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STUDENT

v.

HARFORD COUNTY PUBLIC SCHOOLS

BEFORE MICHAEL J. WALLACE,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-HARF-OT-19-21536

DECISION

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STATEMENT OF THE CASE

On or about July 11, 2019, ██████████ (Parent) filed a Due Process Complaint (Complaint) on the behalf of ██████████ (Student) with the Office of Administrative Hearings (OAH). The parties waived a resolution session on July 16, 2019, and notified the OAH on July 17, 2019, of the waiver. The parties did not participate in mediation.

In the eight-page Complaint, the Parent alleged that Harford County Public Schools (HCPS) violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415(f)(1)(A) (2017), by denying the Student a free, appropriate, public education (FAPE) in that HCPS improperly denied placement at and reimbursement for the ██████████ Academy from January 2019 through the present. The Parent’s requested remedy is that HCPS immediately reimburse the Parent for the costs associated with placement at the ██████████ Academy as well as

the costs for a private neuropsychological assessment that was performed at the request of the Parent.¹

On August 9, 2019, I conducted a telephone pre-hearing conference. The following individuals participated: Wayne D. Steedman, Esquire, on behalf of the Parent, and Andrew Nussbaum, Esquire, on behalf of HCPS.

At the request of the parties, I scheduled the hearing for September 5, 6, 9, 10, 11 and 17, 2019.

I held the hearing on the scheduled dates in Bel Air, Maryland. Mr. Steedman represented the Parent, who was present every day. Mr. Nussbaum represented HCPS.

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)(2), (c), 300.515(a), (c) (2018).² In this case, the decision would have been due on August 30, 2019, which is forty-five days after July 16, 2019, the date that the parties advised that no settlement would occur as they waived the resolution session. 34 C.F.R. §§ 300.510(c), 300.515(a) (2016). At the pre-hearing conference, the parties requested an extension of time to schedule the hearing and advised that they had already mutually agreed on the hearing dates after allowing for a brief period for preparation; and taking into consideration the Labor Day holiday, selection and availability of witnesses, and the ten-day subpoena request period. I granted this request. The earliest available date for the hearing was September 5, 2019.

¹ In her complaint, the Parent also requested reimbursement for attorney's fees. During the hearing, however, the Parent adduced no evidence related to this request and in closing, the Parent only requested reimbursement for the neuropsychological evaluation and reimbursement for tuition/transportation associated with the placement at the ██████████ Academy.

² C.F.R. is an abbreviation for Code of Federal Regulations. Unless otherwise noted, all references are to the 2018 edition.

On the original due date of August 30, 2019, the hearing had not yet begun. When it ended on September 17, 2019 as scheduled, the parties requested an extension of time until October 17, 2019 for me to issue a decision. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2018). I also granted this request.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a); Md. Code Ann., Educ. § 8-413(e)(1) (2018); 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 procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

The issues are as follows:

1. Did the HCPS wrongfully deny the Student a FAPE by failing to place the Student at the [REDACTED] Academy beginning in January 2019 through the present?
2. Did the HCPS wrongfully deny reimbursement for this placement as well as a private neuropsychological evaluation performed at the request of the Parent; and, if so,
3. What, if any, relief is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent presented one binder of exhibits marked 1 through 20, including a thumb drive containing exhibit 10A. The parties stipulated to the admission of exhibits 1- 14. The following were admitted into evidence:

1. [REDACTED] Middle School ([REDACTED]) documents including emails and disciplinary reports, various dates

2. Functional Behavior Assessment/Behavior Intervention Plan, dated September 27, 2017
3. Individualized Education Program (IEP) Progress Report, 2017-2018
4. [REDACTED] High School ([REDACTED]) correspondence, various dates
5. Email correspondence of Student, September 16, 2018 – September 30, 2018
6. Home and Hospital Instruction documents, various dates
7. HCPS emails, February 8, 2019- June 13, 2019
8. Emails between Parent and [REDACTED] dated January 7, 2019 and January 9, 2019
9. Home and Hospital Documents, various dates
10. Transcript from June 14, 2019 IEP Meeting with attached thumb drive recording of meeting 10A
11. *Curriculum Vitae*, [REDACTED] M.Ed.
12. *Curriculum Vitae*, [REDACTED] M.D.
13. *Curriculum Vitae*, [REDACTED] Ph.D. ABN
14. *Curriculum Vitae*, [REDACTED]
15. Article-Low visual information processing speed and attention are predictors of fatigue in elementary and junior high school students
16. Article-“Putting on My Best Normal.”
17. Not submitted
18. Not Submitted
19. Article by [REDACTED] with Student’s responses
20. [REDACTED] HS Grade 9 First Quarter Report Card

HCPS presented one binder of exhibits marked 1 through 48. The parties stipulated to the admission of exhibits 1-38. The following were admitted into evidence:

1. Prior Written Notice, dated September 27, 2017

2. Prior Written Notice, dated November 14, 2017
3. Prior Written Notice, dated February 13, 2018
4. Prior Written Notice, dated June 15, 2018
5. Prior Written Notice, dated September 18, 2018
6. Prior Written Notice, dated November 9, 2018
7. Prior Written Notice, dated December 6, 2018
8. Prior Written Notice, dated January 3, 2019
9. Prior Written Notice, dated February 15, 2019
10. Prior Written Notice, dated June 14, 2019
11. IEP, dated September 27, 2017
12. IEP, amended November 14, 2017
13. IEP, dated June 15, 2018
14. IEP, amended September 7, 2018
15. IEP, amended January 16, 2019
16. IEP, Amendment Changes February 15, 2019
17. IEP, Amended May 8, 2019
18. IEP, Amended June 14, 2019
19. IEP Progress Reports
20. Functional Behavior Assessment/Behavior Intervention Plan, dated November 14, 2017
21. Functional Behavior Assessment/Behavior Intervention Plan, dated February 13, 2018
22. Functional Behavior Assessment/Behavior Intervention Plan, dated June 15, 2018
23. Functional Behavior Assessment/Behavior Intervention Plan, dated February 15, 2019
24. Anger Regulation and Anger Scales (ARAS), dated November 7, 2017

25. Psychological Evaluation, [REDACTED] Hospital, dated September 21, 2015
26. HCPS Psychological Report, dated November 24, 2015
27. Neurological Evaluation, [REDACTED] Associates, dated March –April 2019
28. HCPS Psychological Report, dated June 14, 2019
29. [REDACTED] Discharge Summary, dated August 25, 2017
30. HCPS Educational Assessment Report, dated October 24, 2018
31. Counseling Reports from [REDACTED] 2017-2018
32. Behavior Record, 2018-2019
33. Discipline Records, 2018-2019
34. Classwork Report, 2018-2019
35. Incentive Sheets, 2018-2019
36. Student's HCPS Report Cards from sixth and eighth grades
37. Student's work samples, various dates
38. Emails concerning Student, various dates
39. *Curriculum Vitae*, [REDACTED] School Psychologist
40. *Curriculum Vitae*, [REDACTED] Special Education Teacher [REDACTED]
41. *Curriculum Vitae*, [REDACTED] Classroom Teacher, [REDACTED]
42. *Curriculum Vitae*, [REDACTED] Assistant Principal, [REDACTED]
43. Not submitted
44. Not submitted
45. *Curriculum Vitae*, [REDACTED] Coordinator of Compliance, HCPS
46. Not submitted
47. *Curriculum Vitae* [REDACTED] Special Education Teacher, [REDACTED]
48. Not submitted

Testimony

The Parent testified on her own behalf and presented the following witnesses:

1. [REDACTED] M.Ed., Education Consultant in Harford County, accepted as an expert in special education with specialties in autism spectrum disorder, learning disabilities and executive functioning;
2. [REDACTED] Ph.D. ABN, Board Certified Psychiatrist, accepted as an expert in Neuropsychiatry;
3. The Student;
4. [REDACTED] M.D., the Student's treating psychiatrist, accepted as an expert in adolescent child psychiatry;
5. [REDACTED] Director of Admissions and Outreach, The [REDACTED] Academy, accepted as an expert in special education; and
6. [REDACTED] [REDACTED] Assistant Director, The [REDACTED] Academy.

The HCPS presented the following witnesses:

1. [REDACTED] the Student's Case manager at [REDACTED] accepted as an expert in special education;
2. [REDACTED] Eighth Grade Social Studies and Language Arts Teacher at [REDACTED] accepted as an expert in general education;
3. [REDACTED] Special Educator at [REDACTED] the Student's Case Manager at [REDACTED] accepted as an expert in special education;
4. [REDACTED] Assistant Principal at [REDACTED] accepted as an expert in general education and school administration;
5. [REDACTED] School Psychologist at [REDACTED] accepted as an expert in school psychology; and
6. [REDACTED] Coordinator of Compliance, Department of Special Education, HCPS, accepted as an expert in special education.

FINDINGS OF FACT

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

1. The Student is a fifteen-year-old boy with the following diagnoses:
 - Autism Spectrum Disorder (ASD) without Language or Intellectual Impairment Requiring Moderate Support
 - Disruptive Mood Dysregulation Disorder
 - Unspecified Anxiety Disorder
 - Attention-Deficit/Hyperactivity Disorder (ADHD) – Combined Presentation.
2. The Student's disabilities impact his socialization, self-regulation and emotional control.
3. The Student has been found eligible for special education services by HCPS with a disability code of multiple disabilities including ASD, Emotional Disability (ED) and Other Health Impairment (OHI) particularly ADHD.
4. The Student has been receiving special education services since first grade.
5. Since kindergarten, the Student has exhibited behavioral issues and by second grade continued to have problems with self-regulation, compliance and social-skills.
6. The Student attended [REDACTED] Elementary School from second grade through fifth grade.
7. At the beginning of fourth grade, the Student was enrolled at the private [REDACTED] School, but was expelled after a few weeks. After that, he went back to [REDACTED] Elementary School.
8. While the Student was in fourth grade in [REDACTED] 2014, his father died, which contributed to significant bereavement and behavioral issues.
9. During fifth grade, the Student generally earned As and Bs but was often disorganized and did not hand in assignments.

10. In May 2015, the Student was placed at [REDACTED] Hospital, a psychiatric hospital, as an inpatient for one week and then discharged to outpatient care after exhibiting a pattern of aggressive behavior, defiance and non-compliant behavior.

11. Upon discharge, he was given multiple diagnoses including ASD, Disruptive Mood Dysregulation Disorder, Unspecified Depressive Disorder, ADHD, and Unspecified Anxiety Disorder.

12. Throughout his educational history, the Student had multiple disciplinary referrals to school administration to address aggression toward other students, insubordination, failure to follow rules and disrespect toward authority figures.

13. He began sixth grade at [REDACTED] and continued to receive outpatient psychiatric treatment.

14. On September 21, 2015, the Student had a psychological evaluation at [REDACTED] Hospital by [REDACTED] Psy.D.

15. Dr. [REDACTED] diagnosed the Student with ASD Level 1, Unspecified Depressive Disorder and ADHD –Combined Presentation.

16. On the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) the Student’s cognitive functioning was assessed as follows:

- Full scale IQ 126 Superior
- Verbal Comprehension 127 Superior
- Visual Spatial 111 High Average
- Fluid Reasoning 126 Superior
- Working Memory 120 Superior
- Processing Speed 92 Average

17. The Student showed relative weakness in his processing speed.

18. During this school year, the Student had multiple disciplinary referrals for disrespect to school staff and class disruption.

19. Prior to seventh grade, given the severity of the Student's psychiatric condition, the Parent, on the suggestion of the Student's therapists, enrolled the Student at [REDACTED] Therapeutic Boarding School in [REDACTED] to address his neurodevelopmental and emotional issues.

20. He began [REDACTED] on September 12, 2016 and remained through August 25, 2017. During his tenure there, he showed uneven behavioral and compliance progress.

21. While at [REDACTED] he earned As except for Health for which he received a B.

22. Upon discharge, the plan from [REDACTED] called for continued education in a structured setting.

23. For the 2017-2018 school year, the Student re-entered [REDACTED] for eighth grade.

24. Class periods at [REDACTED] were fifty minutes long.

25. A Functional Behavioral Assessment (FBA) and Behavior Intervention Plan (BIP) was implemented for the Student on September 27, 2017, based on previous plans the Student had in elementary school. This BIP and FBA focused on non-compliance, aggressive and non-aggressive outbursts and disrespect toward others.

26. The Student began seeing a psychologist in September 2017 for weekly therapy sessions. In November 2017, the psychologist had to terminate the sessions because of health issues.

27. The Student began seeing psychiatrist Dr. [REDACTED] in October 2017. Dr. [REDACTED] managed the Student's medications and provided weekly therapy sessions.

28. Early in the school year, the Student was suspended for aggressive behavior, inappropriate language and flipping chairs and tables.

29. During the school year, the Student continued to have disciplinary problems, trouble completing work, and difficulty relating to teachers and his peers. He had two behavioral

incidents/office referrals for behavioral issues in the first quarter, two in the second quarter, one in the third quarter and five in the fourth quarter.

30. The Student's frequency in non-compliant behaviors went from an average of 2.5 times per week in February 2018, according to his BIP/FBP, to seven times per week according to his June 15, 2018 IEP.

31. The Student had instances where he lost control of voice or body fourteen times in the second quarter and twenty four times each in the third and fourth quarters.

32. His grades for the year averaged a low C in the first quarter, a low B in the second quarter and high Cs in the third and fourth quarters.

33. The Student finished eighth grade with passing grades due to the Parent's constant intervention, support and communication with school staff, particularly in assuring that the Student completed and handed in his assignments.

34. The Student attempted to enter three magnet programs for high school, was turned down by two because of low grades, but was accepted into the third: the [REDACTED] Magnet Program at [REDACTED] for the 2018-2019 school year.

35. The Student was excited to begin the [REDACTED] Program at [REDACTED] because he had a particular interest in ecology and science.

36. Class periods at [REDACTED] were ninety minutes long.

37. The Student's IEP was amended and approved on September 7, 2018. His disability code remained Multiple Disabilities (ASD, OHI, ED).

38. An educational assessment was performed by HCPS on October 24, 2018. The Student's Reading Composite was above average, his Mathematics Composite was superior and his Spontaneous Writing Composite was very superior.

39. On November 9, 2018, an IEP meeting was held to review the results of the educational assessment. The psychological assessment from 2015 was deemed relevant by the IEP Team for purposes of determining the current disabilities.

40. Early in the semester, the Student began refusing the Parent's help.

41. The Student's grades for the first quarter were as follows:

- Fine Art Prep E
- [REDACTED] D
- Honors English E
- Spanish I D
- Health E
- Algebra II E
- Honors Biology B
- American Gov't D

42. The reasons given on the report card for the low grades were described as "Does not complete assignments"; "Performs below ability"; "Does not complete minimal requirements"; "Does not complete projects by due dates"; "Lacks motivation"; and "Poor test results."

43. By November 21, 2018, the Student's progress report indicated that the Student was making sufficient progress in reducing actions that interfere with his completing his assignments by showing an increase in completion of assignments from 75% to 90%. However, he was showing only an approximate 70% completion rate during the first quarter and significantly less during the short time he was at [REDACTED] in the second quarter.

44. By December 3, 2018, the Student refused to attend school. He was depressed and anxious and stated to the Parent that he wanted to fall asleep and never get up and that everything going on in his life was hopeless. He also indicated that he had given up and could not go to school.

45. The school psychologist told the Parent that the Student needed either home and hospital teaching services, or to be referred to the [REDACTED] Program.

46. Because the [REDACTED] Program had a long waiting list, the Parents deemed it unfeasible.

47. At the IEP meeting on December 6, 2018, the Team determined that due to the Student's recent mental health concerns, additional time was needed for IEP development.

48. On December 17, 2018, the Parent submitted an application for home and hospital instruction after the Student continued to tell her he was stressed, overwhelmed and unable to attend school.

49. On January 3, 2019, another IEP meeting was held to address the Student's placement in home and hospital instruction. The Parent stressed that she wanted to discuss other educational placements because the Student was overwhelmed and depressed and was sleeping sixteen to twenty hours per day. At that point, the Student was still unable to attend school and home and hospital services was approved.

50. The IEP Team declined to consider a private placement stating, that a private placement can only be made by the Central IEP Team after additional data is collected and analyzed.

51. On January 7, 2019, the Parent, after reviewing the proposed IEP, told Ms. [REDACTED] the Student's caseworker at [REDACTED] that she did not approve the IEP, noting that the Student needed a program where his social and emotional needs could be met throughout the day.

52. On January 9, 2019, the Parent advised Ms. [REDACTED] that she would be enrolling the Student at the [REDACTED] Academy ([REDACTED] in mid-January and requested HCPS to reimburse her for the tuition.

53. [REDACTED] is a private school in [REDACTED] Maryland that provides one-on-one instruction to students with a wide range of emotional, educational, and social needs.

54. The Student began attending [REDACTED] on January 25, 2019.

55. Class periods at [REDACTED] were fifty minutes long.
56. By February 8, 2019, the Student's anxiety had stabilized.
57. Another IEP meeting was held on February 15, 2019 to address the placement at [REDACTED] and the Parent's request for reimbursement. At this meeting, the Team revised the IEP in the areas of Supplementary Aids and Services and Specialized Instruction.
58. Special education instruction was set at four hours per month to address self-management; four hours per month to address social-emotional needs; eighty minutes per month for counseling; and eighty minutes per month to address social interaction.
59. The Team also determined that the IEP could be implemented at [REDACTED] or at [REDACTED] ([REDACTED] high school, which was the Student's public home school.
60. [REDACTED] is a comprehensive HCPS high school that does not offer the [REDACTED] Program that the Student was in at [REDACTED]
61. The Parent advised the Team that the Student was enrolled at [REDACTED] and was doing well. She further advised that the Student did not feel that he could attend [REDACTED] any longer.
62. The Team refused the Parent's request for funding at [REDACTED] and terminated the home and hospital instruction.
63. On April 25, 2019, the Student had an independent neuropsychological evaluation with Dr. [REDACTED]
64. Dr. [REDACTED] diagnosed the Student with ASD without Language or Intellectual Impairment Requiring Moderate Support; Disruptive Mood Dysregulation Disorder marked by episodes of irritability, temper dyscontrol and dysphoria (a state of unease or dissatisfaction), Unspecified Anxiety Disorder marked by ease of agitation, restlessness, irritability and ADHD –

Combined Presentation marked by executive function deficits which are evident in his behavior, emotional control and cognition.

65. On the (WISC-V) the Student's cognitive functioning was assessed as follows:

- Full scale IQ 129 Very High
- Verbal Comprehension 142 Extremely High
- Visual Spatial 114 High Average
- Fluid Reasoning 134 Extremely High
- Working Memory 94 Average
- Processing Speed 89 Low Average

66. The Student showed relative weaknesses in his working memory and processing speed.

67. The Student's academic profile fell below expectations given his cognitive functioning General Ability Index score of 140 and a full scale IQ score of 129.

68. Neurological weaknesses were shown in bilateral fine motor speed, sustained auditory attention, and response control skills for auditory and visual stimuli, which all fell in the below average range.

69. On the IVA-2 Continuous Performance Test, the Student scored in the Severely Impaired range with an Auditory Attention Quotient in the less than .02 percentile showing significant inattention to auditory stimuli.

70. Emotionally, the Student showed a pattern of despondency, dysphoria, irritability, and diminished sympathy/empathy for others. He described self-destructive thoughts, a sense of emotional isolation and expected disappointment from others.

71. Dr. [REDACTED] concluded that the Student is not capable of navigating the complexities of a comprehensive high school and needs multiple interventions to support his health and progress. He recommended placement in a small, highly structured classroom throughout the day with constant support, access to interventions for ASD and the implementation of an evidence based social skills program.

72. Because of his ASD and mood dysregulation disorder, the Student is highly sensitive and easily overwhelmed by the noise and behavior of other students typical in a public high school resulting in anxiety, avoidance and withdrawal and would be unlikely to benefit from interaction with typically developing peers.

73. Dr. [REDACTED] report was shared with the IEP Team at a June 14, 2019 IEP meeting. In response, the Team revised the IEP by modifying Supplementary Aids and Supports to include opportunities for small group instruction in a co-taught classroom.

74. The Team suggested the development of a transition plan to allow the Student to take a limited number of classes at [REDACTED] or [REDACTED] and to monitor his progress under the revised IEP with the additional supports added in February 2019. The Parent declined, stating that she did not feel the proposed IEP was sufficient or appropriate due to the placement.

75. At [REDACTED] the Student earned an A+ in Honors Biology, an A in Honors English and a B- in Algebra with Trigonometry A and an A+ in Algebra with Trigonometry B.

DISCUSSION

The General Legal Framework

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; and COMAR 13A.05.01. The IDEA requires “that all children with disabilities have available to them a FAPE³ that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A); *see also* Educ. § 8-403.

³ “FAPE” is an acronym meaning free appropriate public education.

To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) and the applicable federal regulations. The statute provides as follows:

(A) In General

The term “child with a disability” means a child –

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious 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.

20 U.S.C.A. § 1401(3)(A); *see also* Educ. § 8-401(a)(2); 34 C.F.R. § 300.8; and COMAR 13A.05.01.03B(78).

The Supreme Court addressed the requirement of a free appropriate public education in *Bd. of Educ. of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), holding that the requirement is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at 201 (footnote omitted). The court set out a two-part inquiry to analyze whether a local education agency satisfied its obligation: first, 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 some educational benefit. *Id.* at 206-07.

The *Rowley* Court found, because special education and related services must meet the state’s educational standards, the scope of the benefit required by the IDEA is an IEP reasonably calculated to permit the student to meet the state’s educational standards; that is, generally, to pass from grade to grade on grade level. *Id.* at 204; 20 U.S.C.A. § 1401(9).

The Supreme Court revisited the meaning of a free appropriate public education in a more recent case, holding that for an educational agency to meet its substantive obligation under the

IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student’s circumstances. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017). Consideration of the student’s particular circumstances is key to this analysis; the court emphasized in *Andrew F.* that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001.

COMAR 13A.05.01.09 defines an IEP and outlines the required content of an IEP as a written description of the special education needs of the student and the special education and related services to be provided to meet those needs. The IEP must take into account:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial evaluation or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

20 U.S.C.A. § 1414(d)(3)(A). Among other things, the IEP depicts a student’s current educational performance, explains how the student’s disability affects the student’s involvement and progress in the general curriculum, sets forth annual goals and short-term objectives for improvements in that performance, describes the specifically-designed instruction and services that will assist the student in meeting those objectives, describes program modifications and supports for school personnel that will be provided for the student to advance appropriately toward attaining the annual goals, and indicates the extent to which the child will be able to participate in regular educational programs. 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(V); COMAR 13A.05.01.09A. IEP teams must consider the student’s evolving needs when developing their educational programs. The student’s IEP must include “[a] statement of the child’s present levels of academic achievement and functional performance, including . . . [h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for non-disabled children)” 34 C.F.R. § 300.320(a)(1)(i). If a child’s behavior impedes his or her learning or that of others, the IEP team must consider, if

appropriate, the use of positive behavioral interventions, strategies and supports to address that behavior. *Id.* § 300.324(a)(2)(i). A public agency is responsible for ensuring that the IEP is reviewed at least annually to determine whether the annual goals for the child are being achieved and to consider whether the IEP needs revision. *Id.* § 300.324(b)(1).

To comply with the IDEA, an IEP must, among other things, allow a student with a disability to advance toward measurable annual academic and functional goals that meet the needs resulting from the child’s disability or disabilities, by providing appropriate special education and related services, supplementary aids, program modifications, supports, and accommodations. 20 U.S.C.A. § 1414(d)(1)(A)(i)(II), (IV), (VI).

Thirty-five years after *Rowley*, the parties in *Andrew F.* asked the Supreme Court to go further than it did in *Rowley* and set forth a test for measuring whether a disabled student had attained sufficient educational benefit. The framework for the decision was the Tenth Circuit’s interpretation of the meaning of *Rowley*’s “some educational benefit,” which construed the level of benefit as “merely . . . ‘more than *de minimis*.’” *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Supreme Court set forth the following “general approach” to determining whether a school has met its obligation under the IDEA:

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: 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.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”’ A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child’s circumstances should come as no surprise. A focus on the particular child is at the core of the IDEA. The instruction offered must be “*specifically* designed” to meet a child’s “*unique* needs” through an “[i]ndividualized education program.”

Andrew F., 137 S. Ct. at 998-99 (citations omitted; emphasis in original). The court expressly rejected the Tenth Circuit’s interpretation of what constitutes “some benefit”:

When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to ‘drop out.’” The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

Id. at 1001 (citation omitted).

Directly adopting language from *Rowley*, and expressly stating that it was not making any “attempt to elaborate on what ‘appropriate’ progress will look like from case to case,” the *Andrew F.* court instructs that the “absence of a bright-line rule . . . should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’” *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same time, the *Andrew F.* court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, “[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive

explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002.

Ultimately, a disabled student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* at 1000. Moreover, the IEP must be reasonably calculated to allow him to advance from grade to grade, if that is a “reasonable prospect.” *Id.*

In addition to the IDEA’s requirement that a disabled child receive educational benefit, the child must be placed in the “least restrictive environment” to achieve a free appropriate public education, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled 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, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the “least restrictive environment” consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). 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.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like HCPS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make

provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1). Consequently, 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. COMAR 13A.05.01.10A(2). In such a case, a free appropriate public education might require placement of a child in a private school setting that would be fully funded by the child's public school district.

Parents may be entitled to retroactive reimbursement from the state for tuition and expenses for a child unilaterally placed in a private school if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The issue of reimbursement for unilateral placement was expanded in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), where the Court held that placement in a private school not approved by the state is not a bar under the IDEA. Under *Burlington*, parents may recover the cost of private education only if (1) the school system failed to provide a free appropriate public education; (2) the private education services obtained by the parent were appropriate to the child's needs; and (3) overall, equity favors reimbursement. The private education services need not be provided in the least restrictive environment. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the Parent has the burden of proving that HCPS failed to provide the Student with a free appropriate public education for the 2018-2019 school year, and that she is entitled to reimbursement for her unilateral placement of the Student at [REDACTED] Academy.

Due Process Complaint

Counsel for HCPS made numerous objections throughout the hearing and argued that the Parent was precluded from challenging the alleged deficiencies in the February 2019 and June 2019 IEPs because she did not specifically reference deficiencies in the IEPs in her due process complaint, only placement.

Under 34 CFR 300.511(d), the issues in due process hearings are narrow:

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under §300.508(b), unless the other party agrees otherwise.

In this matter, the Parent is indeed challenging the placement of the Student in a comprehensive HCPS high school instead of [REDACTED]. In doing so, she notified HCPS on numerous occasions that she did not agree with the IEP. On January 3, 2019, the Parent stressed that she wanted to discuss other educational placements because the Student was overwhelmed and depressed, was sleeping sixteen to twenty hours per day, and was unable to attend school. At that meeting, the IEP Team declined to consider a private placement stating that a non-public placement can only be made by the Central IEP Team after additional data is collected and analyzed. The IEP was drafted and reviewed by the Parent, who on January 7, 2019 told team members that she did not approve the IEP noting that the Student needed a program where his social and emotional needs could be met throughout the day. At another IEP meeting on February 15, 2019, after the Student began attending [REDACTED] the Team revised the IEP in the areas of Supplementary Aids and Services and Specialized Instruction, but determined that the IEP could be implemented at [REDACTED] or at [REDACTED] high school. The Parent advised the Team that the Student was enrolled at [REDACTED] and was doing well. She further advised that the Student refused to attend [REDACTED] any longer and expressed her view that the IEP driving the placement determination was insufficient. At the June 14, 2019 IEP meeting after reviewing Dr. [REDACTED]

neuropsychological evaluation of the Student, the Team revised the IEP by modifying Supplementary Aids and Supports to include opportunities for small group instruction in a co-taught classroom. The Team further suggested the development of a transition plan to allow the Student to take a limited number of classes at [REDACTED] or [REDACTED] and to monitor his progress under the revised IEP with the additional supports added in February 2019. The Parent immediately declined stating that she did not feel the proposed IEP was sufficient or appropriate.

The Parent expressed concerns over the IEP in her complaint, mostly over how the services called for could not be met in a public comprehensive high school. She mentioned the neuropsychological evaluation by Dr. [REDACTED] and expressed her belief that the IEP, as drafted, would not meet the needs of the Student in light of Dr. [REDACTED] findings. The Parent did not necessarily have issues with the goals, objectives and supports in the IEP, but did have issues with how the Student's instruction would be delivered and made it abundantly clear throughout the IEP process and in her complaint that the IEP, as drafted, would not provide an appropriate education to the Student in the public school environment. Asserting that she did not specifically challenge the deficiencies in the IEPs ignores the obvious fact that the Parent was objecting to the placement decision which was inextricably driven by these IEPs. Accordingly, I find that the Parent's challenges to the IEP were consistent with her due process complaint and were proper.

Individual Educational Evaluation

The Parent obtained, without HCPS approval, an independent neuropsychological assessment of the Student from Dr. [REDACTED] and requested that it be funded at public expense. The Student had a previous psychological evaluation in 2015, which the Team felt was sufficient for the current evaluation of the Student.

In the context of Maryland law, a Maryland statute, Md. Code Ann., Educ. §8-408(a)(2) defines "assessment" as "the process of collecting data" Maryland State Department of

Education regulations are clear on the distinction between the term “evaluation” and “assessment.” COMAR 13A.05.01.03B, defines “assessment” as a “process for *collecting* data” and defines “evaluation” as a “process of *reviewing* information” that has been collected. COMAR 13A.05.01.03B(3) (emphasis added) and (25); *see also* COMAR 13A.05.01.06 (Evaluation). In practice, however, the terms have been used interchangeably.

When a parent is not satisfied with the evaluation or assessment process on which an IEP team relies, a parent can request an independent educational evaluation (IEE) under the procedural safeguard provisions of the federal statute. 20 U.S.C.A. §1415(d)(2). That code section, however, is the only one that mentions an IEE, and it does not specify who is responsible to pay. An IEE, at public expense, is not specifically authorized by the federal statute. *A.C. v. Jefferson Co. Bd. of Ed.*, 701 F. 3d 691, 695 (11th Circ. 2012).

The U.S. Department of Education regulations and Maryland State Department of Education regulations authorize an IEE, “at public expense,” under certain circumstances. 34 C.F.R. §300.502 and COMAR 13A.05.01.14. The federal rule defines an IEE as “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child.” 34 C.F.R. §300.502(a)(3)(i). The federal regulatory scheme contemplates that the IEE will be paid for by the school system if the evaluation being challenged is not “appropriate.” 34 C.F.R. §300.502(b). The regulation provides the following:

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense[.]

34 C.F.R. §300.502(b); *see also* COMAR 13A.05.01.14B(2) (virtually identical State regulation).

The Parent agreed that a new psychological evaluation was not needed in September 2018 when the IEP for school year 2018-2019 was being developed. After the Student performed so miserably in the fall 2018 at ██████ however, she felt that HCPS should perform an updated psychological assessment suggesting that since the last one was performed in 2015, it no longer provided an accurate picture of the Student's current psychological condition. The Student was now three years older, faced a new and difficult challenge in entering high school, and has exhibited new and more severe behaviors recently. The most recent psychological assessment by Dr. ██████ in March and April 2019 revealed some differences, particularly adding Unspecified Anxiety Disorder and Disruptive Mood Dysregulation Disorder as diagnoses causing impediments to the Student's education such as episodes of irritability, temper dyscontrol, dysphoria, ease of agitation, and restlessness.

The Parent contends that the Student's 2015 assessment does not conform to all of the legal requirements because it is no longer sufficiently comprehensive to identify the Student's special education and related services' needs. 34 C.F.R. §300.304(c)(6).

Her theory is that without assessments that specifically collect recent psychological and cognitive data, HCPS's psychological evaluation of the Student is inappropriately incomplete and that an updated evaluation is necessary. As such, she contends that she is entitled to an updated psychological evaluation at public expense.

Thus, the first question I must answer is whether the HCPS evaluation in the area of psychology by using the 2015 assessment was appropriate. If not, I must then answer the question whether the Parent has a right to an independent psychological evaluation at public expense. For the reasons that follow, I find that the 2015 HCPS psychological evaluation was

outdated and thus inappropriate, and the Parent is entitled to reimbursement for the neuropsychological assessment by Dr. [REDACTED] at public expense.

Dr. [REDACTED] was accepted as an expert in neuropsychology. He opined that since the 2015 assessment at [REDACTED] the Student's cognitive abilities increased but that his grades and performance declined. He noted the General Ability Index Score of 140 placing the Student in the 99.6 percentile is a much better predictor of his cognitive ability because it does not take into consideration the Student's processing speed, which is deficient. He noted that the Student's processing speed decreased and that this decline needs to be addressed so that the Student can access instruction. He noted that in the high school setting, the class periods are longer and move at a faster pace which has the effect of frustrating the Student and causing him to disengage and shut down, which is precisely what happened. He noted that the Student has multiple disabilities and that it is extremely unusual for a child to have such high cognitive abilities while at the same time suffering from so many educational barriers related to his disabilities. He also found that the Student demonstrated weaknesses in his executive functioning skills. Dr. [REDACTED] testified that based on the Student's cognitive abilities, he should be performing much better in school. He is not however; because due to his executive function deficits, he simply cannot access the instruction in a comprehensive public high school setting given his disabilities and needs to be placed in a small, highly structured classroom. Dr. [REDACTED] further stated that the Student would unlikely benefit with interaction with non-disabled peers in a public comprehensive high school setting because of his ASD.

HCPS did not refute Dr. [REDACTED] assessment or conclusions other than to assert that the 2015 assessment gave a valid snapshot of the Student's psychological profile and abilities and that [REDACTED] is too restrictive and would not allow interaction with non-disabled peers. HCPS also suggested that Dr. [REDACTED] performed the assessment while the Student was in crisis thereby

obtaining inaccurate results. [REDACTED] the Student's school psychologist in eighth grade at [REDACTED] testified that she felt Dr. [REDACTED] assessment was untimely because she felt that the Student was in crisis at that time and needed more time to develop a baseline at [REDACTED] since he had only been a student there for one semester before testing was performed. Ms. [REDACTED] however, did not have any contact with the Student since he left [REDACTED] and testified that she had not contacted his therapists while he was a student at [REDACTED]

The evidence established that the Student had stabilized by March and April 2019 after his enrollment at [REDACTED]. During testing, Dr. [REDACTED] found that the Student put forth good effort, was cooperative, and saw no evidence of malingering. He concluded that the testing provided a valid and reliable reflection of the Student's functions. He further recommended that another neuropsychological re-evaluation be performed in three years to assess ongoing cognitive, academic and emotional development as these aspects of his psychological profile can change rapidly as the Student grows and develops.

Applying the comprehensive requirements of an evaluation set forth in 34 C.F.R. §§300.304 and 300.305, I conclude that the Parent has shown that the 2015 evaluation is outdated and thus inappropriate and that she should be reimbursed for the costs associated with Dr. [REDACTED] 2019 neuropsychological evaluation.

An Overview of the Student's Education

The Student is an extremely intelligent fifteen-year-old boy who has been diagnosed with ASD, without Language or Intellectual Impairment Requiring Moderate Support, Disruptive Mood Dysregulation Disorder, Unspecified Anxiety Disorder and ADHD-Combined Presentation. These disabilities impact his socialization, self-regulation and emotional control. He was found eligible for special education services by HCPS with a disability code of multiple disabilities including ASD, ED and OHI, particularly ADHD and has been receiving special

education services since first grade. Early on, he exhibited behavioral issues and problems with self-regulation, compliance and social-skills. While the Student was in fourth grade in [REDACTED] 2014, his father died, which contributed to significant bereavement and behavioral issues. In fifth grade, he earned As and Bs but was often disorganized and did not hand in assignments. During that year, he was placed at [REDACTED] Health System as an inpatient for one week and then discharged to outpatient care after exhibiting a pattern of aggressive behavior, defiance and non-compliant behavior. Throughout his educational history, the Student had multiple disciplinary referrals for aggression toward other students, insubordination, failure to follow rules and disrespect toward authority figures.

In September 2015, the Student began sixth grade at [REDACTED] and continued to receive outpatient psychiatric treatment. Early in the school year, he had a psychological evaluation at [REDACTED] Hospital and his cognitive functioning was established to be mostly in the high average and superior range but he showed relative weaknesses in his executive functioning, particularly in his processing speed. He also had multiple disciplinary issues with disrespect to school staff and disruptive behavior.

Prior to seventh grade, the Parent enrolled the Student at [REDACTED] Therapeutic Boarding School in [REDACTED] to address his neurodevelopmental and emotional issues. During his seventh grade year at [REDACTED] he showed uneven behavioral and compliance progress but earned As and a B. For the 2017-2018 school year, the Student returned home and re-entered [REDACTED] for eighth grade. At the beginning of the school year, an FBA/BIP was implemented based on previous BIP plans the Student had in elementary school. This BIP and FBA focused on non-compliance, aggressive and non-aggressive outbursts and disrespect toward others. In addition, the Student began seeing a psychologist in September 2017 for weekly therapy sessions

and a psychiatrist, Dr. [REDACTED] in October 2017. Dr. [REDACTED] managed the Student's medications and provided weekly therapy sessions.

Early in the school year, the Student was suspended for aggressive behavior, inappropriate language, and flipping chairs and tables. He continued to have disciplinary problems, trouble completing work, and difficulty relating to teachers and his peers. The Student's frequency in non-compliant behaviors increased as the year progressed and his grades for the year averaged a low C in the first quarter, a low B in the second quarter and high Cs in the third and fourth quarters. During the year, the Student had continuous support, intervention from the Parent and school staff to keep the Student on task and to assure he completed and handed in his assignments.

When he was ready to leave middle school and transition to high school, the Student applied to three county magnet programs but was turned down by two because of low grades. He was, however, accepted into [REDACTED] Magnet Program at [REDACTED] for the 2018-2019 school year because he had a particular interest in ecology and science.

To assist in his transition, the Student's IEP was amended and approved on September 7, 2018. He began classes but issues arose quickly. Early in the semester, the Student began refusing the Parent's help, became withdrawn and fatigued and by December 3, 2018, refused to continue attending [REDACTED]. His first quarter grades consisted of four Es, three Ds and one B in biology. To a large extent, the Student's poor grades were not due to any cognitive issues but were due to reasons stemming from his ASD, depression, anxiety and executive functioning deficits. He was not completing assignments and projects, was performing well below his cognitive ability, and was unmotivated. While his progress report indicated that he was making sufficient progress in his IEP goals, he was, in fact, consistently falling short of his minimum goals. The Student continued to be depressed and anxious and stated to the Parent that he wanted

to fall asleep and never get up and that everything going on in his life was hopeless. He also indicated that he had given up and could not go to school.

On December 17, 2018, the Parent submitted an application for home and hospital instruction after the Student continued to tell her he was stressed, overwhelmed and was unable to attend school. At a subsequent IEP meeting on January 3, 2019 the Parent stated that she wanted to discuss other educational placements. She told the Team that the Student was overwhelmed and depressed and was sleeping sixteen to twenty hours per day and still refused to attend school. The IEP Team refused to consider a private placement but instead insisted that the Student continue in a public high school in order to collect additional data. The Parent told the Team that she did not approve the IEP and expressed her belief that the Student needed a program where his social and emotional needs could be met throughout the day. In Mid-January 2019, the Parent enrolled the Student at [REDACTED] and requested HCPS to reimburse her for the tuition.

The Student began to thrive at [REDACTED] and his anxiety began to abate. Another IEP meeting was held on February 15, 2019 to address the placement at [REDACTED] and the Parent's request for tuition reimbursement. At this meeting, the Team revised the IEP in the areas of Supplementary Aids and Services and Specialized Instruction but maintained that the IEP could be implemented at [REDACTED] or at [REDACTED]. The Team refused the Parent's request for funding at [REDACTED] and terminated the home and hospital instruction.

On April 25, 2019, the Student had an independent neuropsychological evaluation with Dr. [REDACTED] who diagnosed the Student with ASD without Language or Intellectual Impairment Requiring Moderate Support; Disruptive Mood Dysregulation Disorder marked by episodes of irritability, temper dyscontrol and dysphoria; Unspecified Anxiety Disorder marked by ease of agitation, restlessness, irritability and ADHD – Combined Presentation marked by executive

function deficits which are evident in his behavior, emotional control and cognition. The Student's cognitive functioning was assessed in the extremely high range, but he showed weaknesses in his working memory and processing speed, which all fell in the below average range. His executive functioning was assessed in the Severely Impaired range with an Auditory Attention Quotient in the less than .02 percentile showing significant inattention to auditory stimuli. Emotionally, the Student showed a pattern of despondency, dysphoria, irritability, and diminished sympathy/empathy for others. He described self-destructive thoughts, a sense of emotional isolation and expected disappointment from others. The conclusions drawn from the assessment by Dr. [REDACTED] were that the Student is not capable of navigating the complexities of a comprehensive high school and needs multiple interventions to support his health and progress. He recommended placement in a small, highly structured classroom throughout the day with constant support, access to interventions for ASD and the implementation of an evidence based social skills program. Dr. [REDACTED] further determined that the Student is highly sensitive and easily overwhelmed by the noise and behavior of other students in a typical public high school. This in turn manifests in anxiety, avoidance and withdrawal making it highly unlikely that the Student would benefit from interaction with typically developing peers.

After evaluating Dr. [REDACTED] report, the IEP Team at a June 2019 IEP meeting, revised the IEP by modifying Supplementary Aids and Supports to include opportunities for small group instruction in a co-taught classroom and suggested the development of a transition plan to allow the Student to take a limited number of classes at [REDACTED] or [REDACTED] and to monitor his progress under the revised IEP with the additional supports added in February 2019. The Parent stated that she did not feel the proposed IEP was sufficient or appropriate.

The Student's Need for Private Placement

The Parent presented the testimony of [REDACTED] an Educational Consultant hired by the Parent to tutor the Student. Ms. [REDACTED] testified as an expert in special education with specialization in learning disabilities, Autism, and executive functioning. She testified that she began working with the Student in the summer of 2018 and stated that the Student had problems with his executive functioning early after beginning classes at [REDACTED] with organization and completing assignments. She characterized the Student as extremely complicated as he was very intelligent but had multiple barriers to accessing his instruction. She noted that he understood his course material, but could not complete the assignments due to his executive functioning deficits. She felt that his teachers, for the most part, did not understand his complexities and failed to recognize that the Student was easily overloaded by the noise, light and chaos of a public comprehensive high school because of his sensory issues compounded by his ADHD, ASD and LD. His inability to self-monitor, assess, regulate and control his own behavior made him unable to navigate the complexities of a typical high school and required a level of supervision and assistance that could be given in this setting. Ms. [REDACTED] opined that placing the Student with non-disabled peers would not be beneficial because his ADHD makes him feel isolated and unable to assimilate in that environment. She testified that the Student is not a neurotypical student and is not making any progress at [REDACTED] because of his sensory and social issues and that the methodology employed by a large public high school is not geared to a student with ADHD and ASD because the delivery system will not allow him to receive the instruction. She felt that the Student needs to be in a small controlled environment.

Dr. [REDACTED] also testified as detailed above that that the Student has multiple disabilities and that it is extremely unusual for a child to have such high cognitive abilities while at the same time suffering from so any educational barriers related to his disabilities, particularly regarding

weaknesses in his executive functioning skills. Dr. [REDACTED] felt that based on the Student's cognitive abilities, he should be performing much better in school but was not because his executive function deficits did not allow him to access the instruction in a comprehensive public high school setting. Dr. [REDACTED] noted that the Student needs to be placed in a small, highly structured classroom and that he would be unlikely to benefit by placement with non-disabled peers.

Dr. [REDACTED] testified as an expert in child and adolescent psychiatry and has been providing the Student with psychiatric counseling and treatment since the fall of 2017. He diagnosed the Student with ASD, Unspecified Anxiety Disorder and ADHD. He noted that he had been providing therapy and medication management to address the Student's diagnoses, particularly his anxiety and depression. Dr. [REDACTED] stated that the Student has many issues in social settings and cannot adjust to social changes readily. He testified that the Student was excited about attending high school in the magnet program, but that his condition quickly deteriorated rapidly in the beginning of the 2018-2019 school year at [REDACTED]. He noted that while the Student performed adequately at [REDACTED] he had an abundance of support in school and at home. In the high school setting, however, the demands, both academically and socially, become much greater on a student. As seen, the Student, as a child with his specific disabilities, became overwhelmed to the point of fatigue, depression, and suicidal thoughts. Dr. [REDACTED] stated that these issues were not a medication issue but were directly related to the Student's disabilities. Because of the Student's ASD, hospitalization to address the suicidal issues would have just exacerbated the Student's symptoms. Dr. [REDACTED] stated that once the Student began attending the [REDACTED] Academy, his symptoms began to stabilize and the Student functioning has improved markedly. Dr. [REDACTED] noted that the Student's therapy and medications have not changed, but that the enrollment at [REDACTED] was the only variable that changed. He opined that the placement at

█████ was critical to his receiving instruction and achieving success in school. He consulted with Dr. █████ and agreed that placement with non-disabled peers would not be beneficial to the Student. He opined that if placed back in a public high school, the Student would be overwhelmed again and would likely regress and decompensate.

█████ the Director of Admissions and Outreach at █████ testified as an expert in special education and provided insight into █████ programming. She stated that █████ offers a fully customized educational program based on the individual needs of the student. She stated that █████ employs a teacher-mentor approach with one to one support. She testified that █████ is accredited as an advanced educational facility and offers a program just as rigorous as a public high school but pairs students with teachers to allow one on one instruction in a less stressful environment with other disabled peers. She stated that students receive high school diplomas upon successful completion of the program.

█████ Assistant Director at █████ also testified and provided insight into █████ academic programs. She noted that █████ focuses on offering instruction in a relaxed setting thereby eliminating the stressors to disabled students found in a typical county high school. She stated that a student has input into designing a curriculum to fit his or her needs and that the program encouraged peer and teacher interaction.

Finally, the Parent and Student testified and detailed the Student's history throughout his educational experience. In fourth grade, the Student lost his father as well as a family pet, which impacted him greatly. He struggled emotionally, as well as, academically and was enrolled at a therapeutic school in █████ The Parent stated that the Student made some progress at █████ but that the Student was homesick and the Parent could no longer afford to send him there. In eighth grade, the Student returned to █████ The Parent testified that if it was not for her constant diligence, supervision and communication with teachers and staff at █████ the

Student would not have gotten through eighth grade because of his executive functioning deficits and behavioral issues. She noted that he understood the material but could not cope with the milieu. She stated that the Student did form a bond with the school psychologist, Ms. [REDACTED] but noted that the Student continued to have significant behavioral problems leading to disciplinary measures being employed. The Parent stated that the Student remained depressed and anxious, and was unable to form any friendships with other students that he pursued outside of the classroom. She testified that the Student had more disciplinary issues than were reported by [REDACTED] and that these incidents increased in frequency as the year wore on. This was reflected in the evidence provided. The Parent noted that while the Student received passing grades in eighth grade, this was only due to her constant supervision and vigilance and assuring that the Student completed his assignments and handed them in. She stated that the Student was ill prepared for high school. He did not receive the same level of supervision at [REDACTED] because he rejected the Parent's help, and the rigors and instruction at [REDACTED] were more fast paced and autonomous than [REDACTED]. She testified that the Student quickly became depressed, slept sixteen to twenty hours per day and became withdrawn. The Parent tried to get the Student to start and complete his assignments, but to no avail as he completely shut-down. She stated that she was exasperated as the Student refused to attend school altogether and to complete any of his assignments. [REDACTED] [REDACTED] was considered but rejected because there was a waiting list so home and hospital instruction was started. The Parent stated that this was unsuccessful and was only able to address the behavioral and executive functioning issues. No academic progress was made because the Student was excused from or would not complete his assignments.

The Parent observed that the Student was stressed, overwhelmed and depressed to the point where he could no longer attend [REDACTED]. The Student felt he was not wanted or understood there. He is a child who had significant problems in middle school with peer and adult

relationships, being defiant and oppositional, not following directions, putting his head down, and calling out in and disrupting class. These issues continued into high school. The only difference was that the Student may not have shown as much aggressive behavior but instead, he completely withdrew, became depressed and anxious and felt totally defeated.

The Parent testified that when she addressed these issues at the various IEP meetings in January, February, and June 2019, the Team rejected a private placement and told her that the Student needed to return to [REDACTED] so that additional data could be collected. In an email dated February 14, 2019, [REDACTED] who managed the Student's home and hospital instruction advised Ms. [REDACTED] and Ms. [REDACTED] that Dr. [REDACTED] suggested strategies including smaller class sizes, shorter class periods, one-on one assistance and flexibility in the school day and assignments. Ms. [REDACTED] further advised that as far as home and hospital instruction was concerned, [REDACTED] and [REDACTED] the psychology supervisor with the home and hospital program and attorney with home and hospital respectively, advised that home and hospital be terminated, and the Student be returned to [REDACTED] stating that if the Student can "physically attend [REDACTED] he can physically attend the public school." In addition, they further suggested another IEP meeting to develop an IEP for the Student to transition back from home and hospital teaching to [REDACTED] and if the Parent "wants to pursue a nonpublic placement, she can file a due process request regarding same." It certainly appeared that HCPS was not open to considering a private placement at that point.

The evidence established, however, that at the IEP meeting on February 15, 2019 the Team revised the IEP in the areas of Supplementary Aids and Services and Specialized Instruction. The IEP provided for special education instruction at four hours per month to address self-management; four hours per month to address social-emotional needs; eighty minutes per month for counseling and eighty minutes per month to address social interaction.

The Team also determined that the IEP could be implemented at [REDACTED] or at [REDACTED] even though [REDACTED] is a comprehensive HCPS high school that does not offer the [REDACTED] Program that the Student was in at [REDACTED]. The nonpublic placement was denied at that time.

The Parent testified that she was not satisfied with the placement decision made in February 2019, because it was totally inadequate to meet the Student's educational and emotional needs. She stated that after a disastrous fall semester at [REDACTED] and placement in the home and hospital program with little to no success, she enrolled the Student at [REDACTED]. In the meantime, she began to feel that the psychological evaluation from 2015, used by the Team during the IEP development did not present an accurate picture of the Student's current psychological profile so she had Dr. [REDACTED] perform his independent neuropsychological evaluation detailed above. The Parent expressed her agreement with Dr. [REDACTED] assessment that the Student is not capable of attending a comprehensive high school because he needs multiple interventions and placement in a small, highly structured classroom throughout the day with constant support and access to interventions for his ASD and behavioral issues stemming from his ADHD. The Parent stated that the Team failed to consider Dr. [REDACTED] recommendations, particularly his assessment, as well as Dr. [REDACTED] that the Student would be unlikely to benefit from interaction with typically developing peers.

The Student testified that he suffers from multiple disabilities and that he experiences heightened sensitivity to noise and crowds. He stated that he frequently was overwhelmed both in middle school and particularly in high school with the increased stimuli and increased class length. He felt that he was thrust into social situations in the public schools and was overwhelmed and exhausted by it. He stated that he did not ever feel accepted by non-disabled peers and needed to be educated with disabled peers where he felt less pressure. He stated that he has more friends than ever at [REDACTED] feels challenged by the academics and feels more rapport

with his teachers as well as other students. He stated that while he was at [REDACTED] he made passing grades but only because he was pushed by his mother. He described the stress he felt by putting this burden on his mother and stated that it caused him to reject her help. This in turn caused him to struggle even more at school, academically and socially, which caused him to be exhausted, depressed and anxious. He stated that he just could not receive the instruction with the methodology used in the public school.

HCPS asserted that the Student was receiving educational benefit while he was at [REDACTED] and at the same time was in the least restrictive environment because he was being educated with non-disabled peers. It further contended that the Student would receive a free appropriate public education based on the IEP developed at the February and June 2019 IEP meetings.

HCPS presented the testimony of [REDACTED] who was the Student's Case Manager while he attended [REDACTED]. Ms. [REDACTED] testified as an expert in special education. Ms. [REDACTED] stated that in June 2018, the IEP Team met to conduct the Student's annual review, and to review and revise the IEP for the Student's ninth grade year. She stated that she did not teach the student, but communicated with the Parent regularly as well as the staff at [REDACTED] and the Student's therapists. Ms. [REDACTED] noted that middle school utilizes more of a team approach while the high school uses a more individualized autonomous approach. Ms. [REDACTED] testified that she felt that the Student was making progress at [REDACTED] despite the fact that he had failing grades in four of his subjects. She stated that he also had three Ds and a B, which are all passing grades. She said that he received failing marks in four of his classes because he was not completing his assignments or taking the tests but not because he was not capable of doing the work. Ms. [REDACTED] noted that the Student did well in classes he enjoyed and was interested in. She suggested the Student's had difficulty completing assignments and was doing poorly because he chose not to be successful, not because of his mental health issues. Ms. [REDACTED] testified that the Student was not referred to the CIEP team

because the Team felt that the Student was making progress and that the IEP could be implemented at [REDACTED]. She stated that the IEP contained two goals and felt that the Student was making progress in both of them. Ms. [REDACTED] stated that the Student did not need a more restrictive setting because he was making progress at [REDACTED] and stated one semester at [REDACTED] did not present a full picture of the Student's needs. She said that the Team needed more data from [REDACTED] to determine if a more restrictive setting was needed. Ms. [REDACTED] stated that the Student was also offered placement at his home school, [REDACTED] where he could be with students that he was familiar with at [REDACTED] [REDACTED] however, did not offer the [REDACTED] magnet program offered at [REDACTED]. Ms. [REDACTED] stated that she was not sure if Dr. [REDACTED] report and recommendations were considered by the Team or whether Dr. [REDACTED] findings were significantly different from the 2015 psychological evaluation.

[REDACTED] testified as an expert in general education. She taught the Student's Social Studies class at [REDACTED] and also had him in her home room while he was at [REDACTED] in eighth grade. Ms. [REDACTED] provided anecdotal accounts of the Student during his eighth grade year and stated that he was "ok" over the course of the year and that his behavior seemed like it improved during the course of the year. She stated that the Student was the most intelligent student she ever taught, but noted that he received Cs and Ds. She stated that the Student had to be interested in the topic in order to be engaged and felt that he should have done much better given his cognitive ability. She stated that he had problems with organization and frequently failed to hand in assignments, which impacted his grades. She believed that the Student benefitted from being with non-disabled peers.

[REDACTED] a special educator, testified as an expert in special education. Mr. [REDACTED] was the Student's Special Education Manager in eighth grade at [REDACTED]. He testified that he was familiar with the Student's history and discussed the Student's IEP implemented

during eighth grade. He stated that additional goals to address social/emotional and self-management needs were added in November 2017, and that counseling was increased to thirty minutes per session from twenty minutes. The Student received services in the general education classroom with support with frequent breaks when needed. Mr. [REDACTED] stated that the Student had behavioral issues in the beginning of the year, but that by February 2018, his behavior improved and he began to successfully manage his own behavior. Mr. [REDACTED] stated that the Student's grades improved in the second quarter, but then dropped somewhat and remained there for the balance of the year. Mr. [REDACTED] noted that he had to provide extensive supervision to help the Student maintain his compliance and to keep him organized and up to date with assignments throughout the school year. Mr. [REDACTED] asserted that the Student made progress over the course of the year overall. He stated that grades are not the only measure of success but also the Student's engagement with others and course materials, interaction and work completion, and how well he is meeting his IEP goals and objectives need to be considered. Mr. [REDACTED] asserted that the Student's compliant behavior increased and that he made gains regarding disciplinary issues over the course of the year. However, Mr. [REDACTED] became somewhat hostile to questioning when it was established that instances of non-compliant behavior increased from February 2018 when there was an average of 2.5 instances per week of non-compliant behavior to seven instances per week by June 2018. In addition, during this school year, the Student continued to have disciplinary problems, trouble completing work, and relating to teachers and his peers. He had two behavioral incidents/office referrals for behavioral issues in the first quarter, two in the second quarter, one in the third quarter and five in the fourth quarter. Evidence further established that there were even more instances that were not reported. Finally, the evidence established that the Student had instances where he lost control of voice or

body fourteen times in the second quarter and twenty four times each in the third and fourth quarters.

██████████ Assistant Principal at ██████████ provided expert testimony in the area of general education and administration. Ms. ██████████ stated that ninth grade is a transition year and typically causes adjustment problems for new students. She testified that the Student displayed elevated emotional and aggressive behavior in eighth grade that was not exhibited at ██████████ She did note that the Student had numerous instances of disciplinary issues at ██████████ requiring detentions and a referral to the school psychologist. She stated that the Student started the year at ██████████ well, but was not handing in his assignments and projects. She testified that the Student appeared to comprehend the course material but his failure to complete assignments affected his grades. She testified that ninth grade success is normally a good predictor of graduation rate. In the case of the Student, however, while she felt that he was capable of graduating, the fact that he was not completing assigned work made any success unlikely as well as graduation.

██████████ School Psychologist at ██████████ testified as an expert in school psychology. Ms. ██████████ stated that she worked with the Student on rapport and trust building as well as coping skills. She stated that she developed a level of trust with the Student and felt that he showed improvement while he was at ██████████ but conceded that his progress was sporadic. She testified that the Student needed to learn how to cope in the real world and felt that it was essential that he be educated with non-disabled peers so that he could model their behavior and learn to resolve issues that occurred on his own. She opined that for this reason, placement in a comprehensive public high school was appropriate. Ms. ██████████ stated that she was unaware that the Student voiced suicidal thoughts to Dr. ██████████ and said that he never mentioned to her that he had suicidal or self-destructive thoughts. She testified that she reviewed Dr. ██████████ report, but disagrees that the Student is not capable of navigating the complexities of a comprehensive

high school. She opined that because he was able to navigate middle school, he was capable of doing so in high school. She observed that in testing, the Student's cognitive functioning scores went up from 2015 to 2018, but his executive functioning went down meaning that his academic functioning is not keeping up with his cognitive functioning. Showing a high IQ but low executive functioning will certainly lead to frustration. She asserted that the Student needed to overcome this and felt that the only way he would obtain these skills would be education with non-disabled peers.

██████████ Coordinator of Compliance, Department of Special Education with HCPS, testified as an expert in special education. Ms. ██████████ stated that she participated in the Student's ██████████ IEP meetings as well as the February and June 2019 meetings. She noted that on the September 2017 IEP, the Student received four-fifteen minute special education sessions outside of general education at ██████████ but that these services were increased to eight-fifteen minute sessions on the June 2018 IEP in order to address the transition to high school. After home and hospital teaching ended, a transition plan was needed for the Student to return to school. Ms. ██████████ testified that after considering Dr. ██████████ report, because the Student needed additional help with his social and emotional needs as well as self-management, five goals were included in the IEP as well as special education services consisting of four-twenty minute sessions outside of general education and separate sixteen-fifteen minute sessions addressing both management and social/emotional needs inside of general education. Ms. ██████████ stated that the Team considered that the Student was not showing destructive behavior so crisis intervention strategies were removed against the Parent's wishes. Ms. ██████████ stated that private placement was deemed to be too restrictive as the school based members of the Team felt that the IEP could be implemented at ██████████ the feeling being that the Student would benefit from inclusion with non-disabled peers. She asserted that if the placement at a comprehensive public high school proved to be ineffective,

the Team could reconvene and consider new strategies including a non-public placement. Ms. [REDACTED] opined that [REDACTED] lacks the exposure to non-disabled peers that she feels the Student needs. Without this exposure, the Student will not have the opportunity to gain perspective from non-disabled peers or learn to cope with real world problems. She noted that even though his grades were low at [REDACTED] she attributed this to the difficult transition from middle school to high school and felt that he made progress as he was no longer exhibiting aggressive behavior.

Were the IEPs Reasonably Calculated to Enable the Student to Make Progress Appropriate for His Circumstances?

The facts in this case are similar to those in *Andrew F.*, which the Supreme Court summarized as follows:

Andrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Andrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Andrew displayed a number of strengths—his teachers described him as a humorous child with a “sweet disposition” who “show[ed] concern[] for friends”—he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.” Supp. App. 182a; 798 F.3d 1329, 1336 (C.A.10 2015). Andrew would scream in class, climb over furniture and other students, and occasionally run away from school. *Id.*, at 1336. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Andrew's parents saw it, his academic and functional progress had essentially stalled: Andrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Andrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Andrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Andrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism.

Andrew did much better at Firefly. The school developed a “behavioral intervention plan” that identified Andrew's most problematic behaviors and set out particular strategies for addressing them. See Supp. App. 198a–201a. Firefly also added heft to Andrew's academic goals. Within months, Andrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. Endrew's parents considered the IEP no more adequate than the one proposed in April, and rejected it. They were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at Firefly suggested that he would benefit from a different approach.

Endrew F., 137 S. Ct. at 996-97.

Although the Student in this case had behavioral issues, unlike Endrew F. his behavior does not necessarily prevent him from making academic progress in the general education curriculum. The Student has an extremely high IQ, and was described by all as an extremely intelligent and well-spoken child, but had behavioral issues in middle school and became depressed and anxious and totally withdrawn after he entered high school. The evidence established that his ability to learn is hampered by ASD, ED, and ADHD.

In rejecting the Tenth Circuit's holding that an IEP need offer only *de minimis* progress, the *Endrew F.* court held:

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.

Id. at 1000-01.

The Parent did not necessarily disagree with the goals and objectives contained in the IEP but felt that any progress that he made was *de minimis*. Her main contention was that the IEPs

could not be implemented in a public comprehensive high school. The IEP Team, however, maintained that the Student needed to be educated with non-disabled peers and felt that placement at the ██████ Academy was too restrictive and would not allow the Student the opportunity to be educated with non-disabled peers. The Team asserted that the Student made progress at ██████ and that he made progress at ██████ despite the fact that he had four Es, three Ds and one B in his first quarter. There was no dispute that the Student was extremely intelligent. One of his general education teachers at ██████ described him as the most intelligent child she ever taught. Despite his intelligence and cognitive ability, the Student was simply not progressing. His behavior regressed somewhat during eighth grade, his grades were passing but only because his mother and school staff constantly supervised and pushed the Student to complete his assignments and to hand his work in. Because he frequently failed to do so, his grades suffered despite his cognitive abilities. All of this is a sign, according to *Andrew F.*, “indicating that he was failing to make meaningful progress toward his aims.” *Id.* at 996.

The evidence is convincing that the major problem with the Student’s 2018 and 2019 IEPs was his placement in a comprehensive public high school. The goals and objectives in those IEPs were reasonable, but the Student’s placement interfered with his ability to receive instruction. Dr. ██████ provided therapy to the Student throughout eighth grade to the present and said the Student suffers from ASD, anxiety and depression. The Student has many issues in social settings and cannot adjust to social changes readily. While the Student was excited about attending high school in the magnet program his condition quickly deteriorated once he began classes. While the Student performed adequately at ██████ he had an abundance of support in school and at home. In the high school setting, however, the autonomous demands, both academically and socially, become much greater on a student, and a child with the Student’s disabilities was overwhelmed to the point of fatigue, depression and suicidal thoughts. Dr.

██████████ noted that these issues were not a medication issue, but were directly related to the Student's disabilities.

Dr. ██████████ agreed that the Student needs multiple interventions to support his health and progress and recommended placement in a small, highly structured classroom throughout the day with constant support, access to interventions for ASD and the implementation of an evidence based social skills program. He cannot access this in a public high school. Dr. ██████████ has thirty years of experience treating ██████████ disorders including ASD, LD, and ADHD. HCPS failed to refute this conclusion.

I gave Dr. ██████████ and Dr. ██████████ testimony great weight for several reasons. First is their education and vast experience providing therapy to students in special education curriculums with ADHD, ED, LD and behavioral issues. Second is their analytical method of presenting their testimony, stating facts from their observations and the Student's records. Both Dr. ██████████ and Dr. ██████████ testimony was unbiased and focused strictly on the Student's needs and abilities, without attempting to denigrate the efforts of HCPS personnel. Third, when cross-examined by HCPS counsel, both remained convincing that they were focused only on the welfare of the Student regardless of which side they were testifying for.

Dr. ██████████ as well as Dr. ██████████ stated that the IEP goals were not necessarily defective. However, the Student's poor executive functioning and sensitivity to stimuli makes it impossible to receive instruction in a general education classroom despite his high cognitive abilities. Both opined that the Student could make significant progress, graduate from high school and even attend college but emphasized that in the general education classroom the Student is unable to receive and process the information being delivered. The Student made passing grades at ██████████ but only because of the constant intervention and communication between the Parent and school staff. The Student's grades did drop toward the end of that year

and he had multiple disciplinary and behavioral issues that increased as the year went on. In high school, while the Student's aggressive behavior decreased, he became depressed, anxious and totally withdrawn to the point of refusing to attend school. He only had one B in a subject that he was immensely interested in, but beyond that, he had Ds and Es. In other words, he made no meaningful educational or behavioral advances. The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

HCPS did not present a witness to effectively counter Drs. [REDACTED] or the Parent. Ms. [REDACTED] the school Psychologist at [REDACTED] is a well-educated and dedicated professional, but she does not have the depth of experience that Drs. [REDACTED] and [REDACTED] do. In addition, she has not had any personal interaction with the Student since he left [REDACTED] and attended [REDACTED]. She testified that the Student had demonstrated progress at [REDACTED] but that the progress was up and down and sporadic. Ms. [REDACTED] was the Student's Case Manager at [REDACTED] but did not observe him in the classroom or teach him. She testified that the Student did not display any aggressive behaviors at [REDACTED] and felt that he was making progress. She suggested, however, that the Student was possibly not making good grades because he chose not to, not because of his disabilities. By proffering that the Student's grades were possibly based on choice, Ms. [REDACTED] showed that she clearly did not understand his diagnoses and how they impacted the Student. Drs. [REDACTED] and [REDACTED] both stated that the Student was not capable of receiving instruction in a general education setting because of his disabilities. It had nothing to do with choice. Ms. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] all opined that the Student's IEP could be successfully implemented in the general education setting and felt that placement at a private school such as [REDACTED] was too restrictive. This is directly at odds with the opinions of Drs. [REDACTED] and [REDACTED] and with the evidence establishing that the Student was not making any

meaningful progress. Finally, the testimony of Ms. [REDACTED] and Mr. [REDACTED] detailed their experiences with the Student while he was at [REDACTED] but neither have had any contact with the Student since he left middle school. Further, their testimony that the Student made progress at [REDACTED] is not borne out by the other evidence presented.

Considering all the evidence in the record, I find that the Student's IEPs of February 2019 and June 2019 were not reasonably calculated to meet his unique needs and to allow him to make appropriate progress in light of his circumstances. The major problem with these IEPs was placing the Student in the general education classroom, where he was academically lost for much of the day. HCPS probably gave the Student all the instruction and services that its resources allowed for a child in the general education population even with the limited special education support. The specialized instruction and support specifically needed by the Student was not available in a comprehensive public high school setting however.

The Student Did Not Receive a Free Appropriate Public Education

The IEPs of February 2019 and June 2019 were not adequate to meet the Student's educational needs in light of his disability particularly due to the placement decision. As such, the Student did not receive a free appropriate public education during the 2018-2019 school year because the IEPs were not reasonably calculated to provide the Student a free appropriate public education in light of his circumstances.

While the Student made minimal, if any educational progress, at least during the eighth grade year with passing grades, his behavior remained problematic and he did not achieve his IEP goals according to his class reports, despite HCPS assertion that he did. During the eighth grade year, the Student was suspended for inappropriate language, and flipping chairs and tables. He continued to have disciplinary problems, trouble completing work, and relating to teachers and his peers. He had two behavioral incidents/office referrals for behavioral issues in the first

quarter, two in the second quarter, one in the third quarter and five in the fourth quarter and his frequency in non-compliant behaviors went from an average of 2.5 times per week in February 2018 to seven times per week by June 2018. In addition, he had instances where he lost control of voice or body fourteen times in the second quarter and twenty four times each in the third and fourth quarters. His grades for the year averaged a low C in the first quarter, a low B in the second quarter and high Cs in the third and fourth quarters. The evidence established that the only reason he received passing grades was because of the Parent's constant intervention, support and communication with school staff, particularly in assuring that the Student completed and handed in his assignments. By the time the Student got to high school, he was not exhibiting the aggressive behaviors seen in middle school but instead, the Student became depressed, anxious and totally shut down and refused to attend school after November. His grades were extremely poor except for Biology and the Student was clearly making no progress despite HCPS assertions that he was as evidenced by some passing grades.

Also, the Student's progress (or lack thereof) is evident. As stated previously, the Student's academic goals and objectives all call for him to receive assistance in social/emotional as well as management areas. The evidence shows that the Student received some level of support but he was still not making sufficient progress in the public school.

However, while additional supports were included in the February 2019 and June 2019 IEPs, this does not offset the inadequacy of the IEPs in terms of its placement decision. The Student needs placement in small group settings for the majority of his day. Placement in a public high school does not accomplish this. I conclude that the Parent has proven that HCPS failed to provide a FAPE to the Student for the 2018-2019 school year, thus meeting the first prong of the *Burlington* test. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985).

Was the Parent's Placement of the Student at The [REDACTED] Academy Appropriate?

To obtain reimbursement for her placement of the Student at [REDACTED] the Parent must also prove that it is an appropriate placement for the Student. Much of HCPS's testimony centered on the Student's progress in eighth grade and the appropriateness of him attending a public comprehensive high school for ninth grade. HCPS's evidence was also geared toward the alleged inappropriateness of the Student attending The [REDACTED] Academy.

[REDACTED] is a private school in [REDACTED] Maryland that provides one-on-one instruction to students with a wide range of emotional, educational and social needs. Class periods were fifty rather than ninety minutes long. [REDACTED] the Director of Admissions and Outreach at [REDACTED] testified that [REDACTED] offers a fully customized educational program based on the individual needs of the student and employs a teacher-mentor approach with one to one support. She testified that [REDACTED] is accredited as an advanced educational facility and offers a program just as rigorous as a public high school but pairs students with teachers to allow the one on one instruction in a less stressful environment with other disabled peers. Ultimately, students receive high school diplomas upon successful completion of the program.

[REDACTED] Assistant Director at [REDACTED] provided insight into [REDACTED] academic programs and noted that [REDACTED] focuses on offering instruction in a relaxed setting thereby eliminating the stressors to disabled students found in a typical county high school. She stated that a student has input into designing a curriculum to fit his or her needs and that the program encouraged peer and teacher interaction. I found Ms. [REDACTED] and Ms. [REDACTED] to be credible and candid witnesses.

As noted above, the Parent was not satisfied with the placement decision made in February 2019, feeling that it was totally inadequate to meet the Student's educational and emotional needs. After a disastrous fall semester at [REDACTED] and placement in the home and

hospital program with little to no success, she enrolled the Student at [REDACTED]. The Parent was adamant that the Student is not capable of attending a comprehensive high school and needs multiple interventions and placement in a small, highly structured classroom with constant support and access to interventions for his ASD and behavioral issues stemming from his ADHD. The Parent insisted that the Student would be unlikely to benefit from interaction with typically developing peers, agreeing with the conclusions of Dr. [REDACTED] and [REDACTED].

The Student was overwhelmed both in middle school and particularly in high school with the increased stimuli and increased class length. He felt that he was thrust into social situations in the public schools and was overwhelmed and exhausted by it. He did not ever feel accepted by non-disabled peers and knew he needed to be educated with his disabled peers where he felt less pressure. He feels challenged by the academics and feels more rapport with his teachers as well as other students. He stated that he just could not receive the instruction with the methodology that was used for him in the public school.

Two factors come into play in analyzing this question. The first is the differing perceptions of the Parent, Student and HCPS about the Student's experiences, happiness and mental health while at [REDACTED]. The second is the value of having the Student spend almost the entire school day with non-disabled peers.

HCPS is adamantly opposed to the Student staying at [REDACTED] and all its witnesses testified that it is not a proper placement for him. The major reason, according to those witnesses, is that the Student needs to be educated with nondisabled peers so that he can model their behavior and learn to cope with the real life problems he will face later in life. Mr. [REDACTED] and Ms. [REDACTED] testified that the Student did well with non-disabled peers, but also conceded that there were a host of behavioral issues related to the Student's ASD and ADHD throughout eighth grade. In addition, they did not observe the student in the high school setting at [REDACTED].

The Student and the Parent told a different story. The Parent testified that in eighth grade, the Student had no friends and was never invited to birthday parties. She said she expressed concerns to the school about the Student's social issues related to his ASD and ADHD and that the HCPS was well aware of the problems. While staff at [REDACTED] said the Student had several friends, the Parent denied this and stated that the Student never interacted with his classmates outside of school. In November 2018, the Student's anxiety and depression increased, his behavior deteriorated, and he refused to go to school at all.

In contrast, according to the Parent's testimony, the Student is getting As and Bs, and he has friends and is engaged in school socially and academically. She stated that for the first time ever, the Student was invited to a birthday party for a classmate. The Student echoed the Parent's comments.

On this issue, I find the Student's and Parent's testimony more useful. The Student is well aware of his needs and comfort level. The Parent lives with him and observes him every day. She is completely involved with his education and had daily contact with staff at [REDACTED] and [REDACTED]. Her perception of the Student's happiness and number of friends are undoubtedly more accurate than those of school personnel, who see the Student less often and in a controlled environment. As the evidence established, the Student is extremely intelligent, can be very engaging and will comply with rules so long as he is happy and sees a need for the rules. Placement at [REDACTED] is not appropriate for this Student. The Student simply could not succeed in the public setting but is thriving at [REDACTED]. Placement with non-disabled peers offered no benefit to the Student and contributed to his only making minimal progress despite his high cognitive ability. In light of this evidence, I see no reason or utility to continue placing the Student in a comprehensive public high school to gather more data, as HCPS suggested, just to see if he fails before making another placement decision. This guinea pig approach is simply not acceptable.

Ms. [REDACTED] testified that the Student is appropriate for enrollment at [REDACTED] based on his disability and her review of his assessments and discussions with the family. She stated that [REDACTED] could meet the Student's needs by providing modified one on one instruction in a small setting with shorter class periods, all of which are needed by the Student. Ms. [REDACTED] stated that [REDACTED] has approximately thirty students. The teachers/mentors provide academic as well as emotional support and interact with each student's private therapists. The teachers at [REDACTED] are trained in techniques to enact the students' BIPs.

On the issue of peer modeling, HCPS was adamant that the Student would not interact with non-disabled peers at [REDACTED] and the behavior of his disabled classmates would interfere with his learning. There is no support for their assertion, however, given Dr. [REDACTED] and Dr. [REDACTED] assessments and recommendation that placement with non-disabled peers would offer no benefit to the Student. The Student's success at [REDACTED] also bears this out.

[REDACTED] is a highly restrictive environment, but parental placements need not meet the least restrictive environment requirement of the IDEA, which exists to prevent school systems from segregating disabled students away from their non-disabled peers. *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009). The Fourth Circuit's *Carter* decision said the following about the appropriateness of a parental placement.

Second, we do not believe that the Supreme Court, by requiring that the private school placement be "proper under the Act," intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state. Rather, when a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3051—the same standard by which the appropriateness of a public school's IEP is assessed.

Carter By & Through Carter v. Florence Cty. Sch. Dist. Four, 950 F.2d 156, 163 (4th Cir. 1991), *aff'd*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).

Taking into account the equitable considerations mentioned in *Burlington* and the Supreme Court's *Carter* decision, I find that the Parent's placement of the Student at [REDACTED] is reasonably calculated to enable the Student to receive educational benefits. Instruction at [REDACTED] is provided at a level and environment the Student can understand in a small classroom setting with one to one instruction and small group assistance. The teachers are all special educators and much of the student population has the same disability as the Student. The school is certainly geared toward educating ASD, ED and ADHD children such as the Student.

Remedy

The Student's mother did not provide any evidence as to how much she has spent on tuition and transportation costs associated with the Student's enrollment at [REDACTED] since January 2019 or the private neuropsychological evaluation. This information can be easily established, however, and provided to HCPS.

HCPS has made it clear that it considers the general education classroom the Student's appropriate placement. The proposed IEP of February 2019 and June 2019 ordered this placement and, if accepted, would have covered the remainder of the Student's ninth grade year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the HCPS IEP of February 2019 and June 2019 was not reasonably calculated to provide the Student with educational benefit and did not provide a free appropriate public education for the Student. *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Board of Education of the Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C.A. § 1415(f)(1)(A) (2017).

I further conclude as a matter of law that the Parent's placement of the Student at [REDACTED] Academy is reasonably calculated to enable the Student to receive educational benefits. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the Parent is entitled to reimbursement for all tuition paid since January 2019 for her placement of the Student at [REDACTED] Academy for the remainder of the 2018-2019 school year. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009).

I further conclude as a matter of law that the HCPS psychological evaluation conducted in 2015 was not appropriate. 34 C.F.R § 300.502(b) (2017); *E.P. v. Howard Cty. Pub. Sch. Sys.*, 2017 WL 3608180 (D. Md. Aug. 21, 2017). Therefore, I conclude that the Parent has a right to an independent psychological evaluation at public expense. *Id.*

ORDER

I **ORDER** that the Harford County Public Schools shall reimburse the Parent for her tuition payments and transportation costs associated with her placement of the Student at [REDACTED] for the remainder of the 2018-2019 school year beginning January 25, 2019; and I further

ORDER that the Harford County Public Schools shall reimburse the Parent for the amount paid for the Neuropsychological evaluation performed by Dr. [REDACTED] in March and April 2019, and I further

ORDER that the Harford County Public Schools shall, within thirty days of the date of this decision, provide proof of compliance to the Chief of the Complaint Investigation and Due Process Branch, Division of Special Education and Early Intervention Services, the Maryland State Department of Education.

October 4, 2019
Date Decision Mailed

Michael J. Wallace
Administrative Law Judge

MW/da
#182035

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 with the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (2018). 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.

Copies Mailed To:





[REDACTED]

STUDENT

v.

HARFORD COUNTY PUBLIC SCHOOLS

BEFORE MICHAEL J. WALLACE,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-HARF-OT-19-21536

FILE EXHIBIT LIST

The Parent presented one binder of exhibits marked 1 through 20, including a thumb drive containing exhibit 10A. The parties stipulated to the admission of exhibits 1- 14. The following were admitted into evidence:

1. [REDACTED] Middle School ([REDACTED] documents including emails and disciplinary reports, various dates
2. Functional Behavior Assessment/Behavior Intervention Plan, dated September 27, 2017
3. Individualized Education Program (IEP) Progress Report, 2017-2018
4. [REDACTED] High School ([REDACTED] correspondence, various dates
5. Email correspondence of Student, September 16, 2018 – September 30, 2018
6. Home and Hospital Instruction documents, various dates
7. HCPS emails, February 8, 2019- June 13, 2019
8. Emails between Parent and [REDACTED] dated January 7, 2019 and January 9, 2019
9. Home and Hospital Documents, various dates
10. Transcript from June 14, 2019 IEP Meeting with attached thumb drive recording of meeting (10A)
11. *Curriculum Vitae*, [REDACTED] M.Ed.

12. *Curriculum Vitae*, [REDACTED] M.D.
13. *Curriculum Vitae*, [REDACTED] Ph.D. ABN
14. *Curriculum Vitae*, [REDACTED]
15. Article-Low visual information processing speed and attention are predictors of fatigue in elementary and junior high school students
16. Article-“Putting on My Best Normal.”
17. Not submitted
18. Not Submitted
19. Article by [REDACTED] with Student’s responses
20. [REDACTED] Grade 9 First Quarter Report Card

HCPS presented one binder of exhibits marked 1 through 48. The parties stipulated to the admission of exhibits 1-38. The following were admitted into evidence:

1. Prior Written Notice, dated September 27, 2017
2. Prior Written Notice, dated November 14, 2017
3. Prior Written Notice, dated February 13, 2018
4. Prior Written Notice, dated June 15, 2018
5. Prior Written Notice, dated September 18, 2018
6. Prior Written Notice, dated November 9, 2018
7. Prior Written Notice, dated December 6, 2018
8. Prior Written Notice, dated January 3, 2019
9. Prior Written Notice, dated February 15, 2019
10. Prior Written Notice, dated June 14, 2019
11. IEP, dated September 27, 2017
12. IEP, amended November 14, 2017

13. IEP, dated June 15, 2018
14. IEP, amended September 7, 2018
15. IEP, amended January 16, 2019
16. IEP, Amendment Changes February 15, 2019
17. IEP, Amended May 8, 2019
18. IEP, Amended June 14, 2019
19. IEP Progress Reports
20. Functional Behavior Assessment/Behavior Intervention Plan, dated November 14, 2017
21. Functional Behavior Assessment/Behavior Intervention Plan, dated February 13, 2018
22. Functional Behavior Assessment/Behavior Intervention Plan, dated June 15, 2018
23. Functional Behavior Assessment/Behavior Intervention Plan, dated February 15, 2019
24. Anger Regulation and Anger Scales (ARAS), dated November 7, 2017
25. Psychological Evaluation, [REDACTED] Hospital, dated September 21, 2015
26. HCPS Psychological Report, dated November 24, 2015
27. Neurological Evaluation, [REDACTED] Associates, dated March –April 2019
28. HCPS Psychological Report, dated June 14, 2019
29. [REDACTED] Discharge Summary, dated August 25, 2017
30. HCPS Educational Assessment Report, dated October 24, 2018
31. Counseling Reports from [REDACTED] 2017-2018
32. Behavior Record, 2018-2019
33. Discipline Records, 2018-2019

34. Classwork Report, 2018-2019
35. Incentive Sheets, 2018-2019
36. Student's HCPS Report Cards from sixth and eighth grades
37. Student's work samples, various dates
38. Emails concerning Student, various dates
39. *Curriculum Vitae*, [REDACTED] School Psychologist
40. *Curriculum Vitae*, [REDACTED] Special Education Teacher [REDACTED]
41. *Curriculum Vitae*, [REDACTED] Classroom Teacher, [REDACTED]
42. *Curriculum Vitae*, [REDACTED] Assistant Principal, [REDACTED]
43. Not submitted
44. Not submitted
45. *Curriculum Vitae*, [REDACTED] Coordinator of Compliance, HCPS
46. Not submitted
47. *Curriculum* [REDACTED] Special Education Teacher, [REDACTED]
48. Not submitted