XXXX XXXX	*	**BEFORE JAMES W. POWER,**
STUDENT	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
ANNE ARUNDEL COUNTY	*	**OF ADMINISTRATIVE HEARINGS**
PUBLIC SCHOOLS	*	**OAH No: MSDE-AARU-OT-12-35466**

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DECISION

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STATEMENT OF THE CASE

On September 6, 2012, XXXX XXXX (Parent), on behalf of her son, [Student], filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of [Student] by the Anne Arundel County Public Schools (AACPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

A case resolution conference was held on September 19, 2012 but the case was not resolved. A Telephone Prehearing Conference was held on October 17, 2012. The Parent was represented by Margaret F. Holmes, Esquire, Legal Aid Bureau and the AACPS was represented by P. Tyson Bennett, Esquire.

Counsel for AACPS was scheduled to be out of state the week of November 5 through November 9, 2012. Counsel for the Parent was unavailable on November 20, 2012. November

6, 12, 21, 22 and 23, 2012 were state holidays. To allow for the five day disclosure, the hearing could not be scheduled before October 24, 2012. The parties agreed to the following dates:

Wednesday, October 31, 2012
Tuesday, November 13, 2012
Thursday, November 15, 2012
Monday, November 19, 2012

The hearing started two hours late on Wednesday, October 31, 2012 because AACPS opened late due to bad weather. The parties also waived the forty-five day deadline for issuing a decision and agreed that a decision would be issued no later than December 19, 2012.

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) (2010); 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 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

Does the December 2011 individualized educational program (IEP) at [School 1] ([School 1]) provide a free, appropriate, public, education (FAPE)?

Does the June 2012 IEP at [School 2] ([School 2]) provide FAPE?

SUMMARY OF THE EVIDENCE

A. Exhibits:

I admitted the following exhibits on behalf of AACPS:

1 National Institutes of Mental Health Information
2. Dispute Resolution Agreement and Meeting Reports
3. Consent and Behavior Plan
4. 5/24/12 IEP
5. 3/9/12 IEP

6. 12/12/11 IEP
7. Evaluations-Bilingual Assessment Reports
8. Language Dominance Documents
9. Report Cards
10. Discipline Reports
11. Psychological Report 12/10
12. Occupational Therapy Report 9/2/12
13. Home and Hospital Instructor report 10/27/11
14. Behavioral Intervention Protocol
15. IEP Team Meeting Report 6/7/12
16. Behavioral Intervention Plan 5/24/12
17. Conference Minutes 1/13/12
18. 6/7/12 IEP
19. Behavioral Point Sheet 1/31/12-5/31/12
20. Suspension Letter October 2012

The Parent relied on the AACPS exhibits and also submitted Exhibits 20a - 31.

20a Suspension Letter
21. Occupational Therapy Report of Observation
22. Interim Report Grade 4
23. Problem Solving Sheets
24. AACPS Website, Home/Hospital Teaching
25. Referral and Checklist for Home and Hospital Teaching
26. Proactive Strategy for Students with ADHD
27. Possible Functions of Behavior
28. Reinforcer Survey
29. Tally and Point Sheets 5/30/12 – 6/6/12
30. XXXX Company Top 10 Modifications for Kids with ADHD
31. Curriculum Vitae, XXXX XXXX

B. Testimony

The Parent testified and presented the following witnesses:

XXXX XXXX, Expert in Special Education
XXXX XXXX , General Education Teacher
XXXX XXXX, Special Education Teacher
XXXX XXXX , Aide
XXXX XXXX , Principal, [School 1]
XXXX XXXX, School Psychologist

AACPS presented the following witnesses:

XXXX XXXX, Aide
XXXX XXXX, Assistant Principal, [School 1]
XXXX XXXX, Elementary Behavior Specialist
XXXX XXXX, General Education Teacher

FINDINGS OF FACT

I find that the following facts were established by a preponderance of the evidence:

1. [Student] is a ten year old male, who currently attends the general education program at [School 1] in the fourth grade. [Student]'s family is originally from the XXXX.

2. During first and second grade, [Student] did not have an IEP or a Section 504 Plan. In second grade, [Student] was found eligible for Section 504 accommodations, but the Parent refused the accommodations. During second grade, [Student] was distracted in class, unable to follow directions and acted impulsively.

3. During the first semester of third grade, on October 14, 2011, the school psychologist for [School 1] referred [Student] for Home and Hospital Teaching, based on the conclusion that [Student] was unavailable for instruction in a school setting due to his behaviors.

4. The referral was based on maladaptive behaviors exhibited by [Student] on a daily basis. These included yelling, moving his chair, making noises, kicking the wall and walking around the classroom. These behaviors had increased from previous school years.

5. As of October 14, 2011, [Student] had received four major referrals, two out of school suspensions and one in school suspension for the current school year.

6. In October 2011 [Student] was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He exhibits attentional, hyperactive and impulsive behaviors.

7. Beginning on October 14, 2011, [Student] began receiving Home and Hospital services from a tutor because of interfering behaviors in the classroom that made instruction difficult.

8. Assessment of [Student]'s success in home teaching was made difficult by the Parent's interference with the tutor's attempts at instruction. [Student] exhibited the same

behaviors in home instruction as he did in school. Specifically, he did not pay attention or follow directions.

9. On December 13, 2011, [Student] returned to school on a half day basis.

10. In January 2012, [Student] returned to school on a full time basis.

11. In December 2011, the IEP team approved the first IEP for [Student]. It called for a Behavioral Intervention Plan (BIP), attending school at [School 1] in the general population, and receiving two hours of special education services per week.

12. The behaviors that were targeted by the BIP were "requisite learning" behaviors, i.e., paying attention, staying in place and following instructions.

13. The BIP called for the aide, Ms. XXXX, to accompany [Student] throughout the day. She kept a checklist and marked off each time [Student] exhibited one of the targeted behaviors. [Student] was given verbal warnings after each of the first two behaviors. After the third incident of the same behavior, he was sent to time out. Because of the layout of the building, the timeout was either in the hallway outside the classroom or in the conference room at the central office.

14. In implementing the BIP, the aide would not issue a warning unless the behavior interfered with the general class instruction.

15. The decision to have [Student] leave the class was always made by either the special education teacher or the general education teacher, not by Ms. XXXX.

16. After [Student] left the classroom, Ms. XXXX would set a timer to five minutes. However, the timer was not set until [Student] had started working on the assigned task. Consequently, the total amount of time he spent outside the classroom could total more than five minutes.

17. At one point during the spring 2012 semester, staff tried to "ignore" [Student]'s behavior to see if this would reduce its frequency. This effort only lasted several days and was not successful.

18. [Student] was not required to sit in his chair but could stand near it. However, he was not allowed to walk around the room. [Student] was allowed to use a "ball chair." This is a chair that has a ball instead of flat surface and allows the child to move without leaving the seat. [Student] used it as a toy and bounced on it.

19. During third grade [Student] attended a class on social skills designed to help him improve his behaviors.

20. At one point in the spring 2012 semester, the BIP was modified and [Student] was given a box with ten "value blocks" in it at the start of the day. If he had at least one block in it by the end of the day, he earned a reward. He was unable to earn any rewards and treated the blocks as toys by throwing them.

21. [Student]'s opportunity to earn rewards was set forth in the behavior protocol, and is adopted by reference from AACPS Ex. #14. He was not successful with this method of earning rewards.

22. The intervention methods of the BIP were used throughout the entire spring 2012 semester and had no effect on [Student]'s behavior. The targeted behaviors, as well as other inappropriate behaviors, continued into the 2012-2013 school year while [Student] is in fourth grade.

23. [Student] was found eligible for extended school year services, but was out of the country during the summer of 2012.

24. Following the approval of the December 2011 IEP, the special educator, Ms. XXXX, provided more than two hours of services per week due to [Student]'s behavior. She sometimes provided as many as eight hours per week.

25. In March 2012, the IEP team met again and decided that a new IEP was needed. It proposed that [Student] attend the special education program at [School 2], which is a general education elementary school that contains a special education program in one wing of the building. [Student] would receive thirty-one hours of special education services per week.

26. The Parent did not agree with the March IEP and filed a due process request. The appeal contained the following issue:

> We disagree with the school team's determination that requires a change in placement to the regional XXXX program at [School 2]. This is because we also disagree with the school team's determination that he requires extensive special education services
>
> We believe that his needs can be met in a comprehensive school and that he does not require a level of special education services that is only provided in a specialty site.

27. A case resolution conference was held on April 24, 2012. At the conclusion of the conference, the parties signed an agreement that read in part:

> Parent agrees to withdraw her due process hearing request with prejudice, currently pending with the Office of Administrative Hearings.

28. The agreement also called for another IEP Team meeting to be held at the end of the school year to finalize the IEP and allow the Parent to observe [Student] in the classroom. IEP meetings were held on May 24, 2012 and May 31, 2012 to finalize the IEP. Because of this delay, there were only two weeks left in the school year to review the data from the new IEP. It was agreed that [Student] would remain at [School 1] for the remainder of the 2011-2012 school year, but would start the 2012-2013 school year at [School 2].

29. Another IEP meeting was held on June 7, 2012. At that meeting the IEP Team again recommended the [School 2] program. Although the IEP Team had considered increasing the special education hours from two to eight, this was never approved by the IEP Team because of the belief that [Student] needed more intensive services.

30. On September 6, 2012, the Parent filed a new due process request, raising the same disagreement over the [School 2] IEP as the April 2012 due process request.

31 [Student] has not attended [School 2] and has attended [School 1] up to the present time.

32. [Student]'s fourth marking period grades from the third grade, the 2011-2012 school year, indicated that he needed improvement in the areas of following rules, showing respect for others, for learning and for property, and cooperating with others.

33 [Student] received final grades of C in reading, C in writing, C in understanding and applying concepts and computations, D in understanding and applying problem solving, C in science and B in social studies. His fourth quarter grades reflected modifications and accommodations.

34. [Student]'s interim grades for the first quarter of fourth grade, dated September 28, 2012, indicated that he had demonstrated difficulty in the areas of using reading strategies, comprehending a variety of texts, following rules and directions, treating others respectfully and staying on task.

35. On September 9, 2011, [Student] was referred for disciplinary action while in line after music class and loudly singing a song with the word "ass" in it.

36. On January 6, 2012, [Student] was referred for disciplinary action when he was disruptive during an assembly. He called out and was touching other students. After being told to sit next to his teacher he started kicking her and asking "does this hurt?"

37. On March 6, 2012, [Student] was referred for disciplinary action when he started coughing in Ms. XXXX's face in a threatening manner.

38. On May 1, 2012, [Student] was referred for disciplinary action. He was at a centers table with a peer. [Student] placed a scale used in math class on the floor after being told by a peer not to do it. [Student] then stepped on the scale.

39. In September and October 2012, [Student] was observed by an occupational therapist. He was seen viewing a pencil as a dart and aiming it another student. He also tried engaging other students in his group by talking loudly. He would put his feet on his chair and would make noises, including nonsense phrases.

40. On September 13, 2012, [Student] was given a "Problem Solving Worksheet" (worksheet) for not respecting himself, others or learning.

41. On September 19, 2012, [Student] was given a worksheet for not respecting himself, others or learning. He had been given three prompts before a time out.

42. On September 27, 2012, [Student] was given a worksheet for not respecting himself, others or learning. This was prompted by his fourth time out of the day.

43. On October 1, 2012, [Student] was given a worksheet for not respecting himself, others or learning. He had been given three warnings and two out-of-class time outs.

44. On October 5, 2012, [Student] was suspended for one day for disruption in the classroom and disrespect of others.

45. On October 9, 2012, [Student] was given a worksheet for not respecting himself, others or learning for calling during class.

46. On October 10, 2012, [Student] was given a worksheet for not respecting himself, others or learning for making noise in class.

47. Other than accurately describing what he did, [Student] does not obtain any benefit from the worksheets and is unable to devise any strategy for avoiding the behavior in the future.

48. On November 15, 2012, [Student] attended the hearing for one and one half hours. He returned to [School 1] at 11:00 a.m. and by 1:40 p.m. had one time out.

49. [Student]'s success in not calling out went from 57% in the January to May period to 27% at the current time. His success at following instructions went from 56% in the January to May period to 35% at the present time. For staying in the assigned area, he did improve 58% to 69%.

50. [Student]'s attentional, impulsive and hyperactive behaviors severely interfere with his ability to gain meaningful educational benefit in a general education classroom.

51. [Student] has great difficulty establishing appropriate relationships with peers.

52. [Student] perceives and uses physical objects in the classroom for purposes other than those for which they are intended.

53. On the Behavior Assessment for Children (BASC), the Parent and all [Student]'s teachers rated [Student] as "very elevated" for attention and hyperactivity.

54. On scales of the BASC involving aggression, conduct and peer relations, the Parent rated [Student] as being within normal limits while his teachers rated him as very elevated.

55. [School 2] is a special education program within a comprehensive elementary school. It provides a small teacher to student ratio with a special education teacher and an aide throughout the day.

56. At [School 2], [Student] would start in all special education classes and can transition to the general education population in lunch, recess and physical education when he is ready.

57. [School 2] has an onsite psychologist and social worker. [Student] would receive eight half-hour counseling sessions per month.

DISCUSSION

At the start of the hearing on October 31, 2012, AACPS made a Motion in Limine based on a settlement agreement that was signed by the Parent and AACPS on April 24, 2012. Unfortunately, this agreement was not made known or discussed at the prehearing conference on October 19, 2012 and had to be addressed at the start of the hearing on October 31, 2012, since it affected the scope of the issue for this hearing.

"An IEP is a snapshot, not a retrospective. In striving for "appropriateness", an IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Roland M. v. The Concord School Committee*, 910 F. 2d 983, 992 (1st Cir. 1990). Generally, one reviews what was and was not known at the time the IEP was proposed.

On April 10, 2012, the Parent requested a due process hearing following an IEP meeting in March. The exact issue raised in that appeal was as follows:

> We disagree with the school team's determination that requires a change in placement to the regional XXXX program at [School 2]. This is because we also disagree with the school team's determination that he requires extensive special education services.
>
> We believe that his needs can be met in a comprehensive school and that he does not require a level of special education services that is only provided in a specialty site.

A case resolution conference for that hearing request was held on April 24, 2012. At the conclusion of that conference, the parties signed an agreement which reads in part:

Parent agrees to withdraw her due process hearing request with prejudice, currently pending with the Office of Administrative Hearings.

On September 6, 2012, the Parent filed the present due process request. During the prehearing conference, the Parent agreed that the sole issue for this hearing was whether [Student] needed a more intensive program at [School 2] or whether he should stay in a general education setting at [School 1]. This was the same issue raised in the April 2012 hearing request.

However, the Parent withdrew the appeal in April 2012 "with prejudice." This means that the Parent cannot raise the same issue again. To hold otherwise would be the equivalent of saying that there can be no settlement agreements in special education, because a Parent can refile the same complaint at a later date, regardless of what was written in an agreement.

If the Parent was confused or unclear about the settlement agreement, she had three days to rescind the agreement. 34 C.F.R. § 300.510(e).

The Parent points out that education is a fluid process and that a parent does not permanently waive her right to contest a school system's decision. This points out the difficulty in determining what an exact "issue" is which is barred by a settlement agreement. Unlike other areas of the law which involve precise events occurring at exact places and times, IDEA allows for a myriad of issues which do not present themselves in such a precise way.

In this case, one cannot simply draw a line and ignore the evidence that existed prior to April 2012. While most of the evidence to be considered is the same, regardless of which due process request is considered, the implications of this withdrawal "with prejudice" have more to do with the way the evidence is evaluated and not with the admissibility of evidence.

The type of "snapshot" consideration of evidence cited in *Roland M.* was negated by the settlement agreement. However, a parent does reserve the right to challenge an IEP, in spite of a settlement, if she can show that there has been some change in the circumstances.

There are several ways that circumstances can change. First, the IEP as it existed after the settlement agreement may not be what the parties had agreed to in the resolution conference. This is not the case here. [School 2] is a comprehensive school with a special education program. It is the exact same IEP now as it was in April.

Next, the "proposed placement" agreed to is not the same when it loses its character as "proposed" and becomes the "actual placement." Once a student enters a new placement and starts performing in that setting, a parent is certainly not bound by a settlement agreement and can challenge the placement if she feels that it is not appropriate, based on the student's performance in that setting.

Unfortunately, [Student] has never attended [School 2]. He has remained in the general education program at [School 1]. Therefore, the [School 2] program remains a proposed placement and can only be evaluated today in the same manner it could have been evaluated in April.

Finally, the student's own situation may change. Students may have traumatic events which make a placement that was appropriate today, inappropriate in a matter of days. Testing may emerge after a settlement agreement that affects the IEP. In these situations, the general approach is to convene an IEP meeting and have the school personnel consider the new data and make a new decision. The Parent then appeals that IEP decision. If events lead a parent to conclude that the circumstances have changed, the Parent has a right to request a hearing.

In this case, there have been six months between the settlement agreement and the time of the hearing. There is at least one report in the record, an occupational therapy report from September 2012, which was not considered at any IEP meeting. [Student] has also entered the fourth grade and has new teachers, whose input could not have been considered in April.

Evidence which arises following the IEP meeting is certainly relevant in this case. Indeed, any review of a change in circumstances would not be the type of "hindsight" described in *Roland M.* The school system is certainly on notice as to what the issue is and actually agreed that the relevant time frame for evidence would be [Student]'s situation up to the day of the hearing.

Therefore, I granted AACPS's motion. The issue for this hearing is whether it is appropriate to change the June 2012 IEP in light of any change in circumstances since April 2012. Specifically, has [Student] demonstrated enough success at [School 1] to conclude that [School 2] is too restrictive? I further advised the parties that witnesses would be allowed to refer to events that occurred prior to April, since establishing a change in circumstances requires some understanding of the original circumstances. For the same reason, reports and evidence would not automatically be excluded simply because they predated the settlement agreement.

My decision would not be a review of the March or May IEPs. On the contrary, the issue is the proper IEP at the time of the hearing, taking into account whatever new evidence has emerged since April 2012.

Following this ruling, the hearing recessed for lunch and the Parent's counsel indicated that she would confer with her client. When the hearing resumed, the Parent elected to continue with the hearing. In opening statement, the Parent cited several areas in which she contends the evidence would show that [Student] is being successful in the general education setting and that [School 2] is too restrictive.

On the second day of the hearing, the Parent field a Motion to Compel the AACPS to allow her expert, Ms. XXXX, to observe [Student] in the classroom at [School 1]. This request was opposed by AACPS and was denied by me.[1]

[Student] has been at [School 1] since the start of the 2011-2012 school year and still attends [School 1], although the recommended IEP and placement is [School 2]. The Parent had ample opportunity during the last semester or even the start of the current school year to have an expert observe [Student]. The issue in terms of placement is the same today as it was in the spring. There is no excuse for waiting until the time of the hearing to have an expert observe [Student] at [School 1].

While a school system is required to allow a Parent or expert to observe the student as part of the IEP process, it is not required to assist the Parent in active litigation. An observation by an expert for purposes of a hearing is a form of discovery which is not allowed under IDEA. Ms. XXXX was scheduled to testify on the day the Motion was made. Allowing her to observe [Student] would have required postponement of the hearing and any report she wrote would not have been admitted under the five day rule. She did testify on November 13 and 15 and her total testimony took up the better part of one day. She was given more than ample time to observe either [School 1] or [School 2]. For these reasons the Motion was denied.

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 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.

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[1] The request also was for an independent evaluation, which was not part of the appeal and never raised at the prehearing conference.

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). The burden of proof in this case is on the Parent to establish the merits of her allegations, i.e., that the program at [School 1] is appropriate and that the program at [School 2] is too restrictive.

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.
>
> . . .

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).

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. More importantly, as illustrated in this case, one must look at the particular way a disability affects learning. The same disability may affect two children differently. One cannot assume that

academic measures, such as grades, are always indicative of FAPE, since a disability may affect a child in other ways, such as emotionally, socially and behaviorally.

[Student] is clearly a child with a disability. He has been diagnosed with ADHD and receives service as "other health impaired." He needs some level of special education services.

However, ADHD has three subtypes, predominantly hyperactive-impulsive, predominantly inattentive, and combined hyperactive-impulsive and inattentive. AACPS Ex. 1a. Based on the BASC, the Parent and teachers both recognize [Student]'s attentional problems. They see a child who has difficulty staying on task. However, he also shows symptoms of hyperactivity, i.e. fidgeting and squirming, dashing around, touching or playing with anything in sight, as well as symptoms of impulsivity, i.e. blurting out inappropriate comments, having difficulty waiting for things or waiting his turn. AACPS Ex. 1c.

In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(1). "An IEP that fails to address disability-related actions of violence and disruption in the classroom is not 'reasonably calculated to enable the child to receive educational benefit.' Nor does it address an important aspect of the student's disability." *Alex R. v. Forrestville Valley Community Unit School District # 221*, 375 F.3d 603, 613 (2004).

The Parent argues that AACPS is acting prematurely without letting the December 2011 IEP be implemented. The Parent believes that [Student] is being singled out, that his behavior is not severe and that he can be educated at [School 1]. While the teachers rated [Student] on the BASC as being "extremely at risk" in conduct and behavior scales, the Parent rated him as being "within normal limits" and claims that none of the behavior alleged at school occurs at home.

If one merely looks at the IEPs on paper, the Parent's position is certainly understandable. At first glance, one must question how a child, within a matter of months and with no precipitating crisis, would go from only needing two hours of services per week to needing a special education program with thirty-one hours of services. This opinion is based on simply looking at two IEPS from December 2011 and March 2012.

This was the opinion of Ms. XXXX XXXX, the Parent's expert witness. She was not involved in this case until just prior to the hearing. She was not a participant in any of the IEP meetings in the spring of 2012 and saw [Student] one time for an hour in a one on one session. She reviewed some of the records, but admitted that she did not have [Student]'s entire educational records. She was unable to observe [Student] in the classroom and is not familiar with the [School 2] program.

Ms. XXXX testified that in her professional experience, she has never seen a child with ADHD go from two hours of services in a general education setting to a special education program with thirty-one hours of services in such a short time. She stated that this was literally unheard of and that students with ADHD do not get to such an intensive program until after a period "years" in less intensive settings.

The law takes into account the value of inclusion and requires a student to be educated, to the extent appropriate, in the least restrictive environment (LRE). The Code of Federal Regulations further explains the least restrictive environment requirement in §§ 300.114, 115 and 116, which provide, in pertinent part, as follows:

§ 300.114 LRE requirements.

(a) General.

(1) [T]he State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§ 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

. . . .

§ 300.116 Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement--

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

§ 300.115 Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must--

(1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

The Fourth Circuit, in *DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989) followed the Sixth Circuit's mainstreaming standard, stating as follows:

The [IDEA]'s language obviously indicates a strong congressional preference for mainstreaming. Mainstreaming, however, is not appropriate for every handicapped child. As the Sixth Circuit Court of Appeals stated:

> The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate. In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

DeVries at 878-79, *quoting Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), *cert. denied*, 464 U.S. 864.

LRE does not require some type of trial and error in which a student, despite the judgment of educators, spends "years" in a setting that is inappropriate only to arrive at an appropriate setting which may be too late to be of any value. A continuum of placements not only allows, but requires a school to provide the appropriate placement along that continuum at any period of time, not based upon preconceived notions of what a "typical disabled child" looks like, but upon the needs of that child at that point in time. The "typical child with ADHD" does not exist in the real world.

After listening to the Parent testify, as well as the AACPS staff, it is clear that there is an entire reality pertaining to [Student]'s lack of success at [School 1] which one cannot appreciate

by simply looking at two IEPs. Further, the Parent has many misconceptions about [Student], the IEPs in question and the programs at [School 1] and [School 2].

With respect to the time frame involved, it is misleading to conclude that AACPS's efforts suddenly began in December 2011. AACPS recommended Section 504 services in the second grade. [Student] was evaluated and found eligible for accommodations, but the Parent rejected these, as she also rejected the extended school year services for the summer of 2012, which were not possible because [Student] was out of the country.

Ms. XXXX talked about the "typical child with ADHD." Not only does the typical child with ADHD not exist, but the "typical parent" of such a child is likewise an abstraction. She failed to account for decisions by parents, such as refusal of accommodations, extended school year services and medication, which might have lessened the effects of the disability at an earlier date, thereby reducing the need for more intensive intervention at a later date.

If accommodations that may have helped in the second grade were rejected, it should not come as a surprise that the third grade would yield the same or worse behavior.

Likewise, the end point for reviewing the AAPCS actions in this case is not March 2012. Based on the procedural posture of this case, its actions are being reviewed as of the time of this decision.

Ms. XXXX may not have been aware that the two hours of services indicated on the December 2011 IEP are misleading. Ms. XXXX testified that upon the implementation of the December 2011 IEP, it immediately became apparent that [Student] needed more services. She was never providing two hours of services but in her words "two or three times" that amount up to eight hours.

The IEP, BIP and the efforts of staff at [School 1] have extended for more than a few months but span seven months over two school years with a range of teachers and staff. The

school system's *attempts* at intervention have now extended for two years, from second to fourth grade, a period of time which Ms. XXXX considers appropriate.

When one looks at the actual time frame and efforts involved, and takes into account the Parent's actions, a move from a general education setting to a self-contained program at [School 2] is not nearly as drastic as depicted by Ms. XXXX.

In determining whether removal from the general program is required one must look at whether the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii).

Courts have always warned about relying on grades and passage from grade to grade as indicators of FAPE. What is "appropriate" depends on how the disability affects learning. In this case, the effect is primarily in the area of "requisite learning," that is, the areas of attention, staying in assigned area and following directions. These are the required behaviors that must be present to benefit from general instruction. [Student] only has one academic goal on his IEP. The most significant goals involve requisite learning.

Three of [Student]'s behaviors have been targeted for intervention: calling out, following instructions and staying in the assigned area. Before examining when these behaviors occur, it is helpful to consider when they do not occur.

The Parent claims that these behaviors do not occur at home. As Ms. XXXX, the Principal at [School 1], stated at an IEP meeting, there is no audience at home so the attention seeking behavior does not occur. When Ms. XXXX enters the classroom to observe, she said [Student] straightens up and behaves. The teacher then tells her what [Student] had done prior to her arrival.

Ms. XXXX saw [Student] one-on-one. She was in effect a captive audience and likewise did not observe these behaviors.

[Student] appeared before me at the hearing. He had obviously been given some explanation about the general nature of the hearing because he recognized my name. Upon entering the hearing room he immediately said he wanted to tell me something, i.e., he exhibited an impulsive behavior of speaking out of turn. I instructed him not to speak and he complied.

What these examples illustrate is that [Student] is capable of following instructions to some extent when they are from certain people in authority. He knows that the Parent, the Principal and the Judge are people who have control over where he goes to school. However, the nature, frequency and complexity of directions given in a classroom are vastly more than exist in these situations. A child who merely sits and watches still has ADHD and is probably not learning.

The next inquiry is what triggers the behavior. On this issue the evidence is overwhelming. In one word, the answer is "school." Each teacher who provided input for the BIP indicated that the triggering events were precisely those that occur throughout the day in a general education setting, i.e., direct instruction, following directions, staying on task and transitioning. Ms. XXXX, [Student]'s current teacher, said she observed this behavior during recess in the form of grabbing other children. Mr. XXXX, the fourth grade aide, said that only a few weeks prior to the hearing, [Student] had gone into the bathroom during morning announcements and was yelling "Abraham Lincoln" to the point of disrupting the rest of the class. When observed in the media center, [Student] likewise exhibited these behaviors. He also exhibits them during assemblies and while in line with other students.

Mr. XXXX, the teacher who attempted to instruct [Student] while he was at home in October 2011, saw [Student] get up while reading and eat at least 15 to 20 small chocolates in a three hour period as well as disregard his instructions.[2]

With respect to impulsive behaviors, by definition, one cannot predict them, because they are random and unpredictable. One can only do what Ms. XXXX described, that is, get a sense of when the child is getting "antsy" and then intervene. [Student]'s behavior often comes without warning in every general education setting.

If the behaviors only occurred at certain times of the day or certain classes, then it would certainly not be appropriate to remove a student from the general education setting to deal with a limited problem. However, [Student]'s behaviors occur at all times of the day with all teachers and in all subject areas.

The question then becomes whether these behaviors can be addressed within a general education setting. This requires a discussion of the BIP. The term "behavioral intervention plan" is not specifically mentioned in § 1414 of IDEA, but is clearly encompassed within the meaning of "positive behavioral interventions and supports, and other strategies."[3]

Stated simply, a BIP is a way of changing negative behavior into positive behavior though association of behaviors with positive rewards and negative reinforcements. The negative behavior of avoiding directions is hopefully replaced with the positive behavior of staying on task and successfully completing it with a reward. When this occurs over time and with enough frequency, the negative behavior is abandoned and the positive behavior emerges. Eventually, this positive behavior occurs without the need for reinforcement, because the

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[2] At the time, the Parent told Mr. XXXX that [Student] does not like candy, which leads one to question why a bowl of chocolates was sitting in the room.

[3] A BIP is mentioned in IDEA with respect to a disabled child being disciplined. 20 U.S.C. 1415(k)(1). However, this case does not involve a BIP under those circumstances.

individual has attained a sense of doing the task for its own sake, and sees the reward in the doing of the task itself, and not some enticement.

In *Honig v. Doe*, 484 U.S. 305, 325-26 (1988), the Supreme Court held that while a school district cannot unilaterally change the placement of a student it deems to be dangerous, it can use "its normal procedures for dealing with children who are endangering themselves or others," such as "timeouts, detention, or the restriction of privileges," or suspension.

One difficulty with behavior modification is that learning what is negative does not automatically lead to knowing what is positive. A child who has negatively learned that yelling out in class is "wrong," may not make the connection that what is "right" is raising one's hand. In his ADHD mind, the child can only resort to the realm of "whatever is not yelling," which may be nothing more than another negative behavior. So the child stands on his desk instead of yelling out. The rationale behind LRE is that a disabled child who has trouble distinguishing between the right and wrong way of acting will see the nondisabled peer and model his behavior on the nondisabled peer's positive behavior. The references in the record of interacting with nondisabled peers are when [Student] either inappropriately touches them or defies them, as he did when he broke a math scale.

The first task is helping the child accurately depict his behavior. "I accidentally bumped into the teacher" is not the same as "I deliberately kicked the teacher in the leg."[4] On this issue, [Student] clearly knows what he has done. When staff speaks with him, he does not deny what he did or attempt to depict it in a way other than what he really did. At the present time, [Student] is given "worksheets" on which he must describe what he did. He accurately depicts what he did, but does not come up with any strategy for not doing it in the future.

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[4] Ms. XXXX, the third grade teacher, testified that at one point during last year [Student] kicked her in the leg during an assembly.

The next step is changing the behavior. One approach is to ignore the bad behavior. If a child is seeking attention and educators give it to him, he will continue seeking attention. This type of "planned" ignoring was tried and had no effect on [Student].

Removing the negative behavior can only be done in conjunction with rewarding the positive behavior. Contrary to the Parent's assertion, the school in this case has utilized the proper approach and tried to foster the positive while reinforcing the negative. The school has a system of rewards by earning tickets that can then be cashed in for a prize. [Student] has never been able to succeed at this or other similar efforts.

Another approach is to provide the reward and then see if the child could learn the proper behaviors for keeping it throughout the day. [Student] was given a box with ten "value blocks" in it at the start of each day. He was given this for no other reason than he was in school. A block was taken away if he exhibited a negative behavior, but he was still able to earn a reward if he had only one block left at the end of the day. He had no success with this approach. Nor was he successful with the approach in the BIP, which included the opportunity to earn a morning and afternoon reward.

Other efforts include modifications which would help reduce the occurrence of the behavior from the start.

First, a student can be given the opportunity to self correct. Giving breaks, counting backwards or taking a deep breath give the student the opportunity to "think twice" before engaging in the wrong behavior. As Ms. XXXX stated, many students with ADHD often become inattentive but quickly return to the task when redirected. In her experience as a general educator, she has simply not seen a student like [Student] who is so resistant to these types of efforts.

Also, physical modifications are possible. A "ball chair" is a chair with a ball instead of a flat bottom. It is used for posture but can also be used for children such as [Student], who need to move about. This also proved ineffective.

Indeed, the physical objects in the class are often seen and used by [Student] for improper purposes. He destroyed a math scale. He took the value blocks from the behavior plan and threw them. The ball chair was used a as toy, not an aid as [Student] would bounce too high. In October 2012, the occupational therapist observed [Student] perceive a pencil as a missile and aim it at a student.

Contrary to the Parent's claim, the BIP was not started in May but was initiated in January. The individuals who administered the BIP were the general educator, the special educator and an aide. [Student] was to be given a verbal warning the first two times he exhibited one of the behaviors. On the third occasion of exhibiting the same behavior, he was removed from the class and spent five minutes in the hallway doing his work. Three time outs in one day merited a referral to the principal. Having listened to both Ms. XXXX and Mr. XXXX testify, I do not believe that either of these two was being overly harsh in implementing the BIP. They did not mark down a behavior until it interfered with the general instruction.

For some reason, the Parent vented her anger at Ms. XXXX. There was an ongoing tension between Ms. XXXX and the Parent relating to Ms. XXXX touching [Student]. At one point, the Parent made an abuse allegation against Ms. XXXX that was never substantiated. In May 2012, the Principal, Ms. XXXX, removed Ms. XXXX as the aide, not because she had done anything improper, but as a way of diffusing the tension that had built up over time.

Ms. XXXX's job was to carry a clipboard and track the times when [Student] exhibited the targeted behaviors. The decision to remove [Student] from class was never made by her but by the general or special educator.

The Parent claims that [Student] was kept out of class for more than five minutes. This is another example of the Parent's misunderstanding of the BIP. The five minute time out did not begin until [Student] left the class and started working on the assignment. At that point, Ms. XXXX would set the timer. Because of [Student]'s inability to focus, there would be numerous occasions when the total amount of time out of class exceeded five minutes.

Mr. XXXX was [Student]'s aide for the first five weeks of the current school year. He was told not to touch [Student] at the Parent's request so as to avoid the type of conflict Ms. XXXX encountered. He had no problem with the Parent and was able to perform his job with no difficulty. The results were the same as Ms. XXXX's.

His testimony was even clearer and more precise than Ms. XXXX's. He stated that [Student] would typically have two time outs by 10:00 a.m. and by the afternoon was in the principal's office. When asked to identify any positive behavior, he had no trouble remembering because "there were so few." He recounted one time when [Student] was able to work for a half an hour on a language arts assignment. He also stated that he would often spend forty-five minutes in the hallway with [Student]. [Student] attended the hearing on November 15 and returned to school at 11:00 a.m. By 1:40 p.m. he already had one time out.

The results of the BIP cover a substantial period of time and are unambiguous. [Student]'s success in not calling out went from 57% in the January to May period to 27% at the current time. His success at following instructions went from 56% in the January to May period to 35% at the present time. For staying in the assigned area, he did improve 58% to 69%. Not only did the BIP fail to maintain his level of behavior, but he substantially decreased in two of the targeted areas.

The behaviors observed and the intervention attempted include two general education teachers, a special education teacher, two aides, a principal and assistant principal as well as an

Elementary Behavior Specialist. [Student] has had both a male and female aide. Both positive and negative reinforcements have been used as well as modifications to the classroom setting.

Ms. XXXX testified that the BIP should be given more time and proposed changes to it. However, her changes, suggested in Ex. #26, are simply variations on what has already been tried. Nor does the Parent cite any substantive requirements of a BIP in IDEA. "Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions of the behavioral intervention plan contemplated by § 1415(k)(1) or 1414(d)(3)(B)(i). In short, the District's behavior intervention plan could not have fallen short of substantive criteria that do not exist." *Alex.,* at 615.

In order for the positive behavior to replace the negative ones, there must be some basis of positive behavior upon which to start. The changes suggested by Ms. XXXX make sense for a child who already has some consistent pattern of positive behaviors.

However, it is difficult to see how positive reinforcement alone can occur in a case where such behaviors are seldom seen and certainly with no regularity. There is no reason to conclude that giving [Student] a lollipop or an object to hold, or rearranging the chairs in class will have any more success than what has already been tried. Positive reinforcement on an infrequent and sporadic basis will not yield a change in behavior.

Had these modifications been provided in second grade, when [Student] exhibited more positive behaviors, there might have been some positive basis upon which to modify his behavior in a general education classroom. It was the Parent, not AACPS, that prevented these interventions.

At some point, educators must exercise professional judgment which involves predicting future behavior. One cannot simply wait indefinitely hoping for better results when the past data suggest otherwise. Optimism is not a plan.

It is clear that the December 2011 IEP is inappropriate and does not provide FAPE. Further, I believe that all parties involve realized this fact by April 2012.

If the trigger for the negative behaviors is the general education environment, then a change in environment is necessary. Such a change is critical at this time because [Student] is already half way through fourth grade and will soon be in middle school, where the requisite learning demands are greater and the tolerance for his behavior will be even less. The program at [School 2] provides this type of change.

While [Student] exhibited negative behaviors in a small group at [School 1], a small group in a special education setting is not the same. A special education teacher, unlike a general education teacher, is very familiar with each child's IEP. She knows each child and has strategies, other than putting the child out of the class, to help each child when the behaviors occur.

Small group activity in a general education class still consists of several small groups in a larger classroom setting. [Student] perceives people outside the group and is distracted by them as well as noise. At [School 2], there is only *one* group of five to seven children with no outside distractions.

One of the accommodations suggested by the Parent is rearranging the room. Eliminating fixed rows in a general education classroom may help an ADHD child, but may have other effects on nondisabled children. A small class at [School 2] does not have the restrictions in space that a general education class has. [Student] has more space to move and is not confined to sitting in a chair in a row.

The Parent's understanding of "crisis counseling," which is part of the [School 2] IEP, is also inaccurate. The word connotes a one time, sudden event requiring immediate intervention,

such as the death of a family member. The Parent correctly points out that no such event has occurred.

That meaning of the term is not relevant in this case. "Crisis" within the context of education involves a child who is unable to cope with the demands of a school setting and helplessly suffers the consequences.

While the general public might not view a fourth grader with behavior problems as a national crisis, it is a crisis for that particular child because it interferes with his ability to benefit from school. A child who is constantly being removed from the classroom, sitting in the hallway or conference room, being suspended, filling out worksheets, and having his behavior reported to his parents, can only be described as being in a state of crisis. The need for crisis counseling is not to deal with a one time event, but the daily situations in which [Student] finds himself.

The Parent described the children at [School 2] as "severely disturbed" and "mentally retarded." The Parent described one child as lying on the floor. Yet as recently as September 21, 2012, [Student] was observed by an occupational therapist engaging in similar behaviors such as getting out of his seat, taking a pencil, pretending it was a dart and aiming it at a student. As explained by Ms. XXXX, [School 2] is appropriate because it is a program for children with [Student]'s behavior profile. It is not a program based on cognitive ability and [Student] has the opportunity to transition back to the general education program at [School 2] if his behavior improves.

"Therapeutic" does not mean [Student] will engage in psychotherapy. ADHD is caused by physical problems in the brain, not Freudian conflict. A school psychologist is trained to understand and interpret ADHD in an educational setting. A guidance counselor in a comprehensive school is only trained to counsel children on general education issues and cannot

be available to one student on a daily basis. An onsite school psychologist and social worker provide the professional supports needed on a daily basis.

In terms of obtaining positive behavior, the missing element at this time is finding what [Student] considers a "reward" that will prompt him to change his behavior. It is clear that the rewards of a general education setting are trivial to [Student] and he does not see them as something worth changing his behavior for. A therapeutic environment may provide the environment to discover this missing element.

When the entire factual record is developed, I must agree with AACPS that despite its best efforts, an appropriate education for [Student] is not in a general education setting. This is not due to lack of effort or failure to use available resources at [School 1]. As Ms. XXXX explained, it is not helpful to look at the "severity of the disability." One looks at "how severely the disability impacts education." Whether [Student] has mild or severe ADHD is not a helpful inquiry. What is clear is that [Student]'s disability severely impacts his ability to learn in a general education setting and a more restrictive setting is needed.

Finally, the Parent points out the possible harm to [Student] at [School 2], which must be considered by an IEP Team in determining a placement. However, the Parent did little more than state the obvious when she pointed out that [Student] would initially not be with non-disabled peers at [School 2]. The IEP Team considered this but determined that the benefits of [School 2] outweigh any possible harm.

If there were any ties to school mates or a network of friends that [Student] has at [School 1], the Parent had ample opportunity to present this. I find an absence in the record of any close friends or groups that would be disrupted by [Student]'s leaving [School 1]. Nor is there any evidence that [Student] is modeling from non-disabled students. As early as the December 2011 IEP meeting, teachers were noting that [Student] had trouble establishing peer relationships.

In *Hartmann v. Loudon County Bd. of Educ.*, 118 F. 3d 996, 1001 (4th Cir. 1997) *cert. denied*, 522 U.S. 1046 (1998), the Fourth Circuit reconfirmed the mainstreaming standards, noting that the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. *Hartmann* mandates that school systems mainstream all disabled children unless the one of following situations exist:

> The disabled child cannot receive educational benefit from a general education class;
>
> Any marginal benefit from including a student in general education is significantly outweighed by benefits that feasibly could be obtained only in a separate instructional setting; or
>
> The disabled child is a disruptive force in the general education environment.

In this case, all three situations exist and removal from [School 1] is justified on all three grounds.

Behavior often speaks louder than the words of a ten year old. Attention seeking behavior from a ten year old occurs because he needs attention. Negative behavior that results in removal from the classroom is done for some reason. Ms. XXXX, who spent the most time with [Student] on a daily basis, stated that [Student] would sometimes say, "Just send me to the office." Given [Student]'s current state, going to the office is not sufficient. The [School 2] program is appropriate and does offer FAPE.

CONCLUSIONS OF LAW

I conclude as a matter of law that the program at [School 1] is not appropriate and does not provide FAPE; *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); and

I further conclude that the IEP at [School 2] is appropriate and does provide FAPE. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

ORDER

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

December 4, 2012
Date Order Mailed

James W. Power
Administrative Law Judge

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (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.