

XXXX XXXX,

STUDENT

v.

HARFORD COUNTY

PUBLIC SCHOOLS

* BEFORE JENNIFER L. GRESOCK,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MSDE-HARF-OT-15-25239

* * * * *

DECISION

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STATEMENT OF THE CASE

On July 28, 2015, XXXX and XXXX XXXX, on behalf of their child, [Student] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Harford County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on September 15, 2015. Ms. XXXX (Parent) was present; she and Mr. XXXX were represented by Holly Parker, Esquire.¹ Andrew Nussbaum, Esquire, represented the HCPS. By agreement of the parties, the hearing was scheduled for four days: October 19, 20, 22, and 23, 2015.

I held the hearing on October 19, 20, and 22. Ms. Parker represented the Parents. Mr. Nussbaum, Esquire, represented the HCPS.

¹ Because only Ms. XXXX was present at the hearing, all references to the Parent in this decision are to Ms. XXXX only.

Federal regulations require that the due process hearing be heard, and a decision issued, with forty-five days of certain triggering events described in the federal regulations. The OAH received the due process complaint on July 28, 2015. A resolution session took place on August 12, 2015; this resolution session did not resolve the issues. On August 18, 2015, HCPS notified OAH that the resolution period had expired and that no resolution had been reached. Therefore, the triggering event in this case was the conclusion of the thirty-day resolution period on August 27, 2015. 34 Code of Federal Regulations (C.F.R.) § 300.510(b) (2015²). The expiration of the resolution period on August 27, 2015, triggers the 45-day timeframe for the due process hearing and decision. 34 C.F.R. §§ 300.510(b) - (c); 34 C.F.R. §§ 300.515(a), (c). The hearing dates requested by the parties fell more than forty-five days after the triggering event described in the federal regulations. However, during the telephone prehearing conference, the parties expressly waived this forty-five-day timeframe for the due process hearing and decision. In addition, at the prehearing conference, the parties jointly agreed to an extension of time, until thirty days after the conclusion of the hearing, for me to issue a decision. 34 C.F.R. § 300.515; Md. Code Ann., Educ. § 8-413(h) (2014).

The hearing dates were chosen by the parties based on the earliest dates that the parties were both available to complete the hearing; I reviewed the parties' calendars with them at the prehearing conference to ensure that the hearing was scheduled on the earliest dates on which they were both available. The hearing concluded on October 22, rather than October 23, 2015, because the parties completed presenting their cases. The final day scheduled for hearing was therefore cancelled.

² All references to 34 C.F.R. are to the 2015 volume.

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 Office of Administrative Hearings (OAH). Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are:³

- (1) Whether HCPS failed to provide/offer an appropriate Individualized Education Program (IEP) for the 2014 – 2015 and 2015 – 2016 school years;
- (2) Whether HCPS failed to provide/offer sufficient related services during the 2014 – 2015 and 2015 – 2016 school years;
- (3) Whether HCPS failed to document valid, measurable present levels of performance on the Student's IEP for the 2014 – 2015 and 2015 – 2016 school years;
- (4) Whether HCPS failed to develop appropriate goals/objectives that address the severity of the Student's special education needs;
- (5) Whether HCPS failed to provide a full continuum of appropriate special education services which would address the Student's individual needs; and
- (6) Whether HCPS failed to incorporate recommendations made by independent evaluators.

³ These are the issues as set out in the Parent's Due Process Complaint, which HCPS agreed to at the prehearing conference. I have edited the issues as presented by the Parent very slightly for clarity.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following Joint Exhibits:

- Joint Ex. 1 – HCPS Prior Written Notice, dated September 11, 2014
- Joint Ex. 2 - HCPS Prior Written Notice, dated November 13, 2014
- Joint Ex. 3 - HCPS Prior Written Notice, dated March 13, 2015
- Joint Ex. 4 - HCPS Prior Written Notice, dated May 4, 2015
- Joint Ex. 5 - HCPS Prior Written Notice, dated May 26, 2015
- Joint Ex. 6 - HCPS Educational Assessment Report, dated October 29, 2013
- Joint Ex. 7 - HCPS Psychological Assessment, dated October 29, 2013
- Joint Ex. 8 - HCPS Occupational Therapy Assessment, undated (based on October 2013 evaluation)
- Joint Ex. 9 - HCPS Speech/Language Assessment Report, dated October 22, 2013
- Joint Ex. 10 - HCPS Special Education Services Assistive Equipment & Technology Services Augmentative Communication Evaluation, dated October 4, 2013
- Joint Ex. 11 - Verbal Behavior Assessment, XXXX, LLC, undated (based on January 2014 assessment)
- Joint Ex. 12 - Verbal Behavior Assessment, XXXX, LLC, undated (based on March and April 2015 assessments)
- Joint Ex. 13 - IEP, amended March 13, 2013
- Joint Ex. 14 - IEP, approved May 26, 2015
- Joint Ex. 15 - Student Medical History, dated July 16, 2015
- Joint Ex. 16 - Student Attendance Profile, dated June 22, 2015
- Joint Ex. 17 - Related Services Log Notes, dated May 28, 2015 through June 18, 2015
- Joint Ex. 18 - Yearly Attendance Record (Speech), 2013 - 2014
- Joint Ex. 19 - Yearly Attendance Record (Occupational Therapy), 2014 – 2015

- Joint Ex. 20 - Yearly Attendance Record (Occupational Therapy), 2013 – 2014
- Joint Ex. 21 - Note from Parent, undated
- Joint Ex. 22 - HCPS Home Schooling Notification Form, dated September 11, 2014
- Joint Ex. 23 - Letter, dated September 12, 2014
- Joint Ex. 24 - HCPS, Portfolio Review, dated January 30, 2015
- Joint Ex. 25 - Email from the Parent to XXXX XXXX, dated July 7, 2014
- Joint Ex. 26 - Email from Ms. XXXX to Mr. XXXX, dated June 19, 2015

I admitted the following exhibits on behalf of the Parents⁴:

- Parents Ex. 1 – Letter from HCPS Department of Transportation, XXXX XXXX, dated June 1, 2015
- Parents Ex. 2 - Home-School Communication Log Book, dated from March 10, 2015 through June 12, 2015
- Parents Ex. 3 - Email from Mr. Nussbaum to Ms. Parker, dated October 9, 2015
- Parents Ex. 4 - HCPS Psychological Assessment, dated October 29, 2013
- Parents Ex. 5 - HCPS Special Education Services Assistive Equipment & Technology Services Augmentative Communication Evaluation, dated September 30, 2013 and October 4, 2013
- Parents Ex. 6 - Individualized Education Program (IEP) (draft), dated November 19, 2013
- Parents Ex. 7 - Letter from [School 1], dated July 1, 2015
- Parents Ex. 8 - HCPS Prior Written Notice, dated December 6, 2013
- Parents Ex. 9 - HCPS Prior Written Notice, dated September 17, 2013
- Parents Ex. 10 - Work Samples, numbers 1 through 13
- Parents Ex. 11 - HCPS Prior Written Notice, dated August 22, 2013
- Parents Ex. 12 - Audio Recording of IEP meetings on December 6, 2013; May 4, 2015; and May 26, 2015

⁴ I retained the Parents' marking of 12 exhibits by number, and six additional exhibits, all resumes, marked by letter.

Parents Ex. A - Resume of XXXX XXXX, Ph.D.

Parents Ex. B - Resume of XXXX XXXX, Ph.D.

Parents Ex. C - Resume of XXXX XXXX

Parents Ex. D - Resume of XXXX XXXX, MS Ed., BCBA

Parents Ex. E - Resume of XXXX XXXX, M.S., BCBA

Parents Ex. F - Resume of XXXX XXXX, MD

I admitted the following exhibits on behalf of HCPS⁵:

HCPS Ex. 27 – Resume of XXXX XXXX, Ph.D.

HCPS Ex. 28 - Resume of XXXX XXXX

HCPS Ex. 29 - Resume of XXXX XXXX

HCPS Ex. 30 - Resume of XXXX XXXX

HCPS Ex. 31 - Resume of XXXX XXXX

HCPS Ex. 32 - Resume of XXXX XXXX

HCPS Ex. 33 - Resume of XXXX XXXX

HCPS Ex. 34 - Resume of XXXX XXXX

HCPS Ex. 35 - Resume of XXXX XXXX

HCPS Ex. 36 - Resume of XXXX XXXX

HCPS Ex. 37 - VB-MAPP Language Milestones, Barriers, and EESA Assessment

Testimony

The Parent testified and presented the following witnesses:

- XXXX XXXX, Supervisor of Transportation, HCPS;
- XXXX XXXX, Bus Driver, HCPS;
- XXXX XXXX, Special Education Teacher, [School 2];

⁵ HCPS placed its exhibits in a binder following the Joint Exhibits. As the Joint Exhibits are labeled 1 through 26, HCPS's Exhibits are numbered 27 through 37. As this is how the parties and I referred to the exhibits throughout the hearing, I have maintained the numbering in this decision.

- XXXX XXXX, admitted as an expert in special education, with an emphasis on the behavior of children with autism;
- XXXX XXXX, Principal, [School 1];
- XXXX XXXX, Consultant;
- XXXX XXXX, Assistant Principal, [School 2];
- XXXX XXXX, admitted as an expert in Applied Behavior Analysis (ABA);
- Dr. XXXX XXXX, admitted as an expert in child psychology, specializing in children with developmental disabilities.

The HCPS presented the following witnesses:

- XXXX XXXX, BCBA and Behavioral Consultant, admitted as an expert in ABA and behavior analysis;
- XXXX XXXX, Special Education Teacher, [School 2], admitted as an expert in special education;
- XXXX XXXX, Coordinator of Special Education, HCPS, admitted as an expert in special education.

FINDINGS OF FACT

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

1. The Student is fourteen years old. His disabilities include autism, intellectual disability, and speech/language impairment.
2. Beginning in April 2012, the Student began having seizures. He also has gastrointestinal difficulties, as well as food allergies and sensitivities.
3. Some of the Student's food allergies can result in immediate symptoms, including anaphylaxis (for peanuts, Brazil nuts, and shellfish). The other allergies and food

sensitivities have less immediate symptoms, including internal inflammation, pain, and cognitive problems (for gluten and casein).

4. Prior to the start of the 2013 – 2014 school year, the family moved from [State] to Harford County, Maryland, where the Parent enrolled the Student in HCPS.
5. HCPS placed the Student at [School 2] for the 2013 – 2014 school year.
6. [School 2] is a separate public day school and is part of the HCPS system. It has about 130 students, 24 teachers, and 60 other staff members.
7. All students at the [School 2] have disabilities and receive services under IDEA.
8. Upon the Student's enrollment, HCPS conducted a number of assessments, including the following:
 - a. Psychological assessment (September 19 and 24, 2013);
 - b. Speech and Language Assessment (September 18, 24, and 26, 2013);
 - c. Educational Assessment, based on information from the Student's classroom teacher, direct observations of the Student in the classroom setting, and one direct testing session (October 15 and 25, 2013); and
 - d. Occupational Therapy Assessment, focusing on sensory processing, fine motor, and self-care skills (October 2013).
9. The Student functions in the extremely low range of intelligence. His visual-motor skills are in the very low range. He exhibits behaviors consistent with autism.
10. At the time of the Speech and Language Assessment in September 2013, the Student exhibited early communication and emerging language skills equivalent to those of an eleven-month to eleven-and-a-half-month old child, auditory

comprehension skills equivalent to those of a one-year, one-month old child, and expressive communication skills equivalent to those of a one-year old child.

11. On September 30 and October 4, 2013, HCPS conducted an Augmentation Communication Evaluation. XXXX XXXX, M.S., Augmentative Communication Specialist recommended that the Student use a low tech augmentative communication book, rather than an assistive technology device.
12. At the time of the Educational Assessment in October 2013, the Student exhibited the following (based on the Brigance Inventory of Early Development II – standardized version):
 - a. Fine motor skills: age equivalent of twenty-six months. The Student could manipulate small objects with his fingers. He could not copy vertical and horizontal lines or draw a circle when prompted; he did not respond when asked to draw a person. He was able to build a tower of five blocks with the examiner.
 - b. Receptive language: age equivalent of twelve months. The Student did not respond when asked to identify body parts or to point to pictures of specified objects. He did respond to his name.
 - c. Expressive language: age equivalent of nine months. The Student was generally non-verbal and expressed needs and wants through gestures, picture selection, and body language.
 - d. Language development (composite score): age equivalent of eleven months.

- e. Mathematical/General Concepts: age equivalent of less than twenty-three months. The Student could identify numbers one through 10, but inconsistently. He could not identify colors or shapes.
 - f. Literacy: age equivalent of less than twenty-five months.
 - g. Academic/cognitive (composite score): age equivalent of less than eighteen months. The Student was proficient at familiar matching tasks and can follow basic classroom routines.
 - h. Daily living (composite score): age equivalent of thirty-two months. The Student needed assistance with buttons and fasteners. He was capable of performing all toileting tasks with prompting.
 - i. Social and emotional development (composite score): age equivalent of eight months. The Student showed interest in the activities of others, delight and excitement, and pulled staff in the direction of his wants. He did not initiate interactions with other children.
13. At the time of the October 2013 Occupational Therapy Assessment, the Student could button his clothing with some assistance but not independently; could not zip his clothing; could not fasten his pants; could not cut shapes; could not trace or copy lines or shapes; could not mimic folding; did not consistently indicate a need to use the bathroom; did not indicate when his pull-up was wet or soiled; and required some prompting assistance with hygiene, dressing and undressing, and washing his hands.
14. In January 2014, XXXX XXXX of XXXX, LLC, conducted a Verbal Behavior Milestones and Assessment Placement Program (VB-MAPP), making specific

recommendations with regard to the use of Applied Behavior Analysis (ABA) in teaching the Student age-appropriate skills.

15. ABA is an approach or treatment for autism using principles of behavior, such as requests (*i.e.*, mands), reinforcement, extinction, and motivation, in a systematic way to improve behavior.
16. Tacting is labeling an item, such as by using a picture of the item to request it.
17. Effective reinforcers are key to the use of ABA. They can be assessed formally or informally and should be reassessed on an ongoing basis.
18. The IEP team determined the Student required Extended Year Services (ESY) for summer 2014, but the Parent declined those services.
19. On September 11, 2014, the IEP team met at the Parent's request. For the 2014 – 2015 school year, the Parent sought to combine a modified day program through HCPS with homeschooling in the XXXX program, a parent-led autism therapy program.
20. When HCPS staff informed the Parent that she could not combine a modified public day program with a homeschooling program, the Parent opted to homeschool the Student for the 2014-2015 school year, using the XXXX program.
21. At the September 11, 2014 meeting, the Student's IEP was amended to reflect that he would be homeschooled.
22. On November 13, 2014, the IEP team met for the Annual Review to review and revise the Student's IEP, if appropriate. The team determined that if the Student were enrolled in HCPS, he would receive direct special education classroom instruction in reading, math, dressing, grooming, and fine motor skills. He would

also receive direct speech and language education services, direct occupational therapy, and direct adapted physical education services. He would also require the related service of special needs transportation.

23. The IEP team reviewed the Student's progress toward IEP goals based on notes submitted by the Parent. The IEP team also approved a new IEP on this date.

24. The November 13, 2014 IEP reflected the following present levels of academic achievement and functional performance:

- a. Reading vocabulary: below pre-kindergarten
- b. Communication: below pre-kindergarten
- c. Early literacy: below pre-kindergarten
- d. Early math literacy: below pre-kindergarten
- e. Physical education: scattered pre-primary to elementary skill abilities, all below grade level outcomes
- f. Fine motor: below pre-kindergarten
- g. Independent living – dressing and grooming: pre-kindergarten
- h. Sensory processing: below pre-kindergarten

25. The November 13, 2014 IEP also provided that the Student needed assistive technology devices, specified as picture symbols, communication books, and voice-output devices.

26. Key supplementary aids, services, program modifications and supports included in the IEP were as follows:

- a. Errorless learning strategies with a “most to least” prompt hierarchy;
- b. Alternate response modes as well as increased response time, processing, and wait time;

- c. Modifications to the special education program, including modified curriculum and pacing; adult assistance; reduced complexity of content; short, clear, concise directions using cue words, visual prompts, and modeling, as well as physical guidance; and modified evaluation;
- d. Picture schedule; first/then chart preferential seating;
- e. Modified content; small group instruction; reduced distractions; reduced distractions to others;
- f. Additional adult support across all educational settings;
- g. Reinforcement of positive behaviors through fidgets, rewards, praise, and preferred tasks;
- h. Adaptive feeding device (plate with suction); and
- i. Consultations for speech/language services; occupational therapy services; physical education services; classroom instruction; nursing.

27. Errorless learning strategies involve the application of ABA principles.

Specifically, the approach uses prompting and reinforcement to minimize student error, increase the rate of acquisition, and decrease problematic behaviors.

28. PECS (Picture Exchange Communication System) are picture symbols paired with text.

29. TOBI (True Object Based Icons) are photographs of objects cut to size.

30. PECS and TOBI are used to teach vocabulary, early literacy skills, and early math skills. They are also used for communication by nonverbal students.

31. The November 13, 2014 IEP addressed transitional goals, specified to be employment as a sorter, as well as transition activities.

32. The November 13, 2014 IEP established 10 goals:

- a. Reading vocabulary: Given pictures of functional vocabulary, verbal and gestural prompting, and a choice of three, [Student] will identify specific vocabulary with 100% accuracy on 4 out of 5 trials.
- b. Communication: Given a variety of language based activities, [Student] will increase his functional communication skills using vocalizations, picture symbols, and signs in 4 out of 5 trials.
- c. Early literacy: Given letter manipulatives, verbal and gestural prompting, and a choice of three, [Student] will identify letters of the alphabet (specifically the letters in his name) and sequence the letters to build words (his name) on 4 out of 5 trials with 100% accuracy.
- d. Early math literacy: Given numbers and sets 1 – 5, verbal and gestural prompting, and a choice of three, the Student will identify numbers and sets 1 – 5 with 100% accuracy on four out of five trials.
- e. Early math literacy: Given shapes, verbal and gestural prompting, and a choice of three, the Student will identify shapes with 100% accuracy on four out of five trials.
- f. Early math literacy: Given color-coded number cards fading to number cards and verbal and gestural prompting, the Student will sequence steps in order to complete a two-step task with 100% accuracy on four out of five trials.
- g. Early math literacy: Given coins, verbal and gestural prompting, and a choice of three, the Student will identify coins with 100% accuracy on four out of five trials.

- h. Physical education: Given a physical activity setting, the Student will demonstrate the ability to use skills essential for developing self-efficacy, fostering a sense of community, and working effectively with others 80% of the time.
- i. Fine motor: The Student will demonstrate the ability to complete prewriting skills of functional pencil grasp, wrist stabilization, and the completion of basic lined and curved strokes on at least 3/5 writing samples across three consecutive sessions.
- j. Independent community living – dressing and grooming: Given practice clothing on a table top and/or clothing with fasteners on his person and prompt hierarchy, the Student will fasten buttons and zipper on 4 out of 5 trials, independently.

33. In March 10, 2015, the Parent reenrolled the Student in HCPS because she found it difficult to meet all of the Student's educational needs at home and to balance those needs with her care of other children in the home.

34. On March 13, 2015, the IEP team met to review and revise the Student's IEP to reflect his reenrollment in HCPS, and to consider ESY services for summer 2015. The Parent did not attend the meeting.

35. When the Student reenrolled in HCPS, the consultations for speech/language and occupational therapy were replaced with in-school services (four 30-minute sessions of speech/language therapy per month and three 30-minute sessions of occupational therapy per month).

36. When the Student reenrolled in HCPS, the Student received the related service of special transportation, with a special XXXX, supervision boarding and exiting the bus, assistance securing his XXXX, and monitoring during the bus ride.
37. The Student's classroom teacher for the 2014 – 2015 school year was XXXX XXXX.
38. Ms. XXXX and the Parent communicated through a log book of handwritten notes that they exchanged.
39. Ms. XXXX's class consisted of about five students of different grade levels. There were two classroom assistants as well as an additional staff member who provided one-to-one assistance to the Student.
40. XXXX XXXX, Coordinator of Special Education, assisted with training Ms. XXXX in ABA principles as applied through errorless learning techniques.
41. Ms. XXXX had limited prior experience with errorless learning. She practiced it with the Student, maintaining anecdotal notes on his progress.
42. Ms. XXXX twice observed the Student in Ms. XXXX's class and observed him actively engaged in the lessons.
43. The Student's PECS were kept on the cabinet door behind his desk, as he would push them off his desk. They were attached to the cabinet door by Velcro.
44. The PECS were used to reinforce trips to the bathroom and to choose rewards.
45. The PECS were kept at school and did not go home with the Student.
46. The Student would wear either a pull up or underwear with a liner at school. He often wet himself at school and would at times remove the liner and throw it when in the bathroom.

47. The Student's mother expressed Ms. XXXX that she strongly preferred that the Student wear underwear with a liner or pad, rather than a pull up.
48. The Student would arrive at school wearing underwear and a liner, and carrying several changes of clothing.
49. Ms. XXXX attempted to have the Student wear underwear, but if he was unsuccessful she would have him wear a pull up instead.
50. On at least one occasion, the Parent ran out of liners and instructed Ms. XXXX to use pull ups.
51. The Student did not typically initiate requests to use the bathroom.
52. The Student had two types of shoes he wore to school: high top sneakers with laces and croc shoes without laces. He would sometimes remove the sneakers and throw them.
53. The Student would attempt to grab snacks from other students at times in the classroom, including foods to which he is allergic.
54. Ms. XXXX addressed the food-grabbing behavior by setting a screen up around the Student to create a barrier.
55. In April 2015, the IEP team determined that it could not evaluate the Student's progress on six of the 10 goals because the Student had not been back at school long enough for these skills to be both introduced and measured. However, the IEP team did document the Student's progress with regard to the following four goals:
- a. Communication: Given a variety of language based activities, [Student] will increase his functional communication skills using vocalizations, picture symbols, and signs in 4 out of 5 trials. As of April 10, 2015, the

Student was making sufficient progress to meet his goal, demonstrating the ability to identify targeted vocabulary in two out of five trials and to follow familiar directions in three out of five trials with familiar activities.

- b. Physical education: Given a physical activity setting, the Student will demonstrate the ability to use skills essential for developing self-efficacy, fostering a sense of community, and working effectively with others 80% of the time. As of April 10, 2015, the Student was making sufficient progress to meet his goal.
- c. Fine motor: The Student will demonstrate the ability to complete prewriting skills of functional pencil grasp, wrist stabilization, and the completion of basic lined and curved strokes on at least 3/5 writing samples across three consecutive sessions. As of April 26, 2015, the Student was not making sufficient progress to meet his goal. He required assistance to grasp his writing instruments 25% of the time, and varying levels of assistance.
- d. Independent community living – dressing and grooming: Given practice clothing on a table top and/or clothing with fasteners on his person and prompt hierarchy, the Student will fasten buttons and zipper on 4 out of 5 trials, independently. As of April 26, 2010, the Student was making progress, but not sufficient progress to meet his goal. He could button 1-inch buttons but not fasten his pants or start a zipper.

56. In March and April 2015, Mr. XXXX conducted a VB-MAPP. Mr. XXXX recommended that ABA principles be employed.

57. On May 4, 2015, the IEP team met for an Annual Review at the request of the Parent.
58. At the May 4, 2015 IEP meeting, the Parent expressed concern about the Student's lack of progress toward achieving the IEP goals. She also expressed that errorless learning strategies in his 2013-2014 IEP were not effectively implemented, his school work was not age appropriate, and that he did not have adequate access to communication devices.
59. Mr. XXXX attended the May 4, 2015 IEP meeting.
60. Mr. XXXX advised the IEP team with regard to the implementation of errorless learning strategies. He also indicated that he had conducted a VB-MAPP assessment and would share the results with the IEP team.
61. The IEP team did not approve the proposed IEP at the May 4, 2015 IEP meeting in order to give the Parent the opportunity to submit Mr. XXXX's VB-MAPP assessment so that the team could incorporate his recommendations into the IEP.
62. The Student rides the bus to and from school. After school, the bus ride to the Student's home is between five and twenty minutes. He wears a XXXX on the bus.
63. On May 8, 2015, the Student's bus was staffed by a substitute bus driver (XXXX XXXX) and a substitute aide (XXXX XXXX). There were four students on the bus, including the Student.
64. The "stop and go sheet," which provides information to the bus driver about the stops (including house numbers, arrival times, and mileage) was not complete, so Ms. XXXX had difficulty locating the Student's stop.

65. While Ms. XXXX searched for the bus stop, circling twice and looking for a parent to meet the Student, another student became agitated. Mr. XXXX attended to that student to calm her.
66. Ms. XXXX and Mr. XXXX decided to take two other students home before dropping the Student off because they could not locate the Student's home.
67. Ms. XXXX called the Student's mother to inform her that the bus would be late.
68. At some point during the bus ride, the Student removed the liner in his underwear and threw it towards the seat immediately behind Ms. XXXX.
69. The Student arrived home over an hour later than usual. When he arrived, his pants were pulled down and he was exposed. He was still in his XXXX.
70. Because the Student was exposed, Mr. XXXX was uncomfortable with the situation and asked the Student's father, who was waiting outside the home, to assist him with removing the Student from the bus.
71. HCPS did not respond to the Parent's request for more information about the incident despite a promise to investigate it.
72. Bus staff receive training in attending to students with special needs.
73. On May 26, 2015, the IEP team met to review and revise the Student's IEP, consider ESY services, and consider post-secondary goals and transition services.
74. The Student's IEP provided that he would receive direct special education classroom instruction in the areas of early literacy, early math literacy, functional/vocational, fine motor, dressing and grooming, feeding/eating, and toileting. In addition, he would receive direct speech and language therapy, direct occupational therapy, direct adapted physical education services, direct nursing

services (allergy and seizure care), and indirect nursing services (regarding food allergies and seizures).

75. The May 26, 2015 IEP reflected the following present levels of academic achievement and functional performance:

- a. Speech and receptive language: significantly below same age peers
- b. Speech and expressive language: significantly below same age peers
- c. Speech and language pragmatics: significantly below same age peers
- d. Early literacy: birth scattered up to 30 months
- e. Early math literacy: birth scattered up to 30 months
- f. Functional skills: below age expectations
- g. Social Emotional/Behavioral: below age and grade expectations
- h. Fine motor: below grade level
- i. Independent living – feeding: below age expectations
- j. Independent Community living – toileting: below age expectations
- k. Independent Community living – dressing and grooming: below grade level
- l. Sensory processing: below grade level

76. The May 26, 2015 IEP also provided that the Student needed assistive technology devices, including PECS, augmentative communication devices, and a variety of instructional technologies including an interactive white board and tablet technology.

77. Key supplementary aids, services, program modifications and supports included in the May 26, 2015 IEP were as follows:

- a. Multi-sensory approach to learning; provide repeated opportunities to practice new skills; vary task and intersperse new skills with mastered skills;
- b. Errorless learning strategies; prompt hierarchies with embedded wait time;
- c. Visual supports; picture schedule; first/then chart;
- d. Alternate response modes;
- e. Sensory diet, sensory items (*e.g.* bands, bean bag chair, weighted items, compression vest, fidgets, bike ride);
- f. Physical education modifications;
- g. Extended Maryland standards, small group instruction, reduced distractions, preferential seating;
- h. Adult support;
- i. Intermittent positive reinforcement including fidgets, rewards, praise, preferred tasks;
- j. Home/school communication system; and
- k. Nursing consult regarding dietary restrictions and seizure care.

78. The May 26, 2015 IEP addressed transitional goals, including employment as a sorter, as well as transition activities.

79. The May 26, 2015 IEP established 14 goals in the following areas:

- a. Speech and Language Receptive Language;
- b. Speech and Language Expressive Language;
- c. Speech and Language Pragmatics;
- d. Early literacy (two goals);
- e. Early math literacy (two goals);

- f. Functional skills (academic – two goals);
- g. Physical education;
- h. Fine motor;
- i. Independent living – feeding;
- j. Independent living – toileting; and
- k. Independent living – dressing and grooming.

80. The IEP team determined that the Student was eligible for ESY services for summer 2015.

81. In making its determinations regarding present levels of performance and goals and objectives, the IEP team relied on formal HCPS evaluations (2013), the VB-MAPP results provided by Mr. XXXX (March and April 2015), the Student's transitional interview (April 30, 2015), and present levels of performance as documented by informal classroom assessments and observations by his teacher, related service providers, and the Parent.

82. The Parent requested that the IEP team refer the Student to the Central IEP team to consider a more restrictive environment; the IEP team declined to do so because it determined the Student did not require a more restrictive placement based on his needs.

83. In June 19, 2015, members of the IEP team added notes reflecting progress on 12 of the 14 goals and insufficient data (or skill not yet introduced) for two of the goals.

84. A BCBA is a Board Certified Behavior Analyst. Becoming a BCBA involves coursework, field work with supervision, and an examination.

85. Over the summer of 2015, Ms. XXXX coordinated an intensive 18-hour training, delivered by behavioral consultant and BCBA XXXX XXXX, over three days to staff at [School 2].
86. Ms. XXXX provides continuing supervision on a biweekly basis to [School 2] staff in the application of ABA techniques.
87. XXXX XXXX attended Ms. XXXX's training. She is the Student's classroom teacher for the 2015 – 2016 school year.
88. Ms. XXXX's class consists of the Student and three other students. There are three other adult staff members in the classroom, including a one-to-one aide for the Student.
89. Ms. XXXX sent home a welcome packet at the start of the school year.
90. Included in the welcome packet was a survey asking parents to provide information about the students' preferences. The Parent did not complete and return the survey.
91. On the first two days of school, the Student wore new high top sneakers with Velcro that he would remove at school. However, since then, he has adjusted to wearing the shoes at school.
92. The Student's school days consist of intensive structured teaching sessions in reading, math, and specials.
93. Ms. XXXX sent the Parent a request for pictures of "known" items to incorporate into her lessons with him. However, the Parent did not respond to this request.
94. Ms. XXXX has four iPads in her classroom. Two are used as communication devices and two have applications that the students use installed on them.

95. Ms. XXXX ensures that the Student has an opportunity to use the bathroom at least hourly.
96. The Student arrives at school in underwear with a liner/pad and with extra clothing with him. Sometimes, he resists wearing the liner. He has on occasion removed it and thrown it in the bathroom.
97. Ms. XXXX maintains a daily report on the Student's toileting, which is sent home at the end of the school day.
98. The Student's toileting since the start of the 2015 – 2016 school year has been inconsistent, with periods of improvement and regression.
99. On September 10, 2015, the Student was ill and had severe diarrhea. He went home early from school.
100. On September 21, 2015, the Student masturbated to completion in the bathroom during a bathroom break. [School 2] staff did not intervene.
101. During the 2015 – 2016 school year, the Student grabbed a cookie that did not belong to him and consumed it. This was the only occasion upon which the Student was able to consume food he was not permitted to have.
102. On September 24, 2015, Ms. XXXX conducted a VB-MAPP. She subsequently prepared a written report reflecting the results of the assessment.

DISCUSSION

Introduction

As framed by the Parent, this case is primarily about the suitability of the IEPs for the relevant school years as well as appropriate educational methodology. With regard to the latter, it is about the techniques employed in educating the Student, and the effectiveness of the implementation of those techniques. As an active, engaged, and well-informed advocate for her

son, the Parent is frustrated both by perceived delays in the implementation of effective techniques and by progress that she finds to be unacceptable in light of the Student's age and the urgency of his needs. The Parent contends that the HCPS has failed to provide the Student with the free appropriate public education (FAPE) to which he is entitled. The Parent points to specific incidents that she believes underscore the inability of HCPS to meet the Student's needs. HCPS does not dispute that the Student's needs are intense, but takes the position that it has been responsive to the Parent's wishes and met its legal obligations in educating the Student.

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parent has the burden of proving that the Student's IEP was not reasonably calculated to provide educational benefit to him, and that placement at a private school is appropriate. The Parent is requesting that the Student be placed at [School 1] ([School 1]), a private school. The Parent maintains that a private school such as [School 1] is the least restrictive environment in which to implement the Student's IEP. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

To prove her case by a preponderance of the evidence, the Parent must convince me that it is more likely than not that HCPS failed to provide the Student a FAPE. Merely raising doubt does not constitute proof by a preponderance of the evidence. For the reasons discussed below, I find in favor of HCPS.

Legal Framework

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010), 34 C.F.R. Part 300, Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008), and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. Courts have defined the word

“appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

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

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

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

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

student to an IEP that is reasonably calculated to enable that student to receive educational benefit. As recently as the first day of the hearing in this case, the Fourth Circuit Court of Appeals declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cty. School Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991) (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. 458 U.S. at 202.

With regard to the appropriateness of the Student’s program, in order to prevail, the Parent must prove that the placement determined by the public agency will amount to a denial of a FAPE and that the identified private school is an appropriate placement. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). In *Carter*, the Supreme Court upheld a lower court’s decision to order reimbursement to the parents for private tuition, after the court’s determination that the IEP was inappropriate and that the private school selected by the parents would offer the child an appropriate education. Specifically, the Supreme Court concluded that parents are “entitled to reimbursement *only* if a federal court concludes both that the public

placement violated IDEA and that the private school placement was proper under the Act.”

Carter, 510 U.S. at 15 (emphasis added).

Arguments of the Parties

The Parent makes four specific arguments that she contends support a finding that HCPS has failed to provide the Student with FAPE and sufficient related services for the 2014 – 2015 and 2015 – 2016 school years. She argues that: (1) HCPS has failed to provide adequate related services, as evidenced by an incident that occurred on the school bus in May 2015; (2) HCPS has failed to address problematic behaviors related to food allergies, toileting, and masturbation; (3) the Student is not making progress with regard to independent living skills, particularly toileting; and (4) the Student is not making progress with regard to academic skills. This failure to progress, argues the Parent, is underscored by the lack of documentation showing measurable progress. HCPS contended in response that: (1) the bus incident was a single, isolated incident; (2) the Parent has exaggerated the alleged problematic behaviors; (3) the Student is making progress on his independent living skills, including toileting; and (4) the Student is making progress with regard to academic skills. Noting that the Student has frequently been absent from school, and that he has attended HCPS only for portions of the two relevant school years (having declined ESY services for both summer 2014 and summer 2015), HCPS contends it has nonetheless documented the Student’s progress.

Issue I: HCPS Provided/Offered an Appropriate IEP for the 2014 – 2015 School Year and the 2015 – 2016 School Year

2014 – 2015 School Year

For most of the 2014 – 2015 school year, the Parent homeschooled the Student, and his November 13, 2014 IEP reflected this. (Joint Ex. 13.) However, on March 10, 2015, the Parent reenrolled the Student at [School 2]. The Student’s IEP was amended on March 13, 2015 to

reflect the Student's return to [School 2]. (Joint Ex. 13.) On May 26, 2015, the Student's IEP was revised. (Joint Ex. 14.) The Student remained in school until approximately June 11, 2015; he missed the last week and a half of school due to illness.

The Student is identified as a student with autism, intellectual disability, and speech or language impairment. The IEP developed on November 13, 2014, required that the Student receive special education services under IDEA as a student with autism, intellectual disability, and speech or language impairment. Specifically, the Student required specialized instruction and related services to address deficits in reading vocabulary, communication, literacy in language and math, physical education, fine motor skills, independent living skills (dressing and grooming), and sensory processing. The IEP team determined that the Student required a highly specialized program with modified instruction towards a significantly modified curriculum, and that a public separate day school was an appropriate placement. It noted the Parent was instead opting to homeschool.

Based on the Student's deficits, the IEP team developed ten goals and objectives to address the identified needs. For example, in the area of reading vocabulary, the Student's goal was, "[g]iven pictures of functional vocabulary, verbal and gestural prompting, and a choice of three, [the Student] will identify specific vocabulary with 100% accuracy in 5 out of 5 trials." The three objectives for this goal establish specific vocabulary, including "stop," "exit," "enter," "bathroom," "library," and "music." In the area of communication, the Student's goal was, "[g]iven a variety of language based activities, [the Student] will increase his functional communication skills using vocalizations, picture symbols and signs in 4 out of 5 trials." The objectives provided the particular methodology – TOBI picture symbols – and specific communications, such as expressing wants and needs. The other goals – which include early literacy goals in both language and math, physical education, fine motor skills (pre-writing),

independent living skills (working with buttons and zippers as part of dressing and grooming) are similarly based on the identified deficits.

The IEP also sets out specific supplementary aids, services, program modifications and supports. These include errorless learning strategies with a most-to-least prompt hierarchy; alternate response modes; increased response time; modified curriculum and pacing in physical education; a picture schedule; reinforcement of positive behaviors through fidgets, rewards, praise, and preferred tasks; speech/language therapy (consultations for homeschooling); and occupational therapy (consultations for homeschooling). These services are clearly drawn in part from the formal assessments. The Educational Assessment Report recommends a prompt hierarchy and an adaptive instructional program (Joint Ex. 6); the Psychological Assessment recommends the use of visual cues (Joint Ex. 7); and the Speech/Language Assessment recommends focusing on the Student's ability to indicate needs and wants through picture symbols, vocalizations, and/or voice output devices (Joint Ex. 9).

An IEP is the "primary vehicle" through which a school provides a student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District*, 303 F. 3d 523, 527 (4th Cir. 2002); see 20 U.S.C.A. § 1414(d)(1)(A). The IEP should be the result of a collaborative process, usually one or more meetings, in which the parents, and their representatives, discuss the child's abilities and needs with school staff.

The IEP was approved on November 13, 2014 at an IEP team meeting. (Joint Ex. 2.) The Parent did not attend the meeting; however, she gave the team permission in her absence to approve the IEP as written. In drafting and approving the IEP, the IEP team considered the

Student's formal evaluations, as well as a transition interview conducted on November 5, 2014, and the Student's present levels of performance, as documented by parent observation and speech therapy data. (Joint Ex. 2.) It is clear that in this case, the IEP team crafted the goals and objectives in light of the Student's deficits, as determined by those formal evaluations and the progress reports from the Parent. Accordingly, I conclude that the IEP as approved on November 13, 2014, was reasonably calculated to enable that student to receive educational benefit.

For most of the 2013-2014 school year, the Student was homeschooled; he returned to [School 2] in March 2015. Nothing in the record suggests that the Parent had any objections to this IEP until May 4, 2015, when an IEP team meeting was convened at the Parent's request. At the IEP meeting on May 4, 2015, the Parent stated that she did not believe [School 2] could meet the Student's needs. She told the IEP team that he was not receiving age-appropriate instruction, that the schedule did not provide adequate instructional sessions, that the PECS available to him for communication were not adequately accessible to him, and that the educational program he was offered did not use the verbal behavior strategies that he requires. In addition, she shared concerns about the toileting protocol and the Student's access to food to which he is allergic. (Joint Ex. 4.)

The Parent echoed these concerns in her testimony. She also offered the testimony of Mr. XXXX, who attended the May 4, 2015 IEP meeting as well. Most of the concerns raised by the Parent at the May 4, 2015 IEP meeting relate to the implementation of the IEP, and not to the IEP itself and will be discussed below. An exception to that is the Parent's objection to the "educational program" outlined in the IEP, which is a challenge to appropriateness of the provisions in the IEP. Mr. XXXX testified regarding the Student's unique needs and the particular barriers that make acquiring skills challenging for the Student. For example, he noted

the Student's tendency to "scroll," or cycle through the possible answers in an effort to guess the correct one. The Student also has few "mands," or requests for reinforcers he wishes to have, which makes it difficult to distinguish his guesses from his mands. Mr. XXXX explained that he believed the Student's needs required teaching overseen by an expert in behavioral analysis.

Mr. XXXX's testimony was persuasive and reflected both his clear expertise and his familiarity with the Student's needs. He made a compelling case for specific educational strategies and how they would benefit the Student. However, HCPS is not obligated to offer an IEP with any particular educational strategies; rather, the IEP must be reasonably calculated to enable the child to receive educational benefit. As documented by HCPS and discussed above, the November 13, 2014 IEP considered the Student's formal evaluations and his present levels of performance as documented by parent observations and speech therapy data, and is reasonably calculated to enable the Student to receive educational benefit.

The Parent also challenged the implementation of the Student's IEP during the 2014-2015 school year. The Parent testified that she felt the work the Student was bringing home was not age appropriate and was too simple to reflect any meaningful learning. She felt his schedule included too many specials and not enough instruction time. She also had concerns about the toileting protocol. The Parent emphasized that toileting is a huge priority because it is key to the Student's ability to access a wider range of adult services, testimony echoed by Mr. XXXX, Dr. XXXX, and Mr. XXXX. She explained that the Student does initially resist change, but that she felt the Student's teacher, Ms. XXXX, was too quick to allow the Student to switch from underwear with a liner to pull ups because it was easier for the teacher than managing the Student's resistance. The Parent also expressed concern that the Student was able to grab food from other students, which was important to avoid because of his allergies. Finally, the Parent testified that she did not believe Ms. XXXX was adequately trained in or properly implementing

errorless learning.

On this last point, the Parent offered the testimony of Mr. XXXX, who observed the Student in Ms. XXXX's classroom on April 10, 2015. Mr. XXXX also offered testimony regarding his classroom observation of the Student on May 21, 2014, which is prior to the time period at issue before me. His testimony based on that observation is nonetheless relevant because it resulted in recommendations that he contended were not implemented in the lesson he observed on April 10, 2015. Specifically, following the May 21, 2014 observation, Mr. XXXX suggested incorporating more known items into instruction, mixing and varying skill types, and using errorless teaching for target skills. He also emphasized the importance of repeated prompted, integrating repeated practice in a manner that avoided reinforcement of guessing, and greater clarity regarding target skills versus skills that the Student had already mastered. Mr. XXXX looked at the November 13, 2014 IEP and stated that his suggestions were not, as far as he could tell, incorporated.

Again, Mr. XXXX's testimony made a compelling case for the use of particular strategies. However, he did not provide evidence that HCPS failed to implement the Student's IEP during the 2014 – 2015 school year. Ms. XXXX testified that in April 2015 she provided training on ABA principles to Ms. XXXX. While Mr. XXXX might disagree with Ms. XXXX's implementation of errorless learning techniques – and Ms. XXXX's testimony did suggest that she did not have the expertise that Mr. XXXX has – there was no evidence that HCPS simply failed to incorporate errorless learning such that the IEP (which specifies the use of errorless learning) was not implemented. Neither disagreement about errorless learning techniques nor the less-skilled application of those techniques amounts to a failure to properly implement the IEP.

With regard to the Student's schedule, the Parent offered no specific evidence that he was

not receiving the hours of classroom instruction specified on his IEP or that time the Student spent in specials compromised the implementation of his IEP. The Parent also objected to the level of work she observed the Student bringing home, expressing that she felt he was being “babied” at school and not receiving challenging work that would allow him to acquire essential skills, particularly in language and communication. She provided some work samples. (Parent Ex. 10.) However, again, the Parent provided no evidence that, as a whole, the Student was consistently presented with inappropriate work. The November 13, 2014 IEP, which I have found to be reasonably calculated to provide the Student with educational benefit, was based on levels of performance that were mostly pre-kindergarten level. I am not persuaded that the work samples establish that the Student was given work inconsistent with the proper implementation of his IEP.

Finally, there was extensive testimony regarding the toileting issue during the 2014 – 2015 school year. The November 13, 2014 IEP, which the Parent agreed to, does not specifically address toileting. It is likely that the Parent was not concerned with toileting goals for most of that school year because she had opted to homeschool the Student. Upon his return to school in March 2015, the Parent testified – and Ms. XXXX’s testimony corroborated – that the Parent wished to focus on moving the Student from pull ups to underwear with a liner. The Parent’s concern about toileting is also clear from the communication log book that she and Ms. XXXX exchanged. (Parent Ex. 2.) As early as March 16, 2015, the Parent was inquiring about the Student’s bathroom schedule and expressing concern that he was wetting his pants. On March 31, 2015, she wrote that “[w]e also need to keep trying with the underwear.” When Ms. XXXX wrote back that the Student seemed to “prefer the pull-ups and is doing fine with those,” the Parent reiterated that the Student was capable of being in underwear and needed to be wearing it instead of pull ups.

The testimony underscoring the importance of toilet training to future services available to the Student was highly persuasive, and the Parent's insistence on a toileting protocol is both understandable and laudable. However, when the IEP was approved on November 13, 2014, there is no evidence that the Parent was dissatisfied that it did not include toileting goals. Ms. XXXX's failure to insist on underwear for the Student, and her capitulation to what she perceived as his preference for pull ups, was therefore not inconsistent with the Student's November 13, 2014 IEP. Clearly, the Parent communicated to HCPS that toileting was a high priority for her in April and May 2015, as the IEP team prepared to re-convene at her request. But with regard to the November 2014 IEP, I find that the IEP offered by HCPS complied with applicable law and regulations.

Beginning on May 26, 2015, a revised IEP was in place for the remainder of the school year. Because the revised IEP applied to the final weeks of the 2014 – 2015 school year, I discuss it here with regard to the 2014 – 2015 school year and in the following section with regard to the 2015 – 2016 school year.

As discussed above, the Parent voiced numerous concerns about the Student's schooling at the May 4, 2015 meeting. Mr. XXXX also shared his expertise with the IEP team. By all accounts, the IEP team started to review the IEP but then postponed the meeting to allow the team to review Mr. XXXX's recommendations and incorporate them into the revised IEP. Specifically, Mr. XXXX told the team that he had conducted a VB-MAPP assessment, which the team agreed to review and incorporate. (Joint Ex. 4.)

Consistent with that approach, on May 26, 2015, the IEP team met again and approved a substantially revised IEP, which the Parent now challenges. (Even at the time of the IEP meeting, the Parent maintained that she did not believe HCPS could meet the Student's needs and requested a referral to the Central IEP office, which the IEP team declined to do because it

determined that there was insufficient data to support such a referral.) I first examine the sufficiency of the IEP itself, and then I consider its implementation.

The IEP team documented that the May 26, 2015 IEP was based on the evaluative data from the Student's formal evaluations, the VB-MAPP results (provided by Mr. XXXX), the Student's transition interview on April 30, 2015, and his present levels of performance, as documented by informal classroom assessments and observations by his teacher, related service providers, and the Parent. (Joint Ex. 5.) The May 26, 2015 IEP noted the Student's deficits in early literacy, early math, pre-writing/fine motor, receptive/expressive/pragmatic language skills, functional/daily living skills, and physical education skills. (Joint Ex. 14.) Accordingly, the IEP team determined that the Student requires specialized, highly structured, small group instruction across all content areas with modified pacing; a modified schedule with frequent breaks and reduced distractions; a significantly modified curriculum which embeds communication and functional skills instruction with academic instruction; and hands-on, multi-sensory, and errorless instructional strategies.

The IEP team also documented the Student's present levels of performance, indicating its reliance on a range of sources, including informal therapy data, the VB-MAPP results, informal data from speech/language therapy sessions, medical history, Parent's progress reports, and classroom observations. These present levels of performance are vastly different from those of the IEP approved on November 13, 2014, indicating that the IEP team took Mr. XXXX's recommendations and the Parent's concerns seriously and incorporated them into the revised IEP. For example, while most present level of performance were listed as "below pre-kindergarten" on the November 13, 2014 IEP (consistent with the documented sources used by the IEP team), the revised IEP most often indicates present levels of performance as "significantly below same age peers" or "below age expectations." In addition, the present levels

of performance include an assessment of his toileting skills and attention to the behavioral issue of his grabbing food that does not belong to him, which is not only a behavioral problem but also a health risk in light of his allergies.

Based on the documented deficits, the IEP team developed fourteen goals. For example, in the area of speech and language receptive language, the IEP team determined that the goal was “[g]iven all tangible, verbal and/or auditory cues necessary for consistency, [the Student] will gain meaning by listening when interacting with others during structured language activities with 80% accuracy.” The more specific objectives for this goal make use of strategies highlighted by Mr. XXXX both in his VB-MAPP assessments, such as identifying items (*i.e.* tacts). Similarly, the expressive language goal (“Given a variety of opportunities and all tangible, verbal and/or auditory cues necessary for consistency, [the Student] will express himself with the modality of his choice including gestures, signs, vocalizations and/or picture exchange for a variety of purposes with 80% accuracy”) is accompanied by objectives that utilize the key concepts highlighted by Mr. XXXX, including the use of mands and echoing. Other goals are tailored to address language and math literacy, functional academic skills, physical education, fine motor skills, independent living skills (feeding, toileting, dressing and grooming). Ms. XXXX, who was not involved in the development of the IEP, testified that the VB-MAPP provided by Mr. XXXX would have allowed the IEP team to develop goals that were well-tailored to the Student’s needs.

With regard to supplementary aids, services, program modifications and supports, the IEP includes such services as errorless learning strategies, prompt hierarchies, multi-sensory learning approaches, visual supports, sensory items, and positive reinforcements.

It is clear that not only is the May 26, 2015 IEP carefully crafted to establish goals that directly address the identified deficits, with attention to documented present levels of

performance, but also that Mr. XXXX's and the Parent's recommendations were highly influential. The May 26, 2015 IEP makes much greater and more explicit use of the specific strategies recommended by Mr. XXXX. In addition, it addresses the food allergy issues and toileting issues that the Parent emphasized as important to her. The goals are clear and their basis is well-documented in the extensive notes regarding present levels of performance; the objectives are detailed with reference to specific techniques and strategies. Accordingly, I find that the May 26, 2015 IEP is reasonably calculated to provide the Student with educational benefit.

As with the IEP revised on November 13, 2014, the Parent challenged the implementation of the May 26, 2015 IEP. While she voiced a number of concerns, her primary concern is the toileting protocol. As discussed above, the Parent was emphatic regarding the importance of having the Student wear underwear, rather than a pull up. She expressed frustration that despite her repeated emphasis of the importance of this goal, the Student was not receiving the behavioral reinforcement he needs to achieve the goal of wearing underwear. The May 26, 2015 IEP does not in fact specify that the goal is for the Student to wear underwear, rather than a pull up. Consequently, any failure by HCPS failure to reinforce use of underwear is not a failure to implement the IEP.

However, HCPS staff acknowledged the Parent's strong preference that the Student wear underwear and agreed that it is a priority. The communication log between the Parent and Ms. XXXX for the portion of the 2014 – 2015 school year after the revision of the IEP on May 26, 2015, does not indicate that Ms. XXXX allowed the Student to use pull ups; instead, it focuses on an apparent medical issue that the Student was having with his bowels. Ms. XXXX, the Student's classroom teacher during the 2015 – 2016 school year, testified that she had spoken with the Parent about the issue and understood that she wished for the Student to wear

underwear. Ms. XXXX explained that she ensured that the Student visits the bathroom at least hourly. She maintained a daily report that is sent home. She stated that the Student has had time periods where he does very well with toileting and then has time periods where he is less cooperative, resisting the pad used with underwear. She also testified that she has been working to find some incentives to encourage the Student's success with toileting.

As HCPS staff appear to appreciate the urgency that the Parent feels with regard to shifting the Student to underwear, it may be appropriate to revise the IEP to update the Student's goal for toileting. But that a more ambitious goal may be appropriate does not render the toileting goal as written and presently implemented inappropriate. I find that the Parent has not shown that HCPS has failed to properly implement the Student's goal with regard to toileting.

In fact, there was no evidence presented to support a finding that HCPS failed to implement the Student's IEP in the 2014 – 2015 school year. While Ms. XXXX faltered when asked to give an example of the errorless learning techniques, she was able to explain that errorless learning might utilize PECs. Again, as noted above, Ms. XXXX clearly lacked the level of expertise that Mr. XXXX has in behavioral principles and techniques, but was able to explain the basic principles and how she utilized them. The Parent did not provide evidence of her concern, for example, that the Student's schedule included specials that compromised his academic instruction. There was no evidence that the Student did not receive the speech/language services, occupational therapy services, or other services specified in his IEP.

2015 – 2016 School Year

Over the summer of 2015, HCPS provided intensive training to its staff members to ensure they would be able to fully implement the Student's IEP. XXXX XXXX, a consultant who is a BCBA and who provided training for HCPS staff, testified that it was an intensive, eighteen-hour training over three days. The training focused on ABA principles, and would, in

Ms. XXXX's professional opinion, be adequate for [School 2] staff to employ those principles, with supervision by a BCBA. Ms. XXXX also provided a three-hour training for Ms. XXXX in September 2015. In addition, Ms. XXXX testified that while [School 2] does not need a full time BCBA on staff to effectively utilize ABA techniques, ongoing supervision by a BCBA is important.

Ms. XXXX has observed the Student twice in his classroom and has been working with his teacher and other staff on training and technologies to meet the Student's educational needs. Ms. XXXX testified extensively regarding her observations in the Student's classroom. She explained that she modeled errorless teaching with the Student and saw it being effectively implemented by his teacher and other staff. Consistent with her testimony that ABA principles are most effectively implemented when there is ongoing supervision by a BCBA, Ms. XXXX stated such supervision is being provided on a biweekly basis, though she acknowledged that such meetings are not taking place with the Student's occupational therapist or speech/language pathologist. She noted that there is no need to have a full-time BCBA on staff. Clearly, the HCPS has acted to ensure that the Student's IEP is properly implemented in the 2015 – 2016 school year.

The Parent also expressed her dissatisfaction regarding the use of technology to meet the Student's needs. She testified that while the family was living in [State], the Student was able to use an iPad at school. The Parent believed that HCPS did not consider the Student high-functioning enough to use an iPad. The basis for her opinion was a December 6, 2013 IEP meeting where the IEP determined that the results of the Student's Augmentative Communication Assessment "did not support readiness for using a dynamic display device." (Parent Ex. 8.) However, Ms. XXXX testified that the Student did in fact use an iPad in her classroom, where four iPads are available for use. Ms. XXXX explained that the Student is

learning to use the iPad for communication, including a voice output feature. The Student's use of the iPad in Ms. XXXX's class is consistent with the May 26, 2015 IEP, which provides for use of "tablet technology." (Joint Ex. 14.)

In short, there was no evidence that the Student was not provided with the services required by the May 26, 2015 IEP during either the 2014 – 2015 school year or the 2015 – 2016 school year.

Finally, the Parent contended that the Student failed to make progress in either the 2014 – 2015 or 2015 – 2016 school years. With regard to the 2014 – 2015 school year, the November 13, 2014 IEP includes progress notes on each of the ten goals. In some cases, these notes indicate that progress was not yet measurable because the skill had not yet been sufficiently introduced. For example, for the goal related to identifying specific vocabulary, there is an April 10, 2015 progress note that indicates "this skill has not been sufficiently introduced and assessed due to late enrollment this quarter. This goal/objective will be addressed and reported on during 4th quarter." In most cases, the final notes on progress are dated April 10, 2015, with no update for fourth quarter progress (an exception to this is the occupational therapy pre-writing goal, for which there is an April 26, 2015 progress report).

The Parent cited the absence of progress updates on the IEP as evidence of the Student's failure to progress and of the HCPS's failure to maintain appropriate data. However, there are no fourth quarter progress notes on the IEP dated November 13, 2014, because it was revised on May 26, 2015. Most goals were substantially re-written, and several were eliminated (such as the goal focusing on identifying coins). Somewhat confusingly, the end-of-year progress notes for the 2014 – 2015 school year appear on the May 26, 2015 IEP, rather than the November 13, 2014 IEP. This makes sense because the November 13, 2014 IEP was revised in an effort to incorporate changes sought by the Parent. However, it also makes it appear that the Student

failed to progress in the fourth quarter, or at least that HCPS failed to document any progression.

An examination of the May 26, 2015 IEP indicates that such concerns are unfounded. All fourteen goals include a progress report dated June 19, 2015. Some of the progress reports indicate that a skill was not sufficiently introduced to be measured by the end of the school year. Others include an assessment of his progress, based on classroom data and observation. As the IEP was only in effect for a brief time period – May 26, 2015 through the Student’s last day of school, June 11, 2015 – it is not unreasonable that many skills had not yet been introduced. The IEP was newly effective and the date established for achieving the goals was May 26, 2016.

For the sake of completeness and clarity, it would have been helpful if the November 13, 2014 IEP included final progress notes through the last date on which IEP was in effect (May 25, 2015). It is not clear from the IEP if, for example, the skill of identifying coins was ever introduced, and, if so, what progress the Student made with regard to the skill. However, as progress was assessed on a quarterly basis, and the IEP goals were revised before the end of that quarter, it is reasonable that all progress in the final weeks of the school year appear on the May 26, 2015 IEP.

Another aspect of the implementation of the May 26, 2015 IEP that the Parent found objectionable was HCPS’s alleged failure to collect data on a key component for meeting the Student’s needs: preferences that motivate him, or reinforcers. Mr. XXXX testified about the essential role that reinforcers play in developing mands, or requests. Mands play a key role in developing communication. Mr. XXXX explained that reinforcers are not static, but change over time, including throughout the school day, because different things may motivate a student at different times. To effectively use reinforcers as part of ABA, the instructor must assess the reinforcers on an ongoing basis. This assessment can be formal or informal in nature. Mr. XXXX acknowledged on cross examination that an informal assessment of reinforcers would not

require keeping data, but he also stated that effective mand training should be based on a preference assessment that produces written data.

Notably, Ms. XXXX twice requested information from the Parent, with the first request being a survey that included questions about the Student's preferences (the second request was for items "known" to the Student that Ms. XXXX could use in the classroom), and the Parent did not respond to either request. The Parent cares for multiple children at home, and her dedication and advocacy on behalf of the Student is clear; the Parent's failure to provide the requested information was clearly not due to uncooperativeness on her part. However, Ms. XXXX's requests do indicate HCPS has sought to collect data on preferences, and Ms. XXXX's October 2015 initiation of a Preference Assessment, which the Parent characterized as "too little, too late," must be considered in that context. (Parent Ex. 3.) Ms. XXXX also testified that she has made her own informal assessment of the Student's preferences; she clearly understands the role reinforcers play in applying ABA techniques. While HCPS has not yet completed a formal Preference Assessment, Ms. XXXX has collected informal data regarding the Student's preferences.

In fact, the Parent's position regarding HCPS's allegedly insufficient maintenance of data extended well beyond the reinforcers. Where, questioned the Parent, is any of the data to support HCPS's position that the Student made progress during either of the two school years at issue? And why did the IEP team respond that there was "insufficient data" to support a referral to the Central IEP office? Noting that the Student was frequently absent during both school years, including about 14 missed school days at the end of the 2014 – 2015 school year and a week-long trip to Disney World in the 2015 – 2016 school year, and that the Parent declined recommended ESY services for both, HCPS maintained that there was still data reflecting the Student's progress.

With regard to the discussion of “insufficient data” at the May 2015 IEP meetings, the relevant document – Prior Written Notice dated May 26, 2015 (Joint Ex. 5) – clearly refers not to an overall absence of data (as the Parent argues), but rather to inadequate data to suggest that [School 2] was unable to meet the Student’s needs. This is clear from the full context of the reference to “insufficient data”: “Insufficient data is currently available to document the need for [the Student] to attend a more restrictive placement in order to receive this type of instruction or to meet his instructional and behavioral needs.” Thus, the reference to “insufficient data” is consistent with the HCPS’s position that the data does not support a conclusion that [School 2] is unable to meet the Student’s needs.

As for data generally, the HCPS argued that the extensive progress notes (discussed above), for which the underlying sources are cited, are based on data, and that the Parent did not offer any evidence to contradict them or undermine their validity. For example, the November 13, 2014 IEP includes progress notes on the goal related to functional communication (“Given a variety of language based activities, [the Student] will increase his functional communication skills using vocalizations, picture symbols and signs in 4 out of 5 trials”); the progress notes are for January 23, 2015 and April 10, 2015, and they document, with specificity, the number of sessions the Student has attended and his progress (“[The Student] has demonstrated the ability to identify targeted vocabulary in 2 out of 5 trials. [The Student] follows familiar directions in 3 out of 5 trials with language activities.”).

Similarly, the May 26, 2015 IEP includes detailed progress reports, documenting, for example, the number of mands the Student made during a therapy session, progress with social interaction as evidenced by eye contact and use of signs, the Student’s need for “full physical prompting” to identify his first name from an array of two, and emerging skills in number identification and vocabulary identification. These progress reports are dated June 19, 2015, and

reflect the Student's progress through the end of the 2014 – 2015 school year.

In addition, the record includes notes for services provided for the Student, including the detailed notes of the Speech Language Pathologist (Joint Ex. 17). Ms. XXXX testified that during the 2014 – 2015 school year, she maintained anecdotal notes as she worked with the Student; she acknowledged that she did not provide these notes to the Parent. As discussed earlier, Ms. XXXX also used a log book to communicate with the Parent, and that log book reflected when the Student grabbed food from others and her efforts as they related to toilet training.

Ms. XXXX, the Student's teacher for the 2015 – 2016 school year, testified that she maintains data on the Student's toileting, including a log that is sent home daily. Ms. XXXX also authored a detailed analysis of the Student's language, learning, and social skills following a VB-MAPP assessment (HCPS Ex. 37). This analysis is dated October 1, 2015, and includes specific skills Ms. XXXX observed (such as the Student's imitation of a teacher when instructed to "do this" and clap hands or touch the top of his head). It also includes an assessment of barriers, such as minor behavior problems (removing shoes/socks), instructional control problems (tantrums, removal of the liner in his underwear), and impaired manding, tacting, motor imitation skills, and echoic skills.

Accordingly, I find that the Parent has not shown that HCPS failed to document the Student's progress through data.

Issue II: HCPS Offered/Provided Sufficient Related Services for the 2014 – 2015 School Year and the 2015 – 2016 School Year

The Parent argued that an incident that occurred on the Student's school bus in May 8, 2015, demonstrates the inability of HCPS to meet the Student's needs and to manage behaviors that leave him vulnerable. I discuss the incident here because transportation is a related service

pursuant to 34 C.F.R. 300.34(c)(16).

The Student's IEP (both the November 13, 2014 IEP and the revised May 26, 2015 IEP) provide for the Student to receive "special needs" transportation, specified to be a XXXX (sometimes referred to as a XXXX during the hearing), supervision boarding and exiting the bus, assistance securing his XXXX, and monitoring during the bus ride. The Student was picked up and dropped off from his home; he would arrive at home between five and fifteen minutes after the end of the school day.

The Parent testified that on May 8, 2015, she was out of town and the Student's father was at home to meet him after school. When the Student did not arrive on time, the Parent contacted the school but did not find the staff helpful; the transportation office repeatedly called the bus driver, but there was no answer. After over an hour, the bus driver called and explained that she had taken another student home first. When the Student finally arrived at home, the bus aide got off and spoke to the Student's father, asking for his assistance in getting the Student off the bus. The Student's father found the Student nude below the waist and his pants around his ankles. The aide told the Student's father that the Student had pulled down his pants and thrown his underwear liner (pad).

The Parent further testified that she called the transportation office and told them what had occurred; she was told that an investigation would take place and she would receive a follow-up call. However, the transportation office did not call her, and she was never provided with any further information despite multiple requests. HCPS never contacted her about the incident any further. In September 2015, the transportation office provided the Parents with a letter written by the bus aide, Mr. XXXX, dated June 1, 2015. (Parent Ex. 1.)

Ms. XXXX also testified at the hearing, in which she generally reiterated the content of the June 1, 2015 letter. She explained that she was a substitute driver and had trouble locating

the Student's home and circled twice, hoping to see a parent waiting. When another child became agitated, the aide tended to that child. Ms. XXXX recalled that that she heard something hit the seat behind her (which turned out to be the Student's pad) and that Mr. XXXX said that the Student was fondling himself. Ms. XXXX confirmed that she took two other children home first, though the Student was to be dropped off first. She also testified that she was not informed that the Student had any special transportation needs, and that this was the only occasion on which she transported the Student.

With regard to training, Ms. XXXX testified that she attended classes in 2010, though it was not clear from her testimony what information provided at the training related to autism. Ms. XXXX, Supervisor of Transportation, testified that all drivers and attendants attend a "special needs" training that includes a review of disabilities. Ms. XXXX also acknowledged that she did not speak to the Student's parents about the incident.

There were some minor but irrelevant discrepancies in the facts presented to me. For example, the Parent disputed the bus number referenced in the June 1, 2015 letter. But it is clear that the Student was on the bus for well over an hour, he pulled his pants down and exposed himself, he removed and threw his underwear pad, and he touched himself in a manner that made the bus attendant "uncomfortable." (This word appears in the June 1 letter, and Ms. XXXX used it when she testified, relating what Mr. XXXX said at the time.) It is also clear that Ms. XXXX and Mr. XXXX were poorly prepared to handle the situation and the Student was left exposed and vulnerable on the bus for an unspecified period of time. These facts are not disputed.

The situation was an inexcusable one, its egregiousness further amplified by the failure to promptly follow up with the Parent and to assure her that HCPS had taken steps to ensure it would not happen again. The Parent's outrage is fully justified by the facts admitted to by HCPS. However, a single, isolated incident – even an egregious one – is not by itself enough to

support a finding that HCPS failed to provide related services to the Student. This is particularly true in light of the unusual circumstances on the day of the incident – the substitute bus driver and attendant, the absence of proper documentation on the bus that would ensure a substitute driver knew the route and the stops, as well as contact information for the families of the student on board. The Parent did not cite any other instances where such a breakdown in meeting the Student’s transportation needs occurred. Accordingly, I do not find that the Parent showed that HCPS failed to provide sufficient related services.

Issue III: HCPS’s Documentation of Present Levels of Performance

The Parent alleges that the HCPS failed to document “valid, measurable levels of performance.” Without such measurable levels of performance, the Parent argues the HCPS has no ability to evaluate the Student’s progress. Present levels of academic achievement and functional performance must be included in an IEP pursuant to 34 C.F.R. 300.320(a)(1), though the regulations do not define the term. However, the regulations do state that they must include “[h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum.” There is no requirement that the present levels be “measureable”; it is the annual goals that must be measurable. 34 CFR 300.320(a)(2)(i).

As discussed above, the November 13, 2014 IEP includes information about the Student’s present level of academic achievement and functional performance. In most areas, the IEP notes that the instructional grade level performance is below pre-kindergarten. This section of the IEP includes extensive notes on the Student’s performance, most of which are based on the Parent’s reports, as the Student was being homeschooled in November 2014. In addition, the notes also reference therapy data and formal assessments. The notes are highly specific, with reference to concrete skills that the Student does not yet have (spelling or writing his name) or has mastered (identifying particular letters of the alphabet). Ms. XXXX, the Student’s classroom

teacher during the 2014-2015 school year, testified that the Student's levels of performance were generally in the pre-kindergarten range. She explained that she discussed specific skills with the Student's mother when he enrolled in HCPS in March 2015.

Exactly what the Parent found objectionable about the present levels of performance is not clear. Their basis is clearly documented, and they are consistent with the detailed notes provided. It is true that most of the notes are based on the Parent's reports, but as the Student was being homeschooled at the time, those reports would reflect the most current information on the Student's present levels of performance. The Parent had declined ESY services for the summer of 2014, though such services were recommended, which limited the availability of other sources on which to base an assessment of present levels of performance.

The present levels of performance were substantially revised in the May 26, 2015 IEP, as discussed previously, with the assessment of "pre-kindergarten level" replaced by language describing the Student as "significantly below same age peer" in most categories. These descriptions of the present levels of performance were drawn in part from Mr. XXXX's input, including the VB-MAPP results, as well as from the formal evaluations (from 2013), an April 30, 2015 transition interview, and informal classroom assessments and observations by his teacher, related service providers, and Parent. Again, they need not be "measurable" specifically. HCPS clearly documented the bases for the present levels of performance, and I am not persuaded that they are either arbitrary or invalid.

A related argument presented by the Parent was that the Student's teachers do not know his present levels of performance, and therefore cannot properly assess his progress. However, Ms. XXXX testified that upon the Student's return to school, she asked the Parent for information about the specific skills he had mastered or was working on, such as name recognition, letters, shapes, and colors. Ms. XXXX also testified that his skill level in most areas

was at twenty-four months or below, which is consistent with the formal assessments and the November 13, 2014 IEP. Ms. XXXX further testified that she informally assessed his skill level as she worked with him in the classroom. Ms. XXXX demonstrated knowledge of the Student's skill level.

Ms. XXXX also testified regarding her knowledge of the Student's present level of performance. For example, she noted that with regard to toileting, he has been inconsistent, with periods of success and some regression. She noted that he is responsive to the PECS and TOBI communication symbols, with some improvement during the 2015 – 2016 school year. She further testified that he remains at a pre-reading level and that his math skills are still pre-kindergarten skills. On cross examination, she acknowledged that she did not know how long he has been at these levels. However, she has only been working directly with the Student since the start of the 2015 – 2016 school year at the end of August 2015. The Parent had again declined ESY services for the summer of 2015, despite the recommendation of the IEP team. Ms. XXXX's role is to provide services and accommodations consistent with the May 26, 2015 IEP, and she demonstrated adequate knowledge of the Student's present levels of performance such that I am not convinced of her inability to perform that role effectively.

Issue IV: HCPS Developed Appropriate Goals/Objectives to Address the Severity of the Student's Needs

The Parent emphasized that the Student's disability is severe and his needs intense. While she expressed appreciation for the efforts of HCPS staff, she argued that HCPS simply cannot provide the services and accommodations the Student needs to make progress and to receive the FAPE to which he is entitled.

To underscore the severity of the Student's needs, the Parent presented the testimony of XXXX XXXX, a clinical psychologist, who evaluated the Student following a session on

September 7, 2014. Dr. XXXX characterized the Student's autism diagnosis as severe, and noted that she observed him to be inattentive, hyperactive, aggressive, and incredibly impulsive. She testified that he became intensely fixated on a bottle of crystals she keeps in her office and that it was very difficult to work with him. She also expressed concern that if the Student is exhibiting behaviors such as masturbation at school and feces-smearing, these behaviors, which she termed "maladaptive," would be difficult to change and would greatly hinder the programs available to the Student as an adult. Dr. XXXX also noted that the Student exhibited attachment issues. Dr. XXXX testified that she told the Parent that the Student's needs were too severe to be addressed effectively by the outpatient services that she was able to provide, and that he needed more intensive supports to properly meet his needs.

I found Dr. XXXX to be well spoken and knowledgeable about the challenges of entrenched maladaptive behaviors and about specific techniques that should be used to address such behaviors, including ABA and an appropriate range of service providers, to include a speech/language pathologist, an occupational therapist, a physical therapist, and a pediatrician with expertise in child development. However, as Dr. XXXX acknowledged, she met the Student only once, for two hours, and that the meeting was over a year before she testified in the hearing before me. For that reason, while Dr. XXXX provided insight into the challenges of addressing severe behavioral issues, I give Dr. XXXX' testimony with regard to the specifics of the Student's needs little weight. Her knowledge of his present needs is limited by both the brevity of her interaction with him and the time that has passed since then.

Assistant Principal XXXX XXXX provided a more current assessment of the Student's behaviors, and the Parent argued that his assessment provides support for her position that the severity of the Student's behaviors is beyond what staff at [School 2] can manage. In his testimony, Mr. XXXX talked about a "spike" in the Student's problematic behaviors. Mr.

XXXX stated that he was “in and out” of classrooms all day at [School 2], and had observed the Student in class. Mr. XXXX testified that the “spike” in problematic behaviors included toileting accidents multiple times per day, a masturbation incident in the bathroom, playing with and smearing feces, and behavioral crises that would take several hours to resolve.

Mr. XXXX’s testimony painted an alarming picture of the Student’s behavioral problems at school, suggesting that new behaviors had emerged and that the behaviors were substantially undermining the Student’s ability to receive an education. However, Mr. XXXX’s perspective is not consistent with the testimony of staff who worked more closely with the Student. As the assistant principal, Mr. XXXX’s familiarity with the Student is clearly more limited than that of the Student’s classroom teacher and the staff working directly with the Student. Mr. XXXX did not provide specifics about the spike in problematic behaviors, such as the dates of these behaviors. In contrast, Ms. XXXX identified specific incidents, with reference to dates, and testified that the problematic behaviors were limited to these incidents (discussed below). In short, while Mr. XXXX was testifying to the best of his recollection, his role as assistant principal would give him limited first-hand knowledge of both the frequency and the severity of the Student’s behaviors.

Ms. XXXX’s testimony, for example, did not corroborate the notion of a “spike” in problematic behaviors. Ms. XXXX testified that the Student had some initial difficulty adjusting to school at the start of the school year, and that she believes some minor behavioral issues emerged at that time due to the transition. Specifically, she noted that he removed his socks and shoes and threw his shoes, which was a behavior he had not exhibited before. She explained that she worked with [School 2] staff on techniques to assist the Student with this transition, and that she understands the Student to have adjusted very well.

However, it is Ms. XXXX, as the Student’s classroom teacher, who is most familiar with

the Student's day-to-day behaviors and who I found most persuasive. Ms. XXXX compellingly testified that she has not observed ongoing behavioral issues that concern her. She stated that there was a single incident, on September 21, 2015, where the Student masturbated in the bathroom. She acknowledged that no protocol was developed to address the issue, but stated that as it has not occurred a second time, there did not appear to be a need for such a protocol. She said that the Student does not fondle himself or put his hands in his pants in his classroom.

With regard to "smearing feces," Ms. XXXX explained that describing the incident in such terms was inaccurate, to her knowledge. Rather, the Student was not feeling well and had severe diarrhea at school. She noticed that he was hunched over that day and appeared uncomfortable, suggesting that he was likely ill. He left school early that day due to illness.

With regard to the food issues, Ms. XXXX testified that there has only been a single incident where the Student grabbed food he should not have had, and that it occurred in the cafeteria.

Ms. XXXX explained that the most serious and persistent behavioral issue she has encountered with the Student is his resistance to wearing underwear with the pad, rather than a pull up. She testified that this was particularly problematic at the start of the school year, but then improved. In recent days, she noted it has become a challenge again. She stated that she takes the Student to use the bathroom hourly and maintains a daily report.

Ms. XXXX, who was present in the hearing room for both Mr. XXXX's and Ms. XXXX's testimony, testified that in her opinion, a Functional Behavior Assessment (FBA) should have been done by HCPS, and that HCPS is now collecting behavioral data. She testified that she believes HCPS is moving towards developing an FBA. She explained that any spike in behavioral problems could be due to increased work at school or to changes at home, and that a functional assessment should be completed.

However, while Ms. XXXX was very knowledgeable about behavioral intervention and

ABA, her direct knowledge of the Student's behavioral issues was limited. She has observed him on two occasions, one of which was brief, and worked with Ms. XXXX and the classroom aide. She did not state the specific basis for her recommendation that an FBA should be done. As noted by the HCPS, an FBA is required when there are disciplinary issues with a student, which is not the case for the Student. (See 20 U.S.C. § 1415(k)(1)(F), which states when FBAs and Behavioral Intervention Plans (BIPs) are required.). The IEP team must also consider a child's behavior when it "impedes the child's learning or that of others." In such cases, the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i).

It was not clear if Ms. XXXX's recommendation was based on her opinion of best practices, rather than any specific obligation on the part of HCPS, or any concern that the Student was not receiving FAPE. In fact, Ms. XXXX testified that in her opinion, [School 2] is an appropriate placement, staff has received necessary training, and the tools are in place to meet the Student's needs. At no point did she take the position that the absence of a FBA or BIP equated to a denial of FAPE or supported a change in placement.

The Student's behavior is clearly an evolving issue, with Ms. XXXX persuasively testifying that the Student's behavior issues are relatively minimal, and Mr. XXXX testifying that problematic new behaviors have emerged during the 2015 – 2016 school year. While Mr. XXXX's characterization of these behaviors as a "spike" is not supported by the record (if that term is understood to mean a sharp increase), [School 2] staff effectively conceded that it had no specific protocol for addressing masturbation. However, as this behavior occurred only once, I am not persuaded that the IEP team must consider the use of specific interventions with regard to this behavior. Overall, I conclude that the Parent failed to show that HCPS has not developed goals and objectives that address the severity of the Student's needs.

Issue V: HCPS did not Fail to Provide the Full Continuum of Appropriate Special Education Accommodations and Services to Address the Student's Needs

The Parent did not specifically identify which accommodations and services her inclusion of this issue is intended to address. The only outstanding concern that the Parent raised and that I do not consider elsewhere in this decision is the Parent's complaint that the Student's IEP for the two school years at issue did not adequately address skills related to independent living.

Attention to the Student's transitional needs was a recurrent theme in the testimony presented by both parties. Transition services, including independent living skills, must be included in an IEP "[b]eginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team . . ." 34 C.F.R. 300.320(b). Now that the Student is 14 years old, the Parent is adamant that the development of the Student's independent living skills is of paramount importance, and every witness who testified on the subject echoed this sentiment. However, the Parent did not offer evidence that the HCPS has failed to adequately integrate skills related to independent living into the IEPs at issue in this case.

The November 13, 2014 IEP included one independent living goal: buttoning and zipping. The Parent did not attend the IEP team meeting that was held on the date the IEP was approved, but nothing in the record indicates that she wished for additional independent living goals to be included in the IEP.

However, when the Parent reenrolled the Student in March 2015, as discussed earlier, she asked that his IEP be revised to reflect greater attention to independent living goals. A summary of what the Parent sought is included on page 18 of the IEP (Joint Ex. 14). Consistent with the Parent's wishes, the revised IEP, effective May 26, 2015, includes goals that address feeding (meal preparation); toileting; and dressing and grooming (buttoning and zippering). The Parent

argued that the Student's goals do not include such things as grocery shopping, and that the Student is thus not being prepared adequately for independent living. However, HCPS argued, and I agree, that the Parent has not shown that inadequate attention is being given to goals of independent living.

Issue VI: HCPS Did Not Fail to Incorporate Recommendations Made By Independent Evaluators

The Parent also alleged that the IEP team failed to incorporate recommendations by independent evaluators into the Student's IEP and the way in which it was implemented. This allegation appears to relate only to Mr. XXXX's recommendations; there was no evidence that any recommendations by Ms. XXXX were ever provided to HCPS, and Mr. XXXX met the Student for the first time only a few days before this hearing. Section 1414(c)(1)(A) of IDEA requires the IEP team to "review existing evaluation data on the child," which (i) specifies to include "evaluations and information provided by the parents of the child." Under Section 1414(d)(3)(A)(iii), this must include the most recent evaluation of the child.

Mr. XXXX testified that he first met the Student in December 2013. As discussed previously, Mr. XXXX testified that he observed the Student in class on May 21, 2014, and made a number of specific recommendations. On April 10, 2015, he again observed the Student in class. Mr. XXXX looked over the May 26, 2015 IEP and stated that it did not incorporate his recommendations. Mr. XXXX also testified that the HCPS had not contacted him regarding his recommendations.

On cross examination, Mr. XXXX acknowledged that the level of coordination he engages in with specific schools varies; often, he stated, he provides his recommendations to the parent to pass on to a school, rather than providing it directly to the school himself. In the Student's case, he stated that he believed the Parent had provided his notes to [School 2] staff,

but that he did not do so himself.

What is puzzling about the Parent's position is that the first time that HCPS was presented with information from Mr. XXXX was when he attended the May 4, 2015 IEP meeting. At that meeting, the IEP team listened to his recommendations and then delayed further work on the IEP to allow the team time to review and incorporate Mr. XXXX's recommendations into the new IEP. The IEP team incorporated Mr. XXXX's findings into the Summary of Assessment Findings in various areas, noting the skills that the Student either has or lacks. In addition, as I discussed earlier, the goals of the May 26, 2015 IEP reflect the key elements of the learning strategies recommended by Mr. XXXX.

The Parent's Proposed Placement

Finally, the Parent argued that the [School 1], a private school, is an appropriate placement for the Student. The appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Burlington*, 471 U.S. 359 (1985). In this matter, I have concluded that the IEP and placement offered by the public agency offers the Student a FAPE. Accordingly, an analysis pursuant *Burlington* and *Carter* is unnecessary and the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision.

In conclusion, after carefully reviewing all of the evidence presented by the Parent and HCPS, I find that HCPS developed an appropriate IEP and placement for the 2014 – 2015 and 2015 – 2016 school years, and that the IEPs were reasonably calculated to provide a FAPE for the Student. Additionally, I find that HCPS properly implemented the Student's IEP in the 2014 – 2015 and 2015 – 2016 school years, including related services.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law

that the Parent failed to establish that the IEPs provided or offered by the Harford County Public Schools for the 2014 – 2015 and 2015 – 2016 school years were not appropriate. 20 U.S.C.A. §§ 1400 - 1487 (2010); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

I further conclude that the Parent failed to establish that the Harford County Public Schools failed to provide or offer sufficient related services for the 2014 – 2015 and 2015 – 2016 school years. 20 U.S.C.A. §§ 1401(26), 1414(d); 34 C.F.R. 300.320(a)(1).

I further conclude that the Parent failed to establish that Harford County Public Schools did not document proper present levels of performance on the Student’s IEPs for the 2014 – 2015 and 2015 – 2016 school years. 20 U.S.C.A. §§ 1401(26), 1414(d)(1)(A)(i); 34 C.F.R. 300.320(a)(1).

I further conclude that the Parent failed to establish that Harford County Public Schools did not develop appropriate goals and objectives to address the severity of the Student’s special education needs. 20 U.S.C.A. § 1414(d)(1).

I further conclude that the Parent failed to establish that the Harford County Public Schools did not provide a full continuum of appropriate special education accommodations and services to address the Student’s individual needs. 34 C.F.R. 300.320(b).

I further conclude that the Parent failed to establish that the Harford County Public Schools did not incorporate recommendations made by independent evaluators. 20 U.S.C.A. §§ 1414(c)(1)(A), (d)(3)(A)(iii).

ORDER

I **ORDER** that the Parent's request to have the Student placed at [School 1] at the expense of Harford County Public Schools is **DENIED**.

November 18, 2015

Date Decision Mailed

Jennifer L. Gresock
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.