in a fighting position and said "I'm a great fighter," crawled in a cubby, pushed the office call button eighteen times, and threw her shoes repeatedly at the office window where Ms. XXXX was standing.

79. On May 5, 2014, the Student kicked the laptop cart and pushed it across the room, threw classroom materials out the window, licked the smartboard, spit on the smartboard pens and eraser, unplugged all electrical wires, spit on Ms. XXXX's legs and arm, threw a marker cap, book and tape at Ms. XXXX's upper body, kicked the laptop cart until it broke off of the hinges, pulled classroom materials out of cabinets and threw them around the room, colored with marker on laptop cart and whiteboard, kicked Ms. XXXX, spit on door window and classroom office window, unraveled a full roll of tape, tipped over chairs, ripped up her schedule, threw papers all over the classroom, pulled down all the window shades, broke Ms. XXXX's bracelet, tried to rip off Ms. XXXX's name tag, and scratched Ms. XXXX's arms and broke the skin.

80. On May 12, 14, and 19, 2014, XXXX XXXX, Ph.D., Developmental Neuropsychologist, evaluated the Student. On the WISC-IV, the Student's scores were high average in perceptual reasoning, average in verbal comprehension, processing speed, and full scale IQ, and low average in working memory. On the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Student's scores were average in reading comprehension, math problem solving, word reading, numerical operations and spelling, and below average in pseudoword decoding. On the Wide Range Assessment of Memory and Learning, Second

Edition (WRAML-2) Story Memory, the Student's score was low average. Dr. XXXX diagnosed the Student with ADHD and a decoding Specific Learning Disability. She noted the Student's emotional dysregulation and elevated need for movement and stimulation and that the Student's anxiety and difficulties with emotional and sensory regulation were features that could be neurobiologically related to autism, although the Student does not fit the diagnostic profile of a child on the autism spectrum.

81. Dr. XXXX made the following recommendations: a small class with a high teacher to student ratio; a predictable schedule of frequent sensory-motor breaks and predictable, calming transitions back to learning activities; specialized approaches to help the Student self-calm and manage her anxiety; a consistent visual schedule; an occupational therapist and psychologist should help design self-regulation approaches; the Parent and the Student should meet with a Developmental Pediatrician or Child Psychologist for medication for emotional regulation; direct, special instruction in social skills, especially flexibility, handling disappointment, and personal space; the Student's social skills therapist should be integrated throughout activities; an updated Speech/Language evaluation, including auditory processing; direct, specialized instruction in decoding; multi-sensory, systematic, phonics-based instruction in reading and writing; when reading, breaking longer words into chunks; support at the beginning of a writing task; and dictation to the teacher or parent.

82. On June 20, 2014, the IEP team met and discussed Dr. XXXX's evaluation and the Student's recent negative behaviors; conducted an annual review of the Student's IEP; and revised her IEP. The team noted the Student's behaviors had worsened lately and that activities that she previously liked and that helped her calm down, she no longer liked and no longer helped her. The team found the Student qualified for special education services based on her emotional disability. The team noted the Student had some processing disorders but that her

classroom performance and standardized assessments continued to be on grade level. TCPS team members did not find the Student met the criteria for a specific learning disability. The team noted that the Student had been spending minimal time in general education because of her behaviors and required 1:1 supervision at all times. The team agreed that the Student needed a therapeutic setting throughout her school day. TCPS recommended a residential placement to provide consistency to the Student and as few transitions as possible. The Parent wanted a day school placement.

83. On September 24, 2014, the IEP team met and agreed to change the Student's placement to a therapeutic non-public day school at the Parent's request, specifically the [School 2].

DISCUSSION

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1482 (2010), 34 C.F.R. Part 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 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.

458 U.S. at 200-01 (emphasis added). *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991).

The IDEA contains the following, similar definition of FAPE:

special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge...[and that have been] provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “[t]he best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland*, 700 F.2d 134, 139 (4th Cir. 1983), *citing Rowley*. Instead, FAPE entitles a student to an IEP that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 177. “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 MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002), *citing Rowley*, 458 U.S. at 192; *see also A.B. v. Lawson*, 354 F.3d 315 (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*, 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, the benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “de minimis.” *Polk v. Central Susquehanna*, 853 F.2d 171, 182 (3rd Cir. 1988).

In addition to the IDEA’s requirement that a disabled child receive some educational benefit, the child must be placed in the “least restrictive environment” to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. 300.114(a)(2)(i) & 300.117 (2014). However, placing disabled children into regular school programs may not be appropriate for every disabled child. Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child’s disability is such that education in a regular classroom cannot be achieved. *Id.*

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 (2005). In this case that is the Parent.

The Parent alleged that TCPS failed to provide the Student with FAPE during the 2012-2013 and 2013-2014 school years. Specifically, the Parent asserted that TCPS delayed evaluating the Student properly, delayed developing an IEP for the Student, and delayed appropriately placing the Student. The Parent claimed that there were early behavior indicators during prekindergarten and behavior referrals in the beginning of kindergarten. The Parent claimed further that the Student struggled in reading and writing during kindergarten and required intervention. The Parent asserted that the Student has a learning disability that TCPS failed to identify. The Parent noted that the Student's behaviors intensified after winter break. The Parent maintained that she requested that the Student be evaluated for special education services in February 2013 but TCPS did not identify the Student as in need of special education until Summer of that year. The Parent asserted that in April 2013 TCPS had enough information to identify the Student as in need of special education due to an emotional disability. The Parent contended that the Student struggled in the beginning of first grade and continued to exhibit the same concerning behaviors. The Parent argued that by the end of first grade the Student was not making progress and TCPS recommended residential placement. The Parent maintained that the Student is doing well this school year in a therapeutic day setting. As a remedy, the Parent requested full days of compensatory education for each day that the Student was deprived FAPE, which the Parent claimed occurred every day during the entire kindergarten and first grade school years.

TCPS maintained that all of its testing of the Student was done within the statutory timeline of sixty days from consent. TCPS asserted that the two discipline referrals at the

beginning of prekindergarten were not a basis to suspect the Student had a disability at the start of kindergarten. TCPS claimed that the Student's behaviors during the first semester of kindergarten were similar to the behaviors of her peers, such as difficulty following directions and with transitions. TCPS argued that the Student's behaviors intensified after the abuse by her father over winter break. TCPS contended that behavior problems in children after being abused is a typical reaction to abuse and not evidence of an emotional disability. TCPS argued that in February 2013 the Parent reported that the Student had been diagnosed with ADHD and the assessments were based on the suspicion that ADHD was impacting the Student's education. TCPS maintained that the Student did not require specialized instruction because of her ADHD, although she did need supports, which were provided. TCPS argued that at first the Student did well with the supports but when her behavior escalated, they then tested her for an emotional disability. TCPS asserted that in order to be identified as emotionally disabled a child's condition must exist over a long period of time and to a marked degree. TCPS maintained that they did not know if the Student's behavior was a reaction to the abuse or emotional disability and that it would have been inappropriate to identify the Student as having an emotional disability right after the abuse. TCPS claimed that the Student's behavior of disrobing and urinating occurred after the April 2013 IEP meeting, and that they conducted more testing as a result. TCPS noted a 504 Plan was in place during the additional testing and the Student was identified as in need of special education that summer. TCPS argued that the Student remained on grade level during kindergarten and first grade and did not miss any educational opportunity. TCPS asserted that the IEP was appropriate and that there was a four month period during first grade that the Student's negative behaviors were largely extinguished. TCPS maintained that as the Student's behaviors changed her IEP was changed; however, by the end of first grade the IEP team recognized that the Student needed a more intense placement. TCPS argued that only Dr.

XXXX testified that the Student needed compensatory education, but that there was no mention of a need for compensatory education in her report. TCPS questioned Dr. XXXX's conclusion that the Student has a learning disability based on one subtest and alleged that her notes from her interviews of the Student's teachers were incomplete and failed to mention that her teachers reported that she was on grade level. TCPS maintained that [School 2] reported that the Student is currently on grade level and doing well academically. TCPS maintained further that when the Student is motivated and not having behavior issues she can perform well; in contrast, a learning disability is consistent, not only present sometimes. TCPS explained that at the end of first grade it recommended a residential placement because of the Student's difficulties with transitions and the distance she would have to travel to a day program. TCPS explained further that it changed the placement to a therapeutic day program at the Parent's request and paid for the Student's transportation and for care for the Student's brother.

The issues before me are whether the Student was denied FAPE during the 2012-2013 and 2013-2014 school years because TCPS delayed identifying the Student as in need of special education, developing an IEP for the Student, and appropriately placing the Student. For the reasons that follow, I find that TCPS did not cause any undue delay and, more importantly, the Student was not denied FAPE.

I set out in detail, in my findings of fact above, the sequence of events in this case. To begin, I find that the two discipline referrals in September of the Student's prekindergarten year without any other incidents of note for the remainder of that year did not put TCPS on notice of any need for a special education evaluation. For the first four months of kindergarten, the Student's records do not document any concern about the Student's behaviors. It was not until December 6, 2012, that Ms. XXXX noted that the Student's behavior was escalating and discussed putting her on a behavior plan, which was done in the following days. The Student's

goal was to follow directions from adults the first time given, which shows that failing to follow directions was the main concern at the time. On January 29, 2013, Ms. XXXX noted the Student was having a very hard time following directions, keeping to herself, and staying on task, and that she often crawled under tables. It was not until February 4, 2013, that the Student engaged in behavior significant enough to warrant a disciplinary referral, specifically, she bit a staff member on the hand. On February 7, 2013, the Parent requested the Student be evaluated for special education services. On February 8, 2013, the Student was climbing on tables, throwing papers and bit an administrator. On February 11, 2013, the Student was suspended as a result of the February 8th incident. On February 21, 2013, the Student returned to school, attending the XLC, and approximately ten days later the Student returned to her kindergarten classroom at [School 1].

On March 4, 2013, an IEP meeting was held during which the team discussed the Student's recent escalated behaviors. The Parent relayed the incident with the Student's father over winter break and stated that the Student had been seeing a psychologist, Dr. XXXX, who had diagnosed the Student with ADHD, Behavior Disorder NOS, and Anxiety Disorder NOS. The team agreed the Student should be evaluated, and the Parent gave consent to the following assessments: expressive language, pragmatic skills, educational, cognitive, social, emotional, behavior, and a Functional Behavioral Assessment. On March 6, 2013, a crisis plan was developed for the Student; however, the Student's behavior continued to escalate, and she had repeated incidents during March and April of out of control and destructive behavior. Beginning March 22, 2013, the Student was also hitting, kicking, and biting staff. TCPS began assessing the Student on March 19, 2013 and four assessments were complete on April 17, 2013: educational, speech/language, cognitive, and functional behavior. It is unclear why TCPS did not begin assessing the Student's social and emotional functioning in March because clearly that

was a concern in addition to the Student's ADHD.

On April 17, 2013, an IEP meeting was held during which the team reviewed the assessments. Ms. XXXX reviewed her educational assessment and described the Student's reading, math, and writing skills as average. She noted strengths in all academic areas and some weakness in the area of contextual writing. Ms. XXXX stated that if the Student preferred an activity she would work diligently to complete it but if she did not prefer an activity she would often refuse to participate. Ms. XXXX reviewed her speech/language assessment and described the Student's receptive, expressive, and pragmatic language skills as average. Ms. XXXX reviewed her cognitive assessment and said the Student had relatively evenly developed, average skills across all areas. She stated that the Student had mild difficulties sustaining her attention to task and following rules and directions, adequate social perception skills, a high level of hyperactivity, verbal aggression, and depressive symptoms. She noted that the Student's level of cooperation was highly correlated to the level of attention she received, her interest in the task, and the availability of incentives. Ms. XXXX reviewed the Functional Behavior Assessment, noting that the Student engaged in disruptive behaviors to get attention and that she was more likely to comply if she liked the activity or got a reward. The team determined that the Student's ADHD did have an educational impact but that the Student did not need specialized instruction for her ADHD, although she did need accommodations. The team agreed a sensory profile and additional assessments were needed for emotional concerns. On April 23, 2013, a 504 Accommodation Plan was developed and implemented for the Student.

On April 30, 2013, the Student's behavior escalated to a new level. She removed her clothing, urinated on the floor, and then slid on the floor through her XXXXXX while laughing and shouting. She engaged in similar behavior on May 1 and 3, 2013. Subsequently, the Student was placed at the XLC with a 1:1 teacher.

On June 10, 2013, the IEP team met to review the Occupational Therapy Evaluation and Emotional/Social/Behavior Assessment. Ms. XXXX noted that when the Student was interested in an activity, she was able to perform fine motor and academic tasks in a typical manner. She noted further that the Student seeks more movement than other children and avoids things she does not like to do; however, that was consistent with ADHD and not a sensory-based issue. Ms. XXXX found that the Student had ADHD and a behavior disorder but also had underlying depression and attachment issues, feelings of rejection, and a perception that her needs and wants were not being met by the adults in her life. She found that the Student had an emotional condition that was marked and pervasive and existed over time. She noted that the Student displayed inappropriate behavior under normal circumstances and was unable to effectively regulate and manage her feelings, becoming verbally and physically aggressive and undressing, urinating, and playing in her XXXXXX. She noted further that the Student's inability to regulate and control her behavior adversely impacted her education in the general education setting. Ms. XXXX recommended a therapeutic educational setting in order to build the Student's self-management and self-regulation strategies and develop coping skills. The team agreed that the Student required specialized instruction and found she was eligible for special education based on her emotional disability.

COMAR 13A.05.01.06A requires an IEP team to complete an initial evaluation of a student for special education services within sixty days of parental consent for assessments and ninety days from receiving a written referral. The Parent requested a special education evaluation on February 7th and gave consent for assessments on March 4th. TCPS completed its initial evaluations of the Student on April 17th, forty-four days after consent and sixty-nine days after the written request. Therefore, I find TCPS's initial assessment of the Student was timely. As I noted above, it is unclear why TCPS did not assess the Student's social and emotional functioning

initially; however, after the initial assessments TCPS agreed that further assessments were necessary and it did assess the Student's social and emotional functioning by June 10th. It is important to note that the Student's behaviors were in flux and escalating during this timeframe and her most extreme behaviors did not begin until April 30th. In addition, TCPS did have supports in place for the Student under the 504 Plan, her crisis plan, and her daily success plan. Moreover, identifying a student with an emotional disability is an assessment that takes time. COMAR 13A.05.01.03B(23)(a) defines an emotional disability as "a condition exhibiting . . . characteristics over a long period of time and to a marked degree, that adversely affects a student's educational performance." The Student's social and emotional functioning should have been assessed by the beginning of May under COMAR 13A.05.01.06A; however, I find that the delay of one month in completing this assessment did not deny the Student FAPE. She continued to attend school during May 2013 at the XLC and was receiving 1:1 instruction. The Student prefers 1:1 adult attention and was able to complete her academic work in this setting. Therefore, I find TCPS did not unduly delay identifying the Student as in need of special education and the Student was not denied FAPE during the 2012-2013 school year.

In July 2013, the IEP team developed an initial IEP for the Student. As detailed in the findings of fact above, the IEP team met repeatedly throughout the 2013-2014 school year and made changes to the Student's IEP in response to changes in the Student's behavior. The Student started the school year with only one behavior incident but by October her behavior began to escalate. In response, the IEP team met on October 14, 2013, discussed the Student's recent behavior, and increased the Student's hours in special education by one hour twenty minutes per day, placing her in special education all afternoon. Thereafter, the Student's behavior improved with only one incident on October 22, 2013. On January 15, 2014, the IEP team met and noted that the Student had been very successful since returning from winter break

and had not had any major behavioral incidents. The team also noted that the Student wanted to spend more time with her general education classmates, was making friendships, and was doing well academically and with her social skills. The team discussed the need for an updated Functional Behavior Assessment and agreed to modify the IEP, gradually increasing the Student's time in general education by five hours. The Student would receive twelve hours and fifty-five minutes per week of special education outside of general education and fifteen hours per week of special education within general education.

Unfortunately, beginning with an incident on February 27, 2014, the Student's behavior began to escalate again. On April 14, 2014, the IEP team met and discussed the Student's deteriorating behaviors. The team discussed that the Student and her family moved in January and there were a number of snow days in February, causing schedule disruptions. The Parent stated that the Student changed therapists in January and again prior to the IEP meeting. The team recommended the Student receive Extended School Year services and agreed to increase the Student's hours of special education instruction outside of general education to seventeen hours and fifty-five minutes per week. On April 23, 2014, a new Functional Behavioral Assessment was completed and a Behavior Intervention Plan was developed. On April 24, 2014, the IEP team met and reviewed the Functional Behavioral Assessment, Behavioral Intervention Plan, and the Crisis Plan. On May 12, 14, and 19, 2014, Dr. XXXX evaluated the Student. On June 20, 2014, the IEP team met and discussed Dr. XXXX's evaluation, the Student's recent negative behaviors, and revised the IEP. The team noted the Student's behaviors had worsened and that activities that she previously liked and that helped her calm down, she no longer liked and no longer helped her. The team found the Student continued to be qualified for special education services based on her emotional disability. The team noted the Student had some processing disorders but that her classroom performance and standardized assessments continued

to be on grade level. TCPS team members did not find the Student met the criteria for a specific learning disability. The team noted that the Student had been spending minimal time in general education because of her behaviors and required 1:1 supervision at all times. The team agreed that the Student needed a therapeutic setting throughout her school day. TCPS recommended a residential placement to provide consistency to the Student and as few transitions as possible. The Parent wanted a day school placement. On September 24, 2014, the IEP team met and agreed to change the Student's placement to a therapeutic non-public day school at the Parent's request, specifically the [School 2].

COMAR 13A.05.01.09D requires that an IEP be in effect at the start of the school year for a student with a disability. TCPS found the Student eligible for special education services on June 10, 2013, at the end of the 2012-2013 school year. TCPS's initial IEP for the Student was approved in July 2013 and in effect at the start of the 2013-2014 school year. Therefore, I find that TCPS did not delay in the development of an IEP for the Student. I further find that TCPS did not delay in appropriately placing the Student. The Student's behaviors fluctuated over the course of the 2013-2014 school year. She had months without any significant behavior incidents. TCPS made changes to the number of hours the Student was outside the general education setting based on the changes in the Student's behavior. When the Student's behavior improved and she expressed a desire to spend more time with her classmates, TCPS responded by gradually increasing her time in the general education classroom. When the Student's behavior deteriorated, TCPS responded by increasing the Student's time in the special education classroom. TCPS actions were consistent with the requirement that a student be educated in the least restrictive environment. *See* COMAR 13A.05.01.10. When it became apparent at the end of the school year that the Student needed a more restrictive setting, TCPS recommended a residential placement. Thus, I find that TCPS appropriately placed the Student according to her

changing needs and changing IEP. There was no delay. Therefore, I find the Student was not denied FAPE during the 2013-2014 school year due to a delay in developing or changing her IEP or placing her in accordance with her IEP.

On the question of whether the Student has a specific learning disability, I find that the evidence does not support such a finding. COMAR 13A.05.01.03B(73) defines specific learning disability as follows:

(73) Specific Learning Disability (SLD).

(a) "SLD" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, consistent with Department criteria.

(b) "SLD" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(c) "SLD" does not include students who have learning problems which are primarily the result of visual, hearing, or motor impairments, intellectual disability, emotional disturbance, or environmental, cultural, or economic disadvantage.

COMAR 13A.05.01.06D(2) provides:

(2) The IEP team shall determine that a student has an SLD if:

(a) The student does not achieve adequately for the student's age or meet State-approved grade level standards when provided with learning experiences appropriate for the student's age and ability levels in one or more of the following areas:

- (i) Oral expression;
- (ii) Listening comprehension;
- (iii) Basic reading skills;
- (iv) Reading fluency skills;
- (v) Reading comprehension;
- (vi) Written expression;
- (vii) Mathematics calculation; or
- (viii) Mathematics problem solving; and

(b) The student's lack of achievement described in §D(2) of this regulation is not primarily the result of:

- (i) A visual, hearing, or motor impairment;
- (ii) Intellectual disability;
- (iii) Emotional disability;
- (iv) Cultural factors;
- (v) Environmental, cultural, or economic disadvantage; or
- (vi) Limited English proficiency.

The Student in this case continued to perform on grade level throughout the 2012-2013 and 2013-2014 school years, and she continues to do so in her current school. Testing showed some weakness in the Student's writing, working memory, and decoding skills. However, the Student has demonstrated over time her ability to perform tasks that she prefers and that interest her. In the classroom, the Student's performance mirrors her willingness to engage in an activity. It is when the Student does not prefer a particular task that her performance is poor or she refuses to perform. Thus, the evidence shows that the Student's weaknesses, to the extent that she has them, are primarily the result of her emotional disability and not due to a specific learning disability.

Compensatory services are "educational services ordered ... to be provided prospectively to compensate for a past deficient program." *G ex rel. RG v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 308 (4th Cir. 2003). Based on my findings that the Student was not denied FAPE in the 2012-2013 and 2013-2014 school years, I find the Parent has not demonstrated that an award of compensatory education is warranted.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student was not denied a free appropriate public education during the 2012-2013 and 2013-2014 school years. 20 U.S.C.A. §§ 1401(9), 1412(a)(1)(A) (2010); Md. Code Ann., Educ. § 8-401(a)(3) (2014); COMAR 13A.05.01.03B(27); COMAR 13A.05.01.06A; COMAR 13A.05.01.09D. Therefore, the Student is not entitled to compensatory education at public expense. *G ex rel. RG v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 308 (4th Cir. 2003).

ORDER

I **ORDER** that the August 6, 2014, Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED**.

February 20, 2015
Date Decision Issued

Lorraine E. Fraser
Administrative Law Judge

LEF/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.