

XXXX XXXX

v.

MONTGOMERY COUNTY

PUBLIC SCHOOLS

*** BEFORE RICHARD O’CONNOR,
* ADMINISTRATIVE LAW JUDGE,
* THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-MONT-OT-14-42553**

* * * * *

DECISION

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STATEMENT OF THE CASE

On December 3, 2014, [Father] and [Mother] (Parents), on behalf of their child, 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 the Montgomery County Public Schools (MCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone pre-hearing conference on January 12, 2015. The Parents were represented by Michael J. Eig, Esquire, Michael J. Eig and Associates, P.C., 5454 Wisconsin Avenue, Suite 760, Chevy Chase, Maryland 20815. Jeffrey A. Krew, Esquire, Jeffrey A. Krew, LLC, 9713 Rugby Court, Suite 100, Ellicott City, Maryland 21042, represented the MCPS. At the pre-hearing conference, the parties requested that the hearing be held on March 17 through 20, 2015; the Parents waived on the record their right to have a decision issued within the

forty-five day timeframe for a decision. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2014). That timeframe began when the parties waived a resolution meeting on December 15, 2014 and would have required a decision on or before January 30, 2015, but the March 17, 2015 date was the earliest on which counsel were available.

I held the hearing beginning on March 17, 2015, at the MCPS Carver Educational Center in Rockville, Maryland. The Parents were present, represented by Michael J. Eig, Esquire. Jeffrey A. Krew, Esquire, represented MCPS. The hearing continued through March 20, 2015, as scheduled, but, unfortunately, the four days allotted for the hearing proved to be insufficient. By agreement of the parties, at the close of the originally scheduled hearing dates, the hearing was continued to March 26, 2015, then to April 15 and 16, 2015. The hearing continued on those dates and concluded on April 16, 2015. The parties requested an extension of time for thirty days for me to issue a decision. Because the thirtieth day, May 16, 2015, falls on a Saturday, the decision is actually due not later than May 15, 2015. 34 C.F.R. 300.515 (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

The issues are as follows:

1. Have the Individualized Education Plans (IEP) developed by the Student's MCPS IEP team failed to provide the Student a free appropriate public education in the least restrictive environment for the 2013-2014 and 2014-2015 school years?
2. Does the Student's current placement at [School 1]¹ of [School 1] ([SCHOOL 1]) provide a free appropriate public education in the least restrictive environment?
3. Should the Student's IEP for the 2014-2015 school year be revised to provide placement at [School 1] of [SCHOOL 1]?
4. Are the Parents entitled to reimbursement for their expenses in placing the Student at [School 1] of [SCHOOL 1] during the 2013-2014 and 2014-2015 school years?
5. Did the Parents commit a procedural violation by failing to provide the MCPS with proper and timely notice of the Student's removal from MCPS and placement at [School 1] of [SCHOOL 1]?
6. If so, should the Parents' entitlement to reimbursement be denied or reduced because of the procedural violation?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Parents:

1. Request for Mediation/Due Process Hearing, December 3, 2014.
2. [School 2] ([SCHOOL 2]) Nursing Discharge Summary, November 2007.

¹ The school's letterhead and other documents sometimes style the school "[School 1]" and sometimes "[School 1]." I shall use the latter for consistency.

3. [SCHOOL 2] Children's School Program Summary, January 4, 2008.
4. MCPS Status Update by XXXX XXXX, January 2009.
5. MCPS Teacher Referral, January 29, 2009.
6. MCPS IEP and Meeting Notes, February 3, 2009.
7. MCPS Academic Student Profile, March 23, 2009.
8. MCPS Teacher Referral, March 24, 2009.
9. MCPS Reevaluation Determination meeting notes, March 31, 2009.
10. Treatment Summary by XXXX XXXX, Psy.D., May 12, 2009.
11. Letter to XXXX XXXX, M.D., from XXXX XXXX, M.D., May 13, 2009.
12. MCPS End of Year Report, June 15, 2009.
13. MCPS Behavior Intervention Plan, October 26, 2009.
14. MCPS Functional Behavioral Assessment Update, November 24, 2009.
15. MCPS IEP, June 9, 2010.
16. [School 3] Seventh Grade Report Card, June 2011.
17. [School 3] ESY Report Card and Progress Report, Summer 2011.
18. [School 3] Monthly Progress Reports and Report Card, Fall 2011.
19. [School 3] Education Plan, October 27, 2011.
20. Letter from Special Education Coordinator at [School 3], November 7, 2011.
21. Emails between Parents and XXXX XXXX, December 6 and 20, 2011.
22. Emails between Parents and XXXX XXXX, April 19, 2012.
23. Letters from [School 4] to Parents suspending the Student, May 4 and 11, 2012.
24. MCPS Educational Assessment Report, June 20, 2012.
25. MCPS Psychological Evaluation Report, June 21, 2012.

26. Letter from XXXX XXXX, M.D., July 12, 2012.
27. Letter from [Hospital 1], August 17, 2012.
28. Letters from [School 4] regarding Student suspension, November 7, 14, 15, and 19, 2012.
29. MCPS Educational Status Report, November 19, 2012.
30. MCPS Prior Written Notice, November 20, 2012.
31. MCPS IEP, December 12, 2012.
32. Letter from XXXX XXXX, M.D., January 7, 2013.
33. Special Education Mediation Agreements, January 8, 2013 and February 20, 2014.
34. MCPS Eighth Grade Report Card, June 20, 2013.
35. MCPS IEP, June 6, 2013.
36. Letter to Parents from the [School 5] ([SCHOOL 5]), August 2013.
37. Emails between Parents and XXXX XXXX of MCPS, November 5, 2013; Summary of Parent Conference, November 5, 2013.
38. Emails between Parents and MCPS staff, November 13 and 14, 2013.
39. MCPS Clarification/Problem Solving Record, November 19, 2013.
40. MCPS Behavioral Intervention Plan, November 20, 2013.
41. MCPS Functional Behavior Assessment, November 20, 2013.
42. MCPS Summary of Parent Conference, November 21, 2013.
43. Letter to Ms. XXXX from Student, November 26, 2013.
44. Letter to Parents from XXXX XXXX, Principal of [School 6] ([School 6]), regarding suspension, November 26, 2013.
45. Letter from XXXX XXXX. M.D., To Whom It May Concern, November 26, 2013.
46. MCPS Summary of Parent Conference, December 2, 2013.
47. Letter to Parents from XXXX XXXX regarding suspension, December 4, 2013.
48. MCPS Summary of Parent Conference, December 5, 2013.

49. MCPS Behavioral Intervention Plan, December 5, 2013.
50. Application for Home and Hospital Teaching, December 9, 2013.
51. Letter to Parents from XXXX XXXX regarding suspension, December 16, 2013.
52. MCPS Report of School Psychologist, December 26, 2013.
53. MCPS Educational Status Report, December 20, 2013.
54. MCPS Speech/Language Status Report, December 23, 2013.
55. MCPS list of Cumulative Suspensions with Active IEP, December 31, 2013.
56. MCPS Student Record Transmittal, January 2, 2014.
57. MCPS Home and Hospital Teaching IEP, January 2, 2014.
58. MCPS Draft IEP, January 2, 2014.
59. Letter from XXXX XXXX of [Program 1] at [School 6], January 3, 2014.
60. Letter to Parents from XXXX XXXX regarding suspension, January 9, 2014, and Student's explanation of events.
61. Letter from XXXX XXXX, M.D., January 10, 2014.
62. MCPS Summary of Parent Conference, January 13, 2014.
63. Letter to Parents from XXXX XXXX requesting IEP meeting, January 15, 2014; IEP meeting notes regarding incidents at school and suspensions, January 16, 2014.
64. MCPS Ninth Grade First Semester Report Card, January 24, 2014.
65. MCPS Draft IEP, January 31, 2014.
66. MCPS [Program 1] Behavior Intervention Reports, September 2013 through January 2014.
67. Request for Mediation and Due Process Complaint, January 31, 2014.
68. MCPS Prior Written Notice, February 4, 2014.
69. Emails between Parents and XXXX XXXX, February 4, 2014.
70. Letter to Parents from XXXX XXXX of MCPS regarding results of mediation, February

- 25, 2014.
71. Letter to Parents from XXXX XXXX regarding [SCHOOL 5] enrollment, March 12, 2014.
 72. MCPS Transfer of Educational Records, March 24, 2014.
 73. Letter from XXXX XXXX, M.D., March 25, 2014.
 74. Letter to Parents from XXXX XXXX regarding [SCHOOL 5] enrollment, March 26, 2014.
 75. Notice of withdrawal email to XXXX XXXX, Principal of [SCHOOL 5], from Parents, March 28, 2014.
 76. Letter from XXXX XXXX to Parents, April 1, 2014.
 77. Letter from XXXX XXXX to Parents regarding use of seclusion, April 4, 2014.
 78. Letter to Parents from XXXX XXXX, April 4, 2014.
 79. Letter to Parents from XXXX XXXX of MCPS, April 8, 2014.
 80. Letter from Parents regarding incident at school, April 8, 2014.
 81. Emails between Parents and XXXX XXXX, Psy.D., of [SCHOOL 5], April 10 and 11, 2014.
 82. Emails between Parents and XXXX XXXX, April 11, 2014.
 83. Letter to Zvi D. Greismann, Esquire, from Michael J. Eig, Esquire, April 17, 2014.
 84. Letters to Parents from XXXX XXXX and XXXX XXXX regarding unlawful absences, January through April 2014.
 85. [SCHOOL 5] SWIS [School-Wide Information System] Behavioral Data, April 2014.
 86. [SCHOOL 5] Incident Reports, April 2014.
 87. [SCHOOL 5] Treatment Summary by XXXX XXXX, Psy.D., April 30, 2014.
 88. General Information about [SCHOOL 5], September 2013.
 89. [SCHOOL 5] School Survey Results, 2011-2012.
 90. MCPS IEP, May 16, 2014.

91. Letter to Zvi D. Greismann, Esquire, from Parents, August 11, 2014.
92. Letter to Michael J. Eig, Esquire, from Zvi Greismann, Esquire, August 14, 2014.
93. Letter to OAH from Michael J. Eig, Esquire, enclosing hearing request, December 3, 2014.
94. Email from XXXX XXXX to XXXX XXXX, December 12, 2014.
95. Email from Parents to Mr. Eig's office, January 16, 2015,
96. Letter from XXXX XXXX, M.D., To Whom It May Concern, February 7, 2015.
97. Letter from XXXX XXXX, M.D., To Whom It May Concern, undated, summarizing a meeting with the Student on March 5, 2015.
98. General Information about [SCHOOL 1].
99. Letter of Acceptance to [SCHOOL 1], April 9, 2014.
100. [SCHOOL 1] Master Treatment Plan, May 20, 2014.
101. [SCHOOL 1] Monthly Progress Reports, April 2014 through January 2015.
102. [School 1] Academic Transcript and Report Cards through second quarter 2015, February 2015.
103. [School 1] Quarterly Education Reports, June through December 2014.
104. Standardized test results, April 2014 through January 2015.
105. [SCHOOL 1] Monthly Individual Therapy Notes by XXXX XXXX, April 2014 through January 2015.
106. [SCHOOL 1] Medication Management notes, April 2014 through February 2015.
107. [SCHOOL 1] Family Therapy Note, January 15, 2015.
108. [School 1] Daily Behavior Data graphs and reports, April through December 2014.
109. [School 1]/[SCHOOL 1] Behavioral Interventions, April through September 2014.
110. [SCHOOL 1] Incident/Information Reports, April through December 2014.
111. [School 1]/[SCHOOL 1] contract and paid invoices, April 2014 through March 2015.

112. Digital communications between Parents and XXXX XXXX, May through December 2014.
113. Resume of XXXX XXXX.
114. Resume of XXXX XXXX.
115. Resume of XXXX XXXX.
116. Resume of XXXX XXXX.
117. [SCHOOL 5] Discharge Summary, April 21, 2014; Psychosocial Psychiatric History, March 24, 2014; Psychiatric Admission Assessment, March 24, 2014; Progress Notes, March 24 through April 21, 2014; Physician's Orders, March 24 through April 25, 2014.
118. [School 1]/[SCHOOL 1] paid invoice, March 2015.
119. [School 1]/[SCHOOL 1] licenses from State of [School 1], 2015-2016; resumes of XXXX XXXX, Jr., XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, XXXX XXXX, and XXXX XXXX.

I admitted the following exhibits into evidence on behalf of MCPS:

1. MCPS IEP June 6, 2013.
2. Email from [Father] to XXXX XXXX, November 18, 2013.
3. Functional Behavioral Assessment and Behavioral Intervention Plan, November 20, 2013.
4. MCPS IEP Documentation, November 21, 2013.
5. Letter to Parents from XXXX XXXX regarding suspension, November 26, 2013.
6. Letter to Parents from XXXX XXXX regarding suspension, December 4, 2013.
7. Application for Home & Hospital Teaching, December 9, 2014.
8. Letter from XXXX XXXX, M.D., To Whom It May Concern, December 5, 2013.
9. Behavioral Intervention Plan update, December 5, 2013.
10. Letter to Parents from XXXX XXXX regarding suspension, December 16, 2013.
11. Letter from XXXX XXXX, M.D., To Whom It May Concern, December 20, 2013.

12. MCPS Educational Status Report, December 20, 2013.
13. MCPS Speech-Language Status Report, December 23, 2013.
14. Email to Parents from XXXX XXXX, December 23, 2013.
15. Professional Services Agreement between XXXX XXXX, Jr., of [Group], Inc., undated, not signed by Parents.
16. MCPS Report of School Psychologist, December 26, 2013.
17. MCPS IEP meeting information, January 2, 2014.
18. MCPS IEP, January 2, 2014.
19. Letter from XXXX XXXX of [Program 1] at [School 6], January 3, 2014.
20. Letter to Parents from XXXX XXXX regarding suspension, January 9, 2014, and Student's explanation of events.
21. Email to Parents from XXXX XXXX, January 9, 2014.
22. Letter from XXXX XXXX, M.D., January 10, 2014.
23. MCPS IEP meeting information, January 16, 2014.
24. MCPS IEP meeting information and IEP, January 31, 2014.
25. Request for Mediation and Due Process Complaint, January 31, 2014.
26. Letter to Parents from XXXX XXXX of MCPS regarding results of mediation, February 25, 2014.
27. Emails between XXXX XXXX and [Mother], February 25 and March 2, 2014.
28. Email string between XXXX XXXX, [SCHOOL 1], and XXXX XXXX of [Group], March 6 through 19, 2014.
29. Letter to Parents from XXXX XXXX regarding [SCHOOL 5] enrollment, March 12, 2014.
30. [SCHOOL 5] New Student Information, March 24, 2014.
31. Letter from XXXX XXXX, M.D., To Whom It May Concern, March 25, 2014.
32. Letter to Parents from XXXX XXXX regarding [SCHOOL 5] enrollment, March 26,

- 2014.
33. Notice of withdrawal email to XXXX XXXX from Parents, March 28, 2014.
 34. Letter from XXXX XXXX to Parents, April 1, 2014.
 35. [SCHOOL 5] Critical Incident Notes, April 2014; Documentation of Physical Intervention or Seclusion, April 4, 2014; Seclusion Observation report, April 4, 2014; Debriefing with Student, April 4, 2014; Debriefing with Staff, April 4, 2014.
 36. Letter from XXXX XXXX to Parents regarding use of seclusion, April 4, 2014.
 - 36-A. [SCHOOL 5] Individual Treatment Plan of Care, April 7, 2014
 37. Letter of Acceptance to [SCHOOL 1], April 9, 2014.
 38. Rates, Expenditures and Fees agreement between the Parents and [SCHOOL 1], April 14, 2014.
 39. [SCHOOL 1] Incident/Information Reports, April through July 2014.
 40. [SCHOOL 1] Behavioral Interventions, April through July 2014.
 41. Letter to Zvi D. Greismann, Esquire, from Michael J. Eig, Esquire, April 17, 2014.
 42. [SCHOOL 5] SWIS Behavioral Data, April 2014.
 43. [SCHOOL 1] Psychiatrist Progress Notes, April 23 through July 16, 2014.
 44. [SCHOOL 1] Medication Management notes, April through July, 2014.
 45. Letter to Michael J. Eig, Esquire, from Zvi Greismann, Esquire, April 24, 2014.
 46. Letter to XXXX XXXX from Michael J. Eig, Esquire, April 29, 2014.
 47. Letter to Michael J. Eig, Esquire, from Zvi Greismann, Esquire, April 30, 2014.
 48. [SCHOOL 5] Treatment Summary by XXXX XXXX, Psy.D., April 30, 2014.
 49. [SCHOOL 1] Monthly Progress Reports, April 2014 through January 2015.
 50. [SCHOOL 1] Monthly Individual Therapy Notes by XXXX XXXX, April 2014 through January 2015.
 51. MCPS IEP, May 16, 2014

52. [SCHOOL 1] Master Treatment Plan, May 20, 2014.
53. Interstate Compact on the Placement of Children Request to [School 1] Division of Child & Family Services from XXXX XXXX, May 27, 2014.
54. Digital communications between Parents and XXXX XXXX, May and June 2014.
55. [School 1] Quarterly Education Report, 4th Quarter 2013-2014.
56. Request for Due Process Hearing, June 20, 2014.
57. MCPS response to due process complaint, June 30, 2014.
58. [School 1] Quarterly Education Report, Summer Quarter 2013-2014.
59. [School 1] Monthly Progress Report, August 6, 2014.
60. Letter to Zvi Greismann, Esquire, from Parents, August 11, 2014.
61. Letter to Michael J. Eig, Esquire, from Zvi Greismann, Esquire, August 14, 2014.
62. [SCHOOL 1] Behavioral Interventions, August and September 2014.
63. [SCHOOL 1] Monthly Progress Reports, August 2014 through January 2015.
64. [SCHOOL 1] Incident/Information Reports, September through December, 2014.
65. Digital communications between Parents and XXXX XXXX, September through December, 2014.
66. Withdrawal of due process complaint, September 22, 2014.
67. [SCHOOL 1] Individual Monthly Therapy Summaries, September 2014 through January 2015.
68. [School 1] Quarterly Education Report, Fall Quarter 2014-2015.
69. [SCHOOL 1] Medication Management notes, October 2014 through February 2015.
70. Letter to OAH from Michael J. Eig, Esquire, December 3, 2014.
71. Request for Due Process Hearing, December 3, 2014.
72. MCPS response to due process complaint, December 11, 2014.
73. [School 1] Quarterly Education Report, Second Quarter, 2014-2015.

74. [SCHOOL 1] Treatment Plan Review, January 15, 2015.
75. [SCHOOL 1] invoices, April 2014 through February 2015.
76. Scholastic Math and Reading Inventories, May 19, 2014 through February 2, 2015.
77. XXXX XXXX *Curriculum Vitae*.
78. XXXX XXXX *Curriculum Vitae*.
79. XXXX XXXX, Ph.D. *Curriculum Vitae*.
80. XXXX XXXX *Curriculum Vitae*.
81. XXXX XXXX *Curriculum Vitae*.
82. XXXX XXXX, Psy.D. *Curriculum Vitae*.

Testimony

The Parents presented the following witnesses:

1. [Mother], the Student's mother;
2. XXXX XXXX, School Administrator of [School 1] at [SCHOOL 1], accepted as an expert in school administration;
3. XXXX XXXX, Director of Residential Treatment, [SCHOOL 1]; and
4. XXXX XXXX, M.Ed., Certified Mental Health Counselor, accepted as an expert in school counseling and clinical mental health counseling.²

MCPS presented the following witnesses:

1. XXXX XXXX, Ph.D., Certified School Psychologist, accepted as an expert in school psychology and clinical psychology, with an emphasis on children and adolescents with anger and mood-related issues;
2. XXXX XXXX, MCPS Coordinator of the Placement and Assessments Services Unit, accepted as an expert in special education with an emphasis on private placement of children;
3. XXXX XXXX, Principal of [SCHOOL 5], accepted as an expert in special education with an emphasis on students with anger and behavior-related problems; and

² Ms. XXXX, Ms. XXXX, and Ms. XXXX testified by telephone.

4. XXXX XXXX, Psy.D., Clinical Psychologist at [SCHOOL 5], accepted as an expert in clinical psychology.

FINDINGS OF FACT

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

1. The Student is sixteen years old.
2. The Student would be in the tenth grade if he were attending MCPS.
3. The Parents adopted the Student from [Country] at age seven months.
4. The Student has been diagnosed with attention deficit hyperactivity disorder (ADHD), pervasive development disorder (PDD)³, generalized anxiety disorder, expressive language disorder,⁴ autism spectrum disorder, mood disorder not otherwise specified, and oppositional defiant disorder.⁵
5. The Student has had IEPs in MCPS since he was in second grade at [School 7].
6. Until 2014, the Student was considered eligible for special education services under “other health impaired” coding. His disability is now listed as “autism.”
7. The Student’s disability frequently causes him to have angry outbursts in class, disrupt class, leave class abruptly and not return, leave school property, disrupt other classes, avoid schoolwork, assault staff, verbally abuse staff and peers, and destroy property.
8. The Student’s disability often causes rigid thinking, inability to interact socially, inability to see others’ viewpoints, and power struggles with adults.

³ PDD is a diagnosis sometimes applied to patients who are on the autism spectrum.

⁴ These four diagnoses were provided in several communications from XXXX XXXX, M.D., the Student’s family psychiatrist.

⁵ The last three diagnoses were provided by XXXX XXXX, Certified Mental Health Counselor at [SCHOOL 1].

9. The Student can also be charming and delightful, engage in conversations, and display a strong intellect.
10. The Student is very fond of music and plays in a band. He also enjoys XXXX.
11. The Student is not cognitively impaired.
12. The Student attended [School 8] and [School 7] for kindergarten through grade five, except that he spent most of third grade participating in a research program at [School 2].
13. The Student transitioned to [School 4] ([School 4]) for sixth grade, but was generally not successful during that 2010-2011 school year.
14. In May 2011, the Parents enrolled the Student at [School 3] in [State 2], a residential school for children with ADHD, autism, mood disorders, and related conditions.
15. The Student spent most of seventh grade (2011-2012) at [School 3], but returned to [School 4] in March 2012.
16. The Student returned to [School 3] in Summer 2012 for an extended school year program, but was expelled for assaulting a staff member.
17. The Student went back to [School 4] for eighth grade in the 2012-2013 school year, where his IEP called for placement in the [Program 1] program.
18. The Student had a number of behavioral incidents and suspensions at [School 4] in 2012. Eventually, he went into the Home and Hospital Teaching (HHT) program.
19. At an IEP meeting on November 20, 2012, the IEP team recommended that the Student be placed in the [Program 1] program at [School 9].
20. Around the same time, MCPS suggested that the Student be referred to [SCHOOL 5] for possible enrollment there.

21. The Parents did not want the Student to attend [School 9] or [SCHOOL 5], and filed a request for mediation in December 2012.

22. On January 8, 2013, the Parents and MCPS entered into a Special Education Mediation Agreement keeping the Student at [School 4] for the rest of the 2012-2013 school year, where he would receive some instruction at school and some through the HHT program. The Agreement also stated that the Student's proposed placement for the 2013-2014 school year would be the [Program 1] program at [School 6].

23. The Student completed eighth grade at [School 4] fairly successfully, attending school two days a week for French and physical education (classes that he liked) and receiving the rest of his instruction through the HHT program.

24. Pursuant to an IEP prepared on June 6, 2013 and the Mediation Agreement of January 8, 2013, the Student began ninth grade in August 2013 in the [Program 1] program at [School 6]. The IEP provided that all of the Student's school day would be spent in a special education setting.

25. The [Program 1] program is a special education program within a general education school. It is designed for students who need mental health services during the day, typically because of autism spectrum disorder, emotional disturbance, or other health impairment.

26. XXXX XXXX, School Psychologist, was assigned as the Student's counselor at [School 6] and prepared his schedule when he arrived in August 2013.

27. The Parents hoped that the Student could have the same sort of hybrid program that he had at [School 4], with some instruction at school and some instruction at home, or at

least some in general education. This was despite the IEP's call for one hundred percent of the Student's time in special education.

28. After speaking with the Parents and meeting the Student, Dr. XXXX prepared a schedule for the Student that included French and physical education in general education settings, and the rest of the Student's school day in self-contained special education settings.

29. The IEP included four fifteen-minute counseling sessions a month at [School 6]. This proved to be impossible, so Dr. XXXX provided two forty-five-minute sessions a month.

30. The Student was not successful in the [Program 1] at [School 6] because of his non-compliant behavior. By November 2013, he was disrupting class, leaving class without permission, wandering the hallways, disrupting other classes, and not doing schoolwork assignments.

31. MCPS prepared a Functional Behavioral Assessment and a Behavioral Intervention Plan on November 20, 2013. The latter was updated on December 5, 2013.

32. By December 2013, the Student's grades were A in physical education; B in French; C in science; and E's in English, algebra, and history.

33. On November 26, 2013, the Student was suspended for two consecutive half-days of school for not obeying school rules and destroying school property.

34. The Student returned to school on December 2, 2013. The next day, December 3rd, he was again suspended for one day for a physical attack on staff.

35. The Parents submitted an application for the Student to re-enter the HHT program on December 9, 2013.

36. On December 16, 2013, the Student was suspended for five days for destruction of property and refusal to obey school policies.

37. On or about January 2, 2014, MCPS approved the Parents' request that the Student receive HHT services.

38. On the same date, the Student was eligible to return to [School 6] after the suspension imposed on December 16, 2013.

39. On January 8, 2014, the Student was suspended for two and one-half days for a physical attack on staff. The Student was eligible to return to school on January 22, 2014, but did not subsequently attend [School 6].

40. At the end of the first semester (January 24, 2014), the Student's grades were as follows: A in Physical Education (weight training), B in French 2A, D in English 9A, D in Algebra 1A, D in Resource Program, and withdrawals in Physical Science and United States History. His grade point averages were 2.57 for the first quarter and 1.28 for the second quarter.

41. On January 27, 2014, the Student began receiving HHT services. The Parents were disappointed that instruction in French was not available.

42. The Parents continued to be interested in having the Student attend [School 6] for his mainstream French and physical education classes, while receiving the rest of his instruction through HHT.

43. Meanwhile, MCPS had come to the conclusion that the Student was not receiving the services he required through the [Program 1] program, and had concerns about the safety of the Student and those with whom he had contact in school.

44. Because of the differing perceptions of the Student's needs and abilities, the parties agreed to have a Central IEP (CIEP) team meet to discuss the Student's placement.

45. The CIEP meeting took place on January 31, 2014, chaired by XXXX XXXX, Coordinator of the Placement and Assessments Services Unit.

46. The CIEP team recommended that the Student be placed in a separate public day school to receive special education services.

47. The only separate public day school in Montgomery County is [SCHOOL 5], which provides intensive services for a small portion of the MCPS special education population. It is the most restrictive placement in the MCPS system.

48. [SCHOOL 5] is a joint venture between MCPS and the XXXX (XXXX). MCPS provides educational services and the XXXX provides the therapeutic component. Educational services are driven by a student's IEP, whereas the clinical team works from an individual treatment plan to address a student's mental health needs.

49. An IEP cannot place a student at [SCHOOL 5] – it can only refer a student to [SCHOOL 5]. [SCHOOL 5] determines whether a student is suitable for admission after reviewing the student's records and conducting pre-admission interviews. [SCHOOL 5] then offers admission to students whose needs correspond to the services it provides.

50. All [SCHOOL 5] students attend the day school; some are also residents at [SCHOOL 5]. Those who are not residents receive transportation services between home and school.

51. The [SCHOOL 5] residential program is for therapeutic purposes. Admission to that program is decided by a student's clinical treatment team, depends on medical necessity, and must be approved by the agency overseeing the student's care.⁶

52. On January 31, 2014, the Parents filed a Request for Mediation and Due Process Complaint, asking that the Student be allowed to continue attending [School 6] for French and physical education classes, while receiving the rest of his instruction through HHT.

⁶ Students at [SCHOOL 5] typically have their expenses there paid by a public program, such as Medicaid, or by a health insurance carrier.

53. After mediation on February 20, 2014, , the Parents and MCPS entered into a written agreement including the following provisions:

- A. MCPS would provide one and one-half hours of weekly instruction in French 2 through the end of the 2013-2014 school year, beginning February 24, 2014;
- B. MCPS would provide necessary textbooks for HHT instruction through the end of the school year or until the Student was placed in accordance with the IEP of January 31, 2014;
- C. MCPS would provide HHT instruction in English, math, science, and history through the end of the school year or until the Student was placed in accordance with the IEP of January 31, 2014;
- D. MCPS would continue to provide French 2 instruction through HHT if it was not available in the Student's placement under the IEP of January 31, 2014;
- E. The Parents would waive any violations of the free and appropriate public education provisions of the IDEA resulting from the Student's placement in HHT prior to February 20, 2014; and
- F. The Parents would withdraw their request for a due process hearing.

54. The Parents went through the admissions process for [SCHOOL 5], which took several weeks.

55. The Student was accepted into the [SCHOOL 5] day school and was not placed in the residential program. He was scheduled to enroll on March 17, 2014.

56. The Student was ill the week of March 17, so he did not enroll at [SCHOOL 5] until March 24, 2014.

57. Meanwhile, throughout the meetings, discussions, and communications with MCPS during the 2013-2014 school year, the Parents had been considering and exploring the option of privately placing the Student in a residential school or treatment program.

58. The Student was making his family's home life very difficult by this time, exhibiting some of the same behavior that caused problems at school. [Mother] spent considerable time trying to get the Student to do his schoolwork, generally without success.

59. The Student's disruption of the family's life was a factor in convincing the Parents that the Student needed to be in a residential treatment and educational setting.

60. The Parents hired XXXX XXXX, an educational consultant with [Group], to advise them with placement and program options for the Student.

61. The Student and his family had been receiving counseling services from XXXX XXXX, M.D., a psychiatrist, for several years.

62. As of November 18, 2013, the Parents were considering [School 10] in [State 1] as a possible placement for the Student.

63. On November 26, 2013, Dr. XXXX suggested [School 11] in [City], [State 3], as a possible long-term residential placement for the Student.

64. On December 23, 2014, Mr. XXXX recommended [SCHOOL 1], among others, as a program the Parents might want to explore.

65. In December 2013 and/or January 2014, [Mother] had extensive conversations with XXXX XXXX, one of the owners of [SCHOOL 1] and [School 1] in [City], [State 1], about the Student and his possible enrollment at [SCHOOL 1].

66. Ms. XXXX is also the director of the residential program at [SCHOOL 1].

67. The Parents did not agree to enroll the Student at this time, nor was he "accepted" into the [SCHOOL 1] program. There was no formal application and acceptance process at [SCHOOL 1], but on March 6, 2014, Ms. XXXX told Mr. XXXX in an email that the Student would be a "good fit" for the [SCHOOL 1] program.

68. Tuition at [School 1], room and board, therapeutic services, and other services provided at [SCHOOL 1] cost \$316.00 a day, or \$9,500.00 a month.

69. The Parents by this time (March 6, 2014) had decided to place the Student in a residential treatment program, but did not decide immediately to enroll the Student at [SCHOOL 1].

70. The Student enrolled at [SCHOOL 5] on March 24, 2014.

71. Dr. XXXX XXXX was assigned as the Student's therapist. At the time, Dr. XXXX had a Doctor of Psychology degree and was working as an intern to become a licensed clinical psychologist. XXXX XXXX II, Ph.D., was her clinical supervisor. She is now licensed by the State of Maryland as a clinical psychologist.

72. The Parents' perspective was that attending [SCHOOL 5] as a day student would not solve their or the Student's problems, partly because they would still have to deal with his behavior and avoidance of schoolwork at home. They continued their efforts to have the Student admitted to the residential program at [SCHOOL 5].

73. The Parents communicated with Dr. XXXX about their wish to have the Student accepted into the [SCHOOL 5] residential program.

74. Dr. XXXX agreed to put the Student on the waiting list to be considered for residential placement. This did not mean that the Student would enter the residential program when a bed became available; it merely meant that he would be evaluated for possible admission to the residential program.

75. Dr. XXXX explained to the Parents that an applicant's appropriateness for the [SCHOOL 5] residential program is assessed by [SCHOOL 5]'s clinical team (the XXXX employees) and depends on the applicant's need for therapeutic mental health services, *i.e.*, medical necessity.

76. Dr. XXXX could not guarantee that the Student would be accepted into the residential program, nor could she tell the Parents how long the evaluation might take.

77. Sometime between March 6 and March 28, 2014, the Parents decided to enroll the Student at [SCHOOL 1].

78. On March 28, 2014, the Parents sent an email to XXXX XXXX, Principal of [SCHOOL 5], informing her that the Student would be withdrawing from [SCHOOL 5] and enrolling at [SCHOOL 1] beginning April 14, 2014. The email requested that MCPS place the Student at [SCHOOL 1] and fund his expenses there.

79. At the time the Parents withdrew him from [SCHOOL 5], the Student had been at [SCHOOL 5] four days.⁷

80. Ms. XXXX responded on April 1, 2014, expressing support for the IEP of January 31, 2014 and the Student's placement at [SCHOOL 5]. She offered a CIEP meeting to address the Parent's concerns, and rejected the Parents' request for placement and funding at [SCHOOL 1].

81. Dr. XXXX telephoned [Mother] after learning of the Student's withdrawal from [SCHOOL 5]. Dr. XXXX urged the Parents to consider medications for the Student, wraparound services,⁸ and continuing to explore the [SCHOOL 5] residential program. Dr. XXXX also offered a clinical team meeting with the Parents.

82. At this point, the Parents were convinced that the Student needed a residential treatment program and were not interested in any other placement. They would consider keeping

⁷ March 28, 2014 was not a school day.

⁸ Wraparound services are provided by social services agencies in a student's home.

the Student at [SCHOOL 5], but only if he were placed in the residential program within a short time.

83. When [SCHOOL 5] could not guarantee the Student's placement in the residential program, the Parents followed through with their plan to enroll the Student at [SCHOOL 1].

84. While these discussions were going on, the Student continued to attend [SCHOOL 5] from March 24 to April 11, 2014.

85. The Student did well at [SCHOOL 5] during his first week; he seemed to be settling in and becoming acclimated to the new educational setting. He did not have any behavioral problems the first week.

86. When the Student's second week at [SCHOOL 5] began on March 31, 2014, he had learned that he was going to [State 1] to live at [SCHOOL 1] and attend [School 1].

87. Between April 1, and April 11, 2014, after the Student learned of his pending transfer to [SCHOOL 1], he displayed major behavioral issues at [SCHOOL 5], which are memorialized in twenty-five Critical Incident Notes.

88. On April 1, 2014, the Student was in the hallway instead of in class. He grabbed a para-educator's keys and identification and ran around the school with them, eventually leaving them outside the building. Later that day he left the speech room without permission and refused to follow directions.

89. On April 2, 2014, the Student said, "Fuck you" and used a racial epithet to staff after being told not to disrupt lunch detention. He then left lunch detention and began walking the halls, refusing to comply with school rules and staff direction. He wandered into a classroom and disturbed a teacher who was eating lunch, refusing to leave or follow the teacher's directions. The Student did not report to his fourth period class and continued to wander the

halls, disrupting other classes. Later that afternoon, the Student disrupted his class to the point that the classroom had to be cleared, then again wandered the halls and refused to go to homeroom.

90. On April 3, 2014, the Student refused to go into his assigned classroom, instead entering an unauthorized area.

91. On April 4, 2014, in the morning, the Student put his middle finger in another student's face. That afternoon he stood on a carrel in class and pushed the carrel into a staff member. This resulted in the Student being placed in seclusion in the quiet room for about nineteen minutes. The Student then went to his homeroom, where he ripped up copies of his Critical Incident Notes.

92. The following week, on April 7, 2014, the Student said to a peer, "At least I ain't a slave," provoking an angry response. In the afternoon he refused to put his Nook away when a teacher asked him to, instead giving staff the middle finger. Shortly thereafter, the Student began teasing a peer in the quiet room and refused to stop when directed by staff. His behavior escalated so that staff felt it was unsafe to put him on the school bus to go home. ([SCHOOL 5] staff members do not ride on the school buses.) [SCHOOL 5] called the Student's mother to come pick him up, but he eventually quieted down and was able to ride the bus home.

93. On April 8, 2014, the Student went to a first period class that was not where he was supposed to be. He was told to go to his correct classroom, but wandered the halls instead. Later that day, the Student yelled at a para-educator, "Get the fuck out of here, you fat-ass bitch!" He also called the para-educator a racial epithet, gave her the finger, and said, "Fuck you. Write me up, I don't give a fuck." Shortly thereafter he called another staff member "fat-ass," then tried to kick the panels out of a door.

94. On April 9, 2014, the Student opened the fire exit door and gave staff the middle finger. He said “Fuck you” to a teacher.

95. On April 10, 2014, the Student was repeatedly cursing in class. He told one peer to go eat his empanadas and referred to another peer by a racial slur.

96. On April 11, 2014, the Student went to a classroom, knocked on the door, and gave students the middle finger.

97. The Student and his father flew to [School 1] on or about April 13, 2014, and the Student enrolled at [SCHOOL 1] and [School 1] on August 14, 2014.

98. [SCHOOL 1] and [School 1] are licensed as a single entity by the [School 1] Department of Human Services Office of Licensing to provide day treatment for clients age thirteen to nineteen.

99. [SCHOOL 1] and [School 1]-XXXX Campus are licensed to provide residential treatment for clients age twelve to seventeen.

100. [School 1] is accredited as a school by AdvancED, a private non-profit school accreditation organization.

101. [School 1] is in a stand-alone building at [address], [City], [State 1].

102. [School 1] currently enrolls forty-three students, all of whom live in the residential treatment program known as [SCHOOL 1].

103. [SCHOOL 1] is a residential therapeutic treatment program, primarily for teenagers with autism spectrum disorder, ADHD, and other emotional or mental health diagnoses.

104. [SCHOOL 1] currently has eighty-two residents, about thirty of which are in the transitional and young adult programs and do not attend [School 1].

105. [SCHOOL 1] owns six residences, and the Student resides in the Boys' Campus XXXX Residence at [address], [City], [State 1], with thirteen other boys, plus staff.

106. The Student shares a room with three other boys.

107. The residence is about two or three miles from [School 1], which is typical of all the residences. The students are transported to and from school in vans.

108. School is in session from 10 a.m. to 3:30 p.m. daily. The students spend the rest of their time at their residences, except when they are engaged in [SCHOOL 1] activities, such as going to a gym or a park.

109. At least two, and sometimes as many as five, [SCHOOL 1] staff members are at the Student's residence at all times, including two overnight. These employees are not therapists, educators, or counselors.

110. The residents of [address] meet in a group session in the morning before school.

111. The Student receives therapy from XXXX XXXX, Certified Mental Health Counselor, at school every Monday for forty-five minutes. He also participates in a family therapy session with Ms. XXXX at the [SCHOOL 1] support offices every Thursday evening. The Parents participate in these sessions by Skype.

112. Ms. XXXX is the Student's primary therapist at [SCHOOL 1]. Her office is in a building owned by [SCHOOL 1] near [School 1] and she is generally available if the Student has a crisis at school.

113. [School 1] does not use traditional grades such as 9th or 10th, or freshman, sophomore, etc. Instead, it groups students with similar abilities and levels of progress into classes.

114. During the fourth quarter of the 2013-2014 school year at [School 1], the Student took science, language arts, physical education, history, art, and mathematics. He earned a B- in science, D in language arts, D- in physical education, D+ in history, B- in art, and D+ in mathematics.

115. In the Summer of 2014, the Student took physics, language arts, physical education, social studies, health, and mathematics.⁹

116. In the first (Fall) quarter of the 2014-2015 school year, the Student took art, biology, mathematics, English, physical education, and sociology. He received a C+ in art, A in biology, B in mathematics, A in English, A in physical education, and A- in sociology.

117. In the second quarter of the 2014-2015 school year, the Student took ceramics, science, biology, English, mathematics, and physical education. The Student's grades were A's and B's, except for a C in ceramics.

118. As of the date of the hearing, the Student's academic schedule and grades were as follows: first period geometry, grade B; second period American Sign Language, grade B-; third period science, grade C; fourth period physical education, grade B; fifth period history, grade C-; sixth period English, grade B-.

119. The Student has been elected to the XXXX Council.

120. The Student participated in the school's talent show in the Fall of 2014.

121. During the third quarter of 2014-2015, as of March 18, 2015, the Student had been absent from history class nineteen times (of thirty-eight), from American Sign Language eight times, from physical education eight or nine times, from mathematics seven times, and from English eight times.

⁹ The Student's transcript states: "N/C Summer Q 2014 lacking seat time."

122. [SCHOOL 1] uses a system of levels to monitor a resident's behavior, ranging from level one to level eight. The Student has attained level five. Behavioral incidents at [SCHOOL 1] (*i.e.*, at the residences) generate Incident/Information Reports.

123. [School 1] does not use a level system; instead, it assesses "behavior intervention points" or "bips" when a student misbehaves in school. These incidents generate reports called Behavioral Interventions.

124. The Student has had a significant history of behavioral transgressions at [SCHOOL 1] and at [School 1] since the day he enrolled. After his first day of school on April 14, 2014, the Student went absent without leave (AWOL) after school, and assaulted and threw rocks at staff who went after him.

125. All Spring and Summer of 2014, the Student had many Behavioral Interventions at [School 1] for not going to class, arriving at class late, not doing the work when he was in class, leaving class without permission, cursing at and insulting staff, and going into unauthorized areas. The Student's behavior generated sixty-five Behavioral Intervention reports and "bips" between April and September 2014.

126. Similarly, the Student behaved badly at his residence and on [SCHOOL 1] activities regularly, by destroying property, assaulting staff, insulting peers, cursing at staff, and not following rules or directions. The Student was written up in Incident/Information Reports twenty-two times between April and December 2014.

127. The Student's behavior has improved in 2015, but he is still in the top ten percent of [School 1] students in needing behavioral interventions.

128. The Student's academic achievement has improved since he arrived at [School 1]. Nevertheless, he still has trouble getting along with peers and staff, gets frustrated and shuts down often, and has trouble coming to and remaining in his classes.

129. The MCPS IEP team, including the Parents, met on May 16, 2014 and developed an IEP that continued the Student's placement at [SCHOOL 5]. The Parents disagreed with this placement and kept the Student enrolled at [SCHOOL 1].

130. The Student is still residing at [SCHOOL 1] and attending [School 1] as of the date of the hearing.

DISCUSSION

The General Legal Framework

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 free appropriate public education. 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 free appropriate public education as follows:

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

458 U.S. at 200-01. *See also In Re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991). The IDEA contains the following similar definition of free appropriate public education:

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, free appropriate public education 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. *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; *A.B. v. Lawson*, 354 F.3d 315 (4th Cir. 2004); *Board of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. March 6, 2006). 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).

Nevertheless, 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), *cert. denied*, 488 U.S. 1030 (1989). To provide a free appropriate public education, the educational program offered to a student must be tailored to the particular needs of the disabled child by the development and implementation of an IEP, taking 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) (2010). The IEP depicts a student's current educational performance, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A). IEP teams must consider students' evolving needs when developing their educational programs. *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009).

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 a free appropriate public education, 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, mainstreaming 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.* Accordingly, in such a case, a free appropriate public education might require placement of a child in a private school setting that would be fully funded by the child's public school district.

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). Accordingly, the

Parents bear the burden of proving that the IEPs developed for the Student's 2013-2014 and 2014-2015 school years, as finalized on January 31, 2014, and May 16, 2014, respectively, were not reasonably calculated to provide the Student a free appropriate public education in the least restrictive environment.

A preliminary word about the scope of this hearing is in order. The Parents have complained that the IEPs for both 2013-2014 and 2014-2015 did not provide the Student with a free appropriate public education. The IEP for the beginning of the 2013-2014 school year placed the Student in the [Program 1] program at [School 6], where he ran into significant difficulties. By early December 2013, the Parents applied for the Student to again receive HHT, which had been fairly successful for him the previous year at [School 4]. MCPS approved the application on or about January 2, 2014, and the Student began receiving HHT services on January 27, 2014.

Shortly thereafter, the Parents had filed a Request for Mediation and Due Process Complaint on January 31, 2014 (the same day the Student's IEP referring him to [SCHOOL 5] was finalized), and entered into a settlement agreement on February 20, 2014. Among other things, the Mediation Agreement states: "Parent agrees to waive any violations of [the Student's] free and appropriate public education (FAPE) resulting from the HHT placement prior to today's date." Parent Ex. 33. The Student's IEP was revised on January 31, 2014, to provide a referral to [SCHOOL 5] for possible placement there. [SCHOOL 5] accepted the Student in March 2014, so that became his placement under the IEP. That IEP remained in effect into the 2014-2015 school year, continuing his placement at [SCHOOL 5], and was revised on May 16, 2014, with the same placement. Therefore, the placement issues in this decision concern the Student's placement at [SCHOOL 5] in the later part of the 2013-2014 school year, and his placement at [SCHOOL 5]

for 2014-2015.

The Adequacy of the Parents' Notice

MCPS contends that the Parents' request for reimbursement should be barred because they failed to give the school system adequate notice of their intention to withdraw the Student from [SCHOOL 5] and privately place him at [SCHOOL 1]. On this issue, section 1412 of the IDEA states, in pertinent part:

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

....

(10) Children in private schools.

....

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

20 U.S.C.A. § 1412 (2010).

The facts, as set forth previously, are that the Student enrolled at [SCHOOL 5] on March 24, 2014. On March 28, 2014, Ms. XXXX sent Ms. XXXX, the principal of [SCHOOL 5], an email stating, in its entirety, as follows:

Ms. XXXX: We hereby notify MCPS that [the Student] will be attending [SCHOOL 1] in [State 1] as of April 14 pursuant to our decision. This decision was made in order to provide him with the free appropriate public education to which he is entitled under the Individual With Disabilities Education Improvement Act ("IDEA"). We hereby request that MCPS place and fund him at [SCHOOL 1]. We do not believe that an appropriate special education program has been offered by MCPS and are deeply concerned about his ability to make meaningful progress at [SCHOOL 5].

MCPS Ex. 33.

MCPS argues that the Parents are not entitled to reimbursement because they did not keep MCPS informed of their ongoing exploration of residential placements and their ultimate

decision to place the Student at [SCHOOL 1], which was made between March 6 and March 28, 2014. In essence, MCPS accuses the Parents of trickery by enrolling the Student at [SCHOOL 5] while, at the same time, deciding that they were going to remove him from [SCHOOL 5] and send him to [School 1].

MCPS's argument on this point fails for two reasons. First, the Parents complied with the letter of 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I)(bb), above, because they gave MCPS ten business days' notice¹⁰ that they were withdrawing the Student from his MCPS placement and privately enrolling him at [SCHOOL 1]. They also included the information required by 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I)(aa) – that they rejected the IEP's placement of the Student at [SCHOOL 5], stated their concerns, and informed MCPS that they were enrolling the Student at [SCHOOL 1].

Second, I do not see the Parents' actions as any sort of subterfuge or deceit. Quite obviously, the Parents had by this time concluded that the Student needed a residential situation, both for his sake and for theirs, and were unwilling to consider any non-residential placement. However, even after their email of March 28th, the Parents continued to communicate with Dr. XXXX at [SCHOOL 5] about the possibility of the Student entering the residential program there. When Dr. XXXX was unable to guarantee the Student's entry into that program or a timetable for a decision, the Parents followed through on their intention to send the Student to [SCHOOL 1]. There is no way to know what might have happened if the Student had been accepted into [SCHOOL 5]'s residential program, but the evidence is convincing that the Parents would have at least considered that program for the Student and kept him at [SCHOOL 5].

Based on the above considerations, I conclude that the Parents' notice of their intention to unilaterally place the Student in a private school met the requirements of 20 U.S.C.A. § 1412. If

¹⁰ March 31 to April 11, 2014 was ten business days.

they are entitled to reimbursement for that placement, the reimbursement will not be denied or diminished because of failure of notice.

The Parents' Request for Reimbursement

The Student enrolled at [SCHOOL 1] on April 14, 2014, and began attending [School 1] the same day. The total cost of the [SCHOOL 1] residential program and [School 1] tuition is \$316.00 a day, or \$9,500.00 a month, which the Parents are seeking to have MCPS pay. There is no disagreement that the Parents enrolled the Student at [SCHOOL 1] without the consent of MCPS; therefore, this case falls under section 1412(C) of the IDEA, which provides, in pertinent part, as follows:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C.A. § 1412(C) (2010). The above language sets forth a fairly simple concept: if the school system made a free appropriate public education available to the Student, and the Parents rejected that offer and instead placed the Student in a private school, then MCPS is not liable for

reimbursement. If the school system did not offer a free appropriate public education, it must pay the Student's costs at [SCHOOL 1], if that placement is appropriate under the IDEA.

The Parents have asked for reimbursement for both the 2013-2014 and 2014-2015 school years. Obviously, the only portion of the 2013-2014 school year that is at issue is the part that began with the Student's enrollment at [SCHOOL 1] on April 14, 2014. Before that date, the Student was in the [Program 1] program at [School 6], in the HHT program, and at [SCHOOL 5], as was called for by his IEPs that were in place at the time.

This is not a case where the IEPs themselves must be minutely parsed to examine the Student's present levels of performance, goals and objectives, or need for services. Everyone agrees that the Student at least needs to be in a separate special education setting. The real issue is whether the Student also needs to be in a residential program, and, if so, whether his need for such a program is so intertwined with his educational needs that he cannot make educational progress outside of a residential program.

Likewise, no great examination of the Student's cognitive functioning is necessary. The Student tests about average on psychological and educational evaluations and is not cognitively impaired. His disability – primarily autism disorder, anxiety, and ADHD – causes him great anxiety and frustration. If he is confronted with a task that he cannot do easily, he becomes frustrated and begins to express anger. The Student has learned over the years that he can avoid frustrating tasks and the anxiety they bring by refusing to do work, disrupting class, or simply leaving. To some extent, the Student cannot control his behavioral outbursts because they are caused by his disability. On the other hand, the Student is bright enough to understand that bad behavior will allow him to avoid schoolwork.

The delay between the Student's last suspension from [School 6] and his enrollment at [SCHOOL 5]

The Parents argued at some length that MCPS was at fault for what they characterized as a three-month delay between the time the Student was “effectively expelled” from the [Program 1] program at [School 6] and beginning classes at [SCHOOL 5]. They implied that their decision to enroll the Student at [SCHOOL 1] was, at least in part, motivated by the fact that the Student was receiving no education during that time. A look at what actually happened during that period takes most of the force out of the Parents’ argument.

By January of 2014, it was obvious that the [Program 1] program was not meeting the Student’s needs. He was essentially out of control at [School 6] and making no educational progress. The Student was suspended on November 26, December 3, December 16, and January 8, and did not return to [School 6] after the last suspension. On December 9, the Parents had applied for HHT for the Student, and MCPS approved that program in an IEP of January 2, 2014.

The Student’s last suspension ended on January 22, 2014, but he did not return to [School 6]. There is some indication in the evidence that he could have done so; MCPS’s prior written notice of February 4, 2014, states, “The [Program 1] at [School 6] continues to be available to [the Student] until the placement process is complete.” Parent Ex. 68. By that time, the CIEP team had met on January 31, 2014, resulting in the referral to [SCHOOL 5]. On the same date, the Parents had filed a due process complaint and request for mediation. Additionally, the Student started receiving HHT services on January 27, 2014.

According to [Mother], the Parents’ impression was that the Student was not allowed back at [School 6], even after his last suspension ended. There is some support for this belief in the record, particularly Ms. XXXX’s letter of January 3, 2014, which includes the following

sentence: “Despite the extensive time and energy invested to support [the Student], the team is very concerned for [the Student’s] safety and feels that his needs exceed the supports available within [Program 1].” MCPS Ex. 19. Then on January 8, the Student was again suspended for assaulting a teacher, and the letter announcing the suspension contained language stating that the Student was not allowed on MCPS property during the suspension.

Ms. XXXX also testified that after HHT began on January 27, 2014, the Student’s tutors would often not show up, and when they did show up the Student would not work with them. Neither party offered any objective evidence about the frequency of the HHT tutors’ appearances; MCPS had no record of the actual HHT sessions, and the Parents did not produce any complaints that the HHT personnel were not coming as scheduled. It is, therefore, impossible to say whether the perceived failure of the HHT program actually occurred, and, if it did, where the blame lies. It was apparent at the time, though, that the Student needed more than HHT and more than [Program 1] to make educational progress.

On January 31, 2014, the Student was referred to [SCHOOL 5], which has a fairly long admissions process. The Student’s records had to be transmitted to [SCHOOL 5] for review, the review had to be completed, and the Parents and Student had to be interviewed. According to Ms. XXXX, [SCHOOL 5]’s principal, the screening and admissions process takes about two weeks once the records are received. [Mother] testified that MCPS “made us wait” for admission to [SCHOOL 5], which did not come until March 12, 2014. Even then, the Student did not enroll at [SCHOOL 5] on March 17, 2014, because he was sick that week, so he did not arrive until March 24, 2014.

In summary, the situation in February 2014 was this: (1) The Student was not attending [School 6]; (2) the Student was receiving HHT services, but not making educational progress; and (3) the Student was awaiting admission to [SCHOOL 5].

On February 20, 2014, the Parents entered into a mediation agreement with MCPS whereby they agreed to waive any due process complaint resulting from the Student's being in the HHT program between January 2 and February 20, 2014. In return, MCPS agreed to add French to the HHT program and continue that program, including providing textbooks, until the Student was placed in accordance with the IEP of January 31, 2014. This agreement, in effect, limits the Parent's complaint concerning the three-month period of no education for the Student to about three weeks – February 21 to March 17, 2014. MCPS did not explain why the [SCHOOL 5] admissions process took two months instead of two weeks in this case.

Nevertheless, in light of the parties' mediation agreement, I do not find that MCPS's failure to provide educational opportunity for the Student between February 20 and March 17, 2014, constitutes a substantive violation of the IDEA. I consider this a *de minimis* violation caused by the Student's deteriorating behavior and MCPS's ongoing effort to properly place the Student.

The Parents' decision to enroll the Student at [SCHOOL 1]

While these efforts were going on (and taking far too long), the Parents had become convinced that only a residential program would be adequate for the Student. Their educational consultant, XXXX XXXX, had suggested [SCHOOL 1] as a possible placement for the Student. Ms. XXXX talked with Ms. XXXX of [SCHOOL 1] for several hours in March. By mid-March, 2014, the Parents had decided that the Student would be enrolled in a residential program, either at [SCHOOL 5] or at [SCHOOL 1].

MCPS contends that the Parents' decision was driven primarily by their need to gain a respite from the Student's behavior at home. Again, there is some support for this position in the record. [Mother] admitted in her testimony that things were "not good at home" because of the Student's behavior and this was "part of the reason" the Parents wanted the Student in a residential setting. At this point in the analysis, though, the Parents' motivation is not important. The fact is that they placed the Student in a private school, which is also a residential treatment center, without the consent or approval of the local education agency. This brings us to the crux of the case, which is whether the MCPS's IEPs of January 2, 2014 and May 16, 2014, placing the Student at the [SCHOOL 5] day school, offered the Student the opportunity to make educational progress.

The significance of educational needs versus therapeutic needs

As stated earlier, the Parents have the burden of proof in this case. In *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), the Supreme Court established a two-part test that must be satisfied before a court will order reimbursement for private placement. First, it must be determined that services provided under an IEP at a public school are inappropriate. Second, the private placement sought by the parents must be appropriate under the IDEA. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). Accordingly, the Parents initially bear the burden of proving here that the IEP proposed by the MCPS on January 31, 2014, as amended on May 16, 2014, was not reasonably calculated to provide the Student a free appropriate public education in the least restrictive environment.

The Parents face a major problem of proof in this case. Their argument rests almost entirely on two pillars, the first being that the Parents themselves are convinced that only a residential school can meet the Student's educational needs. The second is that the Student is

doing well educationally at [School 1] and that his behavior has improved. Missing from the Parents' evidence is testimony from any qualified educational personnel that the Student actually needs residential placement to make educational progress. The essential elements of the Parents' case boil down to this: the Student's educational history demonstrates that he cannot make progress in any less restrictive environment, and his success at [SCHOOL 1] shows that he can make progress in a residential setting. From this, I am asked to infer that the Student can make educational progress *only* at a residential school. It is certainly possible for the Parents to prove entitlement to reimbursement in such a case, but it is very difficult without a qualified educational professional's support of the Parents' opinion.

MCPS contends that it cannot be required to fund the Student's placement at [SCHOOL 1] because he is there primarily for therapeutic, or mental health, treatment, not educational purposes. MCPS cites eleven cases as standing for this proposition in its memorandum of legal authorities, not all of which will be analyzed herein.

In *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990), the court held that the Education of the Handicapped Act (the precursor of the IDEA) did not require the local school district to pay for an autistic student's in-home habilitative services¹¹ because they were not essential for him to make any educational progress. The student in *Denton* was more severely handicapped than the Student in this case, and needed a round-the-clock program to control his aggressive behavior. The court framed the issue as follows:

The question in this case is, then, whether the Board's IEP, which does not include a home instruction component, is reasonably calculated to enable Chris to receive educational benefits. Congress recognized that in some instances home instruction or residential placement would be required for the handicapped child to benefit educationally. *See* 20 U.S.C. § 1401(16); *id.* § 1413(a)(4)(B); 34 C.F.R. §§ 300.302, 300.551. If the educational benefits which can be provided through

¹¹ Habilitative services are provided to teach the handicapped child skills of daily living. The parties stipulated that the Student does not need habilitative services.

residential care are essential for the child to make *any* educational progress at all, then residential care is required under the EHA. *See Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir.1983); *see also Matthews v. Davis*, 742 F.2d 825, 829 (4th Cir.1984). Where medical, social, or emotional problems are intertwined with educational problems, courts recognize that the local education agency must fund residential programs if the requirements of the EHA and *Rowley* are to be met. *See Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 693–94 (3d Cir.1981); *Vander Malle v. Ambach*, 667 F.Supp. 1015, 1039 (S.D.N.Y.1987). The determination whether services beyond the regular school day are essential for the child to receive any educational benefit is necessarily fact and case specific. *See Kruelle*, 642 F.2d at 692–93; *Drew P. v. Clarke County School Dist.*, 676 F.Supp. 1559, 1566 (M.D.Ga.1987), *aff'd*, 877 F.2d 927 (11th Cir.1989).

On the other hand, “[i]t follows from *Rowley* that the Act does not authorize residential care merely to enhance *an otherwise sufficient* day program.” *Abrahamson*, 701 F.2d at 227 (emphasis in original). If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement. *See McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C.Cir.1985) (citing *Kruelle*, 642 F.2d at 693). And *Rowley* makes clear that the EHA requires only that the child be able to benefit from the instruction that she receives, not that she be able to maximize her potential commensurate with the opportunity provided nonhandicapped children. 458 U.S. at 198, 102 S.Ct. at 3046.

Id. at 980.

The court held that the student had benefitted educationally from the school board’s IEP and that the parents had failed to prove a link between the habilitative services and the educational needs. *Id.* at 982.

Shaw v. Weast, 364 Fed.App’x 47 (4th Cir. 2010) involved a teenage student who was attending a private day school under an IEP developed by MCPS. The Student had harmed herself and attempted suicide twice, and her parents unilaterally placed her in a residential therapeutic program. On the issue of educational versus therapeutic placement, the court held:

The state may be required in certain cases to fund residential placements. “If the educational benefits which can be provided through residential care are essential for the child to make *any* educational progress at all, then residential care is required under the EHA [the precursor to the IDEA].” *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir.1990) (emphasis in original). However, the IDEA “does not authorize residential care merely to enhance an *otherwise*

sufficient day program.” *Id.* (quoting *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir.1983) (emphasis in original)). “If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement.” *Id.* at 980. *See also Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir.1990) (finding student’s hospitalization was primarily for medical and psychiatric reasons and the state was therefore not required to fund it).

Id. at 53. After stating the general principle above, the court addressed the specifics of the complaint in the case before it, as follows:

While *Kruelle* presents a compelling set of circumstances, and residential placement may be required where a student’s medical needs and educational needs are less clearly unitary, this case presents facts near the other end of the spectrum. The Shaws’ decision to place E.S. in a residential treatment facility was based on their desire to ensure E.S. did not hurt herself, that she took her medicine, and that she was in a safe environment. The ALJ found based on all of the evidence that E.S.’s parents’ “demand for residential placement in this case, is primarily to address the safety needs of the Student as a result of her mental health issues and not her educational needs.” JA 1396. Based on an independent review of the record, we agree that the treatment of E.S.’s mental health and safety issues was distinct and segregable from her educational needs.

Id. at 53-54.

Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981), mentioned in the quotation above, concerned a child with cerebral palsy who could not walk, dress himself, talk, eat unaided, and was not toilet trained. His IQ was below thirty and he suffered from emotional problems that caused vomiting and choking. The court addressed the link between the “supportive service” and the child’s educational needs and upheld the district court’s finding that full-time care was necessary to allow the child to learn. *Id.* at 694.

MCPS also relies on *Bd. of Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (4th Cir 1998), which denied funding for residential placement of a teenager with ADHD, oppositional defiant disorder, and anxiety disorder. Brett Y’s IEP placed him at RICA, but his parents enrolled him at a private school for residential treatment. The court followed the *Denton* court’s holding and found that the child’s emotional needs were segregable from his educational needs.

The Parents likewise rely on the *Denton*, *Shaw*, and *Kruelle* decisions, but emphasize language in those cases that indicates that the school agency must reimburse for a private school placement if “medical, social, or emotional problems are intertwined with educational problems, courts recognize that the local education agency must fund residential programs if the requirements of the EHA and *Rowley* are to be met.” *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980.

The Parents also cited *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997), in which an emotionally disturbed teenager’s IEP placed her in a private residential school. Upon re-evaluation after several years, the school system recommended transitioning back to public school, but the child’s parent kept her at the private school. The school board agreed to pay for the educational portion of the child’s costs, but not her residential treatment. The court held:

If institutionalization is required due to a child’s emotional problems, and the child’s emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for the costs of the placement. *Id.* at 1534; *Abrahamson*, 701 F.2d at 228. *See also Vander Malle*, 667 F.Supp. at 1039 (“As long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement.”). As the Third Circuit reasoned, “the concept of education is necessarily broad with respect to [such children].” *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3d Cir.1981).

Based on these principles, the district court properly concluded that even though M.M. was placed in the residential program to deal with her emotional problems and her home-life, the state had to fund the program because it was necessary for M.M. to make educational progress. The evidence shows that M.M.’s behavior was regressing, and that her failure to advance academically was due primarily to her severe emotional problems, which could not be effectively dealt with outside a residential setting. In the face of M.M.’s problems, the state offered no meaningful alternative for her. Accordingly, the defendants were obliged to pay for the entire cost of the residential placement.

Id. at 1122.

In *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996), *abrogated in part on*

other grounds by Schaffer v. Weast, 546 U.S.49, 56-58 (2005), the eleven-year-old student was diagnosed with attachment disorder, an oppositional defiant disorder, a conduct disorder, and a histrionic personality. She “exhibited frequent behavioral problems, including physical and verbal aggression, oppositionality, tantrums, attention difficulties, and the showing of inappropriate affection toward adults.” *Id.* at 1497. Three doctors testified at the due process hearing that the student’s disabilities affected her ability to participate in learning activities, and that she needed residential placement as soon as possible. The school system’s medical expert had had no contact with the student, was less familiar with her condition, and testified that placement in a day school might meet her needs. *Id.* at 1501. The court held:

Finally, the School District asserts that it should not be responsible for the costs of Intermountain because Intermountain is essentially a “medical” rather than an “educational” program. To the contrary, Intermountain is an accredited educational institution under state law. *See Taylor v. Honig*, 910 F.2d 627, 633 (9th Cir.1990). Witnesses testified that it is not a psychiatric hospital and is not based on a “medical model.” That A.S.’s disability, like most disabilities under the IDEA, stems from medical or psychiatric disorders, 34 C.F.R. § 300.7(b)(1)-(13), and that Intermountain’s program addresses these disorders in an attempt to ensure that A.S. is able to benefit from her education, does not render the program invalid or remove the District’s financial responsibility. *See, e.g., Tilton v. Jefferson County Bd. of Educ.*, 705 F.2d 800, 803 (6th Cir.1983) (“The concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of ‘treatment.’ ”), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 998, 79 L.Ed.2d 231 (1984); 20 U.S.C. § 1401(a)(17) (appropriate educational placement includes “related services,” which encompass “such developmental, corrective, and other supportive services (... including rehabilitative counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education”). The ALJ’s order, affirmed by the district court, expressly limited the School District’s financial responsibility to nonmedical costs.

Based on these considerations, the district court properly found that the School District’s day-schooling proposal was inadequate, that A.S. could not receive an appropriate education outside a residential placement, and that Intermountain was an appropriate placement. Accordingly, the School District was responsible under the IDEA for the nonmedical costs of A.S.’s placement at Intermountain.

Id. at 1502 (footnote omitted).

What these and other cases teach us is that each request for reimbursement for private placement must be looked at individually, and its facts closely examined. The facts in this case are not seriously disputed; the dispute centers on the significance of those facts.

For the Parents, no educational expert testified that the Student needs a residential placement to access learning and make educational progress. The Parents apparently believe that I should reach the conclusion that he does need residential placement based on the chaos and misery of the Student's 2013-2014 school year before he enrolled at [SCHOOL 1], together with his progress at that residential setting.

The Parents presented two expert witnesses, both from [SCHOOL 1]. XXXX XXXX, an [School 1] administrator, was accepted as an expert in school administration. She explained the set-up of [School 1] and, based on reports from the Student's teachers, testified that he is inattentive and impulsive at times, which impacts his education.

XXXX XXXX, an expert in school counseling and clinical mental health counseling, is a licensed Clinical Mental Health Counselor at [SCHOOL 1] and the Student's primary therapist. She wrote the Student's treatment plan and oversees its implementation. Ms. XXXX testified that the Student's behavior "gets in the way" of his education and affects his ability to even stay in class. The Student quickly gets frustrated and becomes disruptive. She said that the Student is "very well placed" at [SCHOOL 1] and "absolutely needs" placement there. Ms. XXXX further opined that the Student could not thrive in a less restrictive setting. At [SCHOOL 1], he has line-of-sight supervision at all times, but not a one-to-one restriction.

I do not have a high degree of confidence in Ms. XXXX's ability to determine the Student's educational needs. She is not an educator, and has no demonstrated expertise in special

education. Although I have no reason to doubt her credibility, she did not seem particularly familiar with the Student's record from MCPS or to be very interested in the Student's situation before he arrived at [SCHOOL 1]. It is easy to testify that the Student needs to be at the institution where she works, but Ms. XXXX did not give any reasoning or specific facts to support her testimony on this point. I give her opinion, to the extent that it was expressed, that the Student needs a residential placement to make educational progress little weight.

The major thrust of the Parents' presentation really came from Ms. XXXX, who, as stated previously, gave a lengthy narration of the Student's difficulties leading up to his enrollment at [SCHOOL 1]. There is no doubt that those difficulties were overwhelming, but Ms. XXXX is not an educator and is not qualified to state that the Student needs residential placement to make educational progress.

The Parents also relied on Dr. XXXX's recommendations, produced in several short letters To Whom It May Concern over about a year. Dr. XXXX did not testify; her level of familiarity with the Student is unknown, although she does describe him as her patient. Ms. XXXX testified that Dr. XXXX has provided therapy to the family for several years. Dr. XXXX's credentials are also unknown, although I have no doubt that she is a psychiatrist, as indicated.

On July 12, 2012, Dr. XXXX wrote: "The academic environment that would suit [the Student] best would be one that is highly structured and predictable with staff well versed in dealing with children in need of frequent behavioral reinforcements." Parent Ex. 26. On January 7, 2013, Dr. XXXX wrote: "[I]t would be optimal that he remain at [School 4] until the completion of his 8th grade year. . . ." Parent Ex. 32.

Dr. XXXX's letter of November 26, 2013, made more specific recommendations: "[The Student] is in need of stabilization and long term residential care. A facility such as [School 11] in [City], [State 3] would be able to provide [the Student] with the structure and support that is currently needed. A placement such as this should be considered a medical necessity. . . ." Parent Ex. 45.

Dr. XXXX wrote two letters in December 2013. The first, on December 5, stated: "HHT is recommended until he is able to return to the classroom or an alternative, more intensive treatment program is identified." MCPS Ex. 8. Her letter of December 20 is similar: "HHT is recommended until he is able to return to the classroom." MCPS Ex. 11.

Dr. XXXX's next letter came on January 10, 2014, and did not contain any recommendation for the Student's placement. Finally, on March 25, 2014, she wrote: "I have recommended that he attend a therapeutic boarding school which has specialized educational instruction since his medical conditions interfere with his ability to learn." MCPS Ex. 31.

As evidence, these letters present several problems. First, they are inconsistent in their opinions of the Student's educational needs, recommending residential programs twice, HHT twice, [School 4] once, and an unspecified setting once. More troubling, they seem to be written as support for whatever placement the Parents were seeking at the time, such as having the Student remain at [School 4] for eighth grade, applying for HHT in December 2013, and requesting residential placement in March 2014. Her recommendation of [School 11] in November 2013 came at the same time that the Parents were communicating with XXXX XXXX about possible residential placement. (See MCPS Ex. 2 – email from [Father] to Mr. XXXX on November 18, 2013.) Finally, Dr. XXXX has no educational expertise and is not qualified to give an opinion as to what the Student's educational placement should be.

MCPS, in contrast, presented four expert witnesses, two in special education and two in psychology. Dr. XXXX XXXX, a school psychologist with the [Program 1] at [School 6], reviewed a psychological report prepared by MCPS school psychologist Dr. XXXX in 2012 (Parent Ex. 25) and concluded that the data in that report do not support residential placement. Dr. XXXX did her own assessment of the Student in December 2013 and decided that he needed an “environment that can address his learning needs along with providing more intensive school based counseling on a regular basis with mental health staff. . . .” MCPS Ex. 16. Again, Dr. XXXX concluded that her data do not support residential placement as necessary for the Student’s educational progress.

Dr. XXXX XXXX, clinical psychologist at [SCHOOL 5], an employee of XXXX, was the Student’s therapist during the brief time he was there. I found her to be a particularly knowledgeable and credible witness, based on her demeanor and demonstrated familiarity with the Student and his history. Dr. XXXX testified that, after receiving the notice of the Student’s withdrawal from [SCHOOL 5], she talked with Ms. XXXX about residential placement, but did not have enough information at the time to recommend such placement. Her opinion was that [SCHOOL 1] is not an appropriate placement for the Student because his behavior before going to [SCHOOL 1] did not warrant such a placement.

The two MCPS special educators gave similar opinions. XXXX XXXX, with long experience and great expertise in the private placement of children, testified that the Student does not need a residential school. He also stated that he is not qualified to give an opinion on whether the Student needs residential treatment for mental health needs, because those needs are not educational.

XXXX XXXX, the principal of [SCHOOL 5] since 2010, testified primarily about her school and how it fit the Student's needs. She stated unequivocally that [SCHOOL 5] could have implemented the Student's IEP on January 31, 2014.

Applying the evidence produced in this case to the law as set forth in the decisions discussed previously, I find that the Parents have not proved that the Student needs placement in a residential setting to make educational progress. In other words, the evidence does not support the argument that the Student's mental and emotional issues are so intertwined with his education that he cannot learn because of them.

The Student has obviously made educational progress in the past. He can write well, as shown in his letters explaining certain transgressions (Parent Ex. 43 and 60). Certainly, his autism, ADHD, and anxiety interfere with his learning. They cause the Student to become frustrated and angry, and to lash out in very antisocial ways. These behaviors, though, are not as severe as the student's needs in *Denton*, where round-the-clock monitoring was necessary to control that student's aggression. He has not attempted suicide or mutilated himself like the student in *Shaw*. The Student is totally unlike the child in *Kruelle*, who needed assistance with every aspect of life.

Looking at the cases relied on by the Parents, this case seems most similar to *Mrs. B*, in which the court ordered the local education agency to pay the costs of a disturbed teenager's residential placement. As set forth previously, the court in that case stated, "The evidence shows that M.M.'s behavior was regressing, and that her failure to advance academically was due primarily to her severe emotional problems, which could not be effectively dealt with outside a residential setting. In the face of M.M.'s problems, the state offered no meaningful alternative for her." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122. The student in *Mrs. B*. had been in

residential placement for years. In this case, MCPS *has* offered a meaningful alternative, [SCHOOL 5], which is a combination of special education and mental health supports.

In *Seattle Sch. Dist., No. 1*, the court seemed inclined to grant funding for residential placement primarily because of the weakness of the school system's evidence. The parents' three experts clearly overmatched the school system's doctor, who was unfamiliar with the child and her needs. The situation in this case is quite dissimilar. The MCPS's witnesses were highly credentialed, and three of the four had many years of experience. All were very familiar with the Student and his history. In contrast, the expertise of the Parents' witnesses was minimal and unimpressive. Furthermore, none of them provided a soundly-reasoned rationale for why the Student needed residential placement.

I also give greater weight to the MCPS's legal authorities, since they come from this jurisdiction. The Parents rely on language in *Denton* and *Shaw*, but the court in those Fourth Circuit cases ruled in favor of the school systems. The other Fourth Circuit case, *Brett Y*, is similar to this case because that student's IEP placed him at XXXX. As mentioned, the *Brett Y* court held that the student's mental and emotional needs, which were similar to the Student's in this case, were segregable from his educational needs.

I reach the same conclusion in this case. The Parents have not produced a preponderance of the evidence that shows that the Student's autism, ADHD, and anxiety so impact his access to learning that he is unable to make educational progress without placement in a residential program. This pillar of the Parents' argument fails.

The Student's progress at [SCHOOL 1]

In *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009), the United States District Court, on remand, allowed the parents to present "additional evidence" of the student's progress after the

initial hearing. The Parents suggest that this ruling, affirmed by the Fourth Circuit, should permit consideration of the Student's progress at [SCHOOL 1] after the due process complaint was filed on December 3, 2014. I agree, and have accepted the Parent's evidence of events after that date as relevant.

To understand the significance of that evidence, though, we must first look at the Student's brief sojourn at [SCHOOL 5]. He enrolled there on March 24, 2014, attending the special education day school. [SCHOOL 5], as mentioned, is a joint venture between MCPS and XXXX, with the latter providing the therapeutic treatment given to all [SCHOOL 5] students. [SCHOOL 5] implements the students' IEPs, and XXXX implements their treatment plans.

According to Dr. XXXX and Ms. XXXX, the Student did well for his first week at [SCHOOL 5] and seemed to be acclimating. Dr. XXXX testified that his peers appeared to accept him. The Student had no behavioral incidents during that first week, which was only four days.

On Friday, March 28, 2014, Ms. XXXX emailed the notice of withdrawal to Ms. XXXX. When the Student returned to [SCHOOL 5] on March 31, he knew that he would be sent to [School 1] by April 14. Dr. XXXX testified that, at that point, the Student refused to talk with her any more, saying that there was no point in it since he was leaving. The Student's behavior deteriorated immediately. During his last ten days at [SCHOOL 5], he generated twenty-five Critical Incident Reports for bad behavior. The Student disrupted classes, left class without permission, cursed and insulted staff and peers, went into unauthorized areas, and refused to follow rules and directions.¹² In fact, the Student had at least one behavioral incident every day that he was at [SCHOOL 5] through April 11, 2014, his last day.

¹² See Findings of Fact 88-96.

The Student apparently did not receive any grades at [SCHOOL 5], and whatever grades he may have received from HHT are unknown. His grades for the first semester at [Program 1] at [School 6] were A in Physical Education (weight training), B in French 2A, D in English 9A, D in Algebra 1A, D in Resource Program, and withdrawals in Physical Science and United States History. His grade point averages were 2.57 for the first quarter and 1.28 for the second quarter.

The Parents vigorously argue that the Student's better grades at [School 1] and better behavior at [SCHOOL 1] show that the residential setting is working for him. Since this is the only placement that has allowed him to make educational progress, they contend, his IEP must be amended to formally place him at [SCHOOL 1].

The Parents' argument on this point does not withstand scrutiny. First, there is no way to compare [School 1] grades with MCPS grades. Ms. XXXX testified that the Student, at the time of the hearing, had a B in geometry, B- in American Sign Language, C in environmental science, B in physical education, C- in history, and B- in English. She also testified that the Student has been absent from history nineteen times out of thirty-eight, from American Sign Language eight times, from physical education eight or nine times, from mathematics seven times, and from English eight times.

Documents presented by the Parents show that the Student's grades during the year prior to the hearing were about the same as for this quarter. Inexplicably, Ms. XXXX testified that the Student has achieved a 3.6 grade point average at [School 1]. If the school uses the normal zero to four scale for grades that MCPS uses, that could not possibly be true. If [School 1] uses some other scale, it means that the Student's grades at [School 1] do not reflect a true picture of his academic achievement.

Ms. XXXX also testified that [School 1] follows the [School 1] secondary school curriculum, and that its students are eligible to earn [School 1] high school diplomas. She stated that [School 1] does not group students by grade, but rather by ability. That is, there may be four or five students in a class all working at the same level, but their ages could vary by a year or two.

If the evidence showed that [School 1] grades and grading systems are equivalent to MCPS grades, I would be convinced that the Student has made significant educational progress. But the evidence does not establish this. Frankly, I find it difficult to believe that the Student could maintain a passing grade in history while being absent half the time. Ms. XXXX's testimony shows that the Student does not attend about twenty to twenty-five percent of his classes other than history. She also described the Student as still needing more behavioral intervention than ninety percent of the residents at [School 1]. Ms. XXXX testified that the Student attends class and does his schoolwork "more often than not."

It is important to note that at [SCHOOL 1], the Student is 2,000 miles from home and is under line-of-sight supervision at all times. He has very little opportunity to avoid schoolwork or leave class without causing a confrontation. Certainly, he is forced to do more work than he was at the [Program 1] program, and his grades are better, at least on paper.

In summary, I believe that the Student has made some educational progress at [School 1], even though I am not willing to accept his grades at face value. I do not conclude, however, that the Student has made more progress at [School 1] than he would have made at [SCHOOL 5], his IEP placement.

In the area of behavior, the evidence does not show any great difference between the Student's activities at [SCHOOL 1] and during his last two weeks at [SCHOOL 5]. When the

Student first arrived at [SCHOOL 1], he had several instances of physical assault, going AWOL off campus, and destruction of property, which were generally more serious than his behavior at [SCHOOL 5] but not much different from what he did at [School 6]. By December 2014, the Student had generated twenty-two Incident/Information Reports for bad behavior at [SCHOOL 1].

The Parents' witnesses testified that the Student's behavior has improved in 2015. Their testimony also left no doubt that he is still a behavior problem. Ms. XXXX stated that February and March 2015 were both "tough months" for the Student. His anxiety has increased, and his progress has been difficult. She attributed some of this difficulty to the Student's having to return to [SCHOOL 1] after a visit home and to the fact that he is adopted.

The Parents did not provide any Incident/Information Reports or Behavior Intervention Reports for 2015, so I cannot quantify his behavior as being better or worse than in 2014. Again, I believe the Parents' witnesses' general impression that his behavior is better lately, but Ms. XXXX's testimony about the Student's regression in February and March is mildly alarming. On the whole, the evidence does not establish that the Student's behavior has improved to any significant extent since his arrival at [SCHOOL 1].

Therefore, even though I find that the evidence of the Student's progress at [SCHOOL 1] is relevant, that evidence does not show that the Student has made educational progress that he could achieve only in a residential placement.

The Parents did not give the IEP a chance to succeed

The Student's IEPs that are being challenged in this case placed him at [SCHOOL 5], a separate special education day school with a therapeutic component. At [SCHOOL 5], the Student would have taken MCPS high school courses and received support and therapy. The

educational staff at [SCHOOL 5] could have implemented the Student's IEP, and Dr. XXXX and the XXXX personnel would have helped him control his behavior.

The Parents never gave this placement a chance to work. Even as they were enrolling the Student at [SCHOOL 5] on March 24, they knew that he would be staying there only a few days unless he was accepted into the [SCHOOL 5] residential program. When Dr. XXXX could not guarantee admission to that program, the Parents pulled the Student out of [SCHOOL 5] and sent him to [School 1].

The Parents did not act in bad faith, but when the Student arrived at [SCHOOL 5] they had determined that they would not accept anything other than a residential placement. When MCPS did not provide that placement, the Parents placed the Student unilaterally at [SCHOOL 1].

It is difficult to understand the Parents' position that the Student needed residential placement because his IEP was not succeeding in producing educational progress. The Student's placement under the IEPs being challenged lasted only fourteen school days, and the Parents had decided to end it almost before it began. In these circumstances, it is practically impossible for the Parents to prevail in their contention that the IEPs of January 31 and May 16, 2014, did not provide a free appropriate public education for the Student. In fact, the evidence shows that [SCHOOL 5] was the proper placement for the Student and would have produced educational progress if the Student had stayed there.

Summary

The Parents produced very little evidence tending to show that the Student needs placement in a residential setting to make educational progress. MCPS produced a significant amount of evidence showing that the Student does not need residential placement, and that the

IEPs of January 31 and May 16, 2014, placing the Student in the day program at [SCHOOL 5], were reasonably calculated to allow the Student to make educational progress.

The Parents' evidence did not establish that the Student's medical, social, or emotional problems are so intertwined with educational problems that without a therapeutic residential program his medical, social, or emotional problems would prevent him from making educational progress.

The Parents unilaterally placed the Student at [SCHOOL 1] without allowing the placement proposed by the Student's IEP an opportunity to succeed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Student's emotional and mental problems are segregable from the learning process, and that the Student does not require a residential treatment program to access education. *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Shaw v. Weast*, 364 Fed.App'x 47 (4th Cir. 2010); *Bd. of Educ. of Montgomery County v. Brett Y*, 155 F.3d 557 (4th Cir 1998); *Kruelle v. New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981).

I further conclude as a matter of law that the Student's IEPs of January 31, 2014 and May 16, 2014 were reasonably calculated to provide a free appropriate public education for the Student. *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); 20 U.S.C.A. § 1412(a)(1)(A) (2010).

I further conclude as a matter of law that the Parents' placement of the Student at [SCHOOL 1]/[School 1] would not provide the Student a free appropriate public education in

the least restrictive environment. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); 20 U.S.C.A. § 1412(a)(5) (2010).

I further conclude as a matter of law that the Parents gave MCPS adequate notice of their intention to withdraw the Student from MCPS and place him in a private school. 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I) (2010).

ORDER

I **ORDER** that the Parents' request that the Montgomery County Public Schools reimburse them for their expenses in placing the Student at [SCHOOL 1] and [School 1] for the 2013-2014 and 2014-2015 school years be, and is hereby, **DENIED**; and I further

ORDER that the Parents' request that Montgomery County Public Schools amend the Student's Individualized Education Program to place the Student at [SCHOOL 1] and [School 1] be, and is hereby, **DENIED**.

May 15, 2015
Date Decision Issued

Richard O'Connor
Administrative Law Judge

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the Student resides. Md. Code Ann., Educ. § 8-413(j) (2014). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

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.