

HARFORD COUNTY PUBLIC

*** BEFORE ROBERT B. LEVIN,**

SCHOOLS

*** AN ADMINISTRATIVE LAW JUDGE**

v.

*** OF THE MARYLAND OFFICE**

XXXX XXXX,

*** OF ADMINISTRATIVE HEARINGS**

STUDENT

*** OAH Case No.: MSDE-HARF-OT-17-06912**

*** * * * ***

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
ORDER

STATEMENT OF THE CASE

On March 8, 2017, the Harford County Public Schools (HCPS) filed a Due Process Complaint with the Office of Administrative Hearings (OAH) seeking to obtain the following assessments of XXXX XXXX, Jr. (Student): Academic Performance-Reading; Academic Performance-Mathematics; Academic Performance-Written Language; Intellectual/Cognitive Functioning; Emotional/Social/Behavior Development and Functional Behavior, without parental consent, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. sections 1400 et seq. (2010 & Supp. 2016).¹ The Student’s parents, Mr. and Mrs. XXXX XXXX, Sr. (collectively, Parents), refuse to consent to the assessments.

¹ All references to the IDEA are to the 2010 replacement volume and 2016 supplement.

Federal and Maryland law require a school system to obtain parental consent prior to conducting any assessments of a child with a suspected disability² and further provide that if the parents refuse to consent, the school system may pursue the assessments by filing a due process complaint.³ Accordingly, on March 8, 2017, as previously noted, HCPS filed a Due Process Complaint with the OAH requesting a hearing to establish that it is lawfully entitled to proceed with the six assessments of the Student, despite the Parents' objection. In its Complaint, HCPS also requested mediation.

The mediation was scheduled for the morning of March 29, 2017, to be followed that day by a telephonic pre-hearing conference. On March 23, 2017, the Parents requested a postponement of the mediation and pre-hearing conference. HCPS did not oppose the requested postponement. On March 27, 2017, the OAH granted the postponement and the mediation and pre-hearing conference were rescheduled to April 13, 2017.

The mediation held on April 13, 2017, before another administrative law judge (ALJ), did not result in a resolution of this matter. On April 13, 2017, following the mediation, I held a pre-hearing conference. I was located at the OAH and all other participants participated by telephone. Patrick J. Spicer, Esquire, General Counsel of HCPS, represented HCPS. XXXX XXXX, Sr. (Father) represented the Student and Parents.

During this pre-hearing conference, the parties discussed the time requirements for issuing a decision. I advised the parties of the time requirements for issuing a decision. 34 C.F.R. § 300.515 states the following, in part:

² See 20 U.S.C.A. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(i) (2016); Code of Maryland Regulations (COMAR) 13A.05.01.13A(1).

³ 34 C.F.R. § 300.300(c)(1)(ii) (2016); COMAR 13A.05.01.13A(2).

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –

- (1) A final decision is reached in the hearing; and
- (2) A copy of the decision is mailed to each of the parties.

34 C.F.R § 300.510 states the following in part:

(b) (1) If the [local educational agency] has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

....

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
- (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

The parties agreed that these timeframes be strictly adhered to. Because none of the circumstances that support an adjustment to the 30-day resolution period occurred, I find that the decision is required to be issued on or before May 22, 2017, which is forty-five days after April 7, 2017, the date of expiration of the 30-day resolution period under section 300.510(b). 34 C.F.R. §§ 300.510(b), 300.515(a) (2016).

At the pre-hearing conference, the parties estimated that the hearing could be concluded in two days. By agreement of the parties, the hearing was scheduled for May 1, and 2, 2017, at the Harford County Board of Education, 102 S. Hickory Avenue, Bel Air, Maryland. May 3, 2017 was reserved in case the hearing could not be completed in two days.

I held the hearing on May 1 and 2, 2017. The hearing concluded on May 2, 2017. Mr. Spicer represented HCPS. The Father represented the Parents and the Student.

The statutory and regulatory authority governing the decision in this matter is set forth in the IDEA; sections 8-401 *et seq.* of the Education Article of the Annotated Code of Maryland; Title 34, Part 300 of the Code of Federal Regulations, and COMAR 13A.05.01. The procedures to be followed in this case are set forth in the contested case provisions of the Administrative Procedure Act, the Maryland State Department of Education regulations governing hearings on due process complaints, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUE

Is HCPS entitled to the issuance of an order that grants HCPS the right to administer the following assessments to the Student: (1) Academic Performance-Reading, (2) Academic Performance-Mathematics, (3) Academic Performance-Written Language, (4) Intellectual/Cognitive Functioning, (5) Emotional/Social/Behavior Development, and (6) Functional Behavior?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted into evidence the following exhibits offered by HCPS⁴:

⁴ On April 26, 2017, the Father filed two motions in limine. The first motion objected to the admission of HCPS Ex. 5 (the minutes of a January 27, 2017 Student Services Team meeting). He argued that the document had been improperly altered and spoliated. He relied on [School]' then-Principal's email of January 31, 2017, in which the Principal advised the Father: "...Once again, thanks for attending the SST team meeting last Friday, January 27th. After you left, we recognized that we inadvertently forgot to check off the recommendation box, 'Refer to IEP'....Although this information is contained within the summary portion of the document, the box was never checked off. We have since checked this box and have placed an updated copy of the SST team summary in the US mail to your attention. That was only [sic] change that was made to the document."

The Father's second motion in limine objected to the admission of HCPS Exs. 7 and 9. HCPS Ex. 7 is the School's Prior Written Notice, in which HCPS proposed an "IEP meeting to discuss the possibility of an educational disability to ensure that [HCPS] is meeting [the Student's] educational needs." HCPS Ex. 9 is HCPS's Notice and Consent for Assessment. The Father's motion in limine contended that HCPS Exs. 7 and 9 are inaccurate and that he is seeking to have them corrected or withdrawn from the Student's records pursuant to the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C.A. § 1232g (2010 & Supp. 2016); 34 CFR Part 99 (2016).

- HCPS Ex. 1 – *Curriculum Vitae* of XXXX XXXX
- HCPS Ex. 2 – *Curriculum Vitae* of XXXX XXXX
- HCPS Ex. 3 – *Curriculum Vitae* of XXXX XXXX
- HCPS Ex. 4 – *Curriculum Vitae* of XXXX XXXX, Ph.D.
- HCPS Ex. 5 – Student Services Team Minutes, dated January 27, 2017
- HCPS Ex. 6 – Notice of Individualized Education Program (IEP) Team Meeting, dated February 1, 2017
- HCPS Ex. 7 – Prior Written Notice, dated February 16, 2017
- HCPS Ex. 8 – IEP Team Participant Sign-In Sheet, dated February 16, 2017
- HCPS Ex. 9 – Notice and Consent to Assessment, dated February 16, 2017
- HCPS Ex. 10 – Email from Father to XXXX XXXX, dated February 9, 2017

I admitted into evidence the following exhibits offered by the Father:

- [Parents] 1 – Progress Reports for the Student, dated November 16, 2016 (Spelling 3), November 16, 2016 (Written Composition 3), December 7, 2016 (Reading 3), December 7, 2016 (Written Composition 3), December 7, 2016 (Written Composition 3, a duplicate of the preceding document), December 22, 2016 (Reading 3), December 22, 2016 (Spelling 3), December 22, 2016 (Written Composition 3), January 20, 2017 (Reading 3), January 20, 2017 (Spelling 3), January 20, 2017 (Written Composition 3), January 27, 2017 (Homeroom 3), January 27, 2017 (Math 3), January 27, 2017 (Science 3), January 27, 2017 (Social Studies 3), February 8, 2017 (Reading 3), February 8, 2017 (Spelling 3), February 8, 2017 (Written Composition 3), February 10, 2017 (Math 3), February 10, 2017 (Social Studies 3), February 24, 2017 (Written Composition 3), February 24, 2017 (Spelling 3), February 3, 2017 (Reading 3), February 26, 2017 (Math 3), February 26, 2017 (Social Studies 3), March 10, 2017 (Reading 3), March 10, 2017 (Spelling 3), March 10, 2017 (Written Composition 3), March 16, 2017 (Math 3), March 16, 2017 (Social Studies 3),

On May 1, 2017, immediately prior to commencing the hearing on the merits, I conducted a hearing on the record on the two motions in limine. I denied both motions on the grounds that a party's claim that an adversary's exhibit was inaccurate or improperly altered does not render the exhibit inadmissible. Rather, the claim goes to the credibility and weight to be accorded the exhibit. The Father would have the opportunity to present his version of the matters described in the documents he challenged. No evidence was presented during the subsequent hearing on the merits that warranted exclusion of HCPS Exs. 5, 7 and 9. Therefore, I admitted those exhibits when HCPS offered them during the merits hearing.

March 26, 2017 (Math 3), March 26, 2017 (Science 3), March 26, 2017 (Social Studies 3), March 26, 2017 (Social Studies 3), March 29, 2017 (Math 3), March 29, 2017 (Science 3), March 29, 2017 (Social Studies 3)

- [Parents] 2 – Progress to College and Career Reports, for time periods June 8, 2015 – June 17, 2016, July 25, 2016 – June 30, 2016, July 8, 2015 – June 17, 2016
- [Parents] 3 – Emails from Father to XXXX XXXX, dated January 31, 2017 and February 9, 2017
- [Parents] 4 – Email from XXXX XXXX to Father, dated October 20, 2016 and email from Father to XXXX XXXX, dated October 24, 2016
- [Parents] 5 – Email from Father to XXXX XXXX, dated April 2, 2017
- [Parents] 6 – The Student’s spelling tests (9 pages), undated
- [Parents] 7 – Letter from XXXX XXXX, Ph.D. to Father, dated October 18, 2016
- [Parents] 8 – Emails from Father to XXXX XXXX, dated May 13, 2016 and May 5, 2016; email from XXXX XXXX to Father, dated February 24, 2016; email from XXXX XXXX to Father, dated May 3, 2017
- [Parents] 9 – *Curriculum Vitae* of XXXX XXXX, Ph.D., undated
- [Parents] 10 – Email from FERPA.Complaints@ed.gov to Father, dated March 20, 2017

Testimony

HCPS presented testimony from the following witnesses:

- XXXX XXXX, the Principal of [School] ([School] or School);
- XXXX XXXX, a third grade teacher at [School], who was accepted as an expert in the field of elementary education and whether a student has a suspected disability and therefore warrants assessments and related matters;
- XXXX XXXX, a school psychologist with HCPS, who was accepted as an expert in the field of school psychology and whether a student has a suspected disability and therefore warrants assessments and related matters; and

- XXXX XXXX, Ph.D., Director of Special Education for HCPS, who was accepted as an expert in the field of special education and whether a student has a suspected disability and warrants assessments.

[Father] testified on the Parents' and the Student's behalf.⁵

FINDINGS OF FACT

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

1. The Student is nine years of age.
2. The Student is a third grade student in the general education setting at [School], which he has attended since kindergarten.
3. The Student is of above average intelligence.
4. The Student earned a 915 "Lexile" score on the Scholastic Reading Inventory (SRI) Assessment in January 2017, which indicates that he is reading at an approximate fourth grade reading level. He is a fluent reader with an age-appropriate vocabulary.
5. The Student possesses the foundational knowledge of math facts, interprets data and has background knowledge in the area of science that enables him to participate successfully in the third grade science curriculum.
6. The Student's writing includes clever ideas, but is often short and minimal, demonstrating some difficulty with the organization of his ideas.
7. The Student frequently does not attend to classroom instruction. He often

⁵ Pursuant to the Father's request, the OAH issued subpoenas for three witnesses: XXXX XXXX, Ph.D., the State Superintendent of Schools; XXXX XXXX, Superintendent of Schools for HCPS; and HCPS's custodian of records. Following his own testimony, however, the Father stated on the record that he did not wish to present any further witness testimony. Accordingly, the subpoenaed witnesses did not appear or testify.

Over HCPS's objection, I allowed the Student to attend the May 1, 2017 hearing session as requested by the Father. See 34 C.F.R. § 300.512, which provides that "Parents involved in hearings must be given the right to- (1) Have the child who is the subject of the hearing present...." The Student sat quietly with a book or napped. The Father did not call the Student as a witness. The Student did not attend the May 2, 2017 hearing session.

engages in off-task behaviors that include noise-making, singing and humming during instructional periods. These off-task behaviors are disruptive and interfere with the Student's learning and that of his classmates.

8. The Student's peers will ask him to be quiet and he does not respond to their requests.

9. When asked to stop any type of disruptive behavior, the Student typically does not comply with adult direction.

10. The Student's emotional and disruptive behavior is highly atypical of that of his peers in terms of the frequency, duration and intensity of the behavior, which is chronic and occurs in all school settings.

11. The Student has had more than twenty referrals to School administrators during the 2016-2017 school year. The School has imposed time-outs, in-school suspensions and out-of-school suspensions, but the behavior continues.

12. During the 2016-2017 school year, the Student accrued suspensions on October 13, 2016 (in-school suspension); December 5, 2016 (one day out-of-school suspension); January 17, 2017 (one-and-a half day out-of-school suspension); March 6, 2017 (two day out-of-school suspension); April 5, 2017 five day out-of-school suspension); April 19, 2017 (half day in-school suspension in the office); April 26, 2017 (half day in-school suspension); and April 27, 2017 (two day out-of-school suspension).

13. The School has conducted approximately thirty pupil conferences (*i.e.* meetings with the Student to discuss his behavior) during the 2016-2017 school year.

14. On January 27, 2017, a Student Services Team (SST) meeting was held at [School] to discuss the Student's progress. The attendees were XXXX XXXX, the School's

then-Principal; XXXX XXXX, school psychologist; XXXX XXXX, Assistant Principal; XXXX XXXX, the Student's math teacher; XXXX XXXX, the Student's reading and language arts teacher; XXXX XXXX, school counselor; XXXX XXXX, reading specialist/teacher; XXXX XXXX, music teacher; and the Student's father.

15. The purpose of the SST meeting was to discuss the Student's current progress.

16. The Student did not regularly participate in the reading lessons. He rarely took home assignments or materials that students are supposed to take home.

17. The Student has strong knowledge of facts, interprets data and shows great interest in the current math topics. He participates minimally in math class, which results in lower test and quiz scores.

18. The Student has excellent decoding skills, a keen vocabulary, loves words, writes cleverly and participates.

19. The Student enjoys his art work and is responsible with library materials. In music he participates in partner work and singing. However, he will talk over instructions and over fellow students, telling jokes at inappropriate times, and refusing to respond to directions given by adults.

20. The Student engages in frequent vocalizations in the classroom, such as singing and humming while instruction is taking place. When asked to stop he continues with the noise. On the morning of the SST meeting, while Mr. XXXX was instructing the math class, the Student played his recorder, refusing for six minutes to stop.

21. The Student demonstrates disrespectful behaviors, using insulting language to refer to teachers and other students.

22. While the Student is a bright young man, his noncompliance and vocalizations

across multiple school settings are adversely affecting his educational performance.

23. The School Personnel at the SST meeting suspected that the Student may have an educational disability.

24. The School personnel at the SST meeting recommended a referral of the Student to an Individualized Education Program (IEP) Team under the IDEA in order to determine if there was a need for further assessments of the Student to determine if the student has an educational disability.

25. The Father did not agree with the IEP referral. He disagreed with the contents of documents that the SST team considered, which described the Student's disruptive behavior and wished to have these documents corrected or withdrawn by the School prior to the School proceeding with further action.

26. On February 1, 2017, HCPS sent a written notice and an invitation to the Father to participate as a partner at an IEP Team meeting to be held at the School on February 16, 2017. The IEP meeting was originally scheduled for February 14, 2017, but was rescheduled to February 16, 2017, at the Parents' request. The notice of the February 16, 2017 IEP meeting stated that the purpose of the meeting was to review existing information to determine the need for additional data regarding the Student.

27. On February 16, 2017, in response to the SST's January 27, 2017 referral, an IEP Team meeting was held, after having been rescheduled at the Parents' request from February 14, 2017. The following persons attended the IEP team meeting: the Student's father; XXXX XXXX, then-Principal and IEP Chairperson; XXXX XXXX, Assistant Principal; XXXX XXXX, Ph.D., HCPS Director of Special Education; XXXX XXXX, special educator; XXXX XXXX, special education evaluator; XXXX XXXX, school psychologist; XXXX XXXX,

teacher; and XXXX XXXX, teacher.

28. The IEP Team considered the minutes of the January 27, 2017 SST meeting that resulted in the Student's referral to the IEP Team. Comments by the teachers and the Father were also considered by the IEP Team.

29. The Student frequently engages in disruptive and disrespectful behaviors that are adversely impacting his ability to reach his full potential in school. These behaviors include the following:

- a. While in class, the Student flips pencils and markers, cuts up Post-It notes and erasers, and stands by the pencil sharpener for extended periods of time.
- b. In August 2013, the Student was referred to an administrator because he kicked a counselor in the leg.
- c. The Student threw an object at an administrator and called him "stupid bald."
- d. The Student threatened to spear another student in the head, eloped from the classroom, crawled on the floor, and said that teachers need to be fired.
- e. In March 2014, the Student began screaming and running away rather than stand in a line.
- f. In April 2014, the Student threatened to poke a student's eye out with a pencil over a dispute about an eraser.
- g. In March 2016, the Student left the classroom without permission and said "ask my ass."
- h. On April 11, 2016, the Student climbed on furniture, kicked chairs, and injured a teacher's hand.
- i. On April 19, 2016, the Student eloped from class, destroyed papers and kicked

over bins of books.

j. On April 20, 2016, the Student threw a pencil and spat on a teacher.

k. On April 27, 2016, the Student asked for writing assistance, but said “damn teacher.”

l. On May 16, 2016, the Student wandered around the science room, opened a teacher’s filing cabinet and said that he would “pulverize” the teacher and that “this is B.S.”

m. On May 18, 2016, the Student stood while the school bus was in motion.

n. On June 9, 2016, the Student disrupted a classroom.

30. Other noted behaviors include bolting from the classroom, using profanity, writing about shooting people, talking over teachers, disruptive vocalizations, along with other disruptions of learning.

31. These behaviors interfere with the teachers’ ability to provide instruction and the other students’ ability to focus on the instruction. The behaviors are also interfering with the Student’s relationships with peers, as the Student has difficulty finding partners to work with during class and other students get upset when they are distracted by the Student during class.

32. The Father stated during the IEP meeting that he disagreed with the accuracy of the teachers’ reports of disruptive behavior. He ascribed the Student’s behaviors to boredom, stating that the staff is unaware of how advanced the Student is in math and reading. He was critical of the teachers. He believes the Student should be in the fifth grade. The Father stated the Student’s behavior is in response to other students’ behavior and targeting by teachers.

33. On February 16, 2017, HCPS issued and sent the Father a “Prior Written Notice” (PWN). The PWN described the action proposed by HCPS, why HCPS proposed the action, any

options considered prior to the action, the information HCPS used as a basis for the proposal and other relevant factors.

34. HCPS stated in the PWN that it proposed to take action in the areas of “Identification/Eligibility,” meaning identification of the Student as a student with an educational disability and determining his eligibility for special education services. Specifically, HCPS proposed in the PWN that assessments would be implemented to identify the existence of an educational disability or to rule it out, in order to ensure that HCPS was meeting the Student’s educational needs. The educational disabilities suspected by HCPS are “Emotional Disability” and/or “Other Health Impairment—Attention Deficit Hyperactivity Disorder (ADHD)”. HCPS also proposed that a Functional Behavior Assessment (FBA) be completed in order to develop an appropriate Behavior Intervention Plan (BIP).

35. Following the IEP Team meeting, HCPS issued a Notice and Consent for Assessment, in which the IEP Team recommended an evaluation of the Student that would include assessments in the following areas Academic Performance-Reading, Academic Performance-Mathematics, Academic Performance-Written Language, Intellectual/Cognitive Functioning, Emotional/Social/Behavior Development, and Functional Behavior.

36. The Academic Performance Assessments for reading, mathematics and written language consist of written standardized tests published by the test developers. These three tests would be administered by XXXX XXXX, the School’s special education evaluator. All three assessments together would take approximately an hour and fifteen minutes. These assessments would help educators determine whether a student needs special education services or to rule out an educational disability.

37. The purpose of the Intellectual/Cognitive Functioning Assessment is to determine

whether a student has a cognitive weakness that might otherwise be mischaracterized as Emotional Disability or Other Health Impairment—Attention Deficit Hyperactivity Disorder (ADHD). This assessment involves a nationally norm-referenced standardized test, similar to an IQ test, which is administered by a school psychologist or a licensed psychologist. This assessment takes from one hour and seven minutes to two hours. The school psychologist would administer it with toys and manipulatives, working with the child to discern his level of cognition, memory, processing speed and how the child goes about the learning task.

38. The Emotional/Social/Behavior Assessments are questionnaires administered to the parent and at least two teachers in order to understand a student's behavior and compare it to that of same-age peers. In addition, the Student may be interviewed. The score may or may not suggest an Emotional Disability or ADHD and would be interpreted by a licensed psychologist.

39. The FBA includes observation of the child in the classroom and playground, interviews and data collection regarding the frequency of behavior and the "before and after" of problematic behaviors. The goal is to create a BIP designed to avoid triggers and form prevention strategies for teachers and the student, so as to change the child's problematic behavior.

40. Each of the proposed assessments would be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment instrument. The IEP Team would then review the Student's educational needs and strengths as shown by the performance levels, assessment results, observations, and information from the parents. The information obtained from the assessments would assist the School in educational planning for the Student. The evaluation results would be shared with the parents.

41. HCPS noted in the PWN that the School members of the IEP Team determined

that the Student is demonstrating a pattern of noncompliant and off-task behavior that is impacting his ability to meet his educational potential. The School members of the IEP Team recommended the above-described assessments in order to determine the Student's current levels of academic achievement as well as his eligibility for special education services if it should be determined that he is a student with Emotional Disability and/or Other Health Impairment--ADHD.

42. The assessments could lead to an IEP that might include a BIP and/or supplemental educational services.

43. If the assessments are not undertaken and the Student's pattern of disruptive and off-task behavior continues, the likely result would be more suspensions and even potential expulsion.

44. The Father disagreed with the behavioral descriptions of his son and the recommendation of the IEP Team that the assessments be undertaken. The Parents have refused consent for each of the proposed assessments.

45. The Father requested another IEP Team meeting to discuss the assessments, at which his wife would participate. HCPS provided three dates for such a meeting. The Parents did not accept the three dates.

46. On March 8, 2017, HCPS filed this Due Process Complaint to obtain authorization to proceed with the proposed assessments.

DISCUSSION

Statutory and Regulatory Background: IDEA, FAPE, IEPs

The Individuals with Disabilities Education Act (IDEA) offers States federal funds to assist in educating children with disabilities. The IDEA conditions that funding on compliance

with certain statutory requirements, including the requirement that States provide every eligible child a “free appropriate public education,” or FAPE, by means of a uniquely tailored “individualized education program,” or IEP. 20 U.S.C.A. §§ 1401(9)(D), 1412(a)(1).

FAPE is defined in COMAR 13A.05.01.03B(27) as follows:

[S]pecial education and related services that:

- (a) Are provided at public expense, under public supervision and direction;
- (b) Meet the standards of the Department, including the requirements of 34 CFR §§300.8, 300.101, 300.102, and 300.530(d) and this chapter;
- (c) Include preschool, elementary, or secondary education; and
- (d) Are provided in conformity with an IEP that meets the requirements of 20 U.S.C. § 1414, and this chapter.

FAPE is similarly defined in the IDEA and in the applicable federal regulations. 20 U.S.C.A. § 1401(9); 34 C.F.R. § 300.17 (2016).

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. In its recent decision in *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1000 (2017) (*Andrew F.*), the Supreme Court held that in order to meet its substantive obligation under the IDEA, “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”

Maryland regulations define an IEP as “written statement for a student with a disability that is developed, reviewed, and revised in accordance with 34 CFR §§300.320 - 300.324 and Regulations .08 and .09 of [COMAR 13A.05.01].” *See* COMAR 13A.05.01.03B(34). In turn, COMAR 13A.05.01.09A outlines the required content of an IEP as follows:

(1) The IEP for a student with a disability shall include:

- (a) A statement of the student’s present levels of academic achievement and functional performance, including:

- (i) How the student's disability affects the student's involvement and progress in the general curriculum,
- (b) Measurable academic and functional annual goals, including benchmarks or short-term instructional objectives related to:
 - (i) Meeting the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general curriculum, and meeting each of the student's other educational needs that result from the student's disability; . . .
- (c) The special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, including staffing support, to be provided to the student, or on behalf of the student;
- (d) Program modifications or supports for school personnel that will be provided for the student to enable the student to:
 - (i) Advance appropriately toward attaining the annual goals;
 - (ii) Be involved in and make progress in the general curriculum;
 - (iii) Participate in extracurricular and other nonacademic activities; and
 - (iv) Be educated and participate with other students with disabilities and students without disabilities;
- (e) An explanation of the extent, if any, to which the student will not participate with students without disabilities in the regular class and in the activities, as described in §A(1)(e) of this regulation;
- (f) A statement of any appropriate individual accommodations that are needed to measure the student's academic achievement and functional performance on Statewide or district-wide assessments, consistent with 34 CFR §300.320(a)(6);
-
- (h) The projected dates for initiation of services, and modifications as described in §A(1)(c) and (d) of this regulation, including the anticipated frequency, location, and duration. . . .

See also 20 U.S.C.A. § 1414(d)(1)(A).

The IEP goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). As previously noted, earlier this year the Supreme Court held in *Endrew F.* that a school must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 138 S. Ct. at 1000.

The School System’s “Child Find” Obligation

Pursuant to the IDEA, local education agencies have certain “Child Find” obligations. Local school systems are charged with a duty to identify, locate, and evaluate children who have a disability or who are suspected to have a disability. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“State educational authorities must identify and evaluate disabled children[.]”) The IDEA requires school systems to have a Child Find system or plan to ensure that all children who are in need of special education services are located, identified and referred appropriately. A school system’s Child Find duties are triggered if the system has reason to suspect a disability and to suspect that special education services may be needed. “When these suspicions exist, the [school] district must conduct an evaluation of the student to determine whether the student qualifies for special education services.”⁶ Local school systems may face liability for their failure to identify, locate, or evaluate a potentially disabled child, as that would essentially constitute a denial of FAPE. *See, e.g., El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008) (in reviewing school district’s compliance with the IDEA, the court considers: (1) whether the district had reason to suspect that a student had a disability, and that special education services might be needed to address that disability, and (2) whether the school

⁶ Philip T.K. Daniel, “Child Find,” Symposium, Dispute Resolution in Special Education (2014), <http://moritzlaw.osu.edu/students/groups/osjdr/files/2014/02/Child-Find-PresentationJDRSymposiumFeb27-282014.pdf>.

district evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability).⁷

The statutory basis for “Child Find” is set forth in the IDEA, 20 U.S.C.A. § 1412(a)(3), which provides:

Child find

(A) *In general.* All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) *Construction.* Nothing in this chapter requires that children be classified by their disability so as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

The federal Child Find regulation, 34 C.F.R. § 300.111, provides in pertinent part:

(a) General.

(1) *The State must have in effect policies and procedures to ensure that—*

(i) *All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated; and*

(ii) *A practical method is developed and implemented to determine which children are currently receiving needed special education and related services.*

...

(c) Other children in child find. *Child find also must include—*

(1) *Children who are suspected of being a child with a disability under § 300.08 and in need of special education, even though they are advancing from grade to grade; and*

(2) *Highly mobile children, including migrant children.*

(Emphasis added).

IDEA’s Enumerated Categories of “Disability”

⁷ While *Richard R.* is not binding authority, I find its reasoning persuasive.

The IDEA, 20 U.S.C.A. § 1401(3), defines the term “child with a disability” to mean a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), *serious emotional disturbance (referred to in this chapter as “emotional disturbance”)*, orthopedic impairments, autism, traumatic brain injury, *other health impairments*, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

(Emphasis added).

34 C.F.R. § 300.8(c)(4) defines “emotional disturbance” as follows:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) *An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.*
- (C) *Inappropriate types of behavior or feelings under normal circumstances.*
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(Emphasis added).

34 C.F.R. § 300.8(c)(9) defines “Other health impairment” as follows:

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, *attention deficit disorder or attention deficit hyperactivity disorder*, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child’s educational performance.

(Emphasis added).

Maryland regulations define the terms “emotional disability”⁸ and “Other health impairment.” “Emotional disability” is defined in COMAR 13A.05.01.03B(23) as follows:

(a) “Emotional disability” means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a student’s educational performance:

(i) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(ii) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(iii) Inappropriate types of behavior or feelings under normal circumstances;

(iv) A general, pervasive mood of unhappiness or depression; or

(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(b) “Emotional disability” includes schizophrenia.

(c) “Emotional disability” does not include a student who is socially maladjusted, unless it is determined that the student has an emotional disability.

COMAR 13A.05.01.03B(51) defines “Other health impairment as follows:

“Other health impairment” means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is adversely affecting a student’s educational performance, due to chronic or acute health problems such as:

(a) Asthma;

(b) *Attention deficit disorder or attention deficit hyperactivity disorder*;

(c) Diabetes;

(d) Epilepsy;

(e) A heart condition;

(f) Hemophilia;

(g) Lead poisoning;

(h) Leukemia;

(i) Nephritis;

(j) Rheumatic fever;

(k) Sickle cell anemia; or

(l) Tourette syndrome.

(Emphasis added).

⁸ While the IDEA and its accompanying federal regulations use the term “emotional disorder” and the Maryland regulation uses the term “emotional disability,” their respective definitions are virtually identical; thus, the terms may be used interchangeably.

Initial Evaluation Under IDEA

The IDEA provides, 20 U.S.C.A. §1414(a)(1)(A), that a State or local educational agency “shall conduct a full and individual initial evaluation...before the initial provision of special education and related services to a child with a disability....” Section 1414(a)(1)(B) provides that either a parent of a child or a State or local educational agency “may initiate a request for an initial evaluation to determine if the child is a child with a disability.” The initial evaluation “shall consist of procedures...to determine whether a child is a child with a disability (as defined in Section 1401 of this title) ...and to determine the educational needs of such child.” 20 U.S.C.A. § 1414(a)(1)(C)(i).

IDEA section 1414(a)(1)(D)(i)(1) requires that the agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 “shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.”

Parental Consent to Evaluation

IDEA section 1414(a)(1)(D)(ii) (“Absence of Consent”) provides:

(ii) Absence of consent

(I) For initial evaluation

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, *the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.*

(II) For services

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.

(Emphasis added).

Thus, where, as here, the parent does not consent to an *evaluation*, the school system may Request, pursuant to IDEA section 1415, a due process hearing against the parent. However, if the parent does not consent to special education *services*, the school system may *not* pursue a due process hearing against the parent.

Evaluation Requirements

IDEA section 1414(b) prescribes the requirements for evaluations, by providing:

(b) Evaluation procedures

- (1) *Notice*. The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.
- (2) *Conduct of evaluation*. In conducting the evaluation, the local educational agency shall--
 - (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining--
 - (i) whether the child is a child with a disability; and
 - (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum . . . ;
 - (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
 - (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. . . .

See also 34 C.F.R. § 300.304 (2016).

Assessment Procedures

The applicable regulations provide guidance in determining whether an assessment⁹ is appropriate. 34 C.F.R. § 300.304, requires that certain standards be met when evaluating a child:

- (b) Conduct of evaluation. In conducting the evaluation, the public agency must –
 - (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child . . . that may assist in determining—
 - (i) Whether the child is a child with a disability under §300.8; and
 - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum . . . ;
 - (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
 - (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (c) Other evaluation procedures. Each public agency must ensure that –
 - ...
 - (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
 - ...
 - (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
 - ...
 - (6) In evaluating each child with a disability under §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
 - (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

⁹ In this context, an “assessment” is “the process of collecting data in accordance with Regulation .05 of this chapter, to be used by the IEP team to determine a student’s need for special education and related services.” COMAR 13A.05.01.03B(3).

See also COMAR 13A.05.01.05B(1) to (3), C(1).

Burden of Proof

Under the IDEA and the relevant regulations, if parents do not consent to a reevaluation plan, or consent only to certain components of that plan,¹⁰ the school system may proceed with the evaluation plan only if it shows, at a due process hearing, that the requested evaluations and assessments are needed to produce data that is necessary to determine the child's educational needs. See 20 U.S.C.A. § 1414(c)(1)(B), (c)(2), and (c)(3); 34 C.F.R. § 300.300(c)(1)(ii). If a school district articulates reasonable grounds for its need to conduct the requested assessment of a student, the lack of parental consent does not bar it from proceeding with the assessment.

Shelby S. v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 (5th Cir. 2006), *cert. denied* 549 U.S. 1111 (2007).¹¹

The burden of proof rests with HCPS, as the party bringing the Due Process Complaint; the burden of proof is by a preponderance of the evidence. *Schaffer*, 546 U.S. at 56. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[.]" when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

Analysis

1. The Parties' Positions

HCPS contended that it has a reasonable basis for conducting the requested assessments because the assessments are necessary to identify whether the Student has any areas of

¹⁰ Refusal to consent to an evaluation also occurs where the parents place extensive conditions on the evaluation, such as dictating the type of assessments, the use that can be made of the assessments, the identity of the assessor, and the time and location of the assessment. *G.J. v. Muscogee Cty. Sch. Dist.*, 668 F.3d 1258, 1261, 1264-65 (11th Cir. 2012).

¹¹ Although not binding, I find the reasoning of *Shelby S.* to be persuasive.

educational disability that adversely affect his educational performance and, if so, to develop an IEP for the Student that will provide a FAPE. The Father responded that the assessments are not necessary because, as the Father stated in his closing argument, “the problem is not with [the Student] but with the school system.” He asserted that the Student’s behavioral incidents either did not occur or were the Student’s legitimate responses to racial or other “targeting” of the Student by school staff or other students, or were the result of the Student’s boredom with instruction not tailored to his ability. The Father also contended that HCPS disregarded procedural safeguards established by the IDEA and applicable regulations, by allegedly failing to provide the Parents with the requisite explanation of the proposed assessments and notice of other possible options.

As set forth below, I find that HCPS established that the requested assessments are reasonably necessary to determine if the Student has an educational disability, and, if so, to develop an IEP and meet his educational needs. I further find that HCPS did not disregard procedural safeguards.

2. Determining Whether the Student Has an Educational Disability, Developing the Student’s IEP and Providing the Student with a FAPE Warrant Overriding the Parents’ Refusal to Consent to the Assessments.

HCPS argued that the requested assessments are necessary to determine whether the Student has an educational disability, develop the Student’s special education programming if the assessments reveal a disability and address his behavioral issues.

The evidence offered by HCPS was sufficient to meet its burden of establishing that the data to be derived from the requested assessments are reasonably necessary to determine whether the Student has an educational disability, to develop an IEP and to provide the Student with a

FAPE. Accordingly, under 20 U.S.C.A § 1414(a)(1), I authorize HCPS to conduct the proposed assessments.

As noted in the above discussion of “Child Find,” school authorities are charged with a duty to identify, locate, and evaluate children who have a disability or who are suspected to have a disability. The focus of my analysis, therefore, is whether HCPS had a reasonable basis on which to suspect that the Student has an educational disability. The evidence demonstrates convincingly that it did.

The testimony of XXXX XXXX, Principal of the School since March 2017, was based on her review of the Student’s files and discussions concerning the Student that she had with his current teachers as well as former principals. Ms. XXXX, an educator with extensive training and experience in elementary education, testified that the Student’s composite score on the nationally normed “CoGat” Cognitive Abilities Test was 80%, meaning that he scored better than 80% of the test takers. In the third grade, his first graded year, he has achieved mostly A’s and B’s. His social and emotional behavior, however, are highly atypical in terms of the frequency, duration and intensity of his problematic behavior. That behavior is chronic and occurs across all school settings.

Ms. XXXX testified that the Student is frequently disruptive, and insubordinate. He leaves the classroom without permission and takes objects from other students. He threatens to sue his teachers or get them fired. He says that he only listens to his parents and does not have to listen to teachers. When greeted by a teacher, the Student responds, “What do you care?” He caused the delay of an assembly of 200 people because he refused to leave the Principals’ office. He refused to comply with the directions for State-wide testing. Behavior of this type has been documented since the Student’s kindergarten year.

In August 2013 the Student was referred to an administrator because he kicked a counselor in the leg. He threw an object at the administrator, calling him “stupid bald.” In March 2014 he began screaming and running away rather than stand in line. In April 2014 he threatened to poke a student’s eye out with a pencil over a dispute about an eraser.

SST meetings in 2015-2016 noted behaviors including bolting from the classroom, using profanity, writing about shooting people, talking over teachers, disruptive vocalizations and other disruptions of learning. The Student threatened to spear another student in the head, eloped from the classroom, crawled on the floor, and said that teachers needed to be fired.

In March 2016 the Student left the classroom without permission and said “ask my ass.” On April 11, 2016, he climbed on furniture, kicked chairs and injured a teacher’s hand. On April 19, 2016, he eloped from class, destroyed papers and kicked over bins of books. On April 20, 2016, he threw a pencil and spat on the teacher. On April 27, 2016, he asked for writing assistance, but said “damn teacher.” On May 16, 2016, he wandered around the science room, opened the teacher’s filing cabinet, said that he would “pulverize” the teacher and that “this is B.S.” On May 18, 2016, he stood while the school bus was in motion. On June 9, 2016, he disrupted the classroom.

The Student had over twenty disciplinary referrals in the 2016-2017 school year, demonstrating a pattern of disruption and insubordination. The School has tried time-outs, in-school and out-of-school suspensions, to no avail. The Student refers disrespectfully to teachers as “Mr. Butt,” refers to a male teacher as “Mrs.,” uses teacher’s first names, rolls his eyes, slams objects down and uses inappropriate language like “Jesus Christ” when a teacher speaks to him. On one occasion it took the School two hours to calm him down.

The Student has accrued suspensions: October 13, 2016 (in-school suspension); December 5, 2016 (one day out-of-school suspension); January 17, 2017 (one-and-a half day out-of-school suspension); March 6, 2017 (two day out-of-school suspension); April 5, 2017 five day out-of-school suspension); April 19, 2017 (half day in-school suspension in the office); April 26, 2017 (half day in-school suspension); and April 27, 2017 (two day out-of-school suspension). The 2016-2017 school year has seen thirty pupil conferences with the Student, who does not acknowledge wrongdoing. Ms. XXXX testified that although the Student's parents assert that the behavioral incidents are either "made up" or the result of racial profiling, the incidents are neither fabricated nor based on racial targeting.

I found Ms. XXXX's account credible. Although she did not provide dates for many of the behavioral incidents she described, I do not accept the notion that the multitude of behavioral incidents recorded in the Student's file simply did not occur. Moreover, the Principal's testimony was corroborated by that of XXXX XXXX, the Student's reading teacher, who described in similar terms the Student's pattern of disruptive behavior. I also find no evidentiary support in the record for the supposition that the Student is the victim of racial or other targeting.

Ms. XXXX testified as an expert in the area of elementary education and whether a student has a suspected disability and therefore warrants assessment. She has taught at the School for 31 years, has taught 200 special education students and attended 400 IEP meetings. She sees the Student for two hours and fifteen minutes each morning. He has ability and sometimes great interest in learning, but his chronic disruptive behavior interferes with his learning. He is often off-task, including laying his head on his desk, reading other materials, cutting and stabbing papers, breaking pens and markers, rocking in his chair, throwing papers on

the floor and chronically vocalizing (humming, chanting, singing and talking to himself). When asked to stop vocalizing he becomes louder.

Ms. XXXX testified that the Student has difficulty forming relationships with adults because he makes disrespectful and demanding remarks and calls adults by names other than their own. He tells Ms. XXXX “you’re not in charge of me,” “my father will sue you” and that it’s “none of your business.” She has had to evacuate her classroom several times because the Student stood on chairs or sat on his desk, refusing to move. She testified that disruptive behaviors occur on a daily basis.

Ms. XXXX noted that the Student’s spelling grade declined from the second quarter to the third quarter and his math grade declined from 79 to 44 on his most recent benchmark. He refuses to participate in group discussion and his written responses are usually minimal. His behavior interferes with his learning. When he has to leave the classroom he misses instruction. Ms. XXXX testified that although he has never been disciplined because of the content of his writing, he has written disturbing content about killing and maiming animals and about wanting to be an XXXX or XXXX.¹²

Ms. XXXX opined that the Student is a student with a suspected disability that needs to be assessed. Based on his behaviors and their adverse effect on his learning on a daily basis, further assessment is warranted. The School wishes to identify the cause of the behavioral problems and formulate strategies for his success. Based as it is on Ms. XXXX’s daily, personal observation of the Student, I give great weight to her testimony, which I note was consistent with the description of the Student’s behavior and performance that Ms. XXXX provided based on

¹² The Father testified that the Student is from a XXXX family background and that there is nothing wrong with wanting to be a XXXX.

her summarization of the Student's records and her own observations since she became the Principal in March 2017.

The School psychologist, XXXX XXXX, testified as an expert in school psychology and whether a student has a suspected disability and therefore warrants assessments. She is a member of both the SST and IEP Teams. She has assessed fifty students for eligibility for special education and has attended 200 IEP Team meetings, about one hundred of which involved assessment issues.

Ms. XXXX observed that the Student has high average cognitive ability and should be able to achieve at a rate similar to or above his peers. Based on his pattern of behaviors since Kindergarten, she suspects that he may have Emotional Disability and/or Other Health Impairment—ADHD.

Ms. XXXX explained that Emotional Disability is an emotional condition marked by an inability to learn that is not explained by cognitive or sensory factors. The Student has high average cognitive ability but his social and emotional development lags behind his cognitive development. He is not making the progress expected of a child of his ability, and the gap is due to his patterns of non-compliance and disruptive behavior that lead to his removal from the classroom. She also noted that the Student has difficulty forming relationships with peers and staff members. The reports of pervasive disruptive and non-compliant behaviors are atypical for his age. The Student perceives that others are targeting him and has a pervasive mood of unhappiness and depression at school. These factors suggest an Emotional Disability.

The other suspected disability that the school psychologist identified is “Other health impairment due to suspected ADHS.” Ms. XXXX suspects ADHD because impulsive and

inattentive behavior is characteristic of ADHD. The Student's behavior includes not seeming to listen, not staying on task, out-of-seat behavior, calling out, interrupting others and vocalizations.

The two suspected educational disabilities can be ruled in or out based on the proposed assessments. The Student is experiencing an adverse educational impact due to the behavior because he is not receiving the same educational benefit as other children. If he cannot control his behavior, that would suggest ADHD. If he can control it, that would suggest Emotional Disability. When considering these two suspected disabilities the proposed Cognitive/Intellectual Assessment is appropriate to determine if there is a cognitive weakness that might be misinterpreted as Emotional Disability or Other Health Impairment.

The Social/Emotional/Behavior Assessment is appropriate to determine whether there are differences with the Student's peers in these areas. It is best practice to perform academic assessments in reading, mathematics and writing in order to rule out the two suspected disabilities and so that the best program can be devised if the assessments reveal a need for special education services.

The FBA would examine what triggers a problem behavior and what happens afterwards. This information helps educators write a BIP. The BIP would include prevention strategies to avoid behavioral triggers, suggest prevention strategies for teachers, and teach a child how to change his other behavior.

Ms. XXXX's description of the assessments suggests that they are neither onerous nor unreasonably invasive. The Cognitive/Intellectual Assessment is a standardized test, similar to an IQ test, which would take one to two hours. The reading, mathematics and writing academic assessments are written, standardized national assessments that would take an hour and fifteen minutes collectively.

The Social/Emotional/Behavior Assessment uses a questionnaire administered to the parent and at least two teachers, and possibly an interview with the student. The score, which may indicate an Emotional Disability, is interpreted by a licensed psychologist. The FBA involves observation of the child in the classroom and playground, interviews and collection of data regarding the frequency of problematic behaviors, with a goal of teaching the child to use different behavior.

I found Ms. XXXX credible and give great weight to her opinions that the Student has a suspected disability and that the proposed assessments are reasonable and necessary to produce data for the School to determine if the Student has an educational disability and to determine the Student's educational needs.

HCPS's final witness was XXXX XXXX, Ph.D., its Director of Special Education, who testified as an expert in special education and whether a student has a suspected disability and warrants assessment. She consulted with the School regarding the Student, observed him in three classes and attended the IEP Team meeting. She noted that the School had also consulted her last year regarding the Student and at that time she did not think a referral for special education was warranted because his behavior was not interfering with his performance. Based on her observation of the Student in his reading, math and writing classes this year, she is of the opinion that he is a student with a suspected disability and should be assessed for Emotional Disability and Other Health Impairment—ADHD.

During the Student's math class that Dr. XXXX observed, the Student did not pay attention, dropped objects off his desk, fidgeted, crawled under his desk, played with his markers by stacking them, called out without raising his hand, got up and went to the bathroom for seven minutes without permission. However, he answered a question correctly. He also talked to peers

off-topic and hummed loudly in a manner that interfered with other students. He was off-task and off-topic for half of the 45 minute math class.

In the reading class that Dr. XXXX observed, the Student was distracted by materials on his desk. He leaned back in his chair and rested on the desk behind him. He did not immediately respond to the teacher's request to put his chair down. His head was on his desk a lot and he appeared disconnected from instruction. He disrupted his neighbor who asked to move away from the Student.

The third class Dr. XXXX observed was written expression/poetry class. The Student engaged at the outset but then lost focus, singing and showing disrespect for the teacher. In all three settings the Student demonstrated pervasive disruptive behavior.

Dr. XXXX opined that the School needs to probe the Student's responses to learning opportunities so the educators can discern if the problem is Emotional Disability or Other Health Impairment—ADHD. The Student is not maximizing his learning opportunities. Dr. XXXX is familiar with the Father's reasons for withholding consent for the assessments, *i.e.* his view that the Student is bored because the instruction does not match his abilities and that he is being racially or otherwise targeted. She testified convincingly, however, that the teachers of math, reading and writing classes that she observed presented the material in an engaging manner. She stated that the teachers' use of a "dry erase board" is appropriate, contrary to the Father's view that all work should be done in a form that can be taken home for parental review. Dr. XXXX did not observe targeting of the Student. Even though he was disruptive in class the teachers would try to redirect and refocus him and would ignore certain behaviors. The classrooms were positive learning environments.

Dr. XXXX stated that there were multiple minority students in the classes, which were not culturally biased. Rather, the classrooms were wholesome learning environments. She noted that the teachers take a cultural proficiency course, the purpose of which is to raise awareness of the nature of all students so that they are respected and can thrive regardless of their differing perspectives.

Dr. XXXX mentioned that while the Student has received generally good grades, his grading reports show variability and inconsistency of performance and a decline in some areas. The inconsistency is a reason for the referral for the assessments. His reading score is well above the national mean, but since he is an above-average learner, she would expect greater growth in reading comprehension.

Dr. XXXX testified that the assessments, if conducted, would lead to the creation of an IEP to include a BIP and supplemental services. Specific behaviors would be identified and strategies developed to address them. The assessments are not punitive. The School wants to identify, for example, the Student's triggers for disrespecting teachers. If the behavior continues, it will lead to more suspensions and potential expulsion. I found Dr. XXXX to be a knowledgeable, compassionate and credible witness and give substantial weight to her testimony that the assessments are needed to determine whether the Student has an educational disability and to assist in designing an IEP that will provide him a FAPE.

The Father testified that the Student was totally innocent of the behaviors described by the four HCPS witnesses. Although he is sincerely and intensely devoted to his son, he did not observe the behaviors that Ms. XXXX and Dr. XXXX personally witnessed, behavior that is documented the Student's file summarized by the Principal, Ms. XXXX. Accordingly, I cannot

accept either the Father's denial that the behavior occurred or his assertion that if the behavior did occur it was purely the result of the Student's mistreatment by teachers and fellow students.

The Father stated that he disputed the accuracy of the records documenting his son's behavioral issues and that the assessments should not be undertaken unless and until the records he challenges are either withdrawn or corrected. Inasmuch as both Ms. XXXX and Dr. XXXX testified to their direct, personal observations of the problematic behavior—testimony that I find credible—any unresolved dispute over the accuracy of School disciplinary records does not justify denying or postponing the proposed assessments. The evidence presented by HCPS establishes that the School authorities have reason to suspect that the Student may be a child with a disability.

Nor do I believe that the Parents' request for a new IEP Team meeting warrants denial or postponement of the assessments. According to Dr. XXXX, the School provided three dates for a new IEP Team meeting that would be attended by the Parents, but the Parents did not accept the dates. HCPS has immediate Child Find obligations that should not be deferred until another IEP Team meeting takes place.

I have considered the Father's contention that he was not properly notified of the nature of the proposed assessments or of the availability of other options. On February 1, 2017, HCPS provided the Notice of the IEP Team Meeting to be held on February 16, 2017. (HCPS Ex. 6). This Notice stated that the purpose of the IEP Team meeting was to "review existing information to determine the need for additional data." The required Parental Rights booklet was sent to the Father with the Notice of the IEP Team Meeting. (*See* HCPS Ex. 7, p. 1)

HCPS further provided the requisite PWN, dated February 16, 2016 (CPS Ex. 7), which notified the parents that HCPS proposed an action in the area of "Identification/Eligibility" for

special education services, because “[t]he SST suspects that [the Student] may have an educational disability.” The PWN states that “[t]he SST suspected an educational disability in the areas of Other Health Impairment and/or Emotional Disability”, “[t]he school IEP team members determined that formal assessment data are necessary to obtain a comprehensive profile of [the Student’s] strength and needs” and that the IEP Team will review the data and determine if additional data is needed to make a decision with respect to a possible educational disability.¹³

The PWN described, under the heading “Description of any options the school district considered prior to this proposal,” the Student’s current placement as “a general education student in the general education setting at [the School].”¹⁴ The PWN noted that “[the Father] is in disagreement with the behavioral descriptions and recommendation to formally assess [the Student] that was made by the school portion of the IEP Team.”

HCPS provided the Father with a Notice and Consent for Assessment (HCPS Ex. 9), also dated February 16, 2017, that specifically identified each proposed assessment. This Notice further stated that the assessments would be administered by trained personnel, that the results would assist the School in educational planning for the Student, and that the results would be shared with the Parents. I conclude based on the Notice of the January 27, 2017 SST minutes (HCPS Ex. 6), the February 16, 2017 PWN (HCPS Ex. 7) and the February 16, 2017 Notice and

¹³ The PWN was provided the same day as, but after, the February 16, 2017 IEP Team meeting. According to the U.S. Department of Education’s (USDE) discussion of the IDEA regulations, prior written notice must be provided a reasonable time before a decision is acted upon: A public agency meets the requirements in § 300.503 so long as the prior written notice is provided a reasonable time before the public agency *implements* the proposal described in the PWN. 71 Fed. Reg. 46691. Here, the PWN was provided before implementation of the assessments.

¹⁴ Ms. XXXX, the school psychologist, testified that she had a vivid memory of explaining the assessments to the Father at the IEP Team Meeting. She also testified that the School tried to exhaust other options before intervention, such as giving the Student extended time on tests, preferential seating and redirection. Other than simply permitting the Student to remain in *status quo*, the record does not reveal any meaningful option—consistent with the clear legal obligation of a school system to evaluate whether a child may be student with a suspected educational disability—other than conducting the proposed assessments.

Consent for Assessment (HCPS Ex. 9) that the record does not support the Father's claim that he was not afforded written prior notice of HCPS's proposed action (which has not yet been implemented), as required by the IDEA. 20 U.S.C.A. § 1415(b)(3) or (c).

Conclusion

I conclude that HCPS is entitled pursuant to COMAR 13A.05.01.13A to undertake the assessments. The evidence demonstrates that the Student is a student with a suspected disability. His chronic pattern of disruptive and off-task behaviors—despite his above-average intelligence—is interfering with his educational performance. The problematic behavior was amply established by the disciplinary history recounted by Principal XXXX and by Dr. XXXX's and Ms. XXXX's personal observations of the Student's behavior in the classroom.

Both Ms. XXXX (the School psychologist) and Dr. XXXX (HCPS's director of special education) cogently explained the need for the assessments and connected the assessments to the behavior that the School is trying to understand and address. The evidence demonstrates that the proposed assessments are neither onerous nor overly intrusive.

Because the School authorities suspect Emotional Disability and ADHD, which are enumerated educational disabilities under the IDEA, HCPS has a legal duty under the Child Find provisions to evaluate the Student and offer him special education services if the School determines that he has an educational disability. 20 U.S.C.A. § 1412(a)(3); 34 C.F.R. § 300.111 (2016). To ignore that obligation would both disserve the Student as well as subject HCPS to potential liability. As the Ninth Circuit recently stated:

The IDEA requires that if a school district has notice that a child has displayed symptoms of a covered disability, it must assess that child in all areas of that disability using the thorough and reliable procedures specified in the Act. School districts cannot circumvent that responsibility by way of informal observations, nor can the subjective opinion of a staff member dispel such reported suspicion.

... [A] disability is “suspected,” and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. ... Once either the school district or the parents suspect disability... a test must be performed so that parents can “receive notification of, and have the opportunity to contest, conclusions regarding their children.” [quoting *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)].... A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation. Rather, such notice automatically triggers mandatory statutory procedures: the school district must conduct an assessment for all areas of the suspected disability using the comprehensive and reliable methods that the IDEA requires.

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119-20; 1121-22 (9th Cir. 2016).¹⁵

I conclude that the proposed assessments are a proper method for HCPS to conduct an initial evaluation pursuant to section 1414(a) of the IDEA and that HCPS appropriately sought an order overriding the parents’ refusal to consent to the assessments. *Id.* Finally, I conclude that the evaluation and assessment procedures conform to the requirements of section 1414(b) of the IDEA, of 34 C.F.R. § 300.304; and of COMAR 13A.05.01.03B(3); 13A.05.01.05B(1) to (3) and C(1).

Students with high cognition can nevertheless have educational disabilities such as Emotional Disability or ADHD. *See Board of Education of the City of New York*, 28 IDELR 1093 (New York State Educational Agency, 1998) (a gifted student may still be a student with an educational disability and therefore entitled to special education services under the IDEA); *Letter to Anonymous*, 55 IDELR 172 (United States Office of Special Education Programs, 2010) (the mere fact that a student is gifted does not disqualify him from eligibility for special education and related services under the IDEA).

¹⁵ While *Timothy O.* is not binding authority, I find the Court’s reasoning persuasive.

I agree with HCPS that the requested assessments are needed to determine whether the Student has Emotional Disability or ADHD and, if so, to formulate a program for him under an IEP that will address his needs and issues in a systematic, research-based manner. The School's prior interventions have not been successful. The proposed assessments will assist the School in creating specially designed instruction adapted to the Student's unique needs and help ensure his continued access to the School's general curriculum. In sum, the weight of the evidence established that the Student is a student with a suspected disability for whom the proposed assessments are warranted.

CONCLUSION OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law that HCPS is entitled to the issuance of an order that grants HCPS the right to administer the following assessments to the Student: (1) Academic Performance-Reading, (2) Academic Performance-Mathematics, (3) Academic Performance-Written Language, (4) Intellectual/Cognitive Functioning, (5) Emotional/Social/Behavior Development, and (6) Functional Behavior Assessment, as requested by HCPS during the Student's February 16, 2017 IEP Team meeting, despite the Parents' refusal to consent to the assessment. 20 U.S.C.A. § 1414(a)-(b); 34 C.F.R. §§ 300.301 and 300.304 (2016); COMAR 13A.05.01.05B(1)-(3), C(1).

ORDER

I **ORDER** that Harford County Public Schools is authorized to administer the following assessments to the Student: (1) Academic Performance-Reading, (2) Academic Performance-Mathematics, (3) Academic Performance-Written Language, (4) Intellectual/Cognitive Functioning, (5) Emotional/Social/Behavior Development, and (6) Functional Behavior, as requested by HCPS during the Student's February 16, 2017 IEP Team meeting.

I further **ORDER** that Harford County Public Schools shall conduct the evaluation of the Student in a manner consistent with the provisions of 20 U.S.C.A. § 1414(a)(1) and 34 C.F.R. §§ 300.301 and 300.304.

May 16, 2017
Date Decision Mailed

Robert B. Levin
Administrative Law Judge

REVIEW RIGHTS

Any party aggrieved by this 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) (Supp. 2016). 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.

RBL/emh