XXXX XXXX	*	**BEFORE MICHAEL W. BURNS,**
v.	*	**AN ADMINISTRATIVE LAW JUDGE**
HOWARD COUNTY	*	**OF THE MARYLAND OFFICE**
PUBLIC SCHOOLS	*	**OF ADMINISTRATIVE HEARINGS**
	*	**OAH NO.: MSDE-HOWD-OT-12-44545**

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DECISION

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STATEMENT OF THE CASE

On November 14, 2012, XXXX XXXX, (Parent), on behalf of her daughter, XXXX XXXX (Student), filed a Due Process Complaint with the Maryland Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Howard County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

The parties did not seek mediation of the dispute. A resolution meeting was held on November 29, 2012 with no agreement reached.

I held a telephone pre-hearing conference on December 13, 2012 with the parties. Jeffrey A. Krew, Esquire, represented HCPS and was present by telephone at the hearing. The Parent represented the Student and she participated via telephone conference call. By agreement of the parties, the merits hearing was scheduled for three days, January 14, 16 and 18, 2013. During

the telephone conference, I informed the parties that the decision in this matter is due forty-five days from when the OAH was notified of the outcome of the resolution meeting. *See*, 34 C.F.R. § 300.515. The resolution meeting was held on November 29, 2012. Forty-five days from November 29, 2012 is Saturday, January 12, 2013; the next business day is Monday, January 14, 2013. The parties advised they would waive the 45-day time limit and agreed to an extension of the due date to thirty days after the conclusion of the hearing, in light of the hearing being conducted after the decision due date.

I held the hearing as scheduled on January 14 and 16, 2013, with the hearing concluding on the second day. Mr. Krew represented HCPS. The Parent represented the Student.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511 (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2008); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

At the conclusion of the Student's case, HCPS made a Motion for Judgment (Motion), COMAR 28.02.01.16E, arguing that there were no procedural issues raised by the Parent and that the Student failed to meet her burden of proof. COMAR 28.02.01.16E. After hearing argument from both parties and reviewing the evidence, I held the Motion for Judgment until after the conclusion of the HCPS' case. After the HCPS concluded its case-in-chief, it renewed the Motion for Judgment. After hearing argument from both parties and reviewing the evidence, I granted the Motion. I explained to the parties that I would fully explain the reasons for granting the Motion in my written decision. The decision on HCPS' Motion for Judgment is provided herein.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules

of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Should the HCPS Motion for Judgment be granted?
2. If the Motion is not granted, did the placement at [School 1] provide the Student with a Free and Appropriate Public Education (FAPE)?
3. If the placement did not provide FAPE, what is the remedy?

SUMMARY OF THE EVIDENCE

A. Exhibits

The Parent offered the following pre-numbered exhibits on behalf of the Student, which I admitted into evidence unless otherwise noted:

Student Ex. 1A[1]	Curriculum Vitae of XXXX XXXX, Psy.D.
Student Ex. 1B	Curriculum Vitae of XXXX XXXX
Student Ex. 2A	Report of Psychological Evaluation, HCPS, report date 5/28/2010
Student Ex. 2B	Speech/Language Assessment, report date 11/30/2012
Student Ex. 3	Educational Assessment Report, dated 11/30/2012 – (Not offered as an exhibit but included in binder by Student)
Student Ex. 4	Functional Behavior Assessment and Behavior Intervention Plan, approved April 27, 2012
Student Ex. 5A	Neurological Evaluation, evaluation date 4/27/2007
Student Ex. 5B	Neurological Re-Evaluation, evaluation dates August 8 and 13, 2012
Student Ex. 5C	Psychological Consult, dated October 28, 2010

[1] Pursuant to the pre-hearing order, the parties prepared binders with exhibits pre-marked. I have utilized the exhibit numbers provided by the parties to the extent possible.

Student Ex. 6	IEP, evaluation date June 13, 2007
Student Ex. 7A	IEP, team meeting date May 25, 2012
Student Ex. 7B	IEP team meeting report, date of meeting December 21, 2012 (Objection to admission sustained, exhibit not admitted)
Student Ex. 7C	IEP report, date of meeting December 7, 2012 (Objection to admission sustained, exhibit not admitted)
Student Ex. 8A	Incident report, dated October 23, 2012
Student Ex. 8B	Flow Chart, Student Managed vs. Teacher Managed (Objection to admission sustained, exhibit not admitted)
Student Ex. 8C	Behavior narratives, various dates (Objection to admission sustained, exhibit not admitted)
Student Ex. 9	Quarter 1 Study Guide
Student Ex. 10	2nd Quarter Interim Report, undated (Not offered as an exhibit but included in binder by Student)

HCPS offered the following exhibits, which I admitted into evidence:

HCPS Ex. 1(36)[2]	Student's Due Process Complaint, dated November 8, 2012
HCPS Ex. 2(7)	Decision, *[Student] v. HCPS*, MSDE-HOWD-OT-10-XXXXX, mailed March 8, 2011
HCPS Ex. 3(60)	Letter from XXXX XXXX, Assistant Attorney General to XXXX XXXX, United States District Court Judge, dated April 29, 1998
HCPS Ex. 4(24)	Neurological Re-Evaluation, dates of evaluation August 8 and 13, 2012
HCPS Ex. 5(52)	Curriculum Vitae, XXXX XXXX
HCPS Ex. 6(13)	Functional Behavior Assessment and Behavior Intervention Plan, date approved April 27, 2012
HCPS Ex. 7(16)	Functional Behavior Assessment and Behavior Intervention Plan, dated June 8, 2012

[2] HCPS pre-numbered its exhibits and provided tabs. I have, therefore, included the HCPS' pre-numbers in parentheses as part of each HCPS Exhibit number.

HCPS Ex. 8(31) Report of Psychological Evaluation, revised report dated December 7, 2012

HCPS Ex. 9(15) IEP, dated May 25, 2012

HCPS Ex. 10(35) Report Card, First Quarter, 2012-2013

The parties jointly agreed to the following exhibit:[3]

Jt. Ex. 1 Proposed Joint Stipulations of Facts, dated January 14, 2012

B. Testimony

The Student was not present. The Parent testified and presented testimony from the following witnesses:

1. XXXX XXXX, Psy.D., clinical psychologist, stipulated to as an expert in the field of clinical psychology

2. XXXX XXXX, retired educator[4]

The following witness testified on behalf of the HCPS:

1. XXXX XXXX, school psychologist, HCPS, accepted as an expert in school psychology

FINDINGS OF FACT

The parties stipulated in writing and on the record at the hearing to the following facts:

1. The Student is XXXX years old, and her date of birth is XXXX, 1998.

2. The Student entered HCPS in September 2007 (the 2007-2008 school year) when she was a third grader and she attended [School 2]. The Student has received special education and related services from HCPS since that time.

[3] The parties produced these Stipulations of Facts pursuant to the Pre-Hearing Conference Order.
[4] Ms. XXXX was offered by the Student as an expert in Special Education. After conducting voir dire of Ms. XXXX, counsel for HCPS objected to Ms. XXXX being found to be an expert in Special Education. After hearing argument from the parties I sustained the objection and did not find Ms. XXXX qualified as an expert in Special Education.

3. On March 8, 2011, Administrative Law Judge XXXX XXXX (Judge XXXX) issued a decision in the case of *[Student] v. Howard County Public School System*, OAH Case No. MSDE-HOWD-OT-10-XXXXX, finding that the Student properly qualified for special education services as a student having Multiple Disabilities rather than being a student having an Intellectual Disability.

4. The Student is eligible to receive special education and related services under the educational disability of Multiple Disabilities (due to a Speech-Language Impairment, that encompasses the Student's borderline intellectual ability and executive dysfunction and a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD)), which are believed to impact her in expressive/receptive language, reading, written expression, math and self-regulation.

5. On May 25 and June 8, 2012, Individualized Education Program (IEP) team meetings were convened to determine the Student's educational program and placement for the 2012-2013 school year. The IEP team recommended that the Student attend [School 1] ("[School 1]") and receive the following special education and related services from May 25, 2012 to May 25, 2013: 24 hours a week of special education classroom instruction within the general education setting: 30 minutes per week (1 30-minute session) of speech-language therapy within the general education setting; 1 hour per week (2 30-minute sessions) of speech-language therapy outside the general education setting; and, 30 minutes per month (2 15-minute sessions) of psychologist services outside the general education setting.

6. As of the beginning of the 2012-2013 school year, the Student has been attending the eighth grade at [School 1].

7. On September 7, 2012, the Parent provided [School 1] school staff with a private neuropsychological re-evaluation of the Student completed by XXXX XXXX, Psy.D., of the XXXX Medical Center, and requested an IEP team meeting be held to review the evaluation.

8. On October 2, 2012, an IEP team meeting was convened. After review and consideration of Dr. XXXX's evaluation, the team determined additional assessments needed to be completed by HCPS personnel and recommended additional educational and speech-language testing be completed, as well as an occupational therapy assessment and a classroom observation, to which the Parent consented.

9. On November 9, 2012, a Facilitated IEP meting was convened.

10. On December 7, 2012, an IEP team meeting was convened to review the psychological, speech-language and educational assessments completed by HCPS personnel. After review and consideration of Dr. XXXX XXXX's private neuropsychological re-evaluation and the assessments completed by HCPS personnel, the team determined that the Student remained eligible to receive special education and related services under the educational disability of Multiple Disabilities (due to a Speech-Language Impairment and an Other Health Impairment, that encompasses the Student's borderline intellectual ability and executive dysfunction and a diagnosis of ADHD). The team also determined that the Student did not meet the eligibility criteria for the educational disability of Intellectual Disability.

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

11. During the 2012-2013 school year, the Student has attended [School 1] and has received special education services in accordance with the IEP, dated May 25, 2012. The May

25, 2012 IEP included both a Functional Behavioral Assessment (FBA) and a Behavior Intervention Plan (BIP). The special education services included: classroom instruction in General Education; speech/language related therapy; and psychological services. All education and services were to be provided at [School 1]. Student Ex. 7A; HCPS Ex. 9(15).

12. The Parent participated in the development of the May 25, 2012 IEP.

13. The FBA/BIP dated June 8, 2012 was initiated by the parent who was concerned that the Student's disabilities of Other Health Impairment due to ADHD and speech/language impairment had lead to repeated disciplinary actions.

14. Under the current IEP BIP, the Student has received one Disciplinary Report (DR) which occurred on October 23, 2012. Student Ex. 8A; HCPS Ex. 8(31).

15. Under the current IEP, the Student's First Quarter grades included two A's, two B's and one C. HCPS Ex. 10(35).

16. The Student's speech and language impairments interfere with her ability to take the Wenchsler Intelligence Scale for Children, 4th Edition (WISC-IV), a test which measures a child's cognitive ability, because that test is heavily language-based.

17. The Universal Nonverbal Intelligence Test (UNIT) also measures a child's cognitive ability. It is completely nonverbal.

18. The UNIT, not the WISC-IV, is the appropriate measure for the Student's I.Q. and cognitive abilities. HCPS Ex. 2(7); Testimony of XXXX XXXXX.

19. The Student is very social. She regularly associates with non-disabled peers.

20. The 2012-2013 IEP meets the needs of the Student.

21. [School 1] is capable of, and is currently, implementing the IEP.

DISCUSSION

Burden of Proof

The Parent contends that the Student's current educational placement does not provide the Student with the appropriate instruction at her level of intellectual functioning. In other words, the current placement does not offer the Student a FAPE. The Parent is requesting that the Student be placed at an out-of-school placement at the public's expense or transferred to another unspecified school in the HCPS system.

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 current placement at [School 1] is not reasonably calculated to provide educational benefit to her and that another placement is appropriate.

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 present evidence that it is more likely than not that the current placement does not provide the Student with a FAPE. Merely expressing opinions or raising doubt does not constitute proof by a preponderance of the evidence.

The 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.

Congress identified four purposes for its enactment (and revision) of IDEA, with the

following being primary:

> (1) (A) to ensure that all children with disabilities have available to them a **free appropriate public education** that emphasizes special education and **related services** designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities.

20 U.S.C. § 1400(d) (emphasis added). The following pertinent terms for implementing this purpose are defined in section 1401:

> (9) **Free Appropriate Public Education**. The term "free appropriate public education" means special education and related services that –
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
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> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> **(D) are provided in conformity with the individualized education program required under Section 1414(d) of this title.**
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> . . .
>
> (14) **Individualized Education Program; IEP**. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with Section 1414(d) of this title.
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> . . .
>
> (26) **Related Services**.
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> (A) In General. The term "related service" means transportation, and such developmental, corrective, and other supportive services (**including speech-language pathology** and audiology services, interpreting services, **psychological services, physical and occupational therapy, recreation, including therapeutic recreation**, social work services, school nurse services **designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child**, counseling services including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(emphasis added). Clearly implicit in these definitions, and as specifically set out in section 1414(d), is Congress' goal that a child's "individualized education program" would be reflected in a comprehensive "written statement . . . that is developed, reviewed, and revised," in accordance with a specific schedule and with specific standards set out in IDEA – in an IEP. 20 U.S.C. § 1414(d)(1)(A)(i). Among other things, the IEP is required to contain "a statement of the child's present levels of academic achievement and functional performance . . ., a statement of measurable annual goals, including academic and functional goals . . ., a description of how the child's progress toward meeting the annual goals . . . will be measured . . ., [and] a statement of the special education and related services and supplementary aids and services . . . to be provided to the child . . . .". 20 U.S.C. §1414(d)(1)(A)(i).

In *Board of Educ. of the Hendrick Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court described FAPE as follows:

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

Rowley, 458 U.S. at 200-01 (emphasis added). *See also In re Conklin*, 946 F.2d 306, 313 (4th Cir. 1991); Md. Code Ann., Educ. § 8-401(a)(3) (Supp. 2012); COMAR 13A.05.01.03B(27).

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to "[t]he best education, public or nonpublic, that money can buy" or "all services necessary" to maximize educational benefits. *Hessler v. State Bd. of Educ. of Maryland,* 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. 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 received 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). A finding that a child is not progressing at the same speed as his other peers also does not shed any light on whether a child has failed to gain educational benefit. As discussed in *Rowley*, what constitutes educational benefit for two different children may differ dramatically, depending on the disabilities that are present. *Id.* at 202.

Therefore, "educational benefit" requires that "the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. *See also M.M. ex rel. D.M. v. Sch. Dist. of Greenville County*, 303 F.3d at 526, *citing Rowley,* 458 U.S. at 207; *see also A.B. v. Lawson,* 354 F.3d 315 (4th Cir. 2004). Thus, the IDEA requires an IEP to provide a "basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt,* 908 F.2d 1200, 1207 (4th Cir. 1990). Yet, the benefit conferred by an IEP and placement must be "meaningful" and not merely "trivial" or "de minimis." *Polk v. Central Susquehanna,* 853 F.2d 171, 182-3 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *see also Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *Bd. of Educ. of Frederick County v. Summers*, 325 F.Supp.2d 565, 576 (D.Md. 2004).

The Court of Appeals for the Fourth Circuit has recognized that 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 the Student to receive appropriate educational benefit. *See In re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991); Md. Code Ann., Educ. § 8-403 (2008). The IEP is the tool for providing necessary services to the disabled child. 20 U.S.C.A. § 1414(d) (2010).

> Furthermore, while a school system must offer a program which provides educational benefits, the choice of the particular educational methodology employed is left to the school system. *Rowley*, 458 U.S. at 208. "Ultimately, [IDEA] mandates an education for each handicapped child that is responsive to his or her needs, but leaves the substance and the details of that education to state and local school officials." *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied,* 502 U.S. 859 (1991).[5]

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. *Rowley,* 458 U.S. 176 (1982). In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits. 458 U.S. at 206-207. See also, *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004).

In addition to IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the least restrictive environment to achieve FAPE. Pursuant to federal statute, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). Yet, mainstreaming disabled children into regular school programs may

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[5] The IDEA is not intended to deprive educators of the right to apply their "professional judgment." *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997).

not be appropriate for every disabled child. The removal of children with disabilities from the regular educational environment should occur, however, only if the nature or severity of the disability is such that education in regular classes (with the use of supplemental aids and services) cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.114; COMAR 13A.05.01.10. That does not mean, however, that in such a case, placement of a child in a private school setting, at the public school district's expense, is the only option available that would allow a child to receive FAPE. If a public school setting has a self-contained special education program that allows the child to access the curriculum and receive educational benefit, then IDEA's requirement that a disabled child be educated in the least restrictive environment would be accomplished by placement at the public school program.

The Parent's Case-in-Chief

The Parent offered the testimony of three witnesses. The first witness was the Parent herself, XXXX XXXX. The Parent explained some of the Student's history, noting that the Student transferred to the HCPS in 2007 when she was in the third grade. The Parent also noted that Dr. XXXX XXXX, who would later testify, had first seen and evaluated the Student in 2007. The Parent said the most recent evaluation by Dr. XXXX (Student Ex. 5B; HCPS Ex. 4(24)) noted that the Student's function was impaired. The Student has limited communication skills and has limited resources for problem solving. According to the Parent, the Student's current environment is hostile to her, which causes the Student to withdraw and to have behavior incidents. The Parent described prior behavior problems, including incident reports, being late to class, headaches and panic attacks. She noted that the Student missed seventeen days during the 2010-2011 school year. She also pointed out an incident report involving the Student from October 23, 2012. Student Ex. 8A.

The Parent discussed the results of prior tests from 2010, including the WISC-IV and UNIT results. It was her opinion that the work required of the Student currently was beyond her ability, and she noted the Student's Quarter 1 Study Guide as an example of such work. Student Ex. 9.

On cross examination, the Parent said that the Student's medications had been changed recently to allow the Student to use them "as needed." She had some difficulty recalling specific details involving the medications.

Although sincere in her testimony, the Parent offered no specific credible testimony that the Student is not receiving appropriate education services currently or that the current educational placement does not provide instruction at the Student's level of function. Apart from pointing to the Quarter 1 Study Guide – for which she gave no explanation as to why the work contained therein was beyond the Student's abilities – the Parent presented no evidence that the Student is not receiving appropriate academic services under the IEP. Apart from one behavioral incident from October 23, 2012 (which is the only recorded behavioral incident which has occurred in the 2012-2013 school year involving the Student), the Parent simply relied on behaviors and events which occurred before the current IEP was in place. In fact, the contrast with the Student's past behavior and her current behavior under the IEP BIP was obvious and actually reflected favorably on the current IEP. The information raised concerning the WISC-IV and UNIT tests from 2010 was outdated and irrelevant to the issues raised by the Parent. The Parent did not specifically refer to the current IEP during her testimony nor did she dispute any aspect of that IEP – including the details of the program to be implemented - during her testimony. The Parent gave no credible examples of how the current placement fails to provide the Student with FAPE. The Parent gave no evidence whatsoever on an alternative placement

for the Student. In summary, the Parent provided little or no credible evidence, certainly none with specificity, that the current placement at [School 1] is failing in any way to provide the Student with FAPE. She offered no credible evidence supporting her proposed resolution, *i.e.* an out-of-school placement at the public's expense or a transfer to another school within the HCPS.

The second witness called by the Parent was Dr. XXXX XXXX, who was stipulated to as an expert in clinical psychology. Dr. XXXX testified that she has supervised the Student's case since 2007. She supervised the 2007 evaluation for scoring and interpretation and wrote the report. She directly evaluated the Student in 2012, including giving what she described as a "full battery of tests" - and found that the Student now has a diagnosis of mental retardation. The Student required two days for the assessment, although one is standard, because her "frustrations" regarding the testing and a "panic attack" made a one day assessment impossible.

Dr. XXXX discussed the Student's current evaluation. According to Dr. XXXX, the Student's limitations are wide and cover a number of areas, including learning, socializing and behavior. The intellectual functioning is only one area of concern. The Student has issues with attention and inhibitory control. The Student has difficulty perceiving situations in the same way as others of her age. She has difficulty in various settings and Dr. XXXX noted that the Student does not have the ability to adapt to her environment. Dr. XXXX pointed out that the 2007 evaluation indicated that the Student was good in rote learning but that the 2012 evaluation did not show the same highlight. The Student has problems recognizing mistakes. She has impairments in her working memory, both short and long term, and does not do well with either. Her various deficiencies impede the Student's learning.

Dr. XXXX explained her re-evaluation process in detail. She said that she had conducted

a number of tests, and had used the same tests over multiple testing periods, including the Woodcock Johnson Tests of Achievement (WJ-III) and the WISC-IV, and that the Student scored below her age and grade level for the levels assessed. Dr. XXXX also reviewed the IEP from May 25, 2012 (Student Ex. 7A; HCPS Ex. 9(15)) as part of her August 8 and 13, 2012 re-evaluation of the Student. She had received ratings from two of the Student's teachers but said that she had never observed the Student in a classroom. The "major problems" she found had come from the report of the Parent. Dr. XXXX did not contact HCPS to confirm what the Parent had told her. Dr. XXXX explained that the first bullet point of her recommendations from the re-evaluation (Student Ex. 5B, p. 7) illustrated why the general education setting is inadequate in addressing the Student's needs. Dr. XXXX noted that the "basis of" the Student's "success" was someone working with her as noted in bullet point number one.

There was extensive cross-examination conducted by the HCPS. According to Dr. XXXX, the Student's history, prior evaluations, and some IEPs were considered in coming to the conclusion regarding the inadequacy of the general education setting. Dr. XXXX admitted that her assistant, XXXX XXXXX, M.S., had administered approximately 60% of the tests in the August 8 and 13, 2012 re-evaluation. She did not know who had administered the WISC-IV test. Dr. XXXX compiled the Student's history and had written up the behavioral observations during the two days of testing.

The Adaptive Behavioral Assessment System (ABAS-II) test was then discussed. Dr. XXXX testified that she had handed the ABAS-II form to the Parent to be filled out and returned. She said the ABAS-II had not been given to "all" of the Student's teachers and that no information had been sought from the teachers regarding the Student's "adaptive behavior." Additionally, she had not obtained a questionnaire regarding adaptive functioning from any of

the Student's teachers. Adaptive behavior is one of the three criteria for finding intellectual disability.

Dr, XXXX stated that she found the Student to have a diagnosis of intellectual disability (mental retardation) and that that was a "medical diagnosis under Diagnostic and Statistical Manual for Mental Disorders (DSM-IV)." She said that DSM-IV is an "appropriate medical diagnosis" of the Student's condition. She admitted that in evaluating the Student in August 2012 she had not spoken to any of the Student's teachers regarding her performance at school. Additionally, she never observed the Student in an education setting, including at [School 1], noting she was not asked by the Parent to go to the school to observe the Student. Dr. XXXX has not written any IEP goals or objectives for the Student and said that she is not a school psychologist. She did receive and review the May 25, 2012 IEP and other IEPs but she was unable to recall details; she had reviewed no other educational records of the Student.

Dr. XXXX stated that she had never been given information about Judge XXXX's March 8, 2011 decision regarding the Student before her August 2012 evaluation. She first learned of that decision on the date of this hearing. Dr. XXXX also noted that the Student did better when she had a one-to-one aide assisting her but she could not recall a time frame when the Student had a one-to-one aide. Dr. XXXX said that the Parent had informed her that the Student had a one-to-one aide and that she had based her conclusions on that representation. When informed that the Student has never had a one-to-one aide, Dr. XXXX had no response. Dr. XXXX said that she had based her judgment and recommendations on information given to her by the Parent "to a great extent" and that, for example, the first two pages of her August 8 and 13, 2012 re-evaluation report had come "mostly" from the Parent. This information included the "Summary of Present Situation and Interim History" for the Student. When it was pointed out that the re-

evaluation report stated that the Student is not currently prescribed any medications, Dr. XXXX testified that she had received that information from the Parent as well.

Dr. XXXX described the academic testing results obtained from the Student's testing. She said that the WJ-III subtest results were all "above" except for the "calculation" a score of 52. She also noted that the WISC-IV score indicated an IQ result of 62.

Based upon her evaluation, she said that the Student is "not a child who is learning" and that the Student is "not showing any or consistent growth in some areas." Dr. XXXX did not point to any specific changes she would recommend in the IEP during her testimony nor did she explain in her testimony why the current placement at [School 1] was not appropriate. She did not give any specific examples of how the Student is not currently receiving FAPE under the IEP. She gave no examples of an appropriate alternative placement for the Student. Dr. XXXX said that her evaluation had been discussed with the IEP team and that she had participated in two IEP team meetings by telephone.

I found Dr. XXXX to be a knowledgeable witness in her field of study, but there were many aspects of her testimony which called into question her ability and credibility to discuss the Student's IEP and the placement at [School 1], as well as the relevance and credibility of her testimony and her evaluation of August 8 and 13, 2012. I will discuss Dr. XXXX's testimony and evaluation more fully later in this decision. At this point, I will simply note I found Dr. XXXX's testimony and evaluation to be neither credible nor persuasive regarding the issues to be decided in this case. She provided no credible support to the Parent's case.

The final witness called by the Parent was XXXX XXXXX. Ms. XXXX is a retired HCPS school administrator. She has a B.S. degree in Elementary and Special Education (1975) and a Master's Degree in Special Education (1980). She was a special education classroom

teacher from 1976-1988. Since 1988 until her retirement in 2010, she was an Assistant Principal and then a Principal at various Howard County schools. She is certified as a special education classroom teacher for K-12.

Ms. XXXX was offered by the Parent as an expert in special education. HCPS conducted *voir dire* of Ms. XXXX. She has not published or peer reviewed any articles regarding special education, only producing her Master's Thesis written several decades ago. After conducting brief *voir dire* of Ms. XXXX, HCPS objected to her being accepted as an expert in special education. HCPS argued that Ms. XXXX's expertise is as a school administrator, not a special educator. It was pointed out that it has been over twenty-three years since Ms. XXXX has taught in a classroom and thirty-three years since she engaged in course work. She has no experience with publishing or peer reviewing special education materials. After hearing very brief argument from the Parent regarding Ms. XXXX, I agreed with HCPS and I did not accept Ms. XXXX as an expert witness in special education. Based on this finding, the Parent chose not to offer Ms. XXXX to testify further. That concluded the Parent's case.

HCPS Case-in-Chief

Although there were at least six HCPS representatives present at the hearing, HCPS offered the testimony of only one witness – school psychologist XXXX XXXX. Ms. XXXX has been a school psychologist with HCPS for twenty-four years and was with Baltimore City for ten years before that. She has a BS degree in psychology (1971) and a MA degree in school psychology (1978). She also completed thirty hours beyond her MA degree (1989). She is also a Nationally Certified School Psychologist, the result of passing an examination after completing her degree and obtaining seventy-five CDU's every five years to maintain that National Certification. Ms. XXXX was offered, and accepted, as an expert in school psychology.

Ms. XXXX first testified to the difference between school and clinical psychologists. She said that a clinical psychologist operates under a medical model while a school psychologist is educationally based. She noted that DSM-IV has no relevance under the IDEA. DSM-IV categories are used for billing purposes. A school psychologist in Maryland focuses on State law and COMAR and operates under those requirements.

Ms. XXXX then discussed the Student's case. She said she became involved with the Student in the Spring of 2012 during the Student's seventh grade year. She reviewed the Student's educational folder at that time. She noted that her review of the Student's test scores from the 2007 evaluation of the Student by Dr. XXXX indicated what she described as "a lot of scatter" in the results which she said was unusual if a child was intellectually limited – usually test results are "very flat" if a child is intellectually limited. A full scale IQ of 63 was also noted in the WISC-IV results. Based on these findings, it was Ms. XXXX's opinion that a non-verbal assessment should have been utilized to more accurately measure the Student - which is what Dr. XXXX had done in May of 2010 when evaluating the Student when referred by the Student's IEP team for evaluation. Dr. XXXX had administered the Universal Nonverbal Intelligence Test (UNIT) which is used for school age youngsters. The UNIT is given entirely non-verbally to a test subject. According to Ms. XXXX, this test takes the verbal element completely out of testing. Since the Student had known speech/language problems and difficulty with her attention, the UNIT test eliminates those problems and gives a "better representation of her potential." The full scale IQ score of 72 obtained from the UNIT indicated that the Student was not mentally retarded. She pointed out that Judge XXXX had agreed in his March 8, 2011 decision that the UNIT test result of 72 most accurately reflects the Student's true I.Q. and cognitive abilities. HCPS Ex. 2(7) at p. 23.

Ms. XXXX then discussed the FBA and BIP process. She stated that some students, such as the Student here, need more planning than others. They require an assessment and then the development of a plan to address specific behaviors. The process is to determine what the antecedent is, what the behavior of the student is and what the consequence is. The goal is to provide intervention services for the student. In this Student's case, the FBA and BIP were developed by various people, including Ms. XXXX. The concerns of teachers were considered and various behaviors were targeted. Both the FBA and the BIP were individually designed for the Student and reasonably calculated to meet her needs. The key, according to Ms. XXXX, is the visual behavior part; since language is an issue for the Student, the FBA and BIP take a visual approach to the issue. In June of 2012, both the FBA and BIP were reviewed and updated, and included input from the Parent. Both are part of the 2012-2013 IEP.

Ms. XXXX then discussed Dr. XXXX's re-evaluation of the Student. Ms. XXXX stated that Dr. XXXX's re-evaluation was reviewed at an IEP team meeting on October 2, 2012. The test results from the 2012 re-evaluation by Dr. XXXX were "very similar" to the 2007 results. Dr. XXXX, however, had utilized the WISC-IV test but not the UNIT test. Dr. XXXX did not, according to Ms. XXXX, know that the UNIT test was the proper test to be given. Although the test results were similar to the 2007 results, Dr. XXXX gave the Student a different diagnosis, using the DSM-IV criteria for mental retardation for her diagnosis. It was Ms. XXXX's view that Dr. XXXX should have gotten input from school staff in conducting her evaluation. Dr. XXXX made her recommendations based on incomplete test data and based on the Parent's often incorrect information without input from school staff. She said that a school psychologist is in a school setting on a day-to-day basis while a clinical psychologist, such as Dr. XXXX, has just one day for assessments. A number of children score low on tests, according to Ms. XXXX, but

function well on day-to-day tasks and do not meet the definition of mental retardation. The DSM-IV diagnosis is not, in Ms. XXXX's judgment, important in the school setting. Ms. XXXX noted that there has to be a thorough examination of the educational impact of the Student's condition, including looking at the details of the current IEP, when evaluating the Student. According to Ms. XXXX, Dr. XXXX did none of those things. Her re-evaluation recommendations did not contain the educational pieces to make conclusions regarding the Student's placement in a general education setting. Ms. XXXX noted that the Student has not had a one-to-one aide while at [School 1] and did not know where Dr. XXXX may have gotten different information to that effect. It was her contention that Dr. XXXX should have corroborated information received from the Parent and noted that Dr. XXXX never contacted HCPS to do that. Dr. XXXX should have observed the Student in the classroom setting as well. Based on all of these facts, the IEP team could not, therefore, use Dr. XXXX's evaluation to make their diagnosis as to the Student.

As a result of Dr. XXXX's re-evaluation, the IEP team did, however, recommend that an evaluation of the Student be conducted by HCPS, including additional testing for the Student. Additionally, the Student was observed in the classroom, her records were reviewed and input was obtained from her teachers. Ms. XXXX then prepared a Report of Psychological Evaluation (HCPS Ex. 8(31)) as a result of the HCPS evaluation of the Student. She found that the Student is meeting with academic success in general in her education classes. The BIP in place is working well; the Student's behavior is not an issue. The test results, which included the UNIT test and an Adaptive Behavior Assessment System (ABAS-II) test to look at adaptive functioning - which had been ignored by Dr. XXXX - did not support a finding that, under COMAR, the Student is intellectually disabled. Ms. XXXX noted that, based on the test results

the Student's adaptive skills look like those of "an average kid." Cognitively, the Student has strengths and weaknesses but "this cognitive profile does not support a mentally retarded code" nor does the data support a finding of intellectually disabled.

Ms. XXXX meets with the Student for fifteen minutes every other week pursuant to the IEP; together they go over the Student's behavior chart, talk about any problems and discuss other issues as relevant. Ms. XXXX described the Student as "attractive, engaging, and articulate." The Student associates with regular education students at school. Significantly, the Student "doesn't perceive herself as a disabled child." The Student's peers also do not view her as intellectually disabled. The Student's self perception is that she is "one of the kids." It is Ms. XXXX's conclusion that the current placement and IEP are assisting the Student and that she is benefiting from the program she is in now. With the accommodations currently in place the Student has been successful. Ms. XXXX said that the mentally retarded/intellectually disabled coding is one which they do not take lightly and expressed her concern that a coding of mentally retarded would negatively affect the Student's self-esteem and performance.

Based on the evaluation of the Student conducted by HCPS, the IEP team found the Student to be in an appropriate program with an appropriate IEP. According to Ms. XXXX, the Student is in a program where she receives some support in each of her classes and is making progress and meeting with success. This is occurring in the least restrictive environment. Ms. XXXX pointed out the Student's first quarter report card, which indicates grades of two A's, two B's and one C. HCPS Ex. 10(35). The Student is appropriately placed. According to Ms. XXXX there is "no measure by which [the Student] is not making success at [School 1]."

I found Ms. XXXX to be an extremely credible and persuasive witness. Her demeanor and presentation were professional and calm. Her testimony was direct and factually based. Her

answers were clear and to the point and she did a very thorough job of explaining her answers as they related to various special education terms, concepts and requirements. Her focus was on special education. Her criticisms and critiques of Dr. XXXX were professionally made without rancor and were direct and clearly based in fact. I found her summary of why Dr. XXXX's evaluation was less significant to the IEP team to be clear and persuasive. She clearly demonstrated why Dr. XXXX's clinical psychological evaluation was not persuasive or relevant to the Student's special education needs and requirements. Not only did she refute any suggestion that the Student is not receiving FAPE under the current IEP placement, she demonstrated convincingly that the Student is actually thriving under the current IEP and placement and that there is the potential for serious harm to the Student if the placement is changed. Ms. XXXX provided substantial, factual and logical evidence on behalf of the HCPS.

The Motion for Judgment

Under the OAH Rules of Procedure at COMAR 28.02.01.16E, a party may move for judgment at the close of the evidence offered by an opposing party:

> E. Motion for Judgment
>
> (1) A party may move for judgment on any or all issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
>
> (2) When a party moves for judgment at the close of the evidence offered by the opposing party, the judge may:
>
> (a) Proceed to determine the facts and render judgment against an opposing party; or
>
> (b) Decline to render judgment until the close of all evidence.

The OAH rule on motions for judgment is patterned after Maryland Circuit Court Rule

2-519. When it adopted this rule in 1984, the Maryland Court of Appeals made a significant change in practice when such a motion is made by party B at the close of party A's case in a non-jury action. In that situation, "the Rule no longer requires the court to view the evidence in a light most favorable to A and to consider only the legal sufficiency of the evidence, so viewed, but allows the court to proceed as the trier of fact to make credibility determinations, to weigh the evidence, and to make ultimate findings of fact." *The Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 402, n.4 (1998). Similarly, under the OAH rule, an Administrative Law Judge considering a Motion for Judgment is not required to view the evidence in a light most favorable to the non-moving party.[6]

The rules permit a judge in a bench trial to decide such a matter on the sufficiency of the evidence or to find facts at the end of a plaintiff's case. Niemeyer and Schuett, *Md. Rules Commentary*: 340 (2nd ed. 1992) (citing *Pahanish v. Western Trails, Inc.*, 69 Md. App. 342 (1986)). Thus, an Administrative Law Judge can properly grant a motion for judgment on the grounds of insufficient evidence (when evidence is not produced to satisfy the elements of proof in an administrative action) or, assuming that the party bearing the burden of proof has offered *some* evidence to satisfy the elements, an Administrative Law Judge can take the next step in the analysis and grant the motion by deciding that evidence was produced to satisfy the elements, but that the evidence was not credible or persuasive.

[6] In *Driggs*, the Board of Contract of Appeals treated the motion as if it were a Motion for Summary Decision.

At the end of the Student's case, HCPS moved for judgment arguing that the Student's evidence was insufficient to prove that HCPS violated State or federal special education laws (i.e., that the Student had failed to establish a *prima facie* case on any of the issues raised in the due process hearing request). The Parent made a brief argument in response. I held the motion, declining to make a ruling until the close of all evidence. HCPS presented its case and then again renewed the Motion. After hearing brief argument from the parties, I granted the Motion. It was, and is, abundantly clear that the Parent provided insufficient evidence to prove her case and, assuming *arguendo* that the Parent had offered *some* evidence to satisfy the elements required, that any evidence that was produced to satisfy the elements was not credible or persuasive.

ANALYSIS

For the Parent to survive HCPS' Motion, she must have offered some competent and probative evidence to establish, at a minimum, that the current education placement does not provide the Student with FAPE. I find no such credible evidence in the Parent's case and, therefore, the HCPS Motion is granted.

In this case, the Student is identified as a student eligible to receive special education services with Multiple Disabilities due to a speech-language impairment and an Other Health Impairment, which encompasses the Student's borderline intellectual ability and executive dysfunction and ADHD. Currently, the Student is in eighth grade at [School 1]. On May 25 and June 8, 2012, the IEP team developed an IEP for the Student that included goals and objectives to address the Student's identified academic, self-management/behavior, and communication needs. The Parent participated in this IEP process.

This IEP requires that the Student receive the following special education and related services: 24 hours a week of special education classroom instruction within the general education setting: 30 minutes per week (1 30-minute session) of speech-language therapy within the general education setting; 1 hour per week (2 30-minute sessions) of speech-language therapy outside the general education setting; and, 30 minutes per month (2 15-minute sessions) of psychologist services outside the general education setting.

The goals and objectives of the IEP were developed in accordance with the applicable law and regulations. 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 of Greenville County,* 303 F. 3d 523, 527 (4th Cir. 2002); *see* 20 U.S.C.A. § 1414(d)(1)(A). The Student's IEP meets these requirements. 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. This process occurred in this matter.

On September 7, 2012 the Parent provided [School 1] with a re-evaluation completed by Dr. XXXX XXXX and requested an IEP meeting to review the evaluation. On October 2, 2012, an IEP team meeting was convened. After review and consideration of Dr. XXXX's evaluation, the team determined that additional assessments should to be conducted by HCPS personnel and recommended additional educational and speech-language testing be completed, as well as an occupational therapy assessment and a classroom observation.

On December 7, 2012, an IEP team meeting was convened to review the psychological, speech-language and educational assessments completed by HCPS personnel. After review and consideration of Dr. XXXX's re-evaluation and the assessments completed by HCPS personnel, the team determined that the Student's current IEP was appropriate and the team also determined that the Student does not meet the eligibility criteria for the educational disability of Intellectual Disability. These conclusions were factually based and correct.

The Parent claims that the current placement of the Student does not, however, provide the Student with a FAPE. The Parent proposes an unspecified out-of-school placement or a transfer to an unidentified different HCPS school. HCPS, on the other hand, argues the current IEP and placement are appropriate and successful in providing FAPE. My review of the evidence indicates that the Parent has completely failed to prove that the current placement does not provide the Student with FAPE and that the HCPS Motion must, therefore, be granted. In fact, the evidence in this matter proves that the current placement is working exceedingly well and is providing the Student with a very successful FAPE. A change in placement might well, in fact, result in the Student receiving less of an educational benefit in a more restrictive environment. Of particular concern is the behavioral and emotional impact of a change in placement on the Student.

The Parent testified; as summarized above, however, she offered no credible evidence to support her claim regarding the current placement of the Student. Her testimony was filled with conjecture and opinion but very little in the way of facts. She did not point to specific problems with the current IEP or how the current placement was specifically failing to provide the Student with a FAPE. In addition, she failed to offer any evidence as to what sort of alternative

placement would provide the Student with a FAPE, or why such an alternative was specifically required. Other than her own opinion testimony, she presented no credible evidence to demonstrate what an alternative placement could provide the Student that she was not currently receiving under the IEP from [School 1].

The Parent offered XXXX XXXX as an expert witness in special education. Ms. XXXX does not, however, peer review or publish in the field of special education. She was a school administrator for 23 years until her retirement in 2010. She has not taught special education in a classroom setting since 1988. Based on the evidence before me, I could not and did not find Ms. XXXX to be an expert in special education. I found no credible evidence that Ms. XXXX was an expert in special education. The Parent decided not to call on Ms. XXXX to testify after I ruled against her being accepted as an expert in special education.

The only support for the Parent's position comes from Dr. XXXX XXXX, who examined the Student on August 8 and 13, 2012, prepared a report of the results of that evaluation, and testified at the hearing. I found neither the report of Dr. XXXX nor her testimony, however, to be particularly relevant or in any way persuasive as to the issues in this case. In short, Dr. XXXX simply was not credible.

Dr. XXXX is an expert in clinical psychology. Clinical psychology is not school psychology, however, as aptly pointed out by Ms. XXXX, the HCPS school psychologist who testified so ably in this case. These two fields are very different. They utilize different terms and different data for different purposes altogether. Dr. XXXX's clinical psychologist's diagnosis of mental retardation/intellectually disabled under the DSM-IV model was very different than a diagnosis of mental retardation/intellectually disabled under a COMAR/State law/education based model. It was Ms. XXXX's opinion that the DSM-IV diagnosis is, because of the

differences between clinical and educational psychology. "not important in the school setting." I found Ms. XXXX's well-organized and fully explained rationale for that opinion to be entirely sound and persuasive and I accept and adopt her conclusions.

There are numerous examples of how Dr. XXXX's evaluation failed to utilize resources and sources related to the Student's education and educational performance and simply relied on faulty or incomplete data. It is clear that because Dr. XXXX relied on the Parent and did not contact HCPS for information, much of the information she relied upon in conducting her evaluation was simply inadequate or incorrect. One example would be Dr. XXXX's finding that the Student performed better with a one-to-one aide when, in fact, she has had no such one-to-one aide. This information came from the Parent. Dr. XXXX admitted that her entire summary of the present situation and interim history had come solely from the Parent. There is no evidence that Dr. XXXX ever attempted to confirm this – or any - information received from the Parent with the HCPS. Dr. XXXX also placed great reliance on the WISC-IV test results in her evaluation and testimony. Dr. XXXX was unaware however, until the date of this hearing, that Judge XXXX in his March 8, 2011 decision had found that the Student's speech-language impairments interfere with her ability to take the WISC-IV test and that the UNIT test is the accurate measure of the Student's true I.Q. and cognitive abilities, not the WISC-IV test. The Parent did not, it appears, ever tell Dr. XXXX of Judge XXXX's decision or give her a copy to review before conducting the August 8 and 13, 2012 re-evaluation of the Student. Dr. XXXX did not perform this critical UNIT test as part of her evaluation and diagnosis and, as testimony showed, the UNIT test result was substantially different from that obtained from WISC-IV. Dr. XXXX, therefore based her conclusions and diagnosis on a test that was inappropriate for the Student. Not surprisingly, the WISC-IV result and the UNIT result indicated significantly

different scores for the Student, differences critical in evaluating the Student's condition. That critical fact alone causes me to doubt the value of Dr. XXXX's evaluation, especially in the special education setting.

Dr. XXXX found ongoing behavior issues with the Student, again apparently based on the Parent's report, but the evidence showed that under the BIP in the Student's IEP she has had only one reported behavioral incident in the 2012-2013 school year. The Student's first quarter report card also shows good academic results, with grades of two A's, two B's and one C. None of these facts square with Dr. XXXX's opinions and her August, 2012 evaluation of the Student.

Dr. XXXX performed a clinical psychological evaluation of the Student. She did not perform a school psychological evaluation of the Student. Dr. XXXX's evaluation was medical and based on incomplete and often faulty information and data. I found it of no value in deciding the issues in this case.

In summary, I find both Dr. XXXX's evaluation and her testimony to be neither credible nor persuasive when it comes to this special education matter. I do not find her conclusions to be reliable for purposes of this case. Dr. XXXX is an expert in clinical psychology and is, for all I know, an excellent clinical psychologist. Her evaluation of the Student on August 8 and 13, 2012 was, from a special education perspective however, flawed, incomplete and without substantive value. Dr. XXXX gave no examples of how the Student was not provided FAPE or why the placement at [School 1] was specifically improper under the IEP during her testimony. She provided no examples of how the IEP was failing. In sum, Dr. XXXX provided no support to the Parent's case.

In spite of these facts, the HCPS conducted a new evaluation of the Student as a result of Dr. XXXX's evaluation as has been described above. The evaluation as described by Ms.

XXXX and summarized in her report, HSPC Ex. 8(31), was complete, exhaustive and conclusive. The HCPS made a good-faith effort to determine if the Student's IEP should be updated in light of Dr. XXXX's evaluations. The testing, the observations, the record review, the entire evaluation indicated that the current IEP is providing the Student with a FAPE, a finding confirmed by the IEP team. I agree with the IEP team's findings and conclusions. Based on the evidence produced at the hearing, including the testimony and exhibits placed in evidence, it is clear that the current IEP is a success in providing the Student with FAPE, and is providing FAPE to the Student in the least restrictive environment.

Under IDEA, the Student must be placed in the least restrictive environment to achieve a FAPE. Pursuant to federal statute, disabled and nondisabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5). The Student in this case is placed in a general education setting and thrives in this environment. Her peers are non-special education students and view her as a non-disabled student. The Student herself does not view herself as disabled. The Student enjoys both general education and special education services and is clearly receiving educational benefit from this combination of services under her IEP. The placement at [School 1] has directly lead to this result.

A FAPE entitles a student to an IEP that is "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 207. The education provided must be sufficient to confer some educational benefit upon the child. *Rowley,* 458 U.S. at 200-201. The evidence is clear and overwhelming that the Student's program at the [School 1] is appropriate, is reasonably calculated to enable the Student to receive educational benefits and provides the Student educational benefit. The Parent did not offer any credible evidence to the contrary.

The judgment of educational professionals such as those at the HCPS is ordinarily entitled to deference. *G. v. Ft. Bragg Dependent Schools*, 343 F.3d 295, 307 (4th Cir. 2003); *M.M. v. School District of Greenville County*, 303 F.3d 523, 532 (4th Cir. 2002). Where appropriate, deference is given to staff where their assertions are supported by evaluative data regarding the Student's needs, including observations and the Student's performance. Based on the evidence, I find such deference entirely appropriate in this matter. For the reasons cited above, I find that the Student's placement at [School 1] provides the Student with a FAPE.

The law recognizes that "once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals." *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990). Therefore, absent any evidence to persuasively dispute the well-reasoned judgment of the HCPS, and in particular Ms. XXXX, I agree with HCPS that the IEP and placement dated May 25, 2012, is appropriate and reasonably calculated to meet the individualized needs of the Student.

I find that the [School 1] offers the Student the opportunity to receive educational benefit in the least restrictive environment. The Parent has completely failed to present any credible evidence to establish that [School 1] could not provide the Student with FAPE and that the Student is not receiving FAPE in the current placement.

I recognize the Parent's desire to have her child receive the best education possible, and that she believes, in this case, that the best education possible would be placement at an out-of-school placement at the public's expense. However, the law does not require the public agency to fund educational services for a child at a private school simply because the parent is seeking the best education for the child. Instead, 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 fact, the Parent offered no specific alternative placement of any kind in this matter, private or public, or even any vague evidence supporting an alternative placement for the Student.

The Parent argued that an out-of-school placement is appropriate as a private placement for the Student. Pursuant to *Carter*, the appropriateness of the Parent's private placement choice is analyzed only if the IEP results in a denial of a FAPE. *Carter,* 510 U.S. 7. 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 to *Carter* is inapplicable and the issue of whether the Parent's proposed placement is appropriate does not need to be addressed in this decision[7].

In conclusion, after carefully reviewing all of the evidence presented by the Parent, I find that the burden of proof has not been met. HCPS developed an appropriate IEP and placement that are reasonably calculated to provide a FAPE for the Student. Based on the lack of evidence from which I could reasonably find material facts to support the Parent's allegation that HCPS failed to provide a FAPE during the 2012-2013 school year, I conclude that the Parent failed to satisfy her burden of production or persuasion in this case. 20 U.S.C.A. § 1412; *Schaffer v. Weast,* 546 U.S. 49, 62 (2005). I grant the HCPS Motion for Judgment. The Parent has failed to offer any evidence to satisfy the elements of proof in this action.

[7] Even if it were to be addressed, the complete lack of evidence from the Parent on the issue of an out-of-school placement would render the discussion short.

CONCLUSIONS OF LAW

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

A. The Parent has failed to satisfy her burden to offer any evidence that creates a legitimate dispute about whether HCPS has failed to provide a FAPE to the Student at [School 1] and whether the Student should be placed in an out-of-school placement at the public's expense and/or that the Student should be placed in another HCPS school. 20 U.S.C.A. § 1400-1487 1412 (2010); *Schaffer v. Weast,* 546 U.S. 49 (2005); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

and

B. HCPS is entitled to a judgment against the Parent. COMAR 28.02.01.12E.

ORDER

I **ORDER** that HCPS Motion for Judgment be, and it is hereby, **GRANTED**; and I further

ORDER that the Parent's Complaint and Amended Complaint be, and is hereby, **DISMISSED**.

February 7, 2013
Date Decision Mailed

Michael W. Burns
Administrative Law Judge

MWB/

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) (2008).

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.