

XXXX XXXX,

STUDENT

v.

HARFORD COUNTY

PUBLIC SCHOOLS

*** BEFORE M. TERESA GARLAND,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MSDE-HARF-OT-16-19627**

*** * * * ***

DECISION

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ORDER

STATEMENT OF THE CASE

On June 27, 2016, XXXX XXXX and XXXX XXXX (Parents),¹ on behalf of their child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Harford County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on August 8, 2016.² The Parents represented themselves. Andrew Nussbaum, Esquire, represented HCPS. By agreement of the parties, the hearing was scheduled for September 7 and 12, 2016.

¹ Ms. XXXX assumed the lead role on behalf of the Parents in the hearing. Throughout this decision, for the sake of clarity, I shall refer to her as “the Parent” and refer to Mr. XXXX as “the Student’s father.”

² On the date and time of the prehearing conference, I called the Parents numerous times at the phone number noted in the OAH file. Each time, the call seemed to be forwarded to a location outside of the United States, as the ring tone changed to a European ring. When I was unable to reach the Parents, Mr. Nussbaum and I discussed hearing dates and chose hearing dates earlier than those ultimately agreed upon. Those dates were August 22 and 23, 2016.

I held the hearing on September 7 and 12, 2016 at the Harford County Board of Education, 102 S. Hickory Avenue, Bel Air, Maryland 21014. The Parents represented themselves. Andrew Nussbaum, Esquire, represented HCPS. At the hearing on both September 7 and September 12, 2016, the Parents were accompanied by a number of “supporters” as well as a reporter from the local newspaper, The Aegis, a publication of the Baltimore Sun Media Group. Prior to the hearing’s commencement on both dates, I advised the Parents on the record that their consent to the presence of non-parties to the Due Process Complaint at the hearing would result in the disclosure of otherwise confidential information regarding the Student’s personally identifiable data, information, and records collected and maintained by HCPS. The Parents acknowledged their understanding and agreed, both verbally and in writing, to allowing the Due Process hearing to be open to the public and to the reporter, who could possibly disseminate the Student’s otherwise confidential information well beyond the confines of the hearing room. A copy of the Parents’ written consent has been made a part of the record in this matter, as has a written “sign-in” sheet of all parties and non-parties present during each of the hearing days. 20 U.S.C. §1232g; 34 C.F.R. Part 99; COMAR 28.02.01.19.

The hearing dates requested by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2015). The Parties requested an extension of time until October 12, 2016 for me to issue a decision. 34 C.F.R. 300.515 (2015); Md. Code Ann., Educ. § 8-413(h) (2014). The OAH received the Notice of the Outcome of the Resolution Session on July 21, 2016. The decision in the matter was due to be issued forty-five

Shortly after the prehearing conference with Mr. Nussbaum, the Parents called the OAH and explained that they were in the United Kingdom and I had called an incorrect phone number. I resumed the prehearing conference thereafter with all parties present.

days from July 21, 2016, which was Friday, September 2, 2016. However, the Parents were not scheduled to return from the United Kingdom until sometime during the last week of August 2016, and Mr. Nussbaum was on vacation the last week of August 2016. The first available date to begin the hearing was beyond the forty-five day deadline.

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) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUE

The issue is whether the Student's present placement at [School 1] appropriately addresses the Student's needs as provided by his Individualized Education Program (IEP).

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Parents:

Parents Ex. 1 – Email from the Parent to XXXX XXXX – January 11, 2016

Parents Ex. 2 – Prior Written Notice – October 21, 2016

Parents Ex. 3 – Email from XXXX XXXX to the Parents – May 11, 2016

Parents Ex. 4 – Photographs – July 26, 2016

Parents Ex. 5 – Health Reports – July 24 and 26, 2016³

³ The July 24, 2016 Report was apparently dated in error. The date should be July 25, 2016, as July 24, 2016 was a Sunday.

- Parents Ex. 6 – Daily Communication Sheet – July 27, 2016
- Parents Ex. 7 – Email from the Parent to XXXX XXXX, Superintendent XXXX XXXX and members of the Harford County Board of Education – August 5, 2016⁴
- Parents Ex. 8 – Letter from XXXX XXXX to the Parents – August 16, 2016
- Parents Ex. 9 – Email from the Parent to XXXX XXXX – July 8, 2016
- Parents Ex. 10 – Email from the Parent to XXXX XXXX with response – July 10 and 11, 2016
- Parents Ex. 11 – Email from the Parent to XXXX XXXX and XXXX XXXX with response – July 13, 2016
- Parents Ex. 12 – Email from XXXX XXXX to the Parent – July 19, 2016⁵
- Parents Ex. 13 – Prior Written Notice – July 13, 2016
- Parents Ex. 14 – Classroom Observation Report of XXXX XXXX, MS, CCC-SLP – June 30, 2016
- Parents Ex. 15 – Speech-Language Pathology Assessment of XXXX XXXX, MS, CCC-SLP – July 9, 2016
- Parents Ex. 16 – Four charts – 2015 and 2016⁶
- Parents Ex. 17 – Informal Reading Inventory – Brief – July 11, 2016
- Parents Ex. 18 – Email string between the Parent and XXXX XXXX with attached Reading Level Correlation Chart – August 29-30, 2016⁷
- Parents Ex. 19 – Two-page chart – November 2015 and July 2016⁸
- Parents Ex. 20 – One-page, four column chart – July 2015 through July 2016⁹
- Parents Ex. 21 – Email string between the Parent and XXXX XXXX – July 18, 2016

⁴ This email also notes a date of August 8, 2016 in the upper right-hand corner.

⁵ There appears to have been a July 21, 2016 response to Mr. XXXX's email which was not included in the exhibit.

⁶ These documents appear to be a part of a larger document. During the hearing, there was no testimony related to the origin of the documents, nor was there any explanation as to their significance.

⁷ During the hearing, there was no testimony related to the origin of the documents, nor was there any explanation as to their significance.

⁸ See FN 6, above.

⁹ *Id.*

- Parents Ex. 22 – Two-page chart referencing three IEP meetings¹⁰
- Parents Ex. 23 – Email string between the Parent, XXXX XXXX and XXXX XXXX – March 8 and 14, 2016
- Parents Ex. 24 – Email string between the Parent and XXXX XXXX – October 6 and 8, 2015
- Parents Ex. 25 – Email string between the Parent and XXXX XXXX – October 6 through 12, 2015
- Parents Ex. 26 – Email from the Parent to XXXX XXXX – July 18, 2015; Email from XXXX XXXX, Esquire, to the Parent – July 20, 2015
- Parents Ex. 27 – Draft/Amended IEP – March 20, 2015¹¹
- Parents Ex. 28 – Amended IEP – March 20, 2015¹²
- Parents Ex. 29 – Letter “To Whom it May Concern” from XXXX XXXX, M.D. – July 14, 2015
- Parents Ex. 30 – Resume - XXXX XXXX, Psy.D.
- Parents Ex. 31 – Resume - XXXX XXXX, M.S., CCC-SLP
- Parents Ex. 32 – Resume - XXXX XXXX
- Parents Ex. 33 – Resume - XXXX XXXX
- Parents Ex. 34 – Conor B. McDonough, Ph.D., Note, *The Mainstreaming Requirement of the Individuals with Disabilities Education Act in the Context of Autism Spectrum Disorders*, 35 Fordham Urb. L.J., 1226 (2007)
- Parents Ex. 35 – Email string between XXXX XXXX and the Parent – June 7, 2016

I admitted the following exhibits on behalf of HCPS:

- HCPS Ex. 1 – Prior Written Notice – October 21, 2015
- HCPS Ex. 2 – Prior Written Notice – November 20, 2015
- HCPS Ex. 3 – Prior Written Notice – December 17, 2015

¹⁰ *Id.*

¹¹ This document, numbered through page sixty-three, is missing forty-six pages. It begins with page one, followed by pages forty-seven through sixty-three.

¹² This document, numbered through page sixty-five, contains only pages one and sixty-two.

HCPS Ex. 4 – Prior Written Notice – April 19, 2016

HCPS Ex. 5 – Prior Written Notice – July 13, 2016

HCPS Ex. 6 – Adaptive Physical Education Assessment – March 27, 2015

HCPS Ex. 7 – Screening Results – Vision and Screening – March 12, 2015

HCPS Ex. 8 – Psychological Report – December 23, 2014

HCPS Ex. 9 – Psychological Report – XXXX Institute – May 11, 2015

HCPS Ex. 10 – Psychological Report – July 7, 2015

HCPS Ex. 11 – Educational Assessment – December 5 and 19, 2014

HCPS Ex. 12 – Speech-Language Assessment – November 19, 2014

HCPS Ex. 13 – Review of Speech-Language Assessment – January 19, 2015 and February 3, 2015

HCPS Ex. 14 – Speech-Language Assessment – June, 2016

HCPS Ex. 15 – Review of Speech-Language Assessment – June, 2016

HCPS Ex. 16 – Occupational Therapy Evaluation – March 27, 2015

HCPS Ex. 17 – Review of Occupational Therapy Report – March 27, 2015

HCPS Ex. 18 – Report from XXXX XXXX, M.Ed. – April 21, 2015

HCPS Ex. 19 – [School 1] – Counseling – April, 2016

HCPS Ex. 20 – [School 1] – Speech-Language Therapy – April 18, 2016

HCPS Ex. 21 – [School 1] – Occupational Therapy – April 19, 2016

HCPS Ex. 22 – [School 1] – Informal Reading Inventory – July, 2016

HCPS Ex. 23 – [School 1] – Related Service Provider Records

HCPS Ex. 24 – IEP – March 20, 2015, amended July 15, 2015

HCPS Ex. 25 – IEP – October 21, 2015, amended April 19, 2016

HCPS Ex. 26 – IEP – October 21, 2015, amended July 13, 2016

HCPS Ex. 27 – Email – Parent to Dr. XXXX – November 23, 2015

HCPS Ex. 28 – Email – Parent to Dr. XXXX – December 14, 2015

HCPS Ex. 29 – Email – Parent to Dr. XXXX – January 14, 2016

HCPS Ex. 30 – Email – Parent to Mr. XXXX – April 14, 2016

HCPS Ex. 31 – Email – Parent to Mr. XXXX – April 20, 2016

HCPS Ex. 32 – Letter – [School 1] to Parents – August 16, 2016

HCPS Ex. 33 – Resume – XXXX XXXX, Ph.D.

HCPS Ex. 34 – Resume – XXXX XXXX

HCPS Ex. 35 – Resume – XXXX XXXX

HCPS Ex. 36 – Resume – XXXX XXXX

HCPS Ex. 37 – Resume – XXXX XXXX

HCPS Ex. 38 – Resume – XXXX XXXX

HCPS Ex. 39 – Resume – XXXX XXXX

HCPS Ex. 40 – Resume – XXXX XXXX, MS, OTR/L

HCPS Ex. 41 – Resume – XXXX XXXX, LCSW-C

HCPS Ex. 42 – Resume – XXXX XXXX

HCPS Ex. 43 – Resume – XXXX XXXX

Testimony

The Parents testified and presented the following witnesses:

- The Student
- XXXX XXXX, the Student’s brother
- XXXX XXXX, Ph.D., Director of Special Education, HCPS

- XXXX XXXX, HCPS Non-Public Schools Special Education Placement

Coordinator

- XXXX XXXX, Part-Time Physical Education Teacher, [School 1]
- XXXX XXXX, Ph.D., HCPS Special Educator, [School 2]
- XXXX XXXX, Principal, [School 2]
- XXXX XXXX, Coordinator, HCPS Pre-School and Elementary School

Education

- XXXX XXXX, Teacher Specialist, HCPS Non-Public Placement
- XXXX XXXX, HCPS Occupational Therapist
- XXXX XXXX, MS, CCC-SLP¹³, admitted as an expert in Speech-Language

Pathology

- XXXX XXXX, Psy.D., admitted as an expert in Clinical Psychology

HCPS presented the following witnesses:

- XXXX XXXX, Educational Director, [School 1], admitted as an expert in Special

Education

- XXXX XXXX, Special Educator, [School 1], admitted as an expert in Special

Education

- XXXX XXXX, Speech and Language Pathologist, [School 1], admitted as an expert in Speech and Language Pathology

- XXXX XXXX, LCSW-C, School Social Worker, [School 1], admitted as an expert in School Social Work

¹³ Masters of Science, Certificate of Clinical Competence - Speech Language Pathology.

- XXXX XXXX, Occupational Therapist, [School 1], admitted as an expert in Occupational Therapy
- XXXX XXXX, Non-Public Schools Special Education Placement Coordinator, HCPS
- XXXX XXXX, Ph.D., Director of Special Education, HCPS, admitted as an expert in Special Education
- XXXX XXXX, Teacher Specialist, HCPS Non-Public Placement

FINDINGS OF FACT

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

1. The Student is ten years old and currently in the fourth grade at [School 1], a non-public separate day school, where he was placed in January 2016.
2. The Student has been diagnosed with Autism and Attention Deficit Hyperactivity Disorder and receives special education services in the following areas: reading; phonics; reading fluency; reading comprehension; written language mechanics and expression; math problem solving; and math calculation.
3. The Student attended [School 3] ([SCHOOL 3]) from kindergarten until he finished the second grade in 2015.
4. In May 2015, the Student was assessed at the XXXX Institute, Center for Autism and Related Disorders (XXXX). The XXXX assessor recommended that the Student receive his special education services in a small, highly structured setting for youngsters with similar cognitive and language profiles that can accommodate children with autism spectrum disorders. (HCPS Ex. 9).

5. Prior to the Student's beginning the third grade, HCPS and the Parents determined that [SCHOOL 3] could not meet the Student's unique educational needs that result from his disability. The Student was transferred to [School 2] ([School 2]), where he attended classes for approximately two weeks before the Parents withdrew him.

6. The Parents requested and HCPS approved the Student for Home/Hospital instruction in his home from September 2015 through January 2016.¹⁴

7. Home/ Hospital Instruction is short-term instruction provided to public school students who are unable to access their educational program due to an emotional or physical condition.

8. On October 21, 2015, HCPS convened an IEP meeting with the Parents to review and revise the Student's IEP and determined that his IEP should be implemented in a private separate day school. The IEP team determined that three private separate day schools met the Student's needs: the XXXX School, [School 4] and [School 5]. The Parents requested that the [School 6] also be considered, but HCPS was not currently placing students at the [School 6] due to concerns with curriculum alignment and instruction. (HCPS Ex. 1.)

9. On November 20, 2015, HCPS convened an IEP meeting with the Parents to review and/or revise the Student's IEP and to receive an update on the Student's Home/Hospital instruction. At that meeting, it was determined that the Student would continue with Home/Hospital instruction through January 11, 2016. (HCPS Ex. 2.)

10. On December 17, 2015, HCPS convened an IEP meeting with the Parents to review and/or revise the Student's IEP goals and objectives and to share informal assessment

¹⁴ HCPS Ex.1 appears to indicate that there was a gap in time of perhaps several weeks between the Student leaving [School 2] and full implementation of Home /Hospital Instruction. *See also* Parents Ex. 25.

results. At the request of the Parents, [School 1] was added to the list of private separate day schools to be considered for the Student. (HCPS Ex. 3 and Ex. 28.)

11. On or about January 12, 2016, the Student began attending [School 1].

12. [School 1] serves thirty-five students comprised of multi-age, multi-grade groupings of six classes. It focuses on building communication skills for students between the ages of two and twelve years. Class sizes range from five to seven students. (T. XXXX.)

13. [School 1] has a Sensory Room, as well as a full-time Occupational Therapist and Speech and Language Pathologist. (T. XXXX.)

14. [School 1] is a program of XXXX Agency.

15. In early January 2016, the Student had a pre-admission visit to [School 1] to determine an appropriate social setting for him within a classroom. He was assessed and assigned to classroom 206 prior to his entering [School 1]. (T. XXXX.)

16. In a January 11, 2016 email to Ms. XXXX, the Student's Parent expressed concern over the Student's classroom assignment and requested that he be assigned to another classroom. Ms. XXXX complied with the Parent's request. (T. XXXX; Parents Ex. 1.)

17. The Student participates in a number of groups throughout the school week, including one concentrated on social skills. The students' interactions within the groups are facilitated by a social worker and/or a speech therapist. (T. XXXX.)

18. On April 19, 2016, HCPS convened an IEP meeting with the Parent to review and/or revise the Student's IEP goals and objectives. During the meeting, the IEP team approved an amendment to the Student's IEP, increasing services in the areas of speech/language, counseling (behavioral), and occupational therapy. The Student had made satisfactory progress at [School 1] in all assessed areas. The Parent expressed concern related to the social environment

at [School 1] and conveyed her desire for consideration of a different non-public placement once the Student reaches optimal levels in assessed areas, including social interaction. (HCPS Ex. 4 and Ex. 25.)

19. On July 13, 2016, HCPS convened an IEP meeting with the Parent to review and/or revise the Student's IEP and to discuss the Student's progress and the Parent's concerns. During the meeting, the Parent agreed that the Student was making academic progress at [School 1], but continued to express concern regarding the Student's social progress. (HCPS Ex. 5 and Ex. 26.)

20. On June 10, 23, and 24, 2016, XXXX XXXX, MS, CCC-SLP, Speech-Language Pathologist, conducted an assessment of the Student. She diagnosed the Student as having Autism, expressive language disorder, disorder of written expression, functional speech articulation disorder and apraxia.¹⁵ She summarized her findings by stating that "[the Student] has demonstrated excellent progress. Statistically significant gains were documented with standardized measures of receptive language, phonological awareness, language processing, feeding skills and speech sound production." (HCPS Ex. 14; Parents Ex. 15.)

21. Ms. XXXX observed the Student at [School 1] on June 10 and 14, 2016,¹⁶ and noted that the Student demonstrated the following strengths: following directions, classroom rule compliance, tolerance for others' differences, appropriate behavior during transitions, pleasant affect, and that he appeared to want to please, and worked hard on guided activities when given attentional/support strategies for learning. (HCPS Ex. 14; Parents Ex. 15.)

¹⁵ Childhood apraxia of speech (CAS) is an uncommon speech disorder in which a child has difficulty making accurate movements when speaking. <http://www.mayoclinic.org/diseases-conditions/childhood-apraxia-of-speech/home/ovc-20202056>

¹⁶ On one visit, Ms. XXXX observed the Student participating in field day activities for forty-five minutes, and during the other visit, she came at the end of math class and the first part of language arts class for thirty minutes. (T. XXXX.)

22. During her [School 1] observations, Ms. XXXX noted that the Student demonstrated the following needs: opportunities/encouragement for peer conversation and socialization with like peers, direct framing and reinforcement of the six pragmatic rules of discourse,¹⁷ preemptive cues/reminders for maintaining focus to task when others' behavior becomes distracting, encouragement to take on leadership or helping roles in the classroom, or during recreational/therapeutic/dining times, occupational support for written communication (manual and keyboard), multisensory approaches to learning, and continued small teacher: student ratio. (HCPS Ex.14; Parents Ex.15.)

23. On May 11, 2016, the Student was slapped by another student as he was walking down the hallway at [School 1]. (Parents Ex. 3.)

24. On July 25 and 26, 2016, the Student experienced two incidents when he was scratched by a [School 1] classmate during outside activities. On both occasions, he was treated at the nurse's office. The scratching incidents were by the same female student and neither was intentional. (Parents Ex. 5.)

25. On July 27, 2016, after the scratching incidents, the Student had a "urinary accident" and soiled himself. The Student otherwise had a "great" day. (Parents Ex. 6.)

26. The Student is making academic progress at [School 1].

27. The Student is making social progress and is not socially isolated at [School 1].

28. [School 1] is implementing the Student's IEP and is an appropriate educational placement in the least restrictive environment.

¹⁷ The six rules of discourse include: 1. take turns; 2. give the appropriate amount of information; 3. give true information; 4. give relevant information; 5. avoid ambiguity, and 6. be orderly. (HCPS Ex. 14; Parents Ex. 15.)

DISCUSSION

MOTION FOR RECUSAL

More than a week after the conclusion of the hearing, and the close of the evidence, I received a “Motion for Recusal” (Motion) via U.S. mail from the Parents. The Parents did not send the Motion to Mr. Nussbaum or properly file the Motion with the OAH.¹⁸ At my instruction, my assistant forwarded a copy of the Parents’ Motion to Mr. Nussbaum, who filed a Reply on September 23, 2016. In their Motion, the Parents contend that my having served two terms on the Harford County Board of Education Ethics Panel (Panel) and my “extracurricular activity and interactions within Bel Air and Harford County” has created an “appearance of impropriety and conflict of interest.” Further, the Parents argue that Mr. Nussbaum’s offer to retain possession of a large binder which contained the HCPS exhibits until the following hearing date, and my acceptance of his offer, was improper. They also aver that I was deferential to Mr. Nussbaum and his “verbal and non-verbal” interactions with me “seemed improper.”

The OAH’s regulations address the issue of recusal. COMAR 28.02.01.11C(1)(a) requires a judge to “withdraw from participation in any proceeding in which personal bias or other reasons render the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may reasonably be inferred from the facts.” Such “personal bias shall be presumed under circumstances set forth in the Code of Judicial Conduct for Administrative Law Judges of the Maryland Office of Administrative Hearings.” COMAR 28.02.01.11C(1)(b).

Under Rule 2.5.1 of the Code of Judicial Conduct for Administrative Law Judges, “an ALJ shall disqualify himself or herself in a proceeding in which the ALJ’s impartiality might reasonably be questioned, including . . . instances where: (a) the ALJ has a personal bias or

¹⁸ The Motion was filed with the OAH Clerks’ Office on or about September 26, 2016.

prejudice concerning the proceeding, or a party or a party's lawyer to the proceeding." The Maryland Court of Appeals has noted that this is an "objective" standard based on whether a "reasonable person" knowing and understanding all the relevant facts would recuse the judge. *Regan v. Bd. of Chiropractic Examiners*, 355 Md. 397, 411 (1999) (quoting *Boyd v. State*, 321 Md. 69, 86 (1990)). The Court of Appeals has also stated that there is a strong presumption of impartiality on the part of judges. *Id.* at 410-411. Further, the Court has declined to reverse the decision not to recuse unless it constitutes an abuse of discretion.

The issues the Parents have raised fail to demonstrate impropriety or partiality. I was a member of the Panel, a volunteer board which met approximately once per year and whose main focus was to review ethics disclosures of employees of HCPS.¹⁹ These ethics disclosures, of which there were relatively few, were mostly comprised of disclosures of possible conflicts of interest in circumstances where an employee's spouse or other immediate family member had a business relationship with HCPS. My term on the Panel ended more than eight years ago, in 2008. There is nothing about my service on the Panel which renders me unable to provide an impartial hearing or decision in this matter or which a reasonable person could perceive as giving the appearance of impropriety.

Further, the Parents have failed to show that either my previous employment as an Assistant State's Attorney for Harford County from 1989 through 2003, or my involvement in my community, requires my recusal in this matter. As aptly noted by Mr. Nussbaum in his Reply, District Court and Circuit Court judges often have substantial involvement in their communities, which does not require recusal and which does not result in partiality in hearing their cases. Moreover, the hearing in this case did not involve the Town of Bel Air or Harford

¹⁹ The Panel was comprised of non-teachers of various professions. The Panel on which I served had, among other professions, a retired lacrosse coach, a dermatologist, an accountant and me, a then-prosecutor.

County Government, as the Harford County Board of Education is an entity distinct from both.

With regard to the Parents' assertions of familiarity between Mr. Nussbaum and me, I had not met Mr. Nussbaum prior to September 7, 2016, and the only prior communication I had with him was during the August 8, 2016 telephone prehearing conference, in which the Parents participated. It is common for attorneys in a case to demonstrate deference and courtesy to the presiding judge, whether an ALJ, a Circuit or District Court judge, or a zoning or liquor board examiner. Mr. Nussbaum's offer to retain the HCPS exhibit binder until the following hearing date was nothing more than an extension of a courtesy, which I accepted.

The Parents raise a concern regarding the sign-in sheet onlookers and participants were required to sign on each of the hearing days. It is a common practice in special education hearings, as well as mediations, to collect the names of all persons present regardless of whether the hearing is "closed," or in this case, open to the public as a result of the Parents' waiver of the Student's confidentiality. The sign-in sheet, copied and distributed to the parties in the case, is retained by the school system much like an IEP sign-in sheet, and I have no concern that it will be used for any purpose other than retention of a complete record of attendance.

Finally, as pointed out in Mr. Nussbaum's Reply to the Parents' Motion, the remainder of the Parents' issues reflect upon their perception of a certain witness's testimony. Because their reflections either were, or should have been, raised prior to the close of the record, I shall not consider them.

For all of the above reasons, the Parents' Motion is denied.

Introduction

As framed by the Parents in their Due Process Complaint, during the prehearing conference, and immediately prior to the commencement of the hearing, this case is solely about

the suitability of the Student's present placement at [School 1], a non-public placement. Further, there was no dispute that the Student's IEP was reasonably calculated to provide a free appropriate public education (FAPE) and that the Student has made academic progress while at [School 1]. The Parents contend that HCPS has failed to provide the Student with the FAPE to which he is entitled because his present placement at [School 1] does not meet his social/emotional needs. The Parents point to specific incidents that they believe underscore the inability of [School 1] to meet the Student's needs and argue that the [School 1] placement is not the least restrictive environment for the Student because there are not enough "like peers" with whom he can socialize and from whom he can grow socially and emotionally. The Parents do not contest that the Student's IEP is reasonably calculated to provide educational benefit to him, or contend that there was any flaw in the IEP process. HCPS does not dispute that the Student's needs are intense, but takes the position that it has been responsive to the Parents' wishes and that the Parents' perception that the Student has inadequate social interaction with like peers at [School 1] has not been their observation.

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Accordingly, the Parents have the burden of proving that the Student's present placement at [School 1] is inappropriate and is not reasonably calculated to provide educational benefit to him, and that placement at another non-public school, specifically [School 7] ([School 7]), is appropriate.²⁰ The Parents maintain that [School 1] is overly restrictive, as the Student does not have access to verbal peers, which has isolated him socially and emotionally. A different non-public school, such as [School 7], is a

²⁰ It is important to note that while the Parents focused on [School 7] as a possible alternative private, separate day school placement, their Due Process complaint generally sought, as relief, the Student's placement in a private, separate day school other than [School 1].

less restrictive environment with a greater number of peers of the Student's level and would afford the Student the emotional and social growth he requires. The burden of proof on these issues is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2009).

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

Legal Framework

The identification, assessment and placement of students in special education is governed by the IDEA, 20 U.S.C.A. §§ 1400-1487 (2010); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2008); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412. Courts have defined the word "appropriate" to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student's IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4th Cir. 1991).

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

Implicit in the congressional purpose of providing access to a "free

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

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

Providing a student with access to specialized instruction and related services does not mean that a student is entitled to “the best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. at 176. Instead, a FAPE entitles a student to an IEP that is reasonably calculated to enable that student to receive educational benefit. Recently, the United States Court of Appeals for the Fourth Circuit declined to interpret IDEA to require “meaningful” benefit, rather than “some” benefit, reiterating that “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cty. School Bd.*, 804 F.3d 354, 360 (4th Cir. 2015).

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or receipt of passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational

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

In addition to the IDEA's requirement that a disabled child receive some educational benefit, the child must be placed in the "least restrictive environment" to achieve FAPE, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i); 300.117 (2014). Indeed, mainstreaming children with disabilities with nondisabled peers is generally preferred, if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cty Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing disabled children into regular school programs may not be appropriate for every disabled child and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. Nonetheless, the issue is not whether another school is better or even as appropriate as the school offered by the school district but whether the school district has offered a FAPE.

With regard to the appropriateness of the Student's program, in order to prevail, the Parents must prove that the placement determined by the public agency will amount to a denial of a FAPE and that the identified, alternative private school is an appropriate placement. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). In *Carter*, the Supreme Court

upheld a lower court’s decision to order reimbursement to the parents for private tuition, after the court’s determination that the IEP was inappropriate and that the private school selected by the parents would offer the child an appropriate education. Specifically, the Supreme Court concluded that parents are “entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.” *Carter*, 510 U.S. at 15 (emphasis added). Here, although HCPS has determined that the Student’s needs would be met through private school placement, the Parents must show that the private school selected by HCPS is not appropriate to meet the Student’s needs that result from his disability and that prevent him from progressing in the general curriculum.

The [School 1] is an Appropriate Placement

The Parents maintain that [School 1] is not the least restrictive environment for the Student and argue that the Student lacks social engagement, as his [School 1] peers are not cognitively or linguistically on the Student’s level, and the Student is not progressing socially in the [School 1] environment. The Parents’ own witnesses belie their position that [School 1] is an inappropriate placement.²¹

XXXX XXXX, Non-Public Placement Coordinator and IEP Chair, HCPS, opined that [School 1] is an appropriate placement because the Student has peers who can provide positive role modeling. Ms. XXXX has observed the Student at each of his educational placements: [SCHOOL 3], [School 2], [School 6]²² and [School 1], and concluded that the Student is “not an

²¹ I have declined to summarize the testimony of six of the Parents’ witnesses in the body of this decision, as their testimony was either not relevant to the core issue to be decided or it was peripheral in nature. Those witnesses are: the Student; XXXX XXXX, the Student’s older brother; Dr. XXXX XXXX, the Student’s Home/Hospital teacher/special education teacher at [School 2]; XXXX XXXX, [SCHOOL 3] Occupational Therapist, who has not seen the Student since 2011; XXXX XXXX, Principal, [School 2]; and XXXX XXXX, who observed the Student on one occasion in April 2015 at [SCHOOL 3] in a crowded auditorium.

²² The Student attended [School 6] during a summer session in 2015. (Parents Ex. 31.)

interactive kid.” She further stated that [School 1] has a “sensory room”²³ and a full-time Occupational Therapist and Speech and Language Pathologist, which the Parents’ preferred alternative private day school, [School 7], does not. Further, [School 7] is not certified by MSDE. The Student’s placement at [School 1] came after the Parents rejected three private placement alternatives offered by HCPS and requested that he be placed at [School 1]. The HCPS evaluated [School 1] and found that it was appropriate to meet the Student’s social skills, academic, and sensory needs. Ms. XXXX emphasized that, as the Placement Coordinator, she needs to know that when a student is placed in a private setting or within the public school system, all supports are in place for that student.

Ms. XXXX observed the Student in a school setting a week before the hearing. He was in math class and she saw him interacting somewhat with his peers. Ms. XXXX also observed the teacher prompting and redirecting the Student. Ms. XXXX said that the peers she observed on the day she was at [School 1] do not align with what the Student’s mother says that she observed.

Ms. XXXX investigated [School 7] and determined that it is not an appropriate placement for the Student. [School 7] is not certified by MSDE and the staff is not certified by MSDE. She testified that there are components of the Student’s IEP which [School 7] cannot implement. For example, [School 7] has no sensory room, and no full-time Occupational Therapist or Speech and Language Specialists. However, there is a sensory room at [School 1] and also a full-time Occupational Therapist and Speech and Language Pathologist. Ms. XXXX concluded that [School 1] is successfully implementing the Student’s IEP.

Dr. XXXX XXXX, Director of Special Education, HCPS, supported Ms. XXXX’s

²³ “Sensory Room” is an umbrella term used to categorize a broad variety of therapeutic spaces specifically designed and utilized to promote self-organization and positive change. <http://www.ot-innovations.com/clinical-practice/sensory-modulation/sensory-rooms-in-mental-health-3/>

opinions and offered that she has observed the Student at [School 1] and described the culture and climate as quiet and the staff-to-student ratio as high. All components of the Student's needs are addressed, with social group supports and counseling services available. She testified, in response to the Parent's questioning, that there have been multiple IEPs and numerous revisions to those documents. IEP meetings were held on October 21, November 20, and December 17, 2015, as well as on April 19, 2016. During those meetings, the IEP was reviewed and revised as appropriate.

Dr. XXXX testified that once the Student was at [School 1], no behaviors were observed which would interfere with his progress. She concurred with Ms. XXXX's concerns regarding the implementation of the Student's IEP with "fidelity" at [School 7], as [School 7] lacks necessary components, such as a Speech Therapist and a Counselor. While [School 7] is a less costly placement, the IEP drives the placement decision. [School 1] is implementing the Student's IEP and, at this time, [School 7] cannot.

XXXX XXXX, a part-time physical education teacher at [School 1], testified that the Student appears comfortable and is improving every time Mr. XXXX sees him. He said that the Student has assumed a leadership role in his class and is eager to demonstrate his skills. The Student's confidence has increased and, according to Mr. XXXX, the Student has good interaction and is "right in the middle doing the activity."

XXXX XXXX is a teacher specialist in non-public placement at HCPS. He testified that he had made two attempts to meet with the Student; on one occasion, the Student was ill, and on another the Student was on a field trip. Mr. XXXX was able to observe the Student on the playground in May 2016, and the Student appeared to be socially engaged. Mr. XXXX had a more formal meeting with the Student in early September 2016. At that time the Student was

engaged, and Mr. XXXX observed him interacting with another student and assisting that student with a glossary. The other student thanked the Student and the Student gave a sign of “thumbs-up.”

XXXX XXXX holds a Master of Science and a Certificate of Clinical Competence - Speech Language Pathology. She was accepted as an expert in the field of Speech Language Pathology without objection.

Ms. XXXX testified that she has known the Student for about twenty months and sees him professionally sometimes two to three times per week, and sometimes as little as every other month. She said that the Student needs structure and routine more than a typically developing student. She observed the Student at [School 1] on two separate occasions, June 10, 2016, for forty-five minutes during Field Day activities, and on June 14, 2016, for one half hour while the Student was in a classroom setting. She said that her role was to see if the Student’s current classroom setting was appropriate for his needs. She recounted her observations and said that she did not observe the Student mingling with other students and he seemed to be bewildered by the action of other students when they had verbal outbursts and were disconnected from the core activity. It took time to bring the other students back to the core activity, which took time away from the Student’s academic time. Ms. XXXX opined that the least restrictive environment for the Student would be a classroom of pseudo-typical students, without disruptive students, where the Student could apply his newly-learned pragmatic social skills. Pseudo-typical students would have near normal behavior, and the classroom would be more homogeneous. She opined that the Student would be best served when not met with the additional challenges of the behaviors of non-typical peers. He needs more opportunity to learn new skills without these interruptions. She continued by testifying that social pragmatics govern everything. They guide social and business

relationships and affect all areas of life. Without social pragmatic skills, children who struggle have relationship, educational and emotional issues. The least restrictive environment for the Student would be an environment with cognitively-like peers.

Dr. XXXX XXXX was accepted as an expert in psychology. He has met with the Student seven times over the past five years. He testified that he observed the Student for approximately two hours on September 9, 2016. The class he observed was reading and phonics, and was broken down into two groups of students: one group of three students and the other group of two. Dr. XXXX described several of the students as having Down's syndrome and/ or cerebral palsy. However, Dr. XXXX did not further inquire as to their diagnosis. The student with whom the Student was paired in class appeared to be on the autism spectrum, with low average cognitive functioning, according to Dr. XXXX. Dr. XXXX did not inquire as to this student's medical diagnosis. He noted that the Student appeared to be the youngest in the class, with ages ranging from ten to twelve years of age. The student paired with the Student was significantly taller than the Student. Dr. XXXX noted that, from his observation, there was only one student in the Student's class with whom he could communicate. However, there were conversation opportunities for the Student although, in Dr. XXXX's opinion, there was only one other child in the class who could promote social interaction. Dr. XXXX's observation of the classroom was that it was heavy in auditory teaching, but when the teacher went to the dry erase board, the Student perked up and began paying attention. The Student's strengths are visual spatial and fluid reasoning. It was Dr. XXXX's opinion that the Student requires visual learning followed by verbal teaching. He opined that [School 1] lacked the technology the student needed. Further, he stated that [School 1] has students who are of a lower ability than the Student. While it would be best to have the Student in a general education setting, it would not be appropriate. The second

best option would be to place the Student in a homogeneous class with peers more closely aligned with the Student's abilities. At [School 1], Dr. XXXX stated, the children are of a lower ability, which is the worst option for the Student. The greatest challenge for the Student is in the social realm and having other students role-modeling him. Dr. XXXX opined that the Student needs exposure to kids with a broader range of interests and on the same or a higher level. Dr. XXXX conveyed that the benefits of a homogeneous setting were overall fewer behavioral concerns, a higher level of technology and assisted technology, and the Student would participate in social skills groups one time per week. However, Dr. XXXX was not familiar with the Student's most recent IEP, was unaware whether the Student was involved in social skills groups at [School 1], and did not inquire as to what technology [School 1] had. He also noted that there are opportunities after school for the Student to engage with like peers. The Student engages with his brother and his brother's friends, and he is involved in XXXX.

The Student's father was offered as an expert in special education by the Parent. The Student's father holds a Master of Science degree in Special Education-Habilitative Science from [University 1], which he was awarded in 1979, and a Master of Arts degree in Experimental Psychology from [University 2], which he earned in 1984. The Student's father was employed at the XXXX, National Institutes of Health, from 1980 through 2014, where he conducted research on memory and aging and treatments for Alzheimer's disease. I declined to accept the Student's father as an expert witness. The remoteness of his special education degree, coupled with his dearth of practical and legitimate experience in the field of special education aside from that with the Student, simply does not elevate him to the status of an expert witness in this field. I accepted him as a witness familiar with the Student and accepted his testimony in his capacity as the Student's father.

The Student's father asserted that the Student has been more withdrawn since entering [School 1]. He was an eager learner while in Home/Hospital teaching. The Student's father testified that [School 7] is a more appropriate placement. He said autistic children have difficulty relating. The Student is in XXXX and interacts well with five or six other children, but when more children are added to the group, the Student's level of anxiety increases. The Student is most comfortable around family. The Student is also involved with XXXX and he enjoys riding on the school bus.

The Student's father expressed concern over two incidents that occurred while the Student was attending [School 1]. Both occurred with the same little girl. The first incident happened on the playground, when the little girl went to hug the students and her nails dug into the Student's neck. The Student was injured and required a trip to the nurse. The second incident also happened on the playground, when a teacher was attempting to extricate the hands of the same little girl from the hair of another little girl. The Student walked in very close proximity to the little girl who had previously scratched him and he was again scratched. The Student's father testified that as a result of the two scratching incidents, the Student's anxiety level increased and he had a urinary accident while in school. After the urinary accident, according to the Student's father, the Student did not want to return to school. The Student's father characterized the scratching incident as aggression. In addition to the scratching incidents, which occurred in July 2016, another student randomly slapped the Student in the face while he was walking down the hall.

The Student's father conveyed that at [School 7], there are typically no emotional outbursts from students. Further, social pragmatics is embedded into [School 7]'s curriculum. The students at [School 7] have a higher average intelligence and are more similar to the

Student's functional intelligence. He opined that [School 7] was more like a "normative environment."

On cross-examination, the Student's father agreed that [School 7] also has students with behavioral problems, likely including aggression.

The Parent testified and described the "growth spurt" the Student had during the time he was on Home/Hospital instruction. She said that she understands that the school system has no obligation to maximize the Student's potential; however, she and the Student's father endeavor to enrich the Student's world. The Parent explained that the Student's self-expression deficiencies have been misinterpreted as low intellectual capacity, but that is not the case. She conveyed that it would be "tragic" to keep the Student at [School 1], as the kids there "are pretty impaired." She offered that the Student needs more of a challenge, stating, "There is a certain dignity to risk." While [School 7] has "quirky kids," the lessons in social skills are reinforced throughout the day.

XXXX XXXX, Education Director of [School 1], which is a program of XXXX Agency, described [School 1] as a private, small, non-public special education school serving children ages two through twelve with special communication needs. The focus of the school is building communication skills. Class sizes range from five to seven students. [School 1] has speech language pathologists, audiologists, and social workers, all of whom are full-time. She stated that she sees the Student on a daily basis. In January 2016, the Student was at [School 1] for a pre-admission visit. After this visit, Ms. XXXX placed the Student in what she believed was an appropriate social group, XXXX. The Parents objected to having the Student in XXXX and requested that he be changed to another classroom. Between January 2016 and June 2016, the Student made good academic progress.

Ms. XXXX stated that the Student's social progress was more of a challenge. The Student is in social skills group, which is facilitated by a social worker and speech therapist. He also participates in a number of other groups throughout the week. In her testimony, Ms. XXXX addressed the two incidents where the Student was scratched by another student. She also addressed the July 27, 2016 urinary accident. She sufficiently explained the urinary accident and described that the Student went from activity to activity that morning and when he realized that he had not used the bathroom when he needed to, it was too late. She did not indicate that the urinary accident was at all related to the Student having been scratched the previous two days. Ms. XXXX conveyed that it is not easy for the Student to initiate social interactions; however, he functions as a leader in gym class. The Student is currently in a class comprised of five students, with one teacher and two aides. The Student is one of several good role models and he has been academically and socially appropriate. In his present classroom setting, which began July 1, 2016, he has an increased opportunity to be a social leader. Finally, Ms. XXXX offered that she has, on more than one occasion, laterally placed a student [in another private school] when she believed that [School 1] was not the appropriate educational environment. She concluded by opining that [School 1] is an appropriate educational environment for the Student.

XXXX XXXX is a special education teacher at [School 1] and was accepted as an expert in special education. She said that the Student is academically between the second and third grade-level. The composition of the Student's class includes some students who have a higher social level than the Student and some who have a lower level and need more support. The Student has no nonverbal classmates and has opportunities to interact throughout the day. Ms. XXXX has observed the Student interacting with others, especially at lunch time and when he comes in the building in the morning, and she has facilitated conversations with the Student

during group activities. Socially, the Student accepts peers who are different from him and he initiates conversations. He prefers not to sit next to a student he does not particularly care for. Within the Student's classroom composition, the abilities range from kindergarten through fourth grade. The Student has one classmate whose abilities are above the Student's. Ms. XXXX offered that the Student is doing well and does not "seem miserable or desperate to get out." She also stated that the Student is progressing academically in all areas of his IEP and has reached 80 to 90 percent of the goals. Ms. XXXX addressed the two scratching incidents that involved the same female student, in which the Student was injured. According to the witness, both incidents appeared to be accidents and unintentional. She observed no anxiety in the Student after the incidents. In fact, the Student wanted to sit next to the girl who had scratched him earlier. The witness added that the Student still engages with the girl who scratched him, and she has not observed any anxiety in the Student when the two are together. With regard to the urinary accident, Ms. XXXX testified that the Student is vocal when he needs to use the bathroom. On the day of the accident, the Student did not take a bathroom break in the morning, when he usually asks for a break two to three times per morning. She further added that [School 1] employs technology, including computers, ipads, chrome books, whiteboards and Promethium boards. This last statement was in apparent response to Dr. XXXX's assertion that [School 1] lacks the technology the Student needs to be successful.

XXXX XXXX, Speech and Language Pathologist at [School 1], was accepted as an expert in her field. She testified that she sees the Student individually to work on his skills with pragmatic language, formulating appropriate responses during a conversation. She has had a relationship with the Student since the end of June 2016, and described him as "doing well." She has had conversations with the Student about pets, the zoo, "fun days" and games. Ms. XXXX

has attended a few of the boys' groups, which are facilitated by a social worker, a psychologist and an occupational therapist. The groups give the students the opportunity to practice pragmatic skills. In addition to the boys' group, where the Student practices pragmatic language and social skills, the Student can practice social skills at lunch, during social skills groups and at recess. The Student attends social skills group four times per week. Ms. XXXX related that she has made adjustments to the Student's speech and language therapy schedule. She has increased the frequency of his therapy sessions, but his actual time in sessions has been reduced by seven minutes per week. (HCPS Ex. 20.) Ms. XXXX has seen improvement in the Student's expressive language and concluded that [School 1] is an appropriate educational setting for the Student. She also opined, when asked by the Parent, that [School 1] is the least restrictive environment for the Student.

XXXX XXXX is a social worker at [School 1] and was accepted as an expert in school social work. She testified that she sees the Student in counseling one time per week. The Student also participates in the boys' group and has a social skills grouping for recess and lunch. Ms. XXXX offered that most of the other students in the Student's group are more readily verbal than he. The Student needs prompting to speak up, but he is making progress. He has four student role models in the social skills group and one in his classroom. She described the Student as "socially reluctant" and he needs to be encouraged to initiate conversation. While the Student is socially reluctant, he is not socially isolated. During his initial entrance to [School 1], when the Student had something to say that he thought people would not want to hear, he would cry. Currently, he will offer an answer that may be uncomfortable for him to say or others to hear. Ms. XXXX said with regard to the scratching incident, the Student has not shown any anxiety toward the student who scratched him. In fact, he sits near her at lunch and on the swings. In April 2016, Ms.

XXXX recommended that the Student's weekly counseling be increased from thirty minutes per week to sixty minutes per week. (HCPS Ex. 19.) She concluded that [School 1] is an appropriate educational placement for the Student.

XXXX XXXX, an occupational therapist at [School 1], was accepted as an expert in occupational therapy. He has been working with the Student since February 2016 on handwriting and keyboarding. Mr. XXXX works with the Student one time per week for thirty minutes. This frequency was increased from three, thirty minute sessions per month at Mr. XXXX's request in April 2016. (HCPS Ex. 21.) Mr. XXXX testified that the Student's handwriting is "pretty strong," but he has some endurance concerns. He summarized that the Student has been making "good and steady" progress. In fact, on cross-examination, Mr. XXXX offered that he would re-draft the Student's IEP Goals and Objectives with regard to handwriting because it has improved dramatically. Mr. XXXX testified that his goal with the Student regarding keyboarding is "keyboarding without tears." The Student has daily keyboarding practice at [School 1], but he needs no special program to practice outside of the school setting.

The Parents do not dispute that the Student has made academic progress while at [School 1], despite their assertions that the Student requires an academic placement with students who function at an intellectually higher level. The core issue to decide is the Student's emotional and social progress. Nearly every witness presented by both the Parents and HCPS attested to the Student's progress in this area. The only two witnesses who challenged the Student's placement at [School 1] were Dr. XXXX and Ms. XXXX. While I respect both of these professionals and their assessments of the Student, neither has impressed me as having the requisite, working knowledge of what services are being provided by [School 1] to the Student on a daily and weekly basis to address his social pragmatic skills to offer an expert opinion that [School 1] is

not an appropriate educational placement for the Student. Each conducted observations of the Student in a school setting. Ms. XXXX's total observation time for two visits to [School 1] was one hour and fifteen minutes. Dr. XXXX's total observation time was approximately two hours. There was no evidence that either witness was aware that pragmatic skills were embedded in the Student's school day, that he participated in numerous groups throughout the week, or that [School 1] had access to and used "modern technology" throughout the school. I simply cannot conclude, based upon my full review of all of the evidence and testimony presented in this case, that HCPS has not provided the Student with a FAPE.

I am sympathetic to the Parents' desire to do what they believe is in the best interest of their son and I am also sympathetic to the concerns they raised about the Student's social and emotional growth. Nonetheless, on the record before me, I am unpersuaded that the Student was denied a FAPE by HCPS. As aptly described by the Fourth Circuit in *A.B. v. Lawson*,

IDEA's FAPE standards are far more modest than to require that a child excel or thrive. The requirement is satisfied when the state provides the disabled child with "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Rowley*, 458 U.S. at 203; *accord MM*, 303 F.3d at 526-27; *Hartmann*, 118 F.3d at 1001.

A.B., 354 F.3d at 330. Here, HCPS offered a FAPE to the Student in the LRE by implementing his agreed-upon IEP in a private day school setting such that the Student would benefit educationally. Indeed, all of the parties agree that the IEP was reasonably calculated to confer some educational benefit. *Id.* at 330-31.

As I have already found that the HCPS placement was reasonably calculated to provide the Student with a FAPE, I need not address the issue of whether a different private placement is appropriate. Accordingly, I find that HCPS provided the Student with a FAPE in the LRE for the relevant portions of the 2016 school year, and placement at the [School 7] or any other

alternative private placement is not appropriate in this case.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the IEP and placement by HCPS for the 2016-2017 school year was reasonably calculated to offer, and provided, the Student a FAPE in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i); 300.117 (2014). *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

ORDER

I **ORDER** that the June 27, 2016 Due Process Complaint filed by the Parents on behalf of the Student is hereby **DISMISSED**.

October 5, 2016
Date Decision Issued

M. Teresa Garland
Administrative Law Judge

MTG/sw

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2014). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings case name and number, the date of the decision, and the county circuit or federal district court case name and docket number.

The Office of Administrative Hearings is not a party to any review process.