

XXXX XXXX,

STUDENT

v.

HARFORD COUNTY

PUBLIC SCHOOLS

*** BEFORE LATONYA B. DARGAN,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH Case No.: MSDE-HARF-OT-15-30639**

*** * * * ***

DECISION

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STATEMENT OF THE CASE

On September 14, 2015, XXXX and XXXX XXXX (collectively, Parents) filed a Request for Due Process Hearing (Request) with the Office of Administrative Hearings (OAH) on behalf of their son, XXXX XXXX ([Student] or Student). The Request alleges Harford County Public Schools (HCPS) violated the Individuals with Disabilities Education Act (IDEA), 20 United States Code Annotated (U.S.C.A.) § 1415(f)(1)(A) (2010 & Supp. 2015). Specifically, the Parents allege HCPS violated IDEA by denying a free and appropriate public education (FAPE) to the Student for the 2014-2015 and 2015-2016 school years (SY), as a result of allegedly failing to (1) develop an individualized education program (IEP) for each school year that was designed to enable the Student to make meaningful education progress, and (2) appropriately identify and evaluate the Student across all areas of suspected disability. As

relief,¹ the Parents seek reimbursement for private placement for the 2014-2015 and 2015-2016 SYs. In the Request, the Parents indicated they only wanted a hearing, not mediation. The parties attended the required resolution session, but they were unable to reach a settlement; they notified the OAH of the outcome of the resolution session on October 6, 2015. 34 Code of Federal Regulations (C.F.R.) § 300.510(a), (c) (2012).

I held a telephone pre-hearing conference (PHC) on October 21, 2015, at which time the original hearing dates were established. Due to the schedules of the party representatives' and their respective witnesses' schedules, the selected hearing dates fell outside of the 45-day period for the issuance of the final decision under 34 C.F.R. § 300.515.² The parties waived the time requirements set forth in 34 C.F.R. § 300.515 during the PHC. The parties further agreed on the

¹ In the Request, the Parents also indicated they sought attorneys' fees under 20 U.S.C.A. § 1415(i)(3)(B), which provides in pertinent part that "in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs ... to a prevailing party who is the parent of a child with a disability." As this language appears in the subsection of the statute related to the jurisdiction of the district courts of the United States over "actions brought under this section," I interpret the language to mean it is the United States District Court for the District of Maryland that has the authority, and not I, to award appropriate attorneys' fees.

² The applicable regulation provides in pertinent part as follows:

- (a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –
 - (1) A final decision is reached in the hearing; and
 - (2) A copy of the decision is mailed to each of the parties.

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

- ...
- (c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:
 - (1) Both parties agree in writing to waive the resolution meeting;
 - (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;
 - (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

The representatives for the Student and Parents were scheduled to appear before the OAH in a separate due process hearing during November 2015. Two of the Parents' expert witnesses are in private consultation practice, and their schedules precluded them from being available prior to December 2015.

final day of hearing that I would have 30 days from the close of the record to issue the decision in this matter.

I convened the hearing as originally scheduled at HCPS headquarters in Bel Air, Maryland on December 1, 2, 3 and 10, 2015. The hearing continued to December 14 and 17, 2015 and January 6 and 7, 2016. Wayne Steedman, Esquire, and Cheryl Steedman, Esquire, represented the Student and Parents. Manisha Kavadi, Esquire, represented HCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

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

ISSUES

1. Did HCPS deny the Student a FAPE by failing to develop IEPs for the 2014-2015 and 2015-2016 SYs which would enable the Student to receive educational benefit during those school years;
2. Did HCPS deny the Student a FAPE by failing to identify suspected areas of disability for the Student with respect to reading fluency and comprehension, executive functioning, pragmatic language, and social-emotional functioning;
3. Is the proposed placement of the Student at [School 1] ([SCHOOL 1]) for the 2014-2015 and 2015-2016 SYs appropriate; and,

4. Are the Parents entitled to reimbursement for their unilateral placement of the Student at [School 2] ([SCHOOL 2]) for the 2014-2015 and 2015-2016 SYs?

SUMMARY OF THE EVIDENCE

Exhibits

A complete exhibit list is attached as an appendix.

Testimony

The Parents presented the following witnesses:

- XXXX XXXX, Teacher Specialist, Special Education, HCPS
- [Father], Athletic Director, [SCHOOL 2]
- XXXX XXXX, Special Education Teacher, [SCHOOL 2], whom I accepted as an expert in Special Education and Reading
- XXXX XXXX, Educational Behavioral Consultant, whom I accepted as an expert in Special Education and Reading
- [Mother], Coordinator of XXXX, Baltimore County Public Schools, whom I accepted as an expert in Mathematics, Grades K-8
- [Student], Student
- XXXX XXXX, Ph.D., whom I accepted as an expert in Educational Psychology
- XXXX XXXX, [SCHOOL 2], whom I accepted as an expert in the Administration of the Woodcock-Johnson Tests of Achievement
- XXXX XXXX, Education Director, [SCHOOL 2]

HCPS presented the following witnesses:

- XXXX XXXX, Licensed Clinical Professional Counselor; Department Chair, School Counseling, [SCHOOL 1], whom I accepted as an expert in School Counseling and in Licensed Clinical Professional Counseling
- XXXX XXXX, whom I accepted as an expert in Special Education
- XXXX XXXX, Speech-Language Pathologist, HCPS, whom I accepted as an expert in Speech-Language Pathology

- XXXX XXXX, School Audiologist, HCPS, whom I accepted as an expert in Audiology and in Speech-Language Pathology
- XXXX XXXX, Ph.D., Director, Special Education, HCPS, whom I accepted as an expert in Special Education and in Reading
- XXXX XXXX, Teacher of the Hearing Impaired, HCPS, whom I accepted as an expert in Teaching of the Deaf and Hearing Impaired

FINDINGS OF FACT

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

1. [Student] is 13 years old. His educational career from kindergarten through 6th grade was spent with HCPS. (P-1; T.³ Mrs. XXXX.)
2. Throughout his educational career, [Student] has been on a diploma track. (P-3; T. Mrs. XXXX.)
3. [Student] was originally referred to the Harford County Child Find Program by his teacher at XXXX Child Care Center due to concerns about his speech and language development. He was first evaluated in November 2006, at which time the evaluation results revealed weaknesses in the areas of expressive language, receptive language and pragmatics. (P-1.)
4. Receptive language is a person's ability to understand what is spoken. Expressive language is a person's ability to structure intelligible communication. Pragmatics is the ability to understand the rules of communication and to adjust how one communicates with others depending on the social context. (P-26; T. XXXX.)
5. On or around December 20, 2006, when [Student] was four years old, he underwent an audiologic evaluation, the results of which demonstrated he has bilateral low and mid-frequency sensorineural hearing loss. (P-1; HCPS-12, 14, 15). Since December

³ The abbreviation "T" stands for testimony.

- 2006, [Student] has been evaluated at least once every six months to assess the progression of hearing loss. (HCPS-14, 15, 16, 19, 20, 21, 22 and 23.)
6. [Student] wears hearing aids in both ears. Since at least the 1st grade, [Student] has used a frequency modulation (FM) system during the school day. (P-1; T. Mrs. XXXX; T. XXXX.) The voice-activated FM system, which is used in conjunction with the hearing aids, transmits the speaker's voice over a radio frequency to a receiver that connects to the hearing aids. The speaker talks into the microphone and the microphone wirelessly transmits sound to the receiver. When the FM system works properly, it brings the speaker's voice directly into the subject's ears, and it elevates the sound of the speaker's voice above the other ambient sounds in a room which are picked up by the subject's hearing aids. (T. XXXX; T. XXXX.)
 7. [Student]'s hearing loss is progressive. Even when using hearing aids, his hearing is outside the decibel range for human speech. Human speech registers between 20 and 45 decibels. When [Student] underwent audiologic evaluation on August 31, 2011, his hearing was at 55 decibels. (HCPS-58; T. XXXX.)
 8. As result of his bilateral hearing loss, [Student] relies significantly on visual cues and direct eye- and face-to-face contact to understand what others say to and around him. (T. XXXX; T. XXXX.)
 9. [Student] is also diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). He takes medication to manage the ADHD, but he nevertheless displays symptoms consistent with the diagnosis, including difficulties with executive functioning, problems with sustaining concentration and focus, and difficulties with organization

of both his thoughts and the materials and tools he needs to attend to school work.
(HCPS-12.)

10. Academically, mathematics has been an area which has presented difficulty for [Student] since the 1st grade. (P-1.)
11. On December 15, 2008, [Student] underwent an educational assessment, administered on behalf of HCPS, to determine if he was a child with a disability that qualified him for special education and related services and to ascertain his educational needs. (*Id.*) He was in the 1st grade at the time of the assessment.
12. During the December 2008 assessment, the following tests were administered to [Student]: Woodcock-Johnson Tests of Achievement, 3rd Edition (WJ-III); the Wechsler Individual Achievement Test, 2nd Edition (WIAT-II); and the Oral and Written Language Scales (OWLS)-Written Expression Scale. The scoring for each test was done on age-based norms, meaning [Student]'s performance was compared to his same-age peers. (*Id.*)
13. [Student]'s standard scores on the Mathematics subtests of the WJ-III placed him in the low average to average range, depending on the subtest.⁴ (*Id.*)
14. [Student]'s standard scores for the Written Language subtests of the WJ-III ranged from low average to high average, depending on the subtest.⁵ (*Id.*)
15. On the WIAT-II, [Student] scored in the low average range on the subtests given to him (*i.e.* Numerical Operations, Math Reasoning). (*Id.*)

⁴ For example, [Student] was in the low average range for Math Fluency, but in the average range for Applied Problems, Calculation, and Quantitative Concepts. (P-1, p. 2.)

⁵ [Student]'s lowest subtest score was an 85, which is in the low average range, on Writing Fluency. His highest subtest score was a 110, which is in the high average range, on the Writing Samples subtest. (P-1.)

16. [Student]'s standard score on the OWLS Written Expression Scale placed him in the average range for performance. (*Id.*)

17. During the Mathematics subtests of the WJ-III, [Student]:

- Accurately completed addition problems with sums of ten
- Accurately answered word problems when given picture clues
- Accurately identified shapes and the concepts of largest & smallest and middle & last
- Used his fingers to count problems
- Was unable to complete any addition or subtraction problems with sums above ten
- Occasionally added items when the directions called for him to subtract
- Displayed difficulty counting sets of mixed coins

(*Id.*)

18. On the Mathematics subtests of the WIAT-II, [Student]:

- Accurately identified a specific number
- Completed a number sequence
- Correctly counted a given amount of pennies
- Accurately answered word problems with picture clues
- Accurately read a table
- Accurately identified ordinal numbers
- Displayed difficulty with given addition and subtraction problems, only able to correctly complete two problems
- Displayed difficulty telling time to the hour, reading a calendar and completing a pattern

(*Id.*)

19. [Student]'s overall performance on the Mathematics subtests of the WJ-III and the WIAT-II was in the low average to average range, and it indicated his instructional grade level performance (IGLP) in math was at a mid-kindergarten level. His strengths were in coin identification, completing word problems using picture clues, and completing basic forward number sequences. He displayed weaknesses with regard to consistently telling time to the hour, addition and subtraction of sums to ten and greater, and completing patterns. (*Id.*)

20. On the Written Language subtests of the WJ-III, [Student]:

- Accurately wrote letters
- Was able to write his first name
- Was able to write words to describe a picture
- Accurately completed a given sentence
- Displayed difficulty correctly spelling words
- Did not consistently use ending punctuation when writing sentences
- Displayed difficulty writing words within the lines provided (*Id.*)

21. On the Written Expression Scale of the OWLS, which measures a student's ability to use conventions of writing, linguistic forms, and to communicate meaningfully, [Student]:

- Was able to write his first name
- Was able to use words to describe a picture
- Displayed difficulty using punctuation when asked to copy sentences
- Displayed difficulty writing sentences to describe a picture
- Was not able to write his last name

- Displayed difficulty recalling multiple details of a short story that was read to him
- Displayed difficulty spacing words properly in written sentences

(Id.)

22. [Student]’s overall performance on the Written Language subtests of the WJ-III and the Written Expression scale of the OWLS demonstrated that his written language skills were in the average to high average range, while his writing fluency was in the low average range. His IGLP in written language was at the beginning 1st grade level. He displayed strengths in writing simple sentences and his name. His weaknesses lay in the spelling of high frequency words, proper use of capitalization and punctuation, letter formation, and use of spacing and alignment. *(Id.)*

23. On or around September 17, 2009, while [Student] was in the 2nd grade, he was diagnosed with absent seizure disorder.⁶ He takes medication on a daily basis to manage any symptoms. (P-3; P-39.)

24. On October 23, 2009, an IEP team convened to develop [Student]’s IEP. He was coded as a student with the primary disability of Other Health Impairment. The academic areas affected by his disability were identified by the team as Math Calculation, Speech and Language-Expressive Language, and Speech and Language-Receptive Language. The IEP team determined his health was affected by his hearing impairment. *(Id.)*

25. The October 23, 2009 IEP team noted [Student]’s combination of disabilities affected his performance in the general education setting in the following ways:

⁶ Neither party explained what this diagnosis means in layman’s terms. I reasonably infer from the documentary evidence that [Student] has had seizures in the past, but by September 2009, he had gone for a significant length of time without having a seizure even if his physiological profile indicates he is at risk to experience them. (P-12.)

- Ability to process information
- Ability to recall ideas
- Ability to express ideas on a concise manner
- Ability to maintain focus
- Ability to use organization to work independently

(Id.)

26. As of October 23, 2009, [Student]’s IGLP in Math Calculation was beginning 1st grade. He demonstrated difficulty with addition and subtraction. He was also noted to have processing speed deficits in terms of quickly solving problems, and recognizing patterns was also a weakness. *(Id.)*

27. As of October 23, 2009, [Student] was noted on his IEP to have a mild receptive language impairment which manifested as difficulties with language processing for temporal concepts and for recalling and manipulating sequential information. He was also noted to have a mild expressive language impairment which had an impact on his ability to express himself orally by using grammatically correct and organized sentences. *(Id.)*

28. During the October 23, 2009 IEP meeting, the Parents expressed their desire for [Student] to meet grade-level expectations in his academic performance. They also voiced a concern about his skill deficits in math and his organizational skills. *(Id.)*

29. The October 23, 2009 IEP included goals and objectives for [Student] in the areas of math calculation, speech and language-receptive language, and speech and language-expressive language. *(Id.)* The IEP also identified the following special considerations and accommodations for [Student]:

- Assistive technology, in the form of the FM system, to be used during all instruction, including any testing and assessments
- Use of visual cues during instruction and testing
- Verbatim reading accommodation on all assessments except the Maryland School Assessment (MSA) in Reading in grade 3
- Use of graphic organizers during instruction and testing to assist him in organizing his thoughts to complete assignments
- Use of manipulatives such as coins, counters, and a number grid to assist him during math instruction and testing
- Additional time to complete his work during instruction and testing
- Reduction of auditory distractions during instruction and testing
- Preferential seating at or near the front of the class/teacher during instruction and testing
- Use of repetition and rephrasing to clarify information and directions to [Student] (*Id.*)

30. The October 23, 2009 IEP also called for weekly collaboration meetings between [Student]’s teachers and service providers, which included a general education teacher, a special education teacher, a speech language pathologist (SLP) and a teacher of the hearing impaired, for the team to discuss and develop effective strategies to support [Student] within a general education setting. (*Id.*)

31. Under the October 23, 2009 IEP, [Student] was to receive services⁷ as follows:

| Service | Location | Description | Begin Date | End Date | Provider | Total Service Time |
|-----------------------|---------------------------|-----------------------------------|-------------------|-----------------|---------------------------------|---------------------------|
| Classroom Instruction | Outside General Education | 24 sessions @ 20-min. per session | 10/24/09 | 10/23/10 | Teacher of the Hearing Impaired | 8 hours per year |
| Classroom | In General | 4 sessions @ | 10/24/09 | 10/23/10 | Spec. Ed | 4 hours |

⁷ This list of services is provided from the 2009 IEP to establish a baseline of the services offered to [Student] by HCPS.

| | | | | | | |
|-------------------------|---------------------------|-----------------------------------|----------|----------|---|-------------------|
| Instruction | Education | 1-hr per session | | | Classroom Teacher General Education Teacher Instructional Assistant | per month |
| Speech-Language Therapy | In General Education | 24 sessions @ 30-min. per session | 10/24/09 | 10/23/10 | SLP | 12 hours per year |
| Speech-Language Therapy | Outside General Education | 10 sessions @ 30-min. per session | 10/24/09 | 10/23/10 | SLP | 5 hours per year |

(P-3.)

32. Under the October 23, 2009 IEP (and for every IEP developed for [Student] afterwards), his parents were to be notified of his progress via quarterly progress reports. (P-3.)

33. On January 14, 2009, [Student] took the Clinical Evaluation of Language Fundamentals, 4th Edition (CELF-IV). His performance confirmed he had mild receptive language impairment. The data collected demonstrated he had difficulty with language processing of temporal concepts, as well as with recalling and manipulating sequential info. (P-3.)

34. [Student]'s CELF-IV performance also indicated a mild expressive language impairment. His scores overall were average, but he demonstrated some difficulty expressing himself orally by using grammatically correct or organized sentences. (Id.)

35. One of [Student]'s most consistent strengths, evident as early as 2nd grade, is his ability to advocate for himself, particularly around the issue of his hearing. He has

always been comfortable advising people around him if his hearing aids or the FM system are not working. (*Id.*)

36. Under the October 23, 2009 IEP, [Student]'s total time in general education setting per week was 29 hours and 50 minutes. His total time outside general education per week was 20 minutes. (P-3.)

37. For the 2010-2011 SY, when [Student] was in 3rd grade, his IEP, finalized on October 12, 2010, differed from his October 23, 2009 IEP in the following ways:

- He was reading at a 3E level in October 2010 versus a 1E level in October 2009.
- A limit was placed on the amount of material [Student] was required to copy from the board and he was to be provided with copies of class notes.
- The objective related to the use of manipulatives was removed from the goal for Math Calculation.
- A second goal for Math Calculation, related to identifying, describing, extending and creating numeric patterns and functions, was added.
- The goal and objectives for Hearing were changed.
- General education class instruction with co-teaching by special education instructor, general education instructor, and instructional assistant was increased from four sessions per month to 12 sessions per month.
- Two 30-minute sessions with the teacher for the hearing impaired, to take place within the general education classroom, were added to the services.
- The number of sessions with the SLP, to take place outside the general education classroom, decreased from ten 30-minute sessions per month to four 30-minute sessions per month.
- The number of sessions with the SLP, to take place inside the general education classroom, decreased from 24 per month to two.

(P-6.)

38. As of the October 12, 2010 IEP team meeting, [Student] was still performing below grade level in Math Calculation.
39. At some point during [Student]’s tenure at [School 3], his annual IEP review date changed from October of the first semester of the SY to February of the second semester.
40. [Student] was seen at XX Institute (XXI) for a neurodevelopmental evaluation by Dr. XXXX XXXX and Dr. XXXX XXXX on February 16, 2012. At that time, he was not experiencing behavioral issues at school or at home. His scores on ratings scales prepared by his parents and teachers at school indicated he had some issues with social interactions. Additionally, his parents expressed concern about his executive functioning and organizational skills. As of the time of the evaluation, [Student] displayed difficulty with organizing himself, starting tasks, and prioritizing tasks. He also displayed some graphomotor dysfunction. Drs. XXXX and XXXX recommended his IEP coding be changed from Other Health Impairments to Multiple Health Impairments.⁸ (P-12.)
41. On April 1, 2012, while in the 4th grade, [Student] took the MSA in Math and Reading. His Reading score placed him at the proficient level, while he scored at the basic level in Math. (P-16; HCPS-1.)
42. On April 13, 2012, when [Student] was in 4th grade, an IEP team meeting convened to re-evaluate his progress and his continued eligibility for special education and related services as a student with a disability. The Parents also requested a discussion of [Student]’s eligibility for extended school year (ESY) services, and whether

⁸ Drs. XXXX and XXXX designated the coding as “multiple health impairments” but the correct nomenclature is “multiple disabilities.”

- [Student]'s disability coding should be changed from "Other Health Impairments" to "Multiple Disabilities." During the meeting, the Parents again expressed their concern about [Student] performing below grade level in math. (P-14.)
43. The April 13, 2012 IEP team determined the coding "multiple disabilities" was appropriate for [Student], as it sufficiently encompassed his health impairments due to epilepsy, ADHD, speech-language impairment and hearing impairment. (*Id.*)
44. On February 6, 2013, during [Student]'s 5th grade year, an IEP team convened to review and, where necessary revise, [Student]'s IEP. At this time, his primary disability coding had changed from Other Health Impairment to Multiple Disabilities. The IEP team also added the following areas as affected by [Student]'s disabilities: Speech-Language, Articulation; Math Problem Solving; Written Language Expression; and, Written Language Mechanics. (P-16; HCPS-1.)
45. The IEP team noted in the IEP that as of February 6, 2013, [Student] was "making progress but is currently performing significantly below grade level in the area of math." (*Id.* at p. 3) The team further indicated [Student] was struggling with writing, and displayed writing skills "far below" what was age appropriate when it came to his ability to spell, write proper sentences and use proper capitalization and punctuation. (*Id.*)
46. As of February 6, 2013, [Student]'s IGLP in Math Calculation, based on the Brigance Third-Grade Placement Test (Brigance) and informal assessments, was at a mid-3rd grade level, and his IGLP in Math Problem Solving was at a beginning 3rd grade level. [Student] continued to display difficulty working with word problems that

contained more than one step and he took a longer than average time to solve them.
(P-16; HCPS-1.)

47. In Written Language Mechanics, [Student]'s IGLP as of February 6, 2013 was at a beginning 4th grade level, based on informal assessments, rough drafts and final drafts of his assignments. He consistently displayed problems with capitalization and punctuation when writing spontaneously. (*Id.*)

48. With respect to Written Language Expression, [Student]'s IGLP was at beginning 4th grade, also based on informal assessments and rough and final drafts of his assignments. He struggled with initiating written pieces, organizing his thoughts as he wrote, and combining simple sentences into complex ones. (*Id.*)

49. The February 6, 2013 IEP team also indicated that [Student]'s speech-language articulation, at the mid-way point of 5th grade, was below age expectations when compared to his same-age peers. His speech was not consistently intelligible to listeners, and he continued to display some mild impairment in both expressive and receptive language. (*Id.*)

50. As of February 6, 2013, the Parents had the following concerns about [Student]'s school performance and progress:

- He was not performing at grade level in all areas, but especially in math.
- His social skills were in need of development, as he could sometimes be immature for his age.
- He was unable to independently complete his homework; they spent a significant amount of time each night re-teaching concepts to him so he could complete his homework assignments.
- He consistently struggled to organize his materials in order to perform his assignments.

(*Id.*)

51. The accommodations added to the February 6, 2013 IEP included:

- Teacher monitoring of his placement of answers on answer sheets
- A scribe
- Access to calculation devices for assignments and instruction
- Access to spelling devices for assignments and instruction
- Access to graphic organizers and visual organizers
- Extended time on assessments and instruction
- Reduced homework

(Id.)

52. Under the IEP, [Student] was also placed in a social skills group with same-aged peers to enable him to improve at interacting in small settings, initiating and maintaining friendships, and initiating and sustaining conversations. *(Id.)*

53. [Student] was also deemed eligible for ESY services for the 2012-2013 SY. *(Id.)*

54. The services for [Student] changed as follows from his 3rd grade IEP:

- Reduced co-taught instruction hours from 12 one-hour sessions per month to 12 thirty-minute sessions per month
- Reduced instruction outside the general education classroom with the teacher of the hearing impaired from 24 twenty-minute weekly sessions to one 30-minute session every quarter
- Reduced the number of sessions outside the general education classroom with the SLP from four 30-minute sessions per month to three 30-minute sessions per month
- Increase in sessions inside general education classroom with the teacher of the hearing impaired from two 30-minute sessions per month to three 30-minute sessions per month
- Addition of a math coach/specialist to the teaching team for 10 twenty-five minute sessions per month in the general education classroom

- Addition of 10 twenty-five minute sessions per month, co-taught by special education instructor, general education instructor and instructional assistant, to take place outside of general education classroom
- Addition of one thirty-minute session per month, outside of the general education classroom, with the teacher of the hearing impaired, a special education instructor, and a speech-language pathologist
- Removed sessions with the SLP which took place inside the general education classroom

(Id.)

55. In the summer hiatus between the 2012-2013 SY (5th grade) and the 2013-2014 SY (6th grade), HCPS began transition planning for [Student]’s move from elementary to middle school, a process called articulation. (T. XXXX; T. XXXX.) As part of the articulation process, staff at [School 1] ([SCHOOL 1]) were trained in the proper use of the FM system and other strategies designed to address [Student]’s hearing impairment in a learning environment. (T. XXXX; T. XXXX.)
56. [SCHOOL 1] is a public middle school under HCPS’ jurisdiction. The student-to-teacher ratio during the 2013-2014 SY was approximately 15-20 students per class per one general educator. (T. XXXX.)
57. [SCHOOL 1] does not offer self-contained special education classrooms except to students who are on a certificate track. (T. XXXX.)
58. [Student] began 6th grade at [SCHOOL 1] in August 2013. At the time, the February 6, 2013 IEP was in place. (P-16.)
59. During the course of the 2013-2014 SY, the Parents continued to be concerned about [Student]’s difficulty with math and with expressive and receptive language. They determined, and the rest of the IEP team agreed, that it was appropriate to have

[Student] formally assessed to ascertain if he had any impairment in the areas of expressive, receptive, and pragmatic language. (P-23; HCPS-5.)

60. On February 21, 2014, an IEP team meeting convened for [Student]'s annual IEP.

The team discussed the following matters:

- Need for formal assessments of [Student]'s expressive and receptive language
- Need to investigate whether [Student] had pragmatic language deficits
- Parents' concerns about [Student]'s self-esteem and his worries about his progressive hearing loss
- Parents' concern about whether [Student]'s math skills would improve such that he could be successful on the Algebra I test needed to qualify for high school graduation
- Addition of an adult assistant to [Student]'s services and supports

(*Id.*)

61. The IEP was approved by the team on February 21, 2014 (and subsequently amended on April 14, 2014). As of February 21, 2014, [Student]'s IGLP in the areas covered by the IEP were as follows:

- Math Calculation: Mid-3rd grade level, based on his performance on SuccessMaker™ math intervention program and his scores on the Scholastic Math Inventory (SMI)
- Math Problem Solving: Beginning 3rd grade level, based on SuccessMaker and SMI scores
- Written Language Mechanics: Beginning 5th grade, based on informal assessments, rough drafts of class assignments and final drafts of class assignments
- Written Language Expression: Beginning 5th grade, based on formal and informal written pieces and class assignments
- Mild articulation impairment
(P-24.)

62. The SMI is administered to students multiple times during the school year to ascertain their proficiency at various math skills over the course of the year. It was administered to [Student] three times during the 2013-2014 SY. His scores were as follows:

- October 15, 2013 470 Quantile
- January 6, 2014 625 Quantile
- Spring 2014 580 Quantile

All three scores were in the “below basic” range, indicating [Student] was performing below grade level in math. (P-24; HCPS-36; T. XXXX.)

63. The following services and supports for [Student] were added to the IEP developed on February 21, 2014:

- Provision of written notes/outlines by [Student]’s teachers or other adult assistant so [Student] did not have to copy as much material from the board
- Adult assistance throughout the day for transitioning, communication, scribing, and procedures and routines and keeping pace with instruction
- Preferential seating

(P-24.)

64. Under the February 21, 2014 IEP, [Student] again qualified for ESY services.

65. On February 26, 2014, [Student] was seen at XXI for a neuropsychological assessment. The assessment was performed by XXXX XXXX, Ph.D., and XXXX XXXX, Ph.D. At the time of the assessment, the Parents did not report any “significant mood or behavioral challenges in the home.” (H-12, p. 3.)

66. During the February 26, 2014 assessment, [Student] demonstrated difficulty formulating responses on verbal tasks, the need for accommodation to support his

comprehension of the information being presented, and the need for frequent repetition and frequent checks for comprehension. He required prompts and cueing to initiate tasks and to continue working. His cognitive ability was within age level expectations for verbal and non-verbal reasoning. He displayed strengths in categorical reasoning tasks involving words (average range) and pictures (very superior range). He displayed weaknesses in short term memory (borderline range), mental manipulation (borderline range) and processing speed (very low range). Additionally, he had difficulty with his working memory, which is the ability to actively hold multiple pieces of information in mind and to recall them when needed. (H-12.)

67. Drs. XXXX and XXXX noted that [Student] was at continued risk for difficulty keeping pace academically with his peers and demonstrating his full cognitive potential. They advised he needs a high degree of adult support and significant interventions to improve his attention, planning, and organizational skills so that he is available for learning. (H-12, p. 7.) Additionally, they recommended instruction should include the use of models, demonstrations, and related hands-on approaches to help clarify abstract concepts. (H-12, p. 8.)

68. On March 28 and April 3, 2014, [Student] underwent a speech-language assessment with XXXX XXXX, SLP. She administered to him the CELF-4. [Student]'s scores on the CELF-4 subtests of Core Language, Receptive Language, Expressive Language, Word Content and Language Memory were all in the below average range. (P-26.)

69. Based on the speech-language assessment, [Student] displayed the following strengths:

- Receptive vocabulary
- Expressive vocabulary
- Recalling sentences
- Word definitions

His weakness were as follows:

- Concepts
- Following directions
- Formulating sentences
- Word classes

(Id.)

70. [Student]'s weaknesses affect his ability to comprehend, recall, and act upon spoken directions in the classroom and to internalize rules. (P-26, p. 6.)

71. Based on the assessment, Ms. XXXX concluded [Student] had a moderate speech-language impairment. (P-26; HCPS-6.)

72. For the purposes of the speech-language assessment, [Student]'s teachers completed the Pragmatics Profile of the CELF-IV, a checklist which is used to informally assess a student's use of communicative intent and non-verbal communication in the academic setting. Based on the checklist, [Student] scored a 99. The criterion score for a child his age is greater than or equal to 142. [Student]'s informal checklist score suggested some impairment in pragmatic language, although not a severe one. (P-26; T. XXXX.)

73. On or around April 14, 2014, [Student]'s IEP was revised to add present levels of performance, as well as goals and objectives, in the areas of Speech Language-Expressive Language and Speech Language-Receptive Language. (H-6.)
74. As of April 14, 2014, [Student]'s IGLP in Math Calculation was mid-3rd grade and his IGLP in Math Problem Solving was at beginning 3rd grade. He still struggled to tell time on an analog clock. (P-27.)
75. As of April 14, 2014, in Written Language Mechanics, [Student] was able to follow the rules of standard English with 90% accuracy in writing prompts, but he still had capitalization errors in his writing when dealing with proper nouns. (P-27.)
76. As of April 14, 2014, [Student]'s services with the SLP were increased to three 30-minute sessions per month outside the general education classroom from one 30-minute session per month. (P-27.)
77. As of May 27, 2014, [Student]'s IGLP in Math Calculation was at a mid-3rd grade level. As of May 27, 2014, his IGLP in Math Problem Solving was also at a mid-3rd grade level. (P-32.)
78. Throughout the 2013-2014 SY, [Student] did not understand his homework assignments and he required intense assistance from his parents to understand and complete his assignments. (T. Mrs. XXXX; T. Mr. XXXX; P-39.)
79. On June 15, 2014, the Parents' then-counsel, Holly Parker, Esquire, notified HCPS that the Parents intended to unilaterally place [Student] at [SCHOOL 2] for the 2014-2015 SY. (P-31.)
80. In August 2014, [Student] started 7th grade at [SCHOOL 2]. [SCHOOL 2] serves a population of approximately 120 students, with varying degrees of learning

disabilities. Students are placed into “clubs” depending on their ages and grades, and they receive a multi-sensory immersive exposure to curriculum subject matters; art and music are integrated into the teaching, so students are not learning solely based on speech and written work. There are approximately 41 middle school students at [SCHOOL 2]. The class sizes are approximately 5-7 students. (T. XXXX.)

81. For each student enrolled at [SCHOOL 2], the staff develops a Personalized Education Plan (PEP), a document similar to an IEP, which identifies the student’s disabilities, the educational areas affected by the disabilities, the student’s present levels of academic/functional performance, the goals and objectives designed to address educational deficits, and the services, supports and accommodations the student needs to be able to access the curriculum. (P-44; P-54.)
82. [SCHOOL 2] staff developed PEPs for [Student] for both the 2014-2015 and 2015-2016 SYs. (P-44; P-54.) [Student]’s 7th grade PEP, developed on November 21, 2014, included goals and objectives for Math, Reading and Written Language. (P-44.) His 8th grade PEP, developed on June 19, 2015, included goals and objectives for Counseling, Math, Reading-Comprehension, Reading-Fluency/Decoding, Reading-Vocabulary, Social-Behavioral, Speech-Language and Writing. (P-46.)
83. On September 22, 2014, [Student] took the Key Math 3 assessment. The Key Math is a comprehensive, individually administered measure of essential mathematical concepts and skills. It includes 10 subtests in three general areas: Basic concepts (conceptual knowledge), Operations (computational skills) and Applications (problem solving). (P-36.) Based on his scores, [Student] was either below average or well below average in all tested areas.

84. On October 9, 2014, [Student] took the Fountas & Pinnell Student Assessment (Fountas & Pinnell). As part of the assessment, [Student] was given four books to read and his comprehension of them was evaluated. Based on the assessment, [Student]'s IGL was at the early 5th grade. (P-37; T. XXXX.)
85. On November 17, 2014, [Student] was psychologically evaluated by XXXX XXXX, Ph.D. The Parents wanted the evaluation after [Student] had an intensely negative emotional reaction to the prospect of possibly returning to [SCHOOL 1]. (P-39, T. XXXX.)
86. During the evaluation, [Student] reported to Dr. XXXX that being in a smaller group setting at [SCHOOL 2] helped him focus better in school and remember better what he needed to do for homework assignments. He also reported the teachers at [SCHOOL 2] did a better job of explaining things to him and he did not feel as rushed as he did at [SCHOOL 1]. (P-39.)
87. As part of the evaluation, Dr. XXXX performed a mental status examination on [Student]. The mental status examination is a tool used by mental health care professionals to obtain a snapshot sense of whether an individual is experiencing symptoms associated with a mental disorder or other mental-emotional dysfunction. (T. XXXX.)
88. During the mental status examination, [Student] reported he felt like dying sometimes, but he did not indicate he had any intention of or plan to harm himself. Dr. XXXX also noted [Student]'s insight and judgment were weak. (P-39.)
89. During the evaluation with Dr. XXXX, [Student] was unable, after attempting for half an hour, to complete a pair of symptom checklists frequently used by mental health

- care providers with younger children. He also had trouble understanding questions that were posed to him, exhibited word find difficulty, and frequently stopped speaking mid-sentence, or abruptly shifted topic. (*Id.*)
90. Dr. XXXX noted [Student]’s verbal learning was “exceptionally weak” and indicated this could be a problem for him in a general education setting as that is the primary mode of learning. (P-39, p. 8.) Additionally, she noted he had a pronounced difficulty with communication in one-on-one situations, which made his placement in a general education setting another source of concern for her.
91. As a result of the evaluation, Dr. XXXX diagnosed [Student] with depressive disorder, not otherwise specified. She recommended that mental health counseling services be added to [Student]’s IEP. She further indicated his instructional needs could best be met in a smaller school environment with a teacher-to-student ratio that was smaller than one would typically see in a public school setting. (P-39.)
92. On December 4, 2014, XXXX XXXX of [SCHOOL 2] administered the Woodcock-Johnson, 4th Edition (WJ-IV) to [Student]. The WJ-IV differs from the WJ-III because it includes a series of subtests designed to measure oral comprehension. (T. XXXX.) [Student]’s standard scores in Mathematics, Broad Mathematics and Math Calculation all dropped from the average range (in 2008) to the deficient range. His Spelling standard score remained in the average range. His Writing Sample score dropped from the high average range to the borderline range, and his score on the Editing subtest was in the deficient range. (P-40.)
93. On May 15, 2015, [Student] took the Key Math-3 assessment again. His scores revealed him to be below average in the following areas: Geometry, Foundations of

Problem Solving, and Applications. He was well below average in the following areas: Numeration, Algebra, Measurement, Mental Computation and Estimation, Addition and Subtraction, Multiplication and Division and Operations. (P-43.)

94. At [SCHOOL 2], [Student] is given grade-level curriculum that is modified for him and presented in a differentiated fashion based on his constellation of disabilities and academic needs.
95. During the 2014-2015 SY at [SCHOOL 2], [Student] mastered, with cues, several of his math goals and objectives, and completely mastered others. Additionally, he made progress on his goals for reading and writing. (T. XXXX, P-44.)
96. On August 31, 2015, an IEP team meeting convened to develop [Student]'s IEP for the 2015-2015 SY.⁹ Based on information from [SCHOOL 2], the IEP team added goals and objectives for [Student] in the areas of Reading Comprehension, Reading Fluency and Speech Language-Pragmatics. The team also identified [Student]'s social and emotional functioning as an area affected by his disabilities, and it added goals and objectives to address social and emotional functioning. (P-55.)
97. The August 13, 2015 IEP proposed keeping [Student] at [SCHOOL 1] in a general education setting throughout the school day, with his supplementary aids and services provided to him within the general education classroom. Only his time with the SLP and with his counselor was to occur outside the general education setting. (*Id.*) The Parents disagreed with [Student] being in a general education setting for the majority of the school day.
98. [Student]'s 1st quarter report card for the 2015-2016 SY reveals he has the following strengths:

⁹ The IEP was amended on September 14, 2015.

- Active participation in tasks with prompting and cues
- Enthusiasm for learning
- Use of additional tools – manipulatives in math, graphic organizers in other subjects – help him maintain focus on class assignments

[Student] still demonstrated a need for assistance in the following areas:

- Frequent check ins with teachers to ensure he comprehends concepts
- Prompting, cueing and modeling to maintain focus while doing in-class assignments
- Repetition of directions to ensure he understands what is required of him and to stay on task
- Pacing himself when reading to ensure full comprehension

(*Id.*)

DISCUSSION

Legal Framework

IDEA and IEPs Generally

The IDEA requires “that all children with disabilities have available to them ... a free appropriate education that emphasizes special education and related services designed to meet their unique needs[.]” 20 U.S.C.A. § 1400(d)(1)(A). The IDEA provides federal money to the states to educate disabled children on condition that states comply with the extensive goals and procedures of the IDEA. 20 U.S.C.A. §§ 1412-1414; 34 C.F.R. § 300.2; *Board of Educ. of the Hendrick Hudson Central School Distr. v. Rowley*, 458 U.S. 176 (1982). Maryland’s special education law is found at Maryland Code Annotated, Education Article § 8-101 *et seq.* (2014). The regulations governing the provision of special education to children with disabilities are found at COMAR 13A.05.01.

A free appropriate education (FAPE) is defined in COMAR 13A.05.01.03B as follows:

(27) “Free, appropriate public education (FAPE)” means special education and related services that:

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

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

FAPE is, in part, furnished through the development and implementation of an IEP for each disabled child. *Rowley*, 458 U.S. at 181-182. 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 goals, objectives, activities, and materials must be adapted to the needs, interests, and abilities of each student. 20 U.S.C.A. § 1414(d). A student’s IEP must be reasonably calculated to enable the child to receive educational benefits. *Rowley*, at 182.

FAPE does not require “the best possible education that a school system could provide if given access to unlimited funds.” *Barnett v. Fairfax Co. School Bd.*, 927 F.2d 146, 154 (4th Cir. 1991). It does, however, require the State to provide personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. The IDEA requires that an IEP allow for a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990).

Although the law in special education has undergone a significant evolution in the past few decades, the *Rowley* case still sets the standard for determining whether a child is being

accorded a free appropriate public education under the IDEA. In *Rowley*, the Supreme Court set forth a two-part analysis. First, a determination must be made as to whether there has been compliance with the procedures set forth in the Act. Second, it must be determined whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefits.

Once an IEP is shown to be procedurally proper, the judgment of education professionals regarding the child's placement should be questioned only with great reluctance by the reviewing authority. *Tice*, 908 F.2d at 1207. There are many cases that support the proposition that substantial deference must be given to educators and school officials to allocate scarce resources as they see fit as long as there are sufficient options available to provide reasonable opportunities for the disabled child. *A.B. by D.B. v. Lawson*, 354 F.3d 315, 325-329 (4th Cir. 2004); *M.M. ex rel. D.M. v. School Dist. of Greenville Co.*, 303 F.3d 523, 532-533 (4th Cir. 2002); *Barnett v. Fairfax County School Board*, 721 F.Supp. 757, 762 (E.D. Va. 1989). Courts have held that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment.” *Hartman v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1001 (4th Cir. 1997). Additionally, to the maximum extent possible, the IDEA seeks to include the child in regular public schools; at a minimum, the statute calls for school systems to place children in the “least restrictive environment” (LRE) consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A).

The nature of the LRE necessarily differs for each child but could range from a regular public school to a residential school where 24-hour supervision is provided. COMAR 13A.05.01.10B. Although the IDEA requires specialized and individualized instruction for a learning- or educationally-disabled child, it also mandates that “to the maximum extent

appropriate, children with disabilities, including children in public or private institutions or other care facilities,” must be “educated with children who are not disabled[.]” 20 U.S.C.A. § 1412(a)(5)(A). It follows that the State and federal regulations that have been promulgated to implement the requirements of the Act also require such inclusion. 34 C.F.R. § 300.114 through 120; COMAR 13A.05.01.10A(1). The IDEA mandates that the school system segregate disabled children from their non-disabled peers only when the nature and severity of their disability is such that education in general classrooms cannot be achieved satisfactorily. *Hartmann v. Loudon County Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997).

Private Placements and Reimbursement

The benefit conferred by an IEP and placement must be “meaningful” and not merely “trivial” or “*de minimus*.” *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). The Supreme Court has articulated the requirements for reimbursement when the private placement desired by a child’s parents is proper, but the one recommended by the school system is inappropriate. The Court has upheld the right of the parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency (LEA) when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). This reimbursement right may even apply when the placement selected by the parents does not meet all of the standards applicable to private placements effectuated by the State itself. *Carter v. Florence County School Dist. Four*, 950 F.2d 156 (4th Cir. 1991), *aff’d*, 510 U.S. 7 (1993); *see also*, 34 C.F.R. § 300.148(a) and (c).

As recognized in *Burlington* and *Carter*, parents who unilaterally remove a child from a public school system placement without the consent of school officials, and who place their child

at a private school, “do so at their own financial risk.” *Burlington*, 471 U.S. at 374. Before they can expect to recoup their expenses for the private placement they must meet a two-pronged test under those cases: (i) the placement proposed by the school system is not reasonably calculated to provide a child with FAPE, and (ii) the private unilateral placement is appropriate.

Burden of Proof

The burden of proof in a due process hearing is by a preponderance of the evidence and rests with the party bringing the Due Process Complaint. *Schaffer v. Weast*, 546 U.S. 49 (2005). Therefore, the burden in this matter is on the Parents.

The Merits of the Instant Case

Arguments of the Parties

The Parents challenged the decision of the HCPS members of [Student]’s IEP team to implement [Student]’s IEP at his home school of [SCHOOL 1] during the 2014-2015 and 2015-2016 SY. They noted that [Student] has a complex set of physiological issues – ADHD and its attendant impact on executive functioning and organizational skills, progressive bilateral hearing impairment, absent epilepsy syndrome, which is regulated by a medication which can and does affect his processing speed, problems with working memory – which work together to significantly impact his ability to learn and to adequately access his educational programming. Despite this constellation of issues, various testing and assessments demonstrate [Student] is of average cognitive capability; he is capable of learning new concepts and generalizing them across various contexts as long as he receives the proper accommodations, services and supports, and receives them at a sufficient intensity level.

The Parents argued HCPS did not properly program for [Student] in terms of the services and supports – namely, the frequency, intensity and number of hours – and the placement

outlined on his IEPs over the years, and particularly the IEPs developed for his 6th, 7th and 8th grade years. As a result of this failure on HCPS' part, [Student] did not perform academically on grade level in math or written language during the 2013-2014 SY and he did not make more than minimal progress towards meeting his IEP goals and objectives in academic areas; he experienced gaps in his core academic knowledge related to what he was taught during the 2013-2014 SY; he experienced a widening of the gaps in his knowledge as the 2013-2014 SY progressed, such that he fell further and further behind his grade-level peers academically, as demonstrated by his scores on the administration of the WJ-IV in December 2014; he became increasingly anxious during the 2013-2014 SY around the issue of even going to school, let alone doing his assigned course work in the evenings at home; and, he was unable to grasp concepts as they were taught in class, which necessitated extra work at home in the evenings and his parents re-teaching concepts to him so he could complete his assignments.

The Parents challenged the IEPs developed for the 2014-2015 and 2015-2016 SYs as inappropriate for [Student] with respect to the continued placement of him at [SCHOOL 1] for the implementation of the IEP. Those IEPs, similar to their 2013-2014 predecessor, called for [Student] to receive almost 30 hours of instruction in the general education setting; there was no pull-out, individualized, specialized instruction time for him with any of his service providers except the SLP (and, for the 8th grade, his counselor). According to the Parents, maintaining [Student] in the general education setting for the bulk of the school day denies him significant educational benefit. As a result of his issues with processing speed, working memory, executive dysfunction and organization, the general education setting is too fast-paced, and not differentiated enough, for him to learn during the day in a manner which enables him to be academically successful. He needs the following in order to be successful: smaller class sizes

than one finds in a general education setting, with a smaller student-to-teacher ratio; significant modification of the delivery of the curriculum in ways which increase his ability to learn, such as the integrated, multi-sensory approach used at [SCHOOL 2]; differentiated instruction tailored to take into account his processing speed deficits and working memory deficits; frequent repetition of information so he can more easily commit a concept to memory; and, more one-on-one instruction and individualized attention throughout the school day which is designed to fill in the gaps in his knowledge, particularly in the area of math.

The Parents also maintain HCPS failed to identify all areas of suspected disability for [Student] when it did not do any assessments of his reading capability during the 2013-2014 SY. According to the Parents, it was evident to Ms. XXXX, as [Student]'s reading teacher, that he struggled to comprehend what he read, even when he was able to read assigned passages quickly or at a pace which was consistent with that of his non-disabled peers. HCPS failed to provide [Student] a FAPE when it did not formally assess [Student] to determine his reading ability, strengths and possible weaknesses at any time during the 2013-2014 SY. [Student]'s deficits in reading were not discovered until [SCHOOL 2] administered the WJ-IV to him in December 2014.

The Parents further argued that by keeping [Student] in the general education setting at [SCHOOL 1] throughout the 2013-2014 SY, and developing IEPs for the 2014-2015 and 2015-2016 SY which continued him in that placement, HCPS failed to design a program for [Student] which actually took into consideration his constellation of disabilities and how the interaction of those disabilities affects the way he learns. By failing to do so, HCPS denied [Student] FAPE.

For its part, HCPS argued it developed extensive and detailed IEPs for [Student] during for the 2013-2014, 2014-2015 and 2015-2016 SY, particularly with respect to accommodations,

services and supports. Each IEP incorporated additional information from the Parents as well as their concerns about [Student]'s processing speed, working memory and executive functioning deficits, and his possible weaknesses in social interaction and functioning. The IEPs for the relevant school years were designed to achieve the directives of IDEA, which include allowing the child to receive appropriate educational benefit and to make educational progress, and allowing the child to do these things in an environment that, where practical, includes his non-disabled peers.

HCPS maintained the educators and service providers who worked with [Student] on a daily basis at [SCHOOL 1] are keenly aware of his constellation of disabling conditions and they are able to recognize how the interplay of those conditions affects his educational performance and ability to learn. They developed and used effective strategies for differentiated instruction with him, and conveyed information to him in formats that were easier for him to understand. [Student]'s educators and service providers at [SCHOOL 1] were knowledgeable about his strengths and weaknesses, and the types of interventions necessary to increase his pool of academic knowledge relative to those strengths and weaknesses.

HCPS iterated that deference should be given to the educators and service providers who worked directly with [Student] during the 2013-2014 SY as they have a greater knowledge base about who he is as a student than the expert witnesses presented by the Parents. In particular, HCPS argued the testimony of Ms. XXXX and Dr. XXXX should not be given as much weight as the school system's witnesses because neither Ms. XXXX nor Dr. XXXX ever spoke with anyone from [SCHOOL 1] in order to gain their perspective on [Student]'s academic performance during SY 2013-2014; all of the information Ms. XXXX and Dr. XXXX received about how [Student] performed in 6th grade was filtered through the Parents.

The school system further noted that [Student] did not exhibit anxious, avoidant or depressive behavior while *in* school, and the Parents did not communicate to either [Student]’s counselor (Ms. XXXX) or to his case manager (Ms. XXXX) that [Student] had difficulties at home related to the prospect of going to [SCHOOL 1]. His educators at [SCHOOL 1] saw at school a child who was not having significant emotional or social difficulties, and HCPS cannot be expected to address or program for issues it does not know about.

With respect to [Student]’s academic progress during the 2013-2014 SY, HCPS argued it is not acceptable to only consider one measure of performance, such as his scores on the December 2014 WJ-IV administration, to determine whether [Student] was receiving educational benefit while at [SCHOOL 1]. Both the Parents’ witnesses and HCPS’ witnesses agreed that one has to consider the whole child across several areas. When [Student]’s performance is viewed in several contexts, HCPS argued, it is clear he made academic progress during the 2013-2014 SYs and the IEPs developed for the 2014-2015 and 2015-2016 SYs were appropriately designed to ensure he would continue to make progress at [SCHOOL 1]. Finally, the educators and service providers who worked with [Student] on a regular basis during the 2013-2014 SY consistently testified [SCHOOL 1] has the resources and ability to implement [Student]’s IEP in a manner that provides him with a FAPE.

Analysis

I note at the outset that HCPS is correct the Parents did not take issue with any of the following aspects of the IEPs developed for [Student] for the 2014-2015 and 2015-2016 SYs: the disability coding, the areas deemed to be affected by [Student]’s disabilities, the designation of the FM system as [Student]’s assistive technology, testing accommodations, instructional accommodations, or the goals and objectives for each area deemed to be affected by [Student]’s

disabilities. The Parents' challenge to the IEPs lies with the determination of the LRE to be [SCHOOL 1], and specifically with the determination that all of [Student]'s services and supports, with the exception of sessions with the SLP and the counselor, will be provided to him in the general education setting. This is, essentially, a disagreement about placement. The central question before me is whether [Student] can receive a FAPE if his IEP is implemented in an entirely general education setting. For the reasons articulated below, I find it is more likely than not that [Student] did not receive a FAPE during the 2013-2014 SY, and to the extent his IEPs for the 2014-2015 and 2015-2016 SYs called for his placement in all general education setting, they would also not provide him with a FAPE.

Progress during 2013-2014 SY

A significant amount of time during the hearing was spent discussing [Student]'s academic, emotional, and social progress during the 2013-2014 SY. While there are a number of measures available through which one can assess whether a student is receiving more than minimal or trivial educational benefit from his or her programming, progress – or the lack thereof – is arguably the best benchmark. Ms. XXXX, whom I accepted as an expert in Special Education and Reading, testified about progress, focusing her attention on the last two years [Student] was in the HCPS system.

Ms. XXXX presented as a very knowledgeable witness and she gave thoughtful, well-considered answers on both direct and cross-examination about how [Student]'s disabilities manifest (Tr. 480-481, 557), what type of programming he needs to be successful (Tr.¹⁰ 554, 574-575), and what type of progress she would expect to see from him if he was in an appropriate educational program (Tr. 558-560). She noted that IGLP is usually determined by reviewing multiple sources of data about a student, ranging from informal assessments such as

¹⁰ The abbreviation "Tr." stands for transcript.

classroom exercises to formal assessments like the WJ-III and IV, or the WIAT. (Tr. 522.) She cautioned of the need to be careful when comparing different formal assessments to one another, because they are not often measuring the same things in the same way; in colloquial parlance, she advised one has to compare “apples to apples” when looking at formal assessments to gauge how well, or not, a child is progressing.¹¹ (Tr. 514.)

In reviewing [Student]’s IEPs during his tenure with HCPS, Ms. XXXX determined that between the 2012-2013 SY (4th grade) and the 2013-2014 SY (6th grade), he made approximately one-and-a-half years of progress in Math Calculation, from a beginning 2nd grade level as of the February 6, 2012 IEP to a mid-3rd grade level as of the February 21, 2014 IEP. In Ms. XXXX’s opinion, the typical rate at which one would expect a student to make progress during a school year is year-to-year growth, i.e., one year of growth in one year’s time. (Tr. 558, 560.) Based on [Student]’s cognitive scores, which place him at an average intelligence level, Ms. XXXX believes he has the capacity to make progress at a greater-than-incremental pace. (Tr. 559.) Specifically, she was of the opinion that if he received a sufficient amount of special education services, and a sufficient amount of special education services *outside* of a general education setting, he could, even as a child with disabilities, make one year’s progress in one year’s time. (Tr. 646-647.) In reviewing the quarterly progress notes prepared by Ms. XXXX to coincide with the February 6, 2013 IEP, Ms. XXXX testified it is of concern to her that [Student] rarely achieves an of his goals or objectives. In Ms. XXXX’s opinion, if [Student]’s educational programming was appropriately tailored to his particular needs and areas of academic weakness,

¹¹ For example, it is appropriate to compare the scores on the WJ-III administered to [Student] in 2008 to the scores on the WJ-IV administered to him in December 2014; this is an “apples to apples” comparison because the WJ measures for the same things in the same ways, regardless of the edition. One would not, in contrast, compare the scores on the WJ to the scores on the Test of Written Language, as the tests measure a student’s abilities in different ways; it would be akin to comparing an apple to an orange. (Tr. 682.)

one would expect to see him achieving more objectives over the course of a school year than he did during the 2013-2014 SY. (Tr. 570-571.)

Ms. XXXX's testimony about the type of progress she would expect to see from [Student] if his educational programming was appropriate was corroborated by Mrs. XXXX, whom I accepted as an expert in Mathematics, Grades K-8. Although Mrs. XXXX is a party to the case, and it is unusual to qualify a party as an expert, she has extensive experience teaching children math, and her professional qualifications, coupled with her status as [Student]'s mother, gave her a distinctly persuasive perspective on the case.

Mrs. XXXX was also of the opinion that given [Student]'s cognitive capabilities, he should, with the appropriate programming and accommodations, not only be able to learn, but learn at a greater-than-incremental pace. (Tr. 760-761.) Like Ms. XXXX, Mrs. XXXX would expect [Student], with the right accommodations and services, to make one year's academic growth in one year's time. (Tr. 878.) She was particularly concerned that if [Student] remained at [SCHOOL 1], and his IGLP in Math Calculation and Math Problem Solving increased at the pace it did during his 5th and 6th grade years, he would not acquire the mathematics knowledge necessary to pass Algebra I, and thus, he would not be able to graduate. (Tr. 1964-1965.) As she explained, math is a subject where aggregate knowledge is crucial to a student's success. The mathematics concepts a child learns in one grade provide the foundation for the concepts the child is taught in subsequent grades. If a student's foundational math knowledge has gaps in it, the student will have a much harder time learning new concepts as his educational career progresses. (Tr. 1964.)

In Mrs. XXXX's opinion, this is the scenario that played out with [Student] during his tenure with HCPS, and particularly during the 2012-2013 and 2013-2014 SY. His IGLP in math

calculation remained at a mid-3rd grade level during those two school years, while his IGLP in math problem solving remained at a beginning 3rd grade level during the same period.

According to Mrs. XXXX, [Student] did not actually make even minimal progress in math during the 2013-2014 SY, despite the indication in his IEP progress reports that he was making sufficient progress to meet his goals in Math Calculation and Math Problem Solving. (Tr. 756.)

Mrs. XXXX testified that she and Mr. XXXX regularly communicated with staff at [SCHOOL 1] and with [Student]'s IEP team they were concerned with his lack of progress, particularly in math, both throughout the 2013-2014 SY and at each IEP team meeting convened during that time.¹² (Tr. 758.)

Mrs. XXXX further explained it was clear to her, from working with [Student] in the evenings, that he did not often understand his homework assignments, and he had not retained the knowledge imparted during classroom instruction. She and Mr. XXXX would spend “a lot” of time with [Student] each evening working with him to correct his homework (and often, class work he brought home with him) and, essentially, to “re-teach” [Student] the concepts from the day’s assignments so he could complete his homework. (Tr. 786, 787; *see also* T. [Father], Tr. 267-268.) In Mrs. XXXX’s opinion, the fact that [Student] struggled so much with his homework and that he could not retain instructional information after a single session of being exposed to it during the school day, belies the idea he made more-than-minimal academic progress in math during the 2013-2014 SY. (Tr. 793, 794.)

Ms. XXXXs’ and Mrs. XXXX’s testimony about the progress [Student] could likely make if his educational programming was appropriate was corroborated by XXXX XXXX, Ph.D., whom I accepted as an expert in Educational Psychology. Dr. XXXX performed a

¹² A review of the IEPs admitted into evidence, some of which are from previous school years, demonstrates it was always the senior XXXXs’ expectation that [Student] should perform on grade level in his core subject areas, including math.

psychological evaluation of [Student] on November 17, 2014. As part of the evaluation she administered some educational and psychological testing to him. Dr. XXXX supported Ms. XXXXs' and Mrs. XXXX's opinion that [Student]'s cognitive functioning, which is at an average level, suggests he is able to learn. (Tr. 929-930.) His reasoning ability and conceptual ability is average (Tr. 923), and his scores on testing suggest he is able to learn from his environment (Tr. 932). In Dr. XXXX's opinion, [Student]'s standard scores on the WJ-IV administered to him in December 2014 are lower than one would expect given [Student]'s actual cognitive ability. (Tr. 935.) [Student]'s constellation of issues do not, in her opinion, automatically mean he would have such low scores in so many areas of the WJ-IV. (Tr. 936-937.) Given [Student]'s average ability to learn, coupled with what Dr. XXXX described as his desire to and interest in learning, she would expect him to make typical year-to-year progress in an appropriate educational environment. (Tr. 942.)

HCPS challenged Ms. XXXXs' and Mrs. XXXX's testimony on the issue of [Student]'s academic progress with that of Ms. XXXX, who was [Student]'s Math, Math Intervention, and Integrated Language Arts teacher, and his case manager at [SCHOOL 1] during the 2013-2014 SY. I accepted Ms. XXXX as an expert in Special Education. Ms. XXXX testified she had regular interaction with [Student]'s other teachers throughout the 2013-2014 SY. (Tr. 1232.) She spoke to them informally throughout the school week to ascertain how [Student] was performing in his other classes, and they had a formal weekly meeting specifically devoted to assessing how [Student] was progressing with the curriculum and to develop and tweak strategies for assisting him in accessing the curriculum. (Tr. 1232-1233.) According to Ms. XXXX, [Student] actively participated in the classes he had with her; he would raise his hand to

provide answers to questions and he enjoyed working in group activities. (Tr. 1235.) He was also working on grade-level curriculum in each of the classes he had with her. (Tr. 1248-1249.)

Ms. XXXX explained that to determine whether a student is making progress, one has to look at as many available sources of data as possible. It is not useful to only consider the student's performance on formal assessments, or to only consider the student's performance on in-class assignments, for example. (Tr. 235.) Additionally, with [Student], one would have to look at the various components of a given skill to measure if he is making progress, because in math, for example, he is stronger in some skills and weaker in others. (Tr. 185-186.) In her opinion, given [Student]'s combination of disabilities, meaningful progress for him is measured if his skills in a given area (such as computation) improved by approximately six months during a school year. For example, if [Student]'s IGLP in math calculation was at the mid-3rd grade level at the start of a school year, she would consider it more-than-minimal progress if his IGLP improved to a beginning 4th grade level by the end of the school year. (Tr. 67-69.)

Ms. XXXX pointed to some specific examples of [Student]'s progress during the 2013-2014 SY, such as his scores on the SMI. The SMI is typically administered to students three times per school year. Ms. XXXX noted that [Student]'s quantile score on the second administration of the test increased from his score on the first administration (from a 470 to 625). While his quantile score on the third administration of the test decreased from the second (625 to 580), she noted his third quantile score was still higher than his first. In her opinion, this demonstrated [Student] made progress in math during the 2013-2014 SY. (Tr. 86-88.)

Additionally, Ms. XXXX testified [Student]'s performance on the math intervention tool, Success Maker, demonstrated he made progress in math during the 2013-2014 SY. Success Maker is a computer program where students log in and perform various skills in response to

questions. It is designed to measure retention or regression of skills over time, and it cycles through different skills each time a student uses it. Between January 2014 and June 2014, [Student]'s course level aptitude in math, as measured by Success Maker, increased from 3.44 (January 2014) to 3.52 (June 2014). In Ms. XXXX' opinion, the increase reflects [Student] made progress in math during the school year. (Tr. 1253-1255.)

Finally, Ms. XXXX discussed [Student]'s IEP progress reports for the 2013-2014 SY. She prepared them, and she noted that the language "making sufficient progress to meet goal" is *not* default language contained in the program used to generate the progress reports. If she indicated in an area that [Student] was "making sufficient progress to meet goal" it is because he was, based on the various data she reviewed while preparing the report. (Tr. 1381.) Ms. XXXX testified [Student] made meaningful progress towards his IEP goals and objectives in both Math and Written Language during the 2013-2014 SY, and he even achieved objectives in some areas during that time. (Tr. 1285-1286.)

Based on my review of the evidence, I do not find the progress [Student] made during the 2013-2014 SY, to the extent he made progress at all, to be more than minimal. The record is clear that [Student] does not have any *cognitive* disabilities or deficits which negatively impact his baseline ability to learn. As Ms. XXXX, Mrs. XXXX and Dr. XXXX all testified, without contradiction, [Student] has the cognitive ability to both learn and retain knowledge, even if it requires consistent repetition of concepts for him to commit the concepts to working memory. I agree with the Parents' witnesses that [Student] should be able to make one year's academic growth in one year's time, if he is appropriately accommodated during the school day for the various challenges his constellation of disabilities present for him.

I am, frankly, troubled that (1) [Student] could enter the 6th grade with an IGLP in Math Calculation that is two-and-a-half years below his grade placement, and an IGLP in Math Problem solving that is three years below his grade placement, and it is (2) considered acceptable for his skills to improve by only six months by the end of the school year. The Parents are correct that such a scenario represents a gap in [Student]'s foundation knowledge. Furthermore, if he only progresses by six months over the course of the school year, then the gap *widens* for him by the start of 7th grade. If [Student]'s IGLP in Math Calculation had improved to a beginning 4th grade level by the end of 6th grade, he would still start 7th grade three grade levels below his same-grade peers. If he only made six months' growth during his 7th grade year, he would start 8th grade three-and-a-half grade levels behind his same-grade peers.

This hypothetical scenario becomes more troubling when I factor in the reality that [Student] did not actually make six months' progress in math during the 2013-2014 SY, and his IGLP in both Math Calculation and Math Problem Solving remained at the levels he displayed during the 2012-2013 SY. I am mindful that [Student]'s scores on the SMI – to use one of Ms. XXXX' examples of his progress – increased from the first administration to the second administration, and his score on the third administration was higher than his score on the first. Ms. XXXX' acknowledged, however, that all three of [Student]'s SMI scores were at the below basic level, which indicated he was performing below grade level at the skills measured by the test. (Tr. 82.) In the same vein, while [Student]'s Success Maker scores reflected a 0.08 increase in course level aptitude, his scores still place him at the mid-3rd grade level in the areas measured. By June 2014, using Success Maker as a measure of progress, [Student] was still at an IGLP in Math Calculation of mid-3rd grade and in Math Problem Solving of beginning 3rd grade. (H-35.)

With respect to the IEP progress reports, I am not persuaded they reflect [Student] making more than minimal progress during the 2013-2014 SY. For a number of the objectives, it appears as though the objectives are sometimes measured differently from how they are articulated, a fact made evident during cross-examination of Ms. XXXX. (Tr. 1378-1380.) For example, one of his Math Calculation objectives called for [Student] to perform a task accurately in four out of five trials (80%). In the progress report for the 4th quarter, he is measured as performing with 100% accuracy on three out of three trials. (H-32, p.6.) I find it problematic that the progress report implies [Student]'s mastery of an objective when it does not measure what the objective is designed to measure. In other words: if he must perform a task accurately in four out of five trials for the objective to be mastered, then he is not satisfying the requirements of the objective if he only performs – and is evaluated on – three trials. There are multiple instances of this kind of objective-tweaking in the progress reports from 2013 and 2014. (H-32, pp. 2-6; H-33.) I do not find this to be reliable in assessing if [Student] is making progress towards his goals and objectives, or how close he is to mastering them.

Math is an area of particular concern for [Student] and has been since his entry into HCPS. The February 6, 2013 IEP, developed in the second semester of [Student]'s 5th grade year and which carried over into the first semester of 6th grade, identified his IGLP in Math Calculation at mid-3rd grade and his IGLP in Math Problem Solving at beginning 3rd grade. (P-16.) [Student] started the 2013-2014 SY approximately three grade levels below his grade placement in these areas; he started out 6th grade much farther behind his grade-level peers in this core academic area. While the IDEA and the cases decided under it hold, a student's educational program does not have to confer the maximum possible educational benefit to the student; the benefit must simply be more than minimal or trivial. A review of [Student]'s

performance during the 2013-2014 SY, particularly in the core academic subject of math, demonstrates the benefit he received from his IEP being implemented at [SCHOOL 1] was minimal. His progress was not merely incremental; it was essentially non-existent. By the end of the 2013-2014 SY, the gap in his math knowledge given his grade level had widened further from where it was when he started the school year. As the educational benefit [Student] received during the 2013-2014 was barely minimal, he did not receive a FAPE. I will discuss more fully below how [Student]'s lack of more-than-minimal progress is related to his placement in a general education setting.

Possible Areas of Suspected Disability

[Student]'s lack of progress during the 2013-2014 SY was not the Parents' only concern. They argued HCPS failed to appropriately identify areas affected by [Student]'s disabilities, specifically with respect to reading fluency and comprehension, executive functioning, pragmatic language, and certain aspects of social and emotional functioning. The alleged failure of HCPS to identify these areas worked to deny [Student] a FAPE.

The IDEA lays out the requirements for an initial evaluation and, in pertinent part, mandates that a local educational agency "ensure ... the child is assessed in all areas of *suspected* disability." 20 U.S.C.A. § 1414(b)(3)(B) (emphasis supplied). The IDEA does not require a local educational agency to evaluate a child for *any* possible disability, but rather, to evaluate the child to confirm or rule out whether a particular, suspected disability exists.

Reading

As support for the position that HCPS failed to identify that [Student] had deficits in reading fluency and comprehension, the Parents presented the testimony of XXXX XXXX, whom I accepted as an expert in Special Education and Reading. Ms. XXXX was [Student]'s English teacher at [SCHOOL 2] for the 2014-2015 and 2015-2016 SY. She testified she noticed

deficits in [Student]'s reading within his first week at [SCHOOL 2] in August 2014. (Tr. 318-319.) He was subsequently given the Fountas & Pinnell on October 9, 2014 (P-37), on which his scores demonstrated his IGLP in Reading was at a late 4th grade level. (Tr. 341, 344, 345.) Ms. XXXX noted that [Student] reads quickly; he often reads beyond the designated stopping point in a text during in-class assignments. Her concern, however, is that he does not always fully understand what he has read when he reads at an unchecked pace. (Tr. 382-384.) His comprehension of passages improves when he slows his pace. (Tr. 384-385.)

Ms. XXXX's assessment of [Student] as having reading comprehension deficits was corroborated by his performance in the Reading subtests of the WJ-IV administered to him in December 2014 and his performance on the Fountas & Pinnell. (*See* P-40 and P-37.) As of December 2014, [Student]'s IGLP in Reading was at the late 4th grade level, approximately two-and-a-half grade levels below his grade placement in the 2014-2015 SY (7th Grade). According to Ms. XXXX, [Student]'s reading deficits were immediately apparent to her once she began teaching him. In her opinion, it is unlikely [Student] was reading at a 6th grade level during the 2013-2014 SY but regressed approximately two grade levels between June 2014 and the start of his 7th grade school year. (T. 320.)

Ms. XXXX testified that when [Student] was in her Integrated Language Arts class at [SCHOOL 1], he was at grade level in both reading comprehension and reading fluency. (Tr. 119-120.) He did not have goals and objectives for reading, nor was reading identified on his IEP as an academic area affected by his disabilities. (Tr. 121.) At the IEP meetings held throughout the 2013-2014 SY, and in Ms. XXXX's correspondence and interaction with the Parents, neither she nor the Parents indicated there might be some concern with [Student]'s reading skills. The academic areas that were of focus and concern for the IEP team, including

the Parents, during the 6th grade were math and written language. While the Parents have consistently maintained a desire for [Student] to perform at grade level in the core academic subjects, math was the big ticket subject of concern for both the Parents and the school system members of the IEP team during 6th grade. Additionally, [Student]'s MSA score in Reading was at the proficient level, as were his SRI scores for the 2013-2014 SY. (HCPS-71; T. XXXX, Tr. 1719-1721.)

Based on the evidence before me, it does not appear as though anyone – not the Parents and not [SCHOOL 1] staff/HCPS personnel – *suspected* [Student] had deficits in reading comprehension and fluency during the 2013-2014 SY. The Parents have not demonstrated that HCPS knew or should have known [Student] had deficits in reading comprehension and fluency during the 2013-2014 SY.

Executive Functioning

The Parents urged me to find that HCPS failed to identify [Student]'s executive functioning as an area affected by his combination of disabilities and, therefore, it failed to develop appropriate educational programming to address his executive function deficits. Based on the record before me, I do not find this to be the case.

Executive functioning refers, generally, to an individual's capacity to organize – thoughts, materials, ideas – and to perform specific tasks in an orderly manner. (T. XXXX, Tr. 245; *See also* P-12; HCPS-12.) Executive functioning deficits are often noted in people diagnosed with ADHD. The IEPs developed for [Student] throughout the years are replete with references to his difficulty in organizing himself, whether it is gathering his materials at the end of one class to transition to another, or marshalling his thoughts to answer a question or to write an assignment. The Accommodations sections of his IEPs specifically acknowledge he needs

extra time to transition from class to class, and that the use of graphic and visual organizers help him to maintain focus on tasks. (T. XXXX, Tr. 123-124.)

XXXX XXXX, whom I accepted as an expert in School Counseling and in Licensed Clinical Professional Counseling, was [Student]'s counselor at [SCHOOL 1] during the 2013-2014 SY. She testified that [Student] often struggled during the first part of the school year to transition from class to class in a timely fashion. With input from the Parents, she instituted an incentive program to aid [Student] in getting better organized at the end of each class so he could report on time to the next class. The incentive program started in November 2013 and carried into the spring semester, at which time they were able to fade out the incentives because [Student] had improved in reporting to class in a timely fashion. (Tr. 1097-1099; *see also* T. XXXX, Tr. 162, 238.) Additionally, Ms. XXXX prepared a visual primer to assist [Student] in moving from one place to another in a timely, orderly manner throughout the day. (Tr. 162-163; H-39.) Finally, [Student]'s February 21, 2014 IEP specifically authorized him to have an adult assistant to help organize himself throughout the day. (P-24.) Based on the evidence, it simply cannot be said HCPS was either unaware of [Student]'s executive functioning deficits or that it failed to develop strategies in [Student]'s IEPs to address those deficits.

Emotional and Social Functioning

A significant amount of time was spent at the hearing discussion [Student]'s emotional state during the 2013-2014 SY and his level of social interaction at both [SCHOOL 1] and [SCHOOL 2]. The Parents testified that as the 2013-2014 SY went on, [Student] became increasingly anxious, agitated and upset about the prospect of attending [SCHOOL 1]. According to Mrs. XXXX, towards the middle of the third quarter of the 2013-2014 SY, [Student] had meltdowns at home related to going to school. He told his parents he did not want

to attend [SCHOOL 1] anymore and he was going to quit school. He felt the pace was too fast and he could not keep up with it. He called himself “dumb” and “too stupid” to get the concepts being taught. (Tr. 756-757.) Mr. XXXX testified it became a struggle in the mornings to get [Student] to go to school, and it got so bad at one point, they had him sleep in his school clothes so there was less work in the morning to get him out of the house. (Tr. 270-271.) According to Mr. XXXX, it felt like [Student] would hold himself together during the school day, and then act out because of his frustrations with school when he got home in the evenings. (Tr. 279-281.) Most tellingly, during Fall 2014, when there was a possibility [Student] might have to return to [SCHOOL 1] after spending a few months at [SCHOOL 2], he had such an intense negative reaction to the idea, the Parents sought out Dr. XXXX for psychological evaluation. (T. XXXX, Tr. 915; P-39.)

During the evaluation, Dr. XXXX performed a mental status examination of [Student], during which he reported to her that he sometimes had thoughts of dying, even though he did not have any kind of plan or intention to harm himself. (Tr. 924, 927; P-39.) Dr. XXXX’s clinical impression of [Student] was that he fit the criteria for a diagnosis of Depressive Disorder, Not Otherwise specified. (P-39, p. 9.)

The Parents’ and Dr. XXXX’s impressions of [Student]’s emotional state stands in stark contrast to the version of [Student] described by Ms. XXXX. Ms. XXXX testified that she did not observe in [Student], nor was it reported to her by any other his other educators and service providers, any anxiety or anxiousness while in school. (Tr. 1112.) [Student] did not engage in work avoidance or refusal to do work, and he did not present as depressed or report to her feelings of depression. (Tr. 1109-1110.) She talked to [Student] on daily basis and believes they had a good rapport (Tr. 1112), and [Student] never told her that he felt sad or upset at the

prospect of coming to school. She also regularly spoke with the Parents during the school year, and they never advised her [Student] was experiencing distress at home about the prospect of coming to school every day. (Tr. 1135.) Ms. XXXX was surprised to read the description of [Student] contained in Dr. XXXX's report, because it did not comport with the child she saw at [SCHOOL 1] every day. (Tr. 1112-1113.)

It is clear to me, based on the record, that [Student] was able to marshal his emotional reserves while in school during the 2013-2014 SY and engage in good behavior during the school day, only to release all his anxiety and frustration when he got home in the evening. The Parents acknowledged that to the degree [Student] acted out in relation to feeling frustrated about school, he did so at home and not in the school setting.

The contrast between [Student]-at-school and [Student]-at-home is the reason HCPS was not aware [Student] was having any emotional difficulties related to attending school at [SCHOOL 1]. I do not doubt that he was; the Parents testified compellingly about how [Student]'s frustrations with school manifested in him at home. The issue, however, is that HCPS was not made aware [Student] was struggling emotionally, either by [Student] or by his parents. The school system did not know [Student] was experiencing any emotional distress about school because he was not displaying that distress *in* school. HCPS cannot create or develop program components to address an issue of which it is unaware. Again, IDEA does not require a local education agency to investigate *any* possible disability in a child, but only suspected disabilities. With regard to [Student]'s emotional state, HCPS did not have a reason to suspect he was experiencing emotional difficulties, particularly because he did not display them while in school. Significantly, once HCPS became aware during the 2015 IEP team meetings, it incorporated a counseling component into [Student]'s IEP services and supports. (P-55.)

[Student]'s social functioning during the 2013-2014 SY is another area where there is a marked contrast between what his educators and service providers from HCPS observe and what his parents and educators at [SCHOOL 2] observe. [Student] reported to his parents that he felt as though some of his friends from elementary school, who also transitioned with him to [SCHOOL 1], were withdrawing from him now that they were all in middle school. Additionally, he reported to his mother at least two instances of other children making fun of him because they perceived him to be intellectually disabled. (T. Mrs. XXXX, Tr. 773-774.) Ms. XXXX testified that while generally [Student] interacts well with the other students at [SCHOOL 2], he seems to have difficulty cultivating interactions with them into closer friendships. (Tr. 369.) When working in a group, [Student] will sometimes distract the other students from their work to get their attention. (Tr. 368.)

In contrast, Ms. XXXX testified that during the 2013-2014 SY, she did not observe, and it was not reported to her by the other teachers that [Student] engaged in any kind of disruptive behaviors to or around the other students in order to get their attention. (Tr. 1094-1095.) He was able to go on class field trips with his non-disabled peers without experiencing any conflict with them. During a classroom assignment related to fixing a grilled cheese sandwich, she observed [Student] take a leadership role; he oversaw making the sandwich and directed the other students on what to do. (Tr. 1102.) From what Ms. XXXX observed of [Student], his transition from elementary to middle school was typical of the other students in the 6th grade. (Tr. 1145.)

The Parents argued HCPS failed to identify the ways in which [Student]'s disabilities affected his social functioning, but I do not find the evidence supports this position. [Student]'s IEPs for 4th and 5th grade did call for him to be in a social skills group. The social skills group remained as part of his IEP supports up through the IEP developed and approved on February 21,

2014. The Parents maintain he would only have been placed in the social skills group because he was having difficulty with social interaction. It is unclear to them why, for the IEP developed for 6th grade, the social skills group was removed from the list of [Student]'s supports. I conclude the Parents want me to draw the inference that [Student] still needed the social skills group during the 6th grade and, thus, it was inappropriate for him to be removed from it. Support for that inference, according to the Parents, comes from Ms. XXXX's testimony about [Student]'s occasionally disruptive, seemingly immature behavior in her class. They argued it is not credible that if [Student] displayed these issues in the 7th grade, he somehow did not have them in the 6th.

I disagree. It is not difficult to believe that during 6th grade, and while amongst some students who had been with him in elementary school, [Student] was able to demonstrate skills he learned while in the social group during two school years. It is equally easy to believe the transition to a new school with new students would undo some of the equilibrium [Student] gained during his time in the social skills group. With respect to the issue of [Student]'s social functioning, the evidence is in equipoise. Accordingly, the tie goes to the non-burden bearing party, in this case, HCPS. *Jones v. State*, 139 Md. App. 212, 227 (2001).

Pragmatic Language

The final area which the Parents argue HCPS failed to develop appropriate educational programming for [Student] relates to alleged deficits he has in pragmatic language. Pragmatics is defined as the rules for oral language used in responding to and conveying messages. (P-26.) Pragmatics involves using language for a variety of purposes (for example, demanding, stating intention, promising), changing language based on the listener situation (for example, the way one talks to one's boss or co-workers is often different from the way one talks to one's family or

friends), and following rules for conversation and storytelling (such as taking turns to speak). (T. XXXX, Tr. 1458-1459.) The Parents argued that [Student] had pragmatic language deficits, as demonstrated by his scores on the CELF-4, and HCPS ignored this fact. It did not identify pragmatic language as an area affected by [Student]'s disabilities, and it did not include any goals and objectives related to pragmatics on the IEP developed for [Student] for 7th grade.

XXXX XXXX, whom I accepted as an expert in Speech-Language Pathology, testified on behalf of HCPS about [Student]'s speech-language background. She worked directly with [Student] during the 2013-2014 SY. (Tr. 1458) Ms. XXXX performed a speech-language assessment of [Student] on March 28 and April 3, 2014. As part of the assessment, she administered the CELF-4 to him. (P-26.) His score on the Pragmatics Profile of the CELF-4, a checklist completed by his teachers, was 99. According to Ms. XXXX, the criterion score for a student [Student]'s age at the time of testing is greater than or equal to 142. [Student]'s score, in Ms. XXXX's opinion, did not suggest he required individual instruction for pragmatic language. (Tr. 1464.) She believes he has the ability to correctly use pragmatic language skills, and he does use them, albeit inconsistently. (Tr. 1466.)

I am mindful that [Student]'s Pragmatics Profile score did not suggest a *severe* deficit in the area of pragmatic language. It is, however, still below average; his score clearly reflects a deficit in the area. I do not understand, based on anything in the record, why HCPS would *not* identify pragmatic language as an area affected by [Student]'s disabilities. [Student]'s scores on testing related to expressive and receptive language have, in the past, demonstrated impairment ranging from mild to moderate. Expressive and receptive language have been identified on his IEPs as areas affected by his disabilities for which IEP goals and objectives were developed. I do not see a reason in the record, nor was one proffered to me, for why pragmatic language was

not included on [Student]’s 7th grade IEP. Even if his 99 standard score could be characterized as reflecting a “mild” deficit, HCPS has developed educational programming in the past to address [Student]’s mild speech-language impairments. Its failure to do so in this regard was not educationally appropriate.

Educational Placement – [SCHOOL 1]

As discussed above, I find [Student] did not make educational progress during the 2013-2014 SY and thus, did not receive more-than-minimal education benefit from the program at [SCHOOL 1]. I find, based on the evidence, that [Student]’s lack of progress is directly tied to his placement in the general education setting at [SCHOOL 1]. Given [Student]’s combination of disabilities, a general education setting is not appropriate for him at this time.

Throughout the record, in IEP team meeting minutes, the IEPs themselves, in progress notes, and in the various evaluation and assessment narratives, reference is made to the interplay between [Student]’s multiple disabilities and their effect on his educational performance. The combination of progressive and bilateral hearing loss, ADHD and its attendant symptomology, expressive, receptive and pragmatic language impairment, and the side effects of the medications [Student] takes to control both ADHD and a seizure disorder has an impact on [Student] across several areas/aspects of learning. (P-1; P-6; P-14; P-16; P-23; P-26; P-27; P-55; HCPS-1; HCPS-2; H-12; H-31; H-32; T. XXXX, XXXX, XXXX, XXXX, XXXX.) His IEPs make particular note of the fact that in order for him to meaningfully access classroom instruction, he requires specialized instruction with minimal distractions, especially auditory distractions. It is also generally agreed-upon that [Student] requires frequent repetition of both directions and concepts, not only to stay on task, but to be able to commit an idea to memory. His performance on formal and informal assessments, including classroom assignments, amply demonstrates he

has difficulty with multiple-step directions; he is more likely to display understanding when information, including directions, is “chunked” for him, i.e., broken into smaller components. [Student]’s executive functioning deficits result in him struggling to keep himself organized, whether with his materials or with gathering his thoughts to respond to a question, or reason his way through a mathematics problem. It also has an impact on his ability to initiate tasks and to remain focused on them once he has started them.

[Student] has documented slow processing speed, i.e., the efficiency with which a person processes information. It takes him longer to understand information presented to him than it does a typical, same-age peer, and longer to formulate his responses to information. At least one of the medications [Student] takes to manage the symptoms of seizure disorder, XXXX, can also affect his processing speed. (H-12.) Additionally, working memory is an area of weakness for [Student]. “Working memory” denotes the storage of information upon the first time a person hears it, and the person’s capacity to recall the information after hearing it. (T. XXXX, Tr. 931.)

The Parents presented evidence demonstrating what effective educational programming for [Student] would look like given the combination of disorders he has and how those disorders interact with one another in a learning environment. Ms. XXXX testified that [Student] needs more specialized, individualized instruction in math than what was proposed for him on the 6th, 7th and 8th grade IEPs, specifically, instruction outside of a general education classroom. (Tr. 549-551.) In her opinion, it is not conducive to [Student] receiving more-than-minimal educational benefit for him to be inside a general education classroom for the majority of the school day, which is what is proposed by the IEPs for the 2014-2014 and 2015-2016 SY. (Tr. 554.) Given his processing speed, attention, executive functioning and working memory deficits,

the pace of a general education classroom would pose significant challenges for [Student] which could not be easily overcome. (Tr. 590-591.)

Ms. XXXX's testimony on the type of setting that would be conducive to [Student] receiving educational benefit under his IEP was corroborated by Dr. XXXX and the Parents. In Dr. XXXX's opinion, based on [Student]'s profile, he needs a smaller classroom with a smaller number of students; a significant amount of one-on-one, specialized instruction in the areas of math, reading and language arts; and, a better integration of the skills he learns with one another than he would receive in a general education classroom. (Tr. 937-938; *see also* P-39.) Unless [Student] received intensive and specialized instruction in the core academic areas, Dr. XXXX would not expect to see him make any kind of significant progress in those areas. According to Dr. XXXX, it does not make educational sense for a child with [Student]'s gaps in academic knowledge to spend the majority of his school day in a general education classroom. He would most likely fall further and further behind his same-grade, non-disabled peers if that were to happen. (Tr. 939-940, 943.)

The Parents testified about [Student]'s experiences in the general education classroom during the 2013-2014 SY. [Student] talked to them openly about school throughout the year (and continues to do so now). Mr. XXXX reported that [Student] had difficulty getting to classes on time during part of the year and when he would finally get to class, he often did not have enough time to finish his in-class assignments. (Tr. 262.) He often did not understand the concepts underpinning his homework assignments or could not recall them, and thus, he had a great deal of difficulty actually doing his homework. (Tr. 268.) Often, Mr. and Mrs. XXXX had to re-teach concepts to [Student] in the evening in order for him to be able to do his homework. (Tr. 275; *see also* T. Mrs. XXXX, Tr. 786-787.) Mr. XXXX had the opportunity to observe

[Student] on one occasion at [SCHOOL 1] during a math session. He did not observe that the lesson was differentiated in any way for [Student], and it was a concept that likely would have taken [Student] at least three sessions to grasp. (Tr. 267.)

Mrs. XXXX had the opportunity to observe [Student] at [SCHOOL 1] in November 2013, during his science class and during his language arts class. In the science class, there were approximately 20 students, one teacher and one instructional aide. (Tr. 731-732.) [Student] was not able to finish the in-class assignment during the session. (Tr. 733-734.) In the language arts class, there were approximately 20 students, including [Student], along with two adults, one of whom was Ms. XXXX. (Tr. 736.) During the class, the students broke into groups to discuss the assigned book. The students in [Student]'s group talked to each other, but did not talk to him. Ms. XXXX noticed and joined the group to engage with [Student] in the discussion. (Tr. 739-740.) According to Mrs. XXXX, [Student] frequently reported to his parents how "fast paced" things seemed to be at [SCHOOL 1]; he expressed concern to them the other kids were "moving past" him, that he often "didn't get" the lessons and he liked it better when she or his father explained things to him. (Tr. 730.) Mrs. XXXX testified that during the 2013-2014 SY, the Parents consistently advocated for [Student] to be in smaller-sized classes and to have more individualized, specialized instruction at [SCHOOL 1] than he was getting from being in the general education setting. (Tr. 812-813.) While she absolutely believes in the value of public education, in her opinion as an educator, the general education classroom setting was not a good fit for [Student] given his constellations of issues. He needs intensive, personalized instruction to enable him to learn and retain educational concepts.

HCPS argued that [Student]'s IEP can appropriately be implemented at [SCHOOL 1], and his placement in a general education setting is in accordance with IDEA's mandate to

mainstream disabled children as much as is practically possible with their non-disabled peers. As support for its position, HCPS relied on the educators and service providers who worked with [Student] at [SCHOOL 1], as well as the February 26, 2014 evaluation from XXI. In that evaluation, Dr. XXXX concluded that [Student]’s “current academic setting (i.e., general education classroom with special education instruction, supports and accommodations) remains appropriate.” (H-12, p. 6.) HCPS urged me to give weight to Dr. XXXX’s conclusion that the proposed placement at [SCHOOL 1] was appropriate for [Student], even in light of his constellation of disabilities. The Parents countered Dr. XXXX’s conclusion with Dr. XXXX, who noted that in performing the neuropsychological assessment of [Student], Dr. XXXX failed to administer any educational testing to [Student]. Although Dr. XXXX comfortably acknowledged Dr. XXXX’s assessment was comprehensive, it was her opinion that Dr. XXXX’s failure to assess [Student] from an educational standpoint undermines his conclusion of what is educationally appropriate for [Student]. (Tr. 1026.) I agree.

I am mindful of the opinions of Ms. XXXX, Ms. XXXX, Ms. XXXX and Ms. XXXX that [SCHOOL 1] has the resources and supports to effectively implement [Student]’s IEP. I believe, based on how they presented during the hearing, that they are knowledgeable about [Student] and they have a good faith commitment to the idea of his educational success. I cannot, however, ignore that for the 2013-2014 SY, [Student] made very minimal progress in the academic area of math, that he had undetected reading deficits for which programming was non-existent, and he was not receiving the kind of specialized, individualized, intensive instruction he needed to make actual, more-than-minimal progress. Based on the record, I find this is due to his placement, for the majority of the school day, in the general education setting. Mainstreaming is an important, laudable goal. When, however, it is clear that a child’s educational development

has essentially remained static across two school years, which [Student]'s did in the area of math, that goal should yield to a model that works to afford the child true educational benefit and growth.

I do not find that given [Student]'s deficits in executive functioning, processing speed, and working memory, he could keep pace with a general education setting. His need for repetition of directions, for regular prompting to remain focused and on task, for assistance with organizing his thoughts and materials, for assistance with initiating and completing tasks, and for extra time to both understand an educational concept and to apply that understanding to problems involving the concept, all require more individualized attention than he receives in a general education classroom setting. I agree with the Parents that [Student] fell further behind his non-disabled peers during the 2013-2014 SY, and, if he had remained in the full-time general education setting for the 2014-2015 and 2015-2016 SY, the gaps in his academic knowledge would widen further, and the academic distance between him and his non-disabled peers would grow even greater. The implementation of [Student]'s IEP in the general education classroom setting at [SCHOOL 1] during the 2013-2014 SY, and the proposed implementation of it in the general education classroom setting for the 2014-2015 and 2015-2016 SY is not educationally appropriate and would not provide [Student] with a FAPE.

Educational Placement – [SCHOOL 2]

Having found the proposed placement in the general education setting is not educationally appropriate, I must now determine if the placement at [SCHOOL 2] is appropriate. Based on the record before me, I find that it is.

[SCHOOL 2] is a school which exclusively service learning disabled students; [Student] spends the majority of his school day in self-contained special education classroom settings. (T.

XXXX, Tr. 308.) [SCHOOL 2] uses an integrated approach to instruction, which includes multi-sensory techniques for teaching beyond speech and writing (such as music and art). (Tr. 313.)

As [Student] is a visual, experiential learner, [SCHOOL 2]' multi-sensory approach is conducive to how he grasps and retains educational concepts. The classes are smaller at [SCHOOL 2], and [Student] benefits most from being in a small group setting. (Tr. 362.) By June 2015, [Student] had mastered, with cues, several of the math goals and objectives on his PEP, and he had completely mastered others. (Tr. 336; *see also* P-54; P-59.) He also made progress in his goals for reading and written language. (Tr. 358-359.) As of the start of the 8th grade, [Student] was reading at a 6.9 grade level, an educational improvement of one-and-a-half grade levels over the course of one school year. (Tr. 384-385.) [Student] has not displayed anxiety, depression or any other emotional distress or instability during his tenure at [SCHOOL 2]. (Tr. 452-453.) He is able to complete many of his homework assignments independently. (T. [Student], Tr. 897-898.)

Since enrolling at [SCHOOL 2], [Student] has received educational benefit across the academic areas affected by his combination of disabilities. [SCHOOL 2] is an appropriate educational placement for him for the 2014-2015 and 2015-2016 SYs.

CONCLUSIONS OF LAW

Based on the Findings of Fact and Discussion, I conclude as a matter of law as follows:

1. HCPS's proposed placement of the Student at [SCHOOL 1] to implement the IEPs for the 2014-2015 and 2015-2016 SYs would not enable the Student to receive educational benefit during those school years and, thus, the proposed placement denies the Student a FAPE;
2. HCPS did not fail to identify suspected areas of disability for the Student with respect to reading fluency and comprehension, executive functioning, and social-emotional functioning;
3. HCPS did not fail to identify the suspected area of disability for the Student with respect to pragmatic language, but it did fail to development IEP components designed to address the Student's pragmatic language impairment;
4. The proposed placement of the Student at [School 1] ([SCHOOL 1]) for the 2014-2015 and 2015-2016 SYs is not appropriate; and,
5. The parents are entitled to reimbursement for their unilateral placement of the Student at [School 2] [(SCHOOL 2)] for the 2014-2015 and 2015-2016 SY.

Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982); *School District Four v. Carter*, 510 U.S. 7 (1993). 20 U.S.C.A. § 1412(a)(5)(A); 20 U.S.C.A. § 1414(b)(3)(B).

ORDER

I **ORDER** that the Parents' request for the Student's placement at [School 2] for the 2014-2015 and 2015-2016 school year is hereby **GRANTED**; and,

I further **ORDER** HCPS to pay the Student's tuition for the 2014-2015 and 2015-2016 school years.

If corrective action is required by this decision, the local education agency shall, within 30 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.

February 5, 2016
Date Decision Mailed

Latonya B. Dargan
Administrative Law Judge

LBD/kkc

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the Student resides. Md. Code Ann., Educ. § 8-413(j) (2014).

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.