XXXX XXXX,	*	BEFORE M. TERESA GARLAND,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
V.	*	OF THE MARYLAND OFFICE
ANNE ARUNDEL COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH No: MSDE-AARU-OT-12-26191

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DECISION

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STATEMENT OF THE CASE

On June 28, 2012, XXXX and XXXX XXXX (Parents), on behalf of their child, XXXX ([Student] or 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 Anne Arundel County Public Schools (AACPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

From June 28, 2012 through September 17, 2012, the Parents were represented by Mark B. Martin, Esquire.[1] Joseph M. Owens, Esquire, represented the Parents at the hearing. Manisha Kavadi, Esquire, Carney, Kelehan, Bresler, Bennett & Scherr, LLP, represented AACPS.

Mediation and a Telephone Prehearing Conference were scheduled in this matter, by agreement of the parties, on July 30, 2012. On July 20, 2012, Parents' counsel requested that the

[1] Mr. Martin also represented the Parents at the May 8, 2012 IEP meeting. Mr. Martin struck his appearance as counsel of record on September 17, 2012, one week prior to the commencement of the hearing.

mediation and prehearing conference be rescheduled due to his scheduling conflict. Mediation and the Telephone Prehearing Conference were rescheduled for August 9, 2012. On July 23, 2012, Parents' counsel filed a written waiver of the Parents' right to a hearing decision within forty-five days. On August 9, 2012, the parties participated in mediation with an unsuccessful outcome.

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) (2009); Md. Code Ann., Educ. § 8-413(e)(1) (2008); 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; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); COMAR 13A .05.01.15C; COMAR 28.02.01.

Procedural History and Motions

On August 9, 2012, I convened a telephone prehearing conference in this matter during which counsel for the Parents, Mark B. Martin, Esquire, expressed his intention to file a motion to shift the burden of production in this matter to the AACPS, thus requiring AACPS to present its case first. On August 13, 2012, I issued a Prehearing Conference Report and Order which noted the scheduled hearing dates of September 24 and 25, 2012, October 1 and 2, 2012 and October 4 and 5, 2012, as well as the dates by which the Parents' motion and the AACPS's response would be filed. I set August 24, 2012 as the due date for the Parents' motion, September 7, 2012 as the due date for AACPS's response and September 14, 2012 as the due date for my decision on the motion.[2] I received the motion and response to the motion timely.

[2] The OAH's Rules of Procedure, at COMAR 28.02.01.12B(3)(a) allow fifteen days for an opposing party to file a response to a motion, and it is OAH policy that motion decisions be issued within thirty days of receipt of the response to a motion. Because the issue concerning the burden of production must be decided sufficiently in advance of the hearing to allow the parties to prepare their trial strategies, I exercised my authority under COMAR

On Friday, September 14, 2012, I issued a decision denying the Parents' motion. On Monday, September 17, 2012, I attempted to schedule a telephone conference with both parties regarding the Parents' subpoena request for fifteen witnesses to appear at the hearing. The purpose of the telephone conference was to obtain a proffer of the witnesses' anticipated testimony to ensure there was no duplication of testimony. Mr. Martin's office was called first, at which time a staff member informed the OAH that Mr. Martin had stricken his appearance as the Parents' counsel effective September 17, 2012. Consequently, the OAH clerk left a message on the Parents' home phone requesting a return call to schedule a telephone conference regarding their requested subpoenas. The Parents did not return OAH's phone call. The requested subpoenas were not issued.

On Monday, September 24, 2012, I commenced the hearing of this matter at the AACPS offices located at 2660 Riva Road, Annapolis, Maryland 21401. Mr. XXXX, the Student's father, (Parent) was present and represented by Joseph M. Owens, Esquire.[3] Manisha Kavadi, Esquire, represented AACPS. At the onset of the hearing, Mr. Owens requested a postponement in order to more fully prepare and to clear his schedule,[4] which I denied after reciting the procedural history of this case to date and much discussion on the record. (T. at 5-24). The

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28.02.01.11B(8) and (11) to compress the schedule for submitting, responding to and rendering a decision on the Parents' motion.

[3] Only XXXX XXXX, [Student]'s father, was present for the hearing. I shall hereinafter refer to him in the singular as the Parent.

[4] Mr. Owens recited a number of conflicts, both personal and professional, that he had throughout the scheduled six-day hearing. One such conflict involved Mr. Owens' travel out-of-state to try a military case on Monday, October 1, 2012. According to Mr. Owens, the military case was scheduled for the entire week, during which this case was scheduled for four hearing days. Mr. Owens presented no documentation of his conflicts, such as military orders or travel arrangements. I informed Mr. Owens that, if he remained unavailable, the hearing would proceed without him during the week of October 1, 2012. The majority of Mr. Owens' conflicts were abated by ending each hearing day early when he had previously scheduled afternoon appointments that could not be rescheduled. Some of Mr. Owens' conflicts resolved themselves. Ultimately, Mr. Owens was present as the Parents' counsel during the entirety of the Parents' case-in-chief, the AACPS' Motion for Judgment, my bench ruling based upon the evidence presented as of the close of the Parents' case-in-chief and the testimony of two of the three AACPS witnesses. Prior to Mr. Owens' departure at noon on Tuesday, October 2, 2012, he requested permission for the Parent to call him after direct examination of AACPS' final witness in order to his seek advice regarding cross-examination of the witness. Mr. Owens indicated that he would be available by phone at his office in Baltimore. I granted Mr. Owens' request; however, the Parent did not exercise the option to call his counsel for advice.

Parent was informed of his option of withdrawing his appeal and re-filing his Due Process Request at a later date, which he declined. The Parents' counsel continually complained that previous counsel's witness subpoenas had been denied. I, in turn, continuously corrected the Parents' counsel and reminded him that the subpoenas had not been denied. They were not issued due to a lack of response to my request for a proffer. Moreover, it is of consequence to note that each of the witnesses requested by the Parents who were employed by AACPS were sitting in the hearing room each day of the hearing and were available to testify if called by the Parents. These witnesses identified themselves, on the record, on the mornings of September 25, 2012, October 1, 2012 and October 2, 2012.

At the end of the presentation of the Parents' case, AACPS made a motion for judgment under OAH Rules of Procedure, COMAR 28.02.01.16E. After hearing argument on the motion by AACPS (Counsel for the Parents offered no argument) and reviewing the evidence, I granted the motion in substantial part, ruling that the Parents had presented no evidence to support their contention that:

1. They were prevented from participating in a meaningful way in the May 8, 2012 IEP;

2. AACPS did not incorporate supplementary aids and services, specifically 1:1 support, 2:1 support and larger groups into the May 8, 2012 IEP goals;

3. AACPS failed to have a comprehensive behavioral assessment of the Student;

4. AACPS failed to provide data or reasoning to support the Student's change in placement; and,

5. The proposed placement was not reasonably calculated to provide the Student with FAPE.

Having so ruled, the only issue which remained, and for which the Parents offered barely a scintilla of evidence, was whether AACPS failed to provide the Student with an appropriate

transition to the proposed placement. Consequently, I instructed the AACPS that it need only present testimony and documents pertaining to that single, narrow issue.

ISSUES

A. Was the Motion for Judgment properly granted on the following issues?

In their case-in-chief, did the Parents carry their burden to prove that:

a. The Parents were prevented from participating in a meaningful way in the May 8, 2012 IEP meeting?

b. AACPS did not incorporate supplementary aids and services, specifically 1:1 support, 2:1 support and larger groups into the May 8, 2012 IEP goals?

c. AACPS failed to have a comprehensive behavioral assessment of the Student?

d. AACPS failed to provide data or reasoning to support the Student's change in placement?

e. The proposed placement was not reasonably calculated to provide the Student with FAPE?

B. Did AACPS fail to provide the Student with an appropriate transition to the proposed placement?

SUMMARY OF THE EVIDENCE

A. Exhibits:

The Parent did not offer any exhibits.

I admitted the following pre-marked exhibits on behalf of AACPS:

AACPS-5	04/30/12 IEP Meeting Report/Prior Written Notice with invitation notice
AACPS-6	05/08/12 IEP Meeting Report/Prior Written Notice with invitation notice
AACPS-7	05/08/12 IEP
AACPS-14	04/10/12 AACPS Assistive Technology Observation/Evaluation Report (by XXXX XXXX)

AACPS-15 01/24/12 AACPS Observation at [School 1] for Early Intervention (by XXXX XXXX and XXXX XXXX)

AACPS-16-16b 02/23/12 AACPS Academic Assessment Report (by XXXX XXXX and XXXX XXXX)

AACPS-16c-16i 01/12/12 AACPS Observation at [School 1] for Early Intervention (by XXXX XXXX and XXXX XXXX)

AACPS-17 02/23/12 AACPS Communication Assessment Report (by XXXX XXXX)

AACPS-18 02/23/12 AACPS Psychological Assessment Report (by XXXX XXXX)

AACPS-19 02/23/12 AACPS Occupational Therapy Assessment Report (by XXXX XXXX)

AACPS-26 2012-2013 School Year Sensory Diet for [Student]

AACPS-27 04/30/12 Behavior Plan

AACPS-28 04/30/12 Behavioral Assessment

AACPS-38 Curriculum Vita for Ms. XXXX XXXX

AACPS-40 Curriculum Vita for Dr. XXXX XXXX

AACPS-41 Curriculum Vita for Ms. XXXX XXXX

AACPS-42 Curriculum Vita for Ms. XXXX XXXX

AACPS-45 Curriculum Vita for Dr. XXXX XXXX

AACPS-51 Courier's Proof of Delivery of AACPS's Hearing Disclosure to the XXXXs

B. Testimony

During their case-in-chief, the Parent testified and presented the following witnesses: [5]

- XXXX XXXX, Ph.D., [School 1];
- XXXX XXXX, [School 1]; and
- XXXX XXXX, [Student]'s sister.

[5] The Parent requested to call two witnesses who had not previously been disclosed to the AACPS. The AACPS did not object to the Parent calling the Student's sister, XXXX. However, AACPS objected the second witness. I denied the Parent's request as to the second witness. Section 300.512(a)(3) provides that any party to a hearing has the right to prohibit the introduction of any evidence "that has not been disclosed to that party at least five business days before the hearing[.]"

AACPS presented the following witnesses:

- XXXX XXXX, Central IEP Chairperson, admitted as an expert in Special Education;
- XXXX XXXX, AACPS Assistive Technology Specialist, admitted as an expert in Assistive Technology; and
- XXXX XXXX, Ph.D., AACPS, Principal, [School 2], admitted as an expert in Special Education.

FINDINGS OF FACT ESTABLISHED DURING PARENTS' CASE-IN-CHIEF

I find that the following facts were established by a preponderance of the evidence during the Parents' case-in-chief:

1. As of the date of this hearing, the Student was six years and XX months old and in pre-kindergarten at [School 1].

2. The Student was diagnosed with Autism at age three and presently functions at an eighteen-month-old level.

3. The Student is a non-verbal child with limited language interaction. While he is considered non-verbal, the Student can say a few words such as "mom," "dad" and "blue."

4. From the age of three until he was almost four, AACPS staff worked with the Student in his home for approximately six months to one year in "early intervention pre-kindergarten."

5. In 2009, at approximately age four, an IEP was developed which noted his present levels of performance and provided for goals and objectives to address the Student's needs. The Parents agreed that the IEP could be implemented at [School 1], a non-public placement located in XXXX, MD. AACP funded the placement.

6. [School 1] is an eleven-month day placement, serving children ages two through the second grade. [School 1] closes for a total of four non-consecutive weeks per calendar year.

7. The Student attends [School 1] five days per week for four hours per day. He spends one-and-one-half hours per day in small group activities and two-and-one-half hours per day in speech and occupational therapy.

8. The Student is capable of a thirty hour per week school schedule.

9. While AACPS has offered to transport the Student to [School 1], one or the other of the Student's Parents transports the Student to [School 1]. The Student has not been exposed to other forms of transportation.

10. When the Student entered [School 1], he had high levels of self-injurious behaviors (SIB) such as hard head hitting and pulling his hair out. One part of his head had most of the hair missing as a result of his self-injurious behavior. The Student also bit others. These behaviors were exacerbated when demands were placed on the Student, such as being asked to make eye contact.

11. The Student's self-injurious behavior, biting and negative response to demands or perceived demands have diminished substantially since entering [School 1]. He has had no major biting incidences in several years.

12. The Student requires a high degree of sensory input. He needs to chew on items, such as ice and toys, and needs to use a swing so that he can feel movement.

13. The Student can dress and feed himself. He is presently working on toileting skills.

14. AACPS held an IEP meeting on April 30, 2012 for which the Parents were in attendance and accompanied by staff from [School 1]. The meeting was continued for eight days at the Parents' request.

15. AACPS resumed the IEP meeting on May 8, 2012. The Parents were in attendance and accompanied by staff from [School 1] as well as their attorney.

16. The Parents separately visited [School 2]. Two staff from [School 1] accompanied Mrs. XXXX. The Student's father was unaccompanied by [School 1] staff.

DISCUSSION

I. Procedural Framework.

A. Burden of Proof/Persuasion.

In administrative hearings addressing the validity of a child's IEP, the burden of proof/persuasion is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As I ruled in my Decision on the Motion to Shift the Burden of Production, and as the Supreme Court defined in the *Weast* case, the burden of proof in this case is thus on the Parents to establish the merits of their allegations. In their Motion, the Parents presented no compelling reason to require AACPS to present its case first. While they claimed to have no knowledge of the basis for the AACPS decision to place the Student at [School 2], and would be disadvantaged by presenting their case first, it was undisputed that both Parents attended the April and May IEP meetings, and were accompanied by Mr. Martin at the May IEP meeting.

B. Standards for ruling on motions 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. In this case, AACPS argued that the Parents had failed to establish a *prima facie* case on any of the issues they raised in the due process hearing request.

C. The Parents' Case-in-Chief

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

1. The Parent's testimony

The Parent testified that the Student was diagnosed with autism at age three. The Student was nonverbal and self injurious. He would bite himself, pull his hair and pull the hair of others. The Student did not like the intervention of strangers. When adults whom he did not know came to the house, he would throw toys at them, pull their hair, pull his own hair and bite himself. Upon the Student's diagnosis, his mother began researching educational opportunities for him and found [School 1]. [School 1] is a private, MSDE-approved non-public placement for children diagnosed with autism. [School 1] serves children from age 2 until second grade from Anne Arundel County, Carroll County, Baltimore County, and Harford County. [School 1] opened in 2006 and is located in XXXX, Maryland.

In order to transition the Student from his home to [School 1], Dr. XXXX XXXX came to the Student's house to work with him. The Parent testified that Dr. XXXX sat in a chair several hours a day for a week with a cup of ice in one hand and a cup of chips and another. These food items were favorites of the Student. By Wednesday, the Student had warmed up to Dr. XXXX and "improved his behavior" toward her as well toward himself. After Dr. XXXX had established a relationship with the Student, XXXX XXXX, also from [School 1], began working with the Student at his house. Ms. XXXX worked on the Student's self-injurious behavior throughout the summer. (T. at 32)

Staff from [School 1] continued to work with the Student in his home for a period of time. In the summer of 2009, the AACPS developed the Student's first IEP and placed him with [School 1]. The Student is presently in his fourth year at [School 1].

The Parent explained that the Student is still non-verbal; however, he can say mom, dad and blue. [School 1] is presently working with him on potty training. The Parent's wife, the

Student's mother, no longer works so that she can transport Student to [School 1]. The hours he is in school are from 9:30 AM until 2:30 PM.

The Parent testified about the virtues of [School 1]. He said that there are four children in the Student's classroom and that the only time the Student is not physically in the classroom is during his half an hour of speech therapy daily and his one half hour occupational therapy three times per week. The Parent further testified that [School 1] allows Parents to observe each of the classrooms. There is a camera in the classroom attached to a viewing room. In his testimony, the Parent addressed AACPS' concerns that the Student was not exposed to verbal children throughout the day by expressing that the Student has several children in his classroom, who can say "some words."(T. at 36).

The Parent testified that since the Student has been at [School 1], he has progressed. He is now able to dress himself and he is able to eat with a fork. (T. at 75).

The Parent expressed concern that the classroom setting at the Student's proposed placement is not appropriate for the Student. He testified that he (as well is his wife) visited [School 2] to observe this potential placement. He said that he was met by someone he believed was a behavioral specialist who gave him a tour of the school. The Parent testified that he observed a classroom that had a horseshoe shaped table with the teacher in the middle. There were eight children seated around the table, two of whom were belted in their seats. There was only one aide in the room. The teacher was doing a science experiment where she was mixing two compounds together to form a gas, and then using that gas to blow up a balloon. (T. at 39). The Parent further testified that the teacher was talking so fast that, in his opinion, the children were not paying attention. Most were not even looking at the balloon. (T. at 40-41). During the Parent's visit to [School 2], he was concerned when one of the children grabbed a computer

component and threw it across the room. A male aide put the child in a "hold" after which the child calmed down. (T. at 41-42).

The Parent expressed concern regarding the possibility that his son may be belted into the chair, and would be subjected to lessons, such as the balloon experiment, which he would not comprehend, and which would be of little value to his learning experience. The Student is a very active child and he is very sensory oriented. The Parent was disappointed with what he observed at [School 2] because, while he and his wife went on different days to observe the school they essentially observed the same thing.

The Parent expressed some very concrete concerns regarding the Student and the proposed placement change. Specifically, the Student does not react well to new people in his life. If the Student perceives that this new person will place demands on him, he will begin crying. For that reason, the Parent no longer has anyone coming to the house who may put demands on the Student. (T. at 46). Further, the Student is embedded in a routine. Every morning before school, the Student watches SpongeBob, while swinging in his swing and then he eats breakfast and goes to school. The Student does not react well when his routine is disrupted. Lastly, the Parent is concerned that [School 2] is not a full year program. It was his belief that there was no extended school year (ESY) all during the month of June and only during part of August. When the Student is not in school, he regresses and loses his skills. (T. at 47-48).

The Parent testified of the difficulties of having the Student attend [School 1] rather than a local, public school. [School 1] is approximately a 45 minute drive from the Parent's home. Sometimes, the traffic is heavy, but fortunately the Parents' vehicle has a DVD player and the Student is able to watch SpongeBob or some other DVD to keep himself occupied. The Student also will have some cereal and a drink for the ride to school. Certainly, the Parent testified, it would be much easier on the whole family if the Student were to attend AACPS. However, the

Parent believes that [School 1] is the best place for his son. (T. at 49-51). Presently, the incidences of the Student biting and hair pulling are almost nonexistent. (T. at 54-55). The Student returns home from [School 1] every day with a notebook in which his therapists or other professionals have written his work for the day. (T. at 56). During questioning by the AACPS, the Parent acknowledged that AACPS had offered to transport his child to [School 1] in XXXX, but he declined. The Parent explained that he did not feel the Student would understand the concept of a bus and that, unless he was strapped into some kind of restraint, he would run freely on the bus. He further said that the Student requires a DVD or some type of visual aid in order to make the commute. (T. at 68). The Parent further testified that the Student has, to his knowledge, never been in a car or vehicle other than the family vehicles.

2. XXXX XXXX

XXXX XXXX, a licensed psychologist and board certified behavioral analyst employed by [School 1], testified on behalf of the Parents. She described [School 1] as a small program for children with autism who are at least two years old through second grade. At [School 1], all of the students enrolled have a diagnosis of autism. (T. at 142). While at [School 1], the Student does not have the opportunity to interact with children who are nondisabled. (T. at 142-143). Within [School 1], there are three Masters-level special educators and a Director, four speech-language pathologists and a Director, and Applied Behavioral Analysis (ABA) consultants. Dr. XXXX is the only psychologist at [School 1]. (T. at 94,121,124). [School 1] is an MSDE-approved nonpublic placement that is monitored by the State. (T. at 105). Dr. XXXX testified that there are approximately 60 children enrolled at [School 1] whose level of intensity could range from a 40 hour a week program to only coming to the Center one hour a week for speech therapy. (T. at 95). According to Dr. XXXX, the goal of [School 1] is to promote independence in its students so that they are able to function in society at the highest possible level. (T. at 95).

Approximately 20 of the 60 children enrolled in [School 1] are placed there by IEP. (T. at 95). The remaining population has been privately placed.

Dr. XXXX testified that when the Student first came to [School 1], he was exhibiting very high levels of self injurious behavior, sometimes "hundreds and hundreds" of times a day. (T. at 97 and 102). He had pulled out most of the hair of a portion of his head and was engaging in "hand to head self-injury" as well. (T. at 97). He would exhibit these behaviors when there was either a perceived or an actual demand presented to him. (T. at 99). While he continues to engage in some self-injurious behavior, it is not at its previous rate of occurrence. (T. at 100). Further, the Student's self- injurious behavior does not tend to occur except under extreme circumstances, perhaps a couple of times a day. While Dr. XXXX testified that [School 1] keeps data on the number of self injurious incidences by the Student, she did not have the data with her from which to testify. (T. at 102 and 103). Presently, the Student can sit in a small group, although much of his learning still requires "a lot of intensity."[7] (T. at 100). The Student's hand-to-head self-injury is minimal because the staff at [School 1] has adapted the Student's environment to help him adapt to changes. (T. at 130). The Student responds much better to demands placed on him than he had previously. (T. at 133). The Student's present IEP requires that he attended [School 1] 20 hours per week. However, Dr. XXXX agrees that the Student is able to attend 30 hour school week. (T. at 139). Dr. XXXX does not provide direct services to the Student.

Dr. XXXX said that the Student has a high degree of sensory need. In order to accommodate his need, [School 1] has developed a "sensory diet" for the Student. The purpose of a sensory diet is to provide a student with sensory input in order to satisfy his sensory needs.

[7] Dr. XXXX did not define this concept.

For example, the Student has access to a swing outside of the space where he attends class. He also has many sensory toys. (T. at 130-131).

Among the Student's strengths are that he can form a connection with a person and he is friendly to adults. (T. at 158)

Dr. XXXX testified that [School 1] offers a full day education program where the Student has access to having materials presented to him in a variety of ways with the goal of increasing the Student's ability to participate more fully in a less restrictive environment. The Student participates in small group activities for 1 1/2 hours per day, which allows him to respond in a group, absorb information and participate in circle time. (T. at 105, 135). Dr. XXXX further stated that the Student needs most of his material presented one-on-one, which allows the professionals working with him to individualize his learning pace and prompting levels. (T. at 106). The Student spends 2 1/2 hours per day in one-on-one education, speech therapy, occupational therapy, and other one-on-one activities. (T. at 135).

Dr. XXXX said that she visited [School 2] on one occasion. During that occasion, it was her observation that some of the children in the classroom were in "Rifton" chairs, which is a chair with a seatbelt where kids are buckled in. (T. at 107). [School 1] does not employee Rifton chairs because they want the children to learn to sit. Dr. XXXX expressed her opinion that Rifton chairs do not facilitate future independence. However, Dr. XXXX acknowledged that Rifton chairs can be used for occupational therapy needs for children and provide postural stability. Dr. XXXX was not aware of whether any of the children in Rifton chairs at [School 2] had any medical or postural issue, which would require the use of a Rifton chair. (T. at 146-147). Dr. XXXX further testified that, while at [School 2], she did not observe any one-on-one teaching. She reiterated that the Student "absolutely needs one-on one." (T. at 108). [School 1] is an eleven month program that is closed for a total of four weeks, which are spread out throughout

the calendar year. [School 1] is closed for a week between Christmas and New Year's, for spring break, at the end of the school year and for a training week. (T. at 108). Dr. XXXX testified that the Student regresses very quickly without a constant program, particularly when it comes to self-injury. She stated that she could not imagine what it would be like to have [the Student off for] the full summer. (T. at 108). Dr. XXXX did not address any of the Parents' contentions recited in their Due Process Complaint.

3. XXXX XXXX

XXXX, the Student's sister and a sixth grade student, testified that her brother likes to watch SpongeBob and that he has an indoor swing he uses while he watches television. The Student cannot be left alone because he does not know right from wrong. (T. at 226). XXXX believes that the Student should continue at [School 1] because "[Student] needs to go to [School 1], and it's the appropriate place for him to go." (T. at 228).

4. XXXX XXXX

Ms. XXXX is a Behavioral Analyst awaiting the results of her board certification examination. She has worked with the Student since 2009. (T. at 233). She is the Director of the school aide program, which oversees one-to-one aides who are assigned to children in other counties. (T. at 246). She said:

> When I met [Student], he was home-based only. He was currently working with some professionals from Anne Arundel County that came into the home. He had a lot of self-injurious behaviors. He was head banging. He was hitting his head into hard objects. He was ripping hair out of his head to the point that he was bald on one side of his head. He would hit his head with a closed fist to the point you could hear it across a room. He also would hit his head in a soft manner, which looked to be sensory input. But if that was not addressed or blocked, he would increase the hits to harder hits, and then hit his head into objects. He also was aggressive. He had no language. He was given PECS, which is a communication system where you exchange a picture instead of using a word. He did not like the system. He was very mistrusting of the system. He was being desensitized to that system, as well as people in general. (T. at 234).

Ms. XXXX was specifically asked about the Student's transition from [School 1] to [School 2] as follows:

> Q. If [Student] were to switch schools, what transition plan would need to occur, in your opinion?
> A. I think for [Student], it would be a very long progression. There's no timeline. There's no it would take, you know, 18 months. You know, you don't know. It's based minute-by-minute on [Student] and what he's telling you. And the fact that he's non-verbal makes it complicated, because he can't say, "I'm uncomfortable. I need a break. I need to stop. I need to," you know, "do this right now." You have to kind of monitor the behaviors, unfortunately, as your measure of whether or not he's comfortable, whether he's going to cope, and then look at his ability to continue to show the same skill sets that he used to have when he was in an enclosed environment. Or if he'll -- you know, if he does them one-to-one at home with me, will he do them in a group setting? Will he do it with two more kids present?
>
> (T at 247).
>
> Q. But based on your knowledge and observations, how would [Student] react to a change in schools?
> A. Well, obviously, I don't know fully, because we've not put him in that specific situation. We had the privilege, because we are a smaller school and we are overseen by a doctor at [sic] level BCBA,[8] to kind of slowly look at the behavior portion of it. So everything we did with him was slowly done. We monitored everything. We made sure we had graphs on it. It was never "I feel," "I think," "We assume." It was always this graph shows us that as soon as we said, "[Student], do this demand and do this demand," that he would react. So we had a whole history of slowly doing it, making him comfortable, and even making sure that when I first worked in the home, I had several familiar items, and those things were immediately in the center when he came to the center, and making sure that he always saw me present during that transition, and then slowly teaching him to trust other professionals too, like the OT and the speech pathologist and his classroom teachers. And he's had a variety of different caregivers at [School 1] because he's been with us for so many years. But each of them were slowly introduced, and he was given the opportunity to communicate with us about his feelings about it.
>
> Q. Based on your knowledge and observations, how long would an effective transition from [School 1] to -- and I'm just using [School 2] as the example here because it's the school in question. But based upon your knowledge and observations, how long would a transition to [School 2] take to effectuate properly?

[8] BCBA is Board Certified Behavioral Analyst.

A. I mean, I don't know, because as always, what I do clinically is always look at his reaction to every move. So it would be, you know -- clinically, in my opinion, it would be a very slow progression. It would be –[9]

(T. at 262-263).

Ms. XXXX' testimony, while informative and enlightening regarding the Student and [School 1], did not address the specific complaints the Parents raised in their Due Process Complaint. Furthermore, her testimony did not address the issue of the AACPS' transition plan for the Student.

I granted AACPS' motion for judgment on the grounds that the Parents had failed to present sufficient proof to establish a *prima facie* case or, if some evidence had been provided, that it was not sufficiently credible or persuasive to establish the issue asserted, with regard to the following issues: The Parents were prevented from participating in a meaningful way in the May 8, 2012 IEP; AACPS did not incorporate supplementary aids and services, specifically 1:1 support, 2:1 support and larger groups into the May 8, 2012 IEP goals; AACPS failed to have a comprehensive behavioral assessment of the Student; AACPS failed to provide data or reasoning to support the Student's change in placement; and the proposed placement was not reasonably calculated to provide the Student with FAPE.

I proceeded to AACPS' case-in-chief on the following issue: that AACPS had failed to provide the Student with an appropriate transition to the proposed placement.[10] I discuss all of the issues in this decision.

II. Legal Framework.

A. Statutory Framework under IDEA.

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[9] The witness's answer abruptly ended when AACPS made an objection.

[10] In fact, it was the only issue addressed at all in the Parents' case which was identified in their Due Process Request. It is significant to note that the Parents never presented or offered the Student's IEP into evidence.

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;
>
> (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.**
>
> . . .
>
> (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.
>
> . . .
>
> (26) **Related Services**.
>
> (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).

B. Supreme Court interpretation of IDEA.

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court affirmed that the congressional purpose in enacting the IDEA was the provision of a free appropriate public education (FAPE) to children with disabilities. The Court stated that implicit in this purpose was a requirement that the education to which access is provided is sufficient to "confer some educational benefit upon the handicapped child." 458 U.S. at 200. The Court noted that a child's grades and his or her advancement through the school program were important factors in determining whether educational benefit was conferred. 458 U.S. at 203. The Court identified the basic inquiry as twofold: first, has the education agency complied with procedures set forth in the IDEA; and second, was the child's IEP, developed through IDEA procedures, "reasonably calculated to enable the child to receive educational benefits?" If these two requirements are met, the requirements of IDEA have been satisfied. 458 U.S. at 206-07.

III. Dismissal of the Parents' Claims

I dismissed each of the following claims made by the Parents in their Due Process Complaint:[11]

a. *Were the Parents were prevented from participating in a meaningful way in the May 8, 2012 IEP meeting?*

The *Rowley* Court explained that it is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of participation at every stage of the administrative process [] as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06.

Not every violation of a procedural requirement under the IDEA is sufficient grounds for relief. *DiBuo ex rel. DiBuo v. Bd. of Educ. of Worcester County*, 309 F.3d 184, 190 (4th Cir. 2002). "[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education." *Id.*, *quoting Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *see also MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 534 (4th Cir. 2002); *Wagner v. Bd. of Educ. of Montgomery County*, 340 F.Supp.2d 603, 617 (D. Md. 2004).

The Parents alleged in their Due Process Complaint that they were prevented from participating, in any meaningful way, in the May 8, 2012 IEP meeting when AACPS chose to caucus outside of the presence of the Parents and their attorney. The Parents presented no evidence during their case-in-chief of any procedural violations which occurred in any IEP meeting. In fact, little mention was made of the IEP meetings at all. The Parents did not present any evidence as to the length of the May 8, 2012 IEP meeting, how long AACPS caucused outside of their presence, and what was the stated purpose of AACPS caucusing. Without this

[11] The Parents presented no documentation or expert testimony at the hearing to support their Due Process Complaint issues.

evidence, the Parents were not able to prove that the caucusing denied them meaningful participation in the May 8, 2012 IEP meeting. The Parents presented no evidence that the caucusing resulted in AACPS pre-determining the outcome of the IEP meeting. Hence, the fact that AACPS staff caucused during the IEP meeting does not, by itself, suggest that the Parents were denied the opportunity to meaningfully participate in the IEP meeting.

b. *Did the AACPS fail to incorporate supplementary aids and services, specifically 1:1 support and larger groups into the IEP goals?*

The Parents failed to introduce the May 8, 2012 IEP into evidence in their case-in-chief and presented no testimony, expert or otherwise, to support their contention.[12] This allegation was dismissed for failure to provide sufficient credible evidence.

c. *Did the AACPS fail to have a Comprehensive Behavioral Assessment of the Student?*

The Parents failed to present any evidence regarding whether the AACPS performed, or did not perform, a Comprehensive Behavioral Assessment. This allegation was dismissed for failure to provide sufficient credible evidence.

d. *Did the AACPS fail to provide data or reasoning to support the Student's change in placement?*

The Parents failed to present any testimonial or documentary evidence to support this contention. This allegation was dismissed for failure to provide sufficient credible evidence.

e. *Is the proposed placement of [School 2] reasonably calculated to provide the Student an appropriate education?*

[12] An Administrative Law Judge determining whether a school system has provided a FAPE to one of its students must first review the student's IEP and its component parts. *See* 20 U.S.C. §§ 1400 – 1401; 34 CFR § 300.320(a).

The IDEA provides that all children with disabilities between the ages of three and twenty-one, inclusive, have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1)(A) (2010). In *Rowley*, 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).

The IDEA contains the following, similar definition of FAPE:

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

20 U.S.C.A. § 1401(9) (2010). *See also* Md. Code Ann., Educ. § 8-401(a)(3) (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). 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. A finding that a child is not progressing at the same speed as his other peers 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 MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d at 526, *citing Rowley,* 458 U.S. at 207; s*ee 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).[13]

As described above, under the legislative scheme set out in IDEA, a school system is obligated to provide a student with disabilities a FAPE; a FAPE includes the provision of appropriate related services; and the FAPE is to be described in detail on an annual basis in an

[13] 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).

IEP established for that student by the school system. *See* 20 U.S.C. §§1400, 1414. Accordingly, the first point of review in a special education due process hearing is the student's IEP for the particular year in question. Although it is conceivable that the information in a student's IEP could be detailed without the written IEP itself, such a process would be lengthy and would likely require a substantial amount of detailed testimony from a number of witnesses.

During their case-in-chief, the Parents never produced the Student's IEP. The Parents did not explain their failure to present the IEP at issue. The Parents did not claim that AACPS had failed to create an IEP for the Student; nor did the Parents claim that AACPS had somehow barred them from having access to these documents. The Parents' failure to present this document was inexplicable and, frankly, baffling.

In this case, the Parents failed to present any evidence to establish that [School 2] could not provide the Student with FAPE. Many of the staff from [School 2] were in the hearing room each day of the hearing, and identified themselves and their positions for the record prior to commencing for the day. The Parents did not present any expert testimony that any component of [School 1]'s program was unique to the program such that, were the Student to be transferred to a program lacking the component, he would be denied FAPE. While Dr. XXXX[14] emphasized that the Student required one-to-one teaching, XXXX XXXX, Central IEP Chair, testified on behalf of AACPS that the Student would have one-to-one as well as small group instruction at [School 2]. This allegation was dismissed for failure to provide sufficient credible evidence.

IV. Sufficiency of the evidence to establish Parents' remaining claim after close of the Parents' case-in-chief.

f. Did the Parents establish that the AACPS failed to provide for the Student's transition from [School 1] to [School 2]?

Because the Parents presented some, although weak, testimony regarding the Student's

[14] Dr. XXXX was not admitted as an expert witness.

transition from [School 1] to [School 2], I required the AACPS to present testimony regarding the Student's transition. Having further reviewed the testimony of the Parents' witnesses, I find that the Parents have failed to meet their burden of production with respect to this issue as well. The only witness who testified regarding the Student's transition to [School 2] was XXXX XXXX and she spoke only generally regarding the need to slowly transition the Student. Again, the Parents had witnesses available from [School 2], which witnesses the Parents disclosed to AACPS prior to the hearing as their possible witnesses, who could have presented the AACPS' plan for transitioning the Student, yet none of those witnesses were called by the Parents to testify.

V. Summary

While I understand that the Parents were placed between the proverbial "rock and a hard place" when their previous counsel struck his appearance, the Parents' present counsel failed to present critical documents, such as the Student's IEP which formed the foundation for each allegation of the Parents' Due Process Complaint. The Parents' former counsel gave appropriate notice of the Parents witnesses and, although subpoenas were not issued for those witnesses, many of them were in the hearing room and available to the Parents' present counsel to call as witnesses.[15] Moreover, it was certainly apparent that the witnesses from [School 1] listed by former counsel would have made themselves available to testify if given sufficient notice. Instead, they were requested to appear to testify at the last moment and were unprepared to answer critical questions.[16]

CONCLUSIONS OF LAW

I conclude as a matter of law that the Parents did not carry their burden to prove that:

[15] As a practical matter, had the subpoenas for the staff at [School 1] been issued, the school would probably have had to close for one or more days during the hearing due to a lack of staff.

[16] Dr. XXXX deferred answering many questions by the Parents counsel because she did not bring the Student's records with her to the hearing. She also avoided other questions because she was not the appropriate witness to respond to the Parent's counsel's inquiries.

1. They were prevented from participating in a meaningful way in the May 8, 2012 IEP meeting;

2. AACPS did not incorporate supplementary aids and services, specifically 1:1 support, 2:1 support and larger groups into the May 8, 2012 IEP goals;

3. AACPS failed to have a comprehensive behavioral assessment of the Student;

4. AACPS failed to provide data or reasoning to support the Student's change in placement;

5. The proposed placement was not reasonably calculated to provide the Student with FAPE; and,

6. AACPS failed to provide the Student with an appropriate transition to the proposed placement.

20 U.S.C.A. § 1415(f)(1)(A) (2010); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

ORDER

I **ORDER** that the Parents' due process complaint is dismissed.

October 26, 2012
Date Order Mailed

M. Teresa Garland
Administrative Law Judge

MTG/fe

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.