

**XXXX XXXX,**

**STUDENT**

**v.**

**TALBOT COUNTY**

**PUBLIC SCHOOLS**

**\* BEFORE JOY L. PHILLIPS,**

**\* AN ADMINISTRATIVE LAW JUDGE**

**\* OF THE MARYLAND OFFICE**

**\* OF ADMINISTRATIVE HEARINGS**

**\* OAH NO.: MSDE-TALB-OT-16-19522**

**\* \* \* \* \***

**DECISION**

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**STATEMENT OF THE CASE**

On June 24, 2016, XXXX XXXX (Parent), on the Student's behalf, filed a Due Process Complaint (Complaint) with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by the Talbot County Public Schools (TCPS) under the Individuals with Disabilities Education Act (IDEA), 20 United States Code Annotated (U.S.C.A.) § 1415(f)(1)(A) (2010).

I held a telephone prehearing conference on August 9, 2016. Wayne Steedman, Esquire, and Leslie Turner Percival, Esquire represented the Parent. David Burkhouse, Esquire, represented TCPS.

I held the hearing on October 5, 6, 7, 11, 12, 13, and 14, 2016 at the Talbot County Board of Education, 12 Magnolia Street, Easton, Maryland. Wayne Steedman, Esquire, represented the Parent. David Burkhouse, Esquire, represented TCPS.

The hearing dates agreed on by the parties fell more than forty-five days after the triggering events described in the federal regulations, which is the date my decision is due. 34 Code of Federal Regulations (C.F.R.) § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2015). The parties requested an extension of time until thirty days from the close of the record for me to issue a decision. 34 C.F.R. 300.515(c) (2015); Md. Code Ann., Educ. § 8-413(h) (2014). I granted the attorneys' request to submit their closing arguments in written form, seven days from the close of the evidence. I have not extended my time for issuing a decision by the same period. The closing arguments were submitted via email on October 21, 2016 and made a part of the record.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2015); Md. Code Ann., Educ. § 8-413(e)(1) (2014); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

### **ISSUES<sup>1</sup>**

(1) Is the Student barred by the statute of limitations from seeking tuition reimbursement for TCPS' alleged denial of a free, appropriate public education (FAPE) during the 2013-2014 school year?

(2) Is the Student barred by notice requirements from seeking tuition reimbursement for the 2014-2015 and 2015-2016 school years following the Parent's unilateral placement of the Student in a private school?

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<sup>1</sup> I have rephrased the issues from those contained in the Prehearing Conference Report to more specifically reflect those raised by the parties during the hearing.

- (3) If not, did TCPS deny the Student a FAPE for the 2015-2016 school year?
- (4) If the Student was denied a FAPE, what is the appropriate remedy?

### **SUMMARY OF THE EVIDENCE**

#### **Exhibits**

I admitted exhibits on behalf of the parties. A complete list of those exhibits is appended to this decision as Appendix A.

#### **Testimony**

The Parent testified and presented the following witnesses:

- The Student
- XXXX XXXX, Ed.D., who was admitted as an expert in special education
- XXXX XXXX, Ph.D., Clinical Psychologist, who was admitted as an expert in psychology
- XXXX XXXX, Executive Director [School 1]
- XXXX XXXX, LCSW-C, who was admitted as an expert in clinical social work

TCPS presented the following witnesses:

- XXXX XXXX, Ed.D., TCPS Behavioral Specialist and Section 504 Coordinator, who was admitted as an expert in school-based mental health services and behavior
- XXXX XXXX, TCPS Supervisor of Special Education, who was admitted as an expert in special education
- XXXX XXXX, Speech-Language Pathologist, who was admitted as an expert in speech-language pathology and assistive technology
- XXXX XXXX, Occupational Therapist, who was admitted as an expert in occupational therapy

- XXXX XXXX,<sup>2</sup> TCPS Assistant Superintendent
- XXXX XXXX, Psy.D., TCPS School Psychologist, who was admitted as an expert in school psychology

The parties submitted written Stipulation of Testimony for the following witness:

- XXXX XXXX, LCPC, XXXX Mental Health and Trauma Services, LLC

### **FINDINGS OF FACT**

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

#### Background

1. The Student was born in 1998 and is now eighteen years old.
2. The Student attended TCPS schools through the ninth grade.<sup>3</sup> He transferred to a private, general education school, [School 1] ([SCHOOL 1]), beginning in the tenth grade.
3. In May 2016, the Student graduated from [SCHOOL 1] with a general education high school diploma.
4. The Student is now a student at [School 2].

#### Fall 2004 (First Grade) - Spring 2009 (Fifth Grade)

5. The Student entered the first grade in the fall of 2004.
6. On November 1, 2004, the Student was diagnosed at the XXXX (XXXX)<sup>4</sup> Autism Clinic with static encephalopathy, Asperger's Disorder, eating disorder, anxiety disorder, and obsessive-compulsive disorder. XXXX recommended that a specific learning disability be ruled out. (Ex. 136.)

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<sup>2</sup> Dr. XXXX's educational credentials were not presented, but the parties referred to her as Dr. XXXX and I will adopt that title in this decision.

<sup>3</sup> All of the schools the Student attended were in Talbot County until he transferred to [School 1] for the tenth grade. The parties focused on the number of schools the Student attended over the years and the reasons for the various transfers, but I do not find that relevant to my decision.

<sup>4</sup> XXXX was then known as XXXX Children's Hospital and that name appears in exhibit 136, but in all other exhibits and throughout witness testimony, it is referred to as XXXX.

7. In November 2004, the Parent emailed TCPS inquiring about an occupational therapy (OT) evaluation for the Student to address his sensory and fine motor skills. (Ex. 140.)

8. On December 16, 2004, at an Individualized Education Program (IEP) Team meeting, TCPS agreed to conduct a psychological evaluation, an educational assessment and a classroom observation. (Ex. 1.)

9. XXXX XXXX, school psychologist, administered a variety of cognitive tests on February 7, 2005. (Ex. 2.) The Student was working above grade level in the areas of math and reading. He displayed average intelligence on the Wechsler Intelligence Scale for Children-IV (WISC-IV) and obtained a full scale IQ score of 100. His processing speed index score was 91, placing him in the average range, but better than only about 27% of others in his age group.

10. XXXX XXXX, a special education teacher, administered the Woodcock-Johnson (W-J) III<sup>5</sup> and the Test of Early Written Language to the Student and observed him in the classroom. (Ex. 3.) The Student's scores ranged from average to superior in the areas of early written language, reading, math, and oral language. His lowest score was in the area of writing fluency, which is a timed assessment.

11. On February 23, 2005, an IEP Team met to discuss the assessments results. (Ex. 4.) The Parent received information regarding her due process rights and procedural safeguards. The Team determined the Student did not have a specific learning disability and did not qualify for special education services, because there was no discrepancy between the Student's achievement in school and his cognitive scores. The Team explained to the Parent that the Student did not qualify for OT, which is a related service, because he did not first qualify for special education. Informal accommodations were implemented, such as extended lunch, extended time to complete tasks and breaks as needed.

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<sup>5</sup> For ease of comparison, I have reprinted and attached a chart compiled by Dr. XXXX comparing all of the Student's W-J scores as Appendix B, and incorporate those scores in these Findings of Fact by reference.

12. On April 21, 2005, XXXX conducted a neuro-psychological evaluation of the Student. (Ex. 5.) XXXX recommended additional enrichment work to keep the Student challenged and occupied, a review of his behavior plan by the school psychologist, and involvement in a social skills group. Due to the Parent's concerns that TCPS was not adequately addressing the Student's needs, XXXX recommended she seek advice from an educational advocate.

13. On May 4, 2005, XXXX administered a speech-language evaluation to the Student. (Ex. 150.) His scores on the Test of Language Competence-Expanded Edition showed the Student's semantic, syntactic and pragmatic language abilities to be in the average range. His lateral lisp was noted. XXXX recommended social skills training, after school activities, and therapy, in the event social skills training was not available to him.

14. On June 27, 2005, XXXX reported that the Student was making good progress. It addressed his medication needs. The Student was receiving private OT sessions at this time.

15. In the fall of 2005, the Student entered second grade. His grades that year showed good or very good progress. He was promoted to the third grade.

16. On August 23, 2006, the Parent requested that the Student be assessed for an IEP and OT. (Ex. 7.)

17. On September 20, 2006, TCPS convened an IEP meeting to determine whether to refer the Student for assessments. (Exs. 8, 9.) The Parent received information regarding due process rights and procedural safeguards. The Parent expressed concern about the Student's lateral lisp and requested OT services at school. She requested testing for a disability in written language. The Student attended a pragmatic social skills group at this time. Teachers noted the Student was doing well in class but had poor handwriting. He had a few friends in class. The

Student was referred for psychological, educational, speech articulation testing, and a classroom observation.

18. On October 6, 2006, the Student was administered the W-J III.<sup>6</sup> (Ex. 11.) Results showed the Student to be above average in reading, average in written expression, high average in math, and average in science, humanities, and social studies. On the Test of Written Language (TOWL) 3, the Student showed weakness in handwriting, average scores in the areas of vocabulary, spelling, punctuation/capitalization, editing skills, and sentence combining (Contrived Writing), and low average skills in the areas of language usage, writing conventions, and story construction (Spontaneous Writing). Ms. XXXX suggested certain accommodations that would assist the Student in class, such as larger, lined paper or raised, lined paper, practice on letter and word spacing, pencil grip, graphic organizer, handwriting drills, and small groups within the general education classroom due to attention concerns. The Parent signed off on Ms. XXXX's report on November 13, 2006.

19. On October 18, 2006, XXXX XXXX, school psychologist, administered a number of psychological assessments. (Ex. 10.) The Student received a full scale IQ score of 102 and a General Ability Index (GAI) score of 112. The Student scored in the average range or the high average range in the areas of intelligence, verbal comprehension, perceptual reasoning, and working memory. Scores from the processing speed index (PSI) showed the Student functioning within the low average range.

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<sup>6</sup> XXXX XXXX, who administered the test, wrote in her report that she administered the W-J Revised, but Ms. XXXX testified convincingly that she asked Ms. XXXX which version of the test she had administered and Ms. XXXX confirmed she used the W-J III, which was the version used by TCPS at that time. This is confirmed on page 2 of the November 13, 2006 IEP minutes in which Ms. XXXX refers to "WJAB-R III." (Ex. 13.) I conclude that identifying it as the Revised version was done in error.

20. On November 8, 2006, TCPS administered a speech-language evaluation to the Student. Although the Student displayed some articulation errors, no evidence of an articulation disorder was found. (Ex. 12.)

21. On November 13, 2006, the IEP Team met to review the assessments. (Ex. 13.) The Parent received information regarding due process rights and procedural safeguards. The Team determined the Student did not have a learning disability, because there was no significant discrepancy between his cognitive abilities and his academic achievement. The Student's poor handwriting and his progress in his pragmatics group were discussed. The Team referred the Student for assessment for a School Support Team (SST) or Section 504 Plan.<sup>7</sup> The Team agreed on accommodations to address the Student's writing.

22. The Student's final grades from the third grade were: As in Art, Music, and Physical Education; Bs in Math, Reading, Sciences, and Spelling; C in English.

23. On April 6, 2007, XXXX wrote a letter containing recommendations for addressing the Student's behaviors, including tantrums, difficulty with frustration tolerance, and self-injurious behaviors. (Ex. 153.) XXXX also recommended modifications to schoolwork and updated achievement testing.

24. XXXX conducted a speech-language evaluation of the Student on August 13, 2007. (Ex. 15.) XXXX recommended a number of accommodations, as well as one hour-per-week of speech-language therapy.

25. On October 2, 2007, TCPS provided the Student with an initial SST Plan. (Ex. 16.) It included accommodations to improve written language and reduce frustration.

26. During this time, the Student was in therapy with the XX Psychological Services (XXPS), which worked with public school students. (Ex. 17.) XXPS developed an Individual

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<sup>7</sup> An accommodations plan developed pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Treatment Plan for the Student. Goals included increasing his ability to tolerate sensory stimuli; using therapy as a healthy outlet for expressing thoughts and feelings; asking to be excused from class when feeling overwhelmed; using coping objects available to him in his locker; improving social skills by making and keeping one age-appropriate, healthy friendship; and identifying and reducing obsessions/compulsions.

27. The Student's final grades in the fourth grade were: As in Art, Music, Physical Education, Sciences, and Spelling; and Bs in English, Math, and Reading. (Exs. 144, 154.)

28. On September 17, 2008, while the Student was in the fifth grade, his SST Plan was updated with a new goal and accommodations related to coping with sensory processing deficits. (Ex. 18.)

29. The Student was achieving or improving on his goals with XXPS during this school year. (Ex. 19.)

30. On May 28, 2009, XXXX recommended a class size of fewer than twenty for the Student. (Ex. 155.)

31. The Student's final grades from fifth grade were: As in English, Music, Physical Education, Sciences and Spelling; and Bs in Art, Math and Reading. (Ex. 156.)

32. In the third through the fourth grades, the Student's scores on the Maryland State Assessment (MSA) were proficient in Math and Reading. In the fifth grade, the Student's scores were proficient in Math and Science, and advanced in Reading. (Ex. 145.)

Fall 2009 (Sixth Grade) - Spring 2012 (Eighth Grade)

33. The Student transferred to [School 3] for the sixth grade. The elementary school is part of the middle and high school building complex. A day care center is also located on site; the Parent worked there at this time.

34. In September 2009, the Parent requested that the Student be evaluated for eligibility for an IEP. (Ex. 20.) She was particularly concerned that he had delayed social and comprehension skills that were impacting him educationally. She noted his poor organizational skills as an additional problem. She reported his two teachers were concerned about the impact of his disabilities on his ability to function in school.

35. In response, TCPS received input from the Student's sixth grade general education teachers, Mr. XXXX and Ms. XXXX, via Child Study Team forms. (Exs. 21, 22.) A classroom observation of Mr. XXXX's class was also conducted. (Ex. 23.)

36. On October 13, 2009, an IEP Team meeting was convened. (Ex. 24.) The Parent received information regarding due process rights and procedural safeguards. The Team reviewed the Child Study Forms and found that the teachers rated the Student as having strengths in the area of reading; no concerns with speech, expressing thought, short or long-term memory, gross motor skills, motivation, work completion or peer/adult interactions; moderate problems with writing skills, attention, impulsivity, organization, completing tasks, mental health, and behavior issues; and a serious problem with fine motor skills. (Ex. 157.) The classroom observer noted the Student refused to write when directed. The observer had no concern over the Student's reading comprehension or expressing thoughts but noted a moderate problem with speech, attention, and organization, and a serious problem with impulsivity, work completion, and peer/adult interactions. The Parent rated the Student as having a serious problem with expressing thoughts, organization, peer/adult interactions, and mental health.

37. The IEP Team discussed the Student's progress with XXPS, whose therapists met with the Student three times per month; the Student's use of coping strategies; his poor handwriting and organization; his use of breaks from class; his use of some of those breaks to see

the Parent in the day care where she worked; his feeling of being different from other children; his friendships; and his improved attendance. Accommodations were discussed.

38. At the meeting, the Parent said she believed the Student's recent anxiety in class was due to a test. The Team noted that he was receiving passing grades and proficient scores on the MSAs.

39. The Team determined no assessments were warranted because his disabilities were not having an educational impact, but it agreed the Student should be evaluated for a Section 504 Plan. The Parent agreed with this decision.

40. The Student continued with his SST Plan until March 1, 2010, when a Section 504 Plan was implemented. (Ex. 28.) The Section 504 Plan continued throughout the Student's seventh through the ninth grades.

41. The Student was provided numerous accommodations in his Section 504 Plan to help him access the curriculum, including, by the ninth grade, extended time to complete work, small group testing, checks for clarity and understanding of directions, checks for expected work completion, checks for content of assignments, repeated directions, preferential seating, reminders to self-check work, chunking of assignments, word banks, verbal responses for longer written assignments and tasks, short breaks when frustrated or tired, and reduced workload up to 20% to enhance quality over quantity. (Exs. 30, 31, 34, 35, 36, 45, 46.)

42. The Student had three disciplinary referrals during his tenure with TCPS, all of which occurred during the sixth grade in the spring of 2010. (Ex. 158.) The referrals involved outbursts or screaming, insubordination, and fighting with another student who was teasing him and laughing at him.

43. The Student's final grades for the sixth grade were: 100 in Physical Education, 99 in Music, 91 in Art, 86 in Math and Sciences/Health, 81 in Language Arts, and 78 in Social Studies. (Exs. 144, 159.)

44. The Student attended seventh and eighth grades at [School 4] ([SCHOOL 4]).

45. On September 1, 2010, the Parent provided a memorandum to his seventh grade teachers introducing and describing the Student to them. (Ex. 29.) She noted that he has many issues which interfere with his attendance and is therefore signed up for the "CHIPS" program, which excuses students with documented reasons for being absent. Among other things, she addressed his diagnoses, inability to change easily, handwriting, fine motor skills, need for breaks, delayed social and emotional skills, therapist, organizational issues, and sensory integration issues. She incorrectly wrote that the Student's IQ is 130.

46. In January 2011, the Student's seventh grade Language Arts teacher deemed him significantly below grade level in the area of overall written expression and at or above grade level in the area of reading. (Ex. 32.) She had strong concerns over his fine and gross motor skills and his impulsivity. Written expression and visual motor coordination posed significant problems for the Student, with listening comprehension and attention posing some problems. (Ex. 33.) The Student did all of his written assignments on the computer.

47. The Student's final grades in seventh grade were: 92 in Music, 91 in Physical Education, 90 in Social Studies, 90 in Health, 87 in Art and Math, 83 in English/Language Arts, and 82 in Sciences. (Exs. 144, 173.)

48. The Student's final grades in eighth grade were: 94 in Music, 92 in Health, 88 in Sciences, 85 in Social Studies, 81 in Physical Education, 77 in Art, 75 in English/Language Arts, and 73 in Math. (Exs. 144, 173.)

49. The Student's scores on the MSA were proficient in Reading and Math in the seventh and eighth grades. (Ex. 146.)

50. From the first through the eighth grade, the Student performed at or above other students of his age in class and on statewide assessments.

Fall 2012 - Spring 2013 (Ninth Grade)

51. In the fall of 2012, the Student transferred to the high school at [SCHOOL 4] for ninth grade.

52. The Student's class size increased from twelve to fifteen students in middle school classes to eighteen students in high school classes. (Ex. 112, pg. 10.)

53. The Student struggled in Algebra. His first quarter grade was 66, in the unsatisfactory range. (Ex. 39.) His progress was affected by incomplete work. He was enrolled in the most advanced English course that was offered for ninth graders, Pre-AP English, but his progress in that class was also affected by incomplete work. His first quarter grade was 78 in English, which was acceptable. His first quarter grade in Physical Science was 71, also considered acceptable, and in World History, 91, which was considered excellent.<sup>8</sup> (*Id.*)

54. At some point during the school year, the Student was working on Algebra problems when he wrote on the sides of the papers: "I GIVE UP; STOP Opressing (sic) me!!!!; I was writing to keep calm!" (Ex. 40.)

55. While the Student was enrolled in TCPS, he was permitted to use headphones to block out noise and distractions, and to wear a hoodie, for the same reason. He was also permitted to use a computer to write.

56. On November 8, 2012, the Student began seeing XXXX XXXX, LCSW-C, for private therapy sessions. (Exs. 41, 42.) The Student reported increased frustration with school,

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<sup>8</sup> A fifth class is listed on the Student's grades, PAMC Graphic Des., for which he received a final semester grade of 77, but I have not included it because the abbreviated name of the class was not explained. (Exs. 39, 56.)

emotional outbursts that caused him to walk out of class, incomplete homework, difficulty concentrating and understanding school work, and poor hygiene. Ms. XXXX, the Parent, and the Student developed an Individual Treatment Plan that included the goal of improved academic performance, effective management of moods, increased personal hygiene, and improved relationships and social interactions within the home. Ms. XXXX noted that the Student had a “tenuous” relationship with the Parent’s boyfriend, who lives with the Student and the Parent. (Ex. 43.)

57. Ms. XXXX saw the Student weekly for many weeks, in therapy sessions scheduled from noon to 1:00 p.m. Her office was in XXXX, which meant the Student was driven approximately twenty minutes from the high school to her office and back in the middle of school days for his therapy sessions. The appointments changed to after school once the Student transferred to private school in tenth grade. The appointment schedule slowed to bi-monthly and then to as-needed by the early spring of 2014.

58. The Student was so frustrated with school that by December 2012, he discussed dropping out. (Ex. 49.) Despite this, he did have a date for homecoming dance, although the Parent worked very hard getting him ready emotionally for the social event. (Ex. 162; T. 833.)

59. Part of the Student’s frustration was that he wanted to understand new concepts in class quickly and when it took longer than he thought it should take, he got so frustrated he would have to leave class. Sometimes there was just too much information, presented more quickly than he could absorb it. (T. 982.)

60. On January 15, 2013, the Student applied for acceptance to [SCHOOL 1]. The Parent pursued this new school because the Student was miserable at [SCHOOL 4], not because his needs were unmet. (T. 899.)

61. [SCHOOL 1] is a private, general education high school that specializes in educating students who have been diagnosed as being on the Autism Spectrum or as having Attention Deficit Hyperactivity Disorder (ADHD). It is a small school, where class sizes range from five to ten students. As a result, students receive individual attention from the teachers.

62. In one section of the [SCHOOL 1] application, the applicant-student answers some questions personally. The Parent wrote answers into that section on behalf of the Student, in addition to the Student's version. The Student's handwriting on that part of the application was very difficult to read. (Ex. 52.) He wrote that he is good at thinking and reading and that he is creative, his friends would describe him as weird and his teachers would describe him as intelligent, and he wanted to attend [SCHOOL 1] because he wanted to attend a school where "I'm taken care of and given what I need to succeed." (*Id.*)

63. During his therapy session with Ms. XXXX on January 29, 2013, the two addressed his lack of organization in regards to his school binder and work. He had no system of organizing any of his papers or homework, causing him to lose course work and be confused about his assignments. (Ex. 55.)

64. By the end of the second quarter, the Student's Algebra grade went down, from 66 to 63, and his teacher noted incomplete work. The Student's Physical Science grade also went down, from 71 to 70, as did his World History grade, from 91 to 84. His grade improved in Pre-AP English, from 78 to 81. (Ex. 56.)

65. On February 8, 2013, the Parent wrote to XXXX XXXX, the principal at [SCHOOL 4], to request special education testing. (Ex. 58.)

66. Dr. XXXX responded to the Parent on February 11, 2013 and initiated a Child Study review. The Teacher Forms showed as follows:

a. The Pre-AP English teacher wrote that the Student is intelligent, has a wide variety of knowledge, has good reading comprehension and recall, and that he was recognizing when he was stressed and needed to remove himself from the situation. His weaknesses included anger issues, difficulty completing work in class, difficulty focusing, and difficulty physically writing so that it could be read. (Ex. 60.) He worked at or above grade level, but the teacher had strong concerns in the areas of focusing and sustaining attention, task completion, motivation for tasks, rate of work completion, and interaction with peers/adults. His ability to express his thoughts and ideas created a moderate concern unless he was stressed, when it became a strong concern. His impulsivity and organizational skills created a moderate concern. She used the following accommodations and modifications in class: preferential seating, extra time, adjusted work load, time to start work, oral tests, reading options, choice in breakdown of work, and sucking on candy before a stressful situation.

b. The Tech Ed teacher wrote that the Student's areas of weakness included keeping his composure, written communication/writing, and completing/following all directions. (Ex. 63.) The Student worked at or somewhat below grade level in the areas of reading and written expression. The teacher had strong concern regarding the Student's organizational skills, completing tasks and rate of work completion, and moderate concern regarding the Student's speech, expressing thoughts and ideas, fine motor skills, impulsivity, motivation for tasks, peer and adult interactions, and mental health issues. The teacher used the following accommodations and modifications in class: extra time, decreased work load, direction check, and redirecting the Student to resources.

c. The Algebra teacher wrote that the Student is intelligent, with varied interests, but is easily overwhelmed and frustrated. (Ex. 64.) She rated the Student as at grade level in Overall Reading, and somewhat below grade level in Overall Math and Overall Written Expression. She had no strong concerns in any rated area and only moderate concerns in the areas of organizational skills, completing tasks, motivation for tasks, rate of work completion, peer/adult interactions and mental health issues. She had mild or no concern in all of the other areas. The teacher used the following accommodations and modifications in class: adjusted workload, preferential seating, and remove from distractions.

d. The Parent also completed a questionnaire. She noted her strong concerns in the areas of the Student's writing skills, expressing thoughts and ideas, motor skills, focusing or sustaining attention, organizational skills, peer/adult interactions and mental health issues. (Ex. 65.)

e. The guidance counselor, XXXX XXXX, completed an educational history form and conducted a classroom observation of the Student's Algebra class. (Exs. 62, 66.) In the Student's Algebra class, there were two teachers for nineteen students. The Student failed to write down certain math problems, complete a chart or equation, and complete work being done by an independent group. The Student had some problem in the areas of visual motor coordination, attention, activity level, work habits and motivation.

67. On February 27, 2013, the Student's interim grades for the third quarter were as follows: 88 in Art, 81 in Tech Ed, 65 in Algebra, 59 in Physical Science, and 55 in Pre-AP English. (Ex. 68.)<sup>9</sup>

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<sup>9</sup> The Tech Ed class was only a second semester class.

68. The IEP Team reviewed the Child Study Forms at a meeting on March 6, 2013 and agreed to assess the Student for a specific learning disability. The Parent received information regarding due process rights and procedural safeguards. (Ex. 69.)

69. On March 17, 2013, the Student was making progress toward the goals on his Individual Treatment Plan implemented by his therapist, Ms. XXXX. (Ex. 70.) He was able to identify triggers in school that influence his academic performance, including lack of organization and “his perception of events as they occur.” He and the therapist worked on identifying new coping skills, as his previous ones were no longer working.

70. On April 5, 2013, the Student received the following third quarter grades: 91 in Art, 72 in Tech Ed, 65 in Pre-AP English, 60 in Algebra, and 38 in Physical Science.

71. Dr. XXXX XXXX, TCPS school psychologist, conducted a cognitive assessment on April 17, 2013. (Ex. 74.) On the WISC-IV, Dr. XXXX scored the Student’s GAI in the high average range, at 115, but did not include the PSI scores in compiling the GAI because they fell within the extremely low range, indicating a processing speed deficit. The Student’s scores indicated unevenly developed skills, but, overall, showed the Student’s general cognitive abilities and verbal reasoning abilities to be within the high average range, and nonverbal and working memory abilities to be within the average range. Dr. XXXX also observed the Student in class. Overall, Dr. XXXX found that a specific learning disability might exist if the IEP Team found significant educational impact. Dr. XXXX recommended that the Student be given the following accommodations: extended time to complete assignment, reduction of quantity of work in favor of quality, time limits for working on assignments, limited or structured copying activities, activities to increase the rate and fluency, extended time on tests, and extended time on formulating and providing written responses.

72. XXXX XXXX, special education teacher, conducted an educational assessment of the Student. (Ex. 77.) Mr. XXXX administered the W-J III Normative Update (NU) to the Student. The Student achieved scores in the very superior range in the Oral Language Composite, the average range in the Broad Reading Composite, the average range in the Broad Mathematics Composite, and the high average range in the Broad Written Language Composite. In two of the timed tests administered, those of Math Fluency and Writing Fluency, the Student scored in the low average range. In the Key Math Diagnostic Assessment 3, the Student achieved a composite score in the average range. In the TOWL 4, the Student achieved an overall writing score in the average range. The Student's overall reading and math skills were found to be within the average range, with weaknesses in computation, math fluency and logical sentences.

73. On May 2, 2013, the IEP Team met to discuss the assessments. (Ex. 76.) The Parent was offered information regarding due process rights and procedural safeguards. The Team reviewed the assessments and found no evidence of a specific learning disability. (Exs. 164, 167.) It deemed the accommodations provided by the Section 504 Plan to be sufficient.

74. The Student received a passing score in Algebra on the High School Assessment test on May 15, 2013. (Ex. 165.)

75. The Student's final grades for the ninth grade were: 83 in Art, 74 in Pre-AP English, 70 in Physical Science and Algebra,<sup>10</sup> and 48 in Tech Ed. (Exs. 80, 168.)

76. While in the ninth grade, the Student left his classes to seek out his Parent or the guidance counselor. He did this when he became frustrated or anxious in class. It was extremely embarrassing for the Student when this occurred. [SCHOOL 4] staff noted that the Student left class far fewer times than reported by the Student, who said it occurred two to three times per

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<sup>10</sup> The parties seemed to agree that the Student's final grade in Algebra was a 70, as shown in exhibit 168, although the final grade is shown as a 65 in exhibit 80. This discrepancy was not explained.

week. No report was required when the Student left class to visit the Parent in the day care center where she worked; a report would only have been required if the Student had eloped from the building. Therefore, there is no way to know exactly how often this occurred. The Student had no disciplinary referrals during the ninth grade.

77. The Student was very unhappy in the ninth grade. He was frustrated when he got behind in class and he felt different from the other students.

78. The Student's absences from class (not necessarily full days) while in TCPS ranged from six-and-a-half to as many as twenty-three per school year. He was absent fifteen times in the ninth grade. (Ex. 163.<sup>11</sup>) Absences were due in part to anxiety about going to school and in part to therapy appointments that conflicted with class times.

79. On June 12, 2013, [SCHOOL 1] notified TCPS that the Student had enrolled in [SCHOOL 1]. (Ex. 166.)

80. The Parent did not notify TCPS of her intent to unilaterally place the Student in private school at public expense. (T. 902.)

#### Fall 2013 (Tenth Grade) - Spring 2016 (Twelfth Grade)

81. The Student entered [SCHOOL 1] in the fall of 2013 for the tenth grade.

82. The Student had difficulty adjusting to the new school, being on the receiving end of some bullying, and testing boundaries with teachers. He reacted with threats and behavior that resulted in incident reports and parent contacts. His behavior improved over time, although he continued to experience outbursts and meltdowns in class throughout high school. [SCHOOL 1] accommodated his need for breaks by giving him "exit tickets" that he could use when he needed to separate himself from class.

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<sup>11</sup> This exhibit is a chart tracking the Student's absences while in TCPS. Dr. XXXX testified that she compiled the chart and noted that the numbers were all off by two categories due to a glitch when it printed. Thus, all numbers should be moved to the left by two years. I have marked the chart accordingly.

83. The Student was not behind academically when he arrived at [SCHOOL 1]. He adjusted to the rigors of tenth grade classes.

84. [SCHOOL 1] uses a writing program called EmPower, which uses templates to help students learn how to approach writing assignments, organize their ideas, chunk the assignment into smaller sections and, ultimately, learn to write multi-page papers independently and without feeling overwhelmed by the process. All [SCHOOL 1] students are taught with this program. The Student used this program and, by the end of his senior year, wrote a research paper. He had progressed through the program enough that he was able to skip the initial steps of the program, because he had incorporated the steps into his writing routine.

85. All [SCHOOL 1] students are given access to a math practice program called XtraMath. This program allows students, including the Student, to practice math problems.

86. The Student's grades improved, but he continued to struggle with incomplete work. (Ex. 88.) By November 8, 2013, he received As in Biology and History, Bs in Music and Geometry, and a C in English.

87. [SCHOOL 1] implemented Student Development Plans (SDT) on January 30, 2014, setting forth goals for the Student. (Ex. 91.) The SDTs were in the areas of Writing Fluency (Exs. 91, 118), Calculation (Exs. 92, 119), Social/Emotional (Ex. 93), and Math Fluency (Exs. 94, 120.) The SDTs were occasionally updated with comments from the Student's teachers as a subjective measure of progress. As an objective measure of progress, [SCHOOL 1] compared standard scores from the W-J. [SCHOOL 1] required an increase of only three standard scores to deem an academic goal achieved.

88. By February 9, 2014, Ms. XXXX found that the Student was making therapeutic progress and that his meltdowns and tantrums had dramatically decreased. (Ex. 95.)

89. The Student received the following final grades in the tenth grade: As in 21<sup>st</sup> Century, Art/Music, and Biology, Bs in U.S. History and Geometry, and C in English. (Ex. 111.)

90. The Student entered the eleventh grade at [SCHOOL 1] in the fall of 2014.

91. The Student's final grades from the eleventh grade were: As in Algebra II and Physics, Bs in 21<sup>st</sup> Century, Creative Writing, and Spanish I, and C in Arts/Music. (Ex. 98.)

92. On May 6, 2015, the Parent requested that TCPS evaluate the Student for special education services.

93. TCPS initiated a Child Study review. The Child Study Teacher Forms were completed on May 14 or 15, 2015 by [SCHOOL 1] teachers and included the following information:

a. In Music, the Student was knowledgeable, with good, critical thinking. The Student was receiving a C. The teacher had moderate concern in the areas of completing tasks and motivation for tasks. (Ex. 104.)

b. The Physics teacher wrote that the Student had high interest in science topics, a lot of knowledge, and good communication skills. The Student experienced outbursts and was easily frustrated. Handwriting was an area of concern. The teacher rated the Student at grade level in all reading areas, basic facts and computation, and spelling. The teacher rated the Student somewhat below grade level in the areas of application of math, grammar, sentence construction and paragraph construction. The only accommodations used by the Student were listening to music on headphones to minimize distractions and using the EmPower strategies in class. The Student had outbursts when frustrated. (Ex. 105.) The Student achieved an A in the class.

c. In English, the Student's strengths were motivation, humor, innate intelligence, class participation, and accountability. He was working to improve study skills. Areas of weakness were time management, organization, turning assignments in on time, and handwriting. He was above grade level in Overall Reading, and at grade level for typed work in Overall Written Expression. The only modifications and interventions used in English were extra time, typing assignments, and using the EmPower writing templates. When the Student became overstimulated by classroom noise, he used his headphones or asked peers to be quiet. The teacher expressed moderate concern in the areas of fine motor skills, completing tasks, and rate of work completion. (Ex. 106.)

d. The Spanish teacher found the Student to be highly intelligent, supportive of other students, encouraging, and a quick learner. Areas of weakness included frustration, withdrawal, and homework completion. The Student was failing Spanish due to incomplete homework, but worked above grade level in the area of reading. The teacher had moderate concern over his speech impediment, completing tasks, motivation for tasks, and mental health issues. The only accommodations used were giving the Student an additional challenge and giving him "choice," based on interest. The teacher noted that the Student is "sometimes impulsive with comments that may not be appropriate. Mood changes can be significant, but overall very stable/consistent." (Ex. 107.)

e. In Math, the Student was curious, intelligent and a team player. The Student's areas of weakness included that he can become overwhelmed easily and can lose his temper occasionally. The Student worked above grade level in the area of math application and at grade level in basic facts/computation. The Student used four accommodations, including breaks, preferential seating, extra time and one-on-one time. The teacher had moderate concern regarding the area of focusing/sustaining attention. (Ex. 108.)

f. The Parent also completed a questionnaire. She listed as the Student's areas of strength History, computer skills, Math, and functional living skills. She listed as areas of weakness his fine motor skills, focus and concentration, and emotional wellness. (Ex. 172.)

94. On May 28, 2015, an IEP Team meeting was convened by TCPS at [School 5].<sup>12</sup> The Parent received information regarding her due process rights and procedural safeguards. The Parent was interested in having assessments conducted in order to obtain transition services for the Student upon his graduation from [SCHOOL 1]. (Ex. 174.) She also noted she has major concerns in writing, fine motor skills, organization, peer and adult interactions, and mental health. XXXX XXXX from [SCHOOL 1] participated in this meeting by telephone and reported the Student's teachers had no major concerns. She said the Student was "making great strides in self-regulating and using strategies to help him through provocative moments."<sup>13</sup> (Ex. 174.) Ms. XXXX stressed that the greatest area of impact arose from the Student's Asperger's Disorder and that assessments were needed to help the Student transition after he graduated and to assist him when taking the SATs.

95. The Team, including the Parent, agreed that observations of the Student should be done in the fall of 2015 during his senior year, because the school year was so close to ending. The Parent did not request an Independent Education Evaluation (IEE) at this meeting.

96. XXXX XXXX, a teacher at [SCHOOL 1], had administered the W-J III NU (Form B) to the Student on October 16, 2014. (Ex. 100.) The Student's scores were in the average or, in the case of basic reading skills, the above-average range. On June 2, 2015, Ms. XXXX administered the W-J IV (Form A) to the Student. (Ex. 110.) The Student's scores increased in the areas of calculation, math fluency and applied problems from the 2014 to the 2015 test.

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<sup>12</sup> [School 5] would have been the Student's home school had he been enrolled in TCPS.

<sup>13</sup> Quoted from the IEP Team minutes, not a verbatim transcript.

97. On July 27, 2015, the Parent wrote to TCPS and requested that an IEP be provided prior to the start of the 2015-2016 school year and that TCPS pay for an IEE. (Ex. 175.) She also wrote, “If the Student is unable to receive an IEP by the beginning of the school year, I will keep him at [[SCHOOL 1]] for the 2015-2016 school year and will ask [TCPS] to pay for his tuition.” (*Id.*) TCPS agreed to pay for the IEE on August 21, 2015. (Ex. 181.)

98. On August 14, 2015, Dr. XXXX XXXX conducted an independent psychological evaluation of the Student. (Ex. 112.) She found his Gf-Gc scores, which measure fluid reasoning and comprehensive knowledge, respectively, placed the Student in the superior range of cognitive abilities. Use of the Gf-Gc scores alone does not measure attentional capacity and processing speed, and therefore, she believed, they provide a more accurate measure of the Student’s true cognitive abilities. (*Id.* at pp. 17-23.) She administered the W-J IV (Form A). She found a significant discrepancy between the Student’s predicted math skills and actual performance, but noted that he still performed at the level of his peers in the area of math. She noted that the Student’s written content was excellent, but the structure of his writing is far below what would be expected given his age, grade and cognitive abilities.

99. Dr. XXXX administered the Childhood Autism Rating Scale 2, a test for high functioning children on the Autism Spectrum. (Ex. 112, pg. 21; T. 323.) She found that the Student showed slightly more symptoms than other children who are also high functioning. Areas of difficulty included sensory difficulties, varied cognitive abilities, anxiety around change of routine, and emotional regulation.

100. Dr. XXXX determined that the Student met the criteria for a child with a disability under the IDEA in the following areas: specific learning disability in written language, depending

on the criteria used by TCPS;<sup>14</sup> Other Health Impairment, due to his ADHD; and Autism Spectrum Disorder. She recommended that the IEP Team meet to determine whether the Student met the criteria for eligibility for services. She also recommended that OT, speech-language, and assistive technology evaluations be conducted. (Ex. 112, pp. 26-28.)

101. Dr. XXXX recommended the following accommodations and services: assistive technology, specialized instruction in grammar and punctuation, a writing program, accommodations for ADHD, use of a quiet room, headphones, point person to assist with sensory issues, warnings for change in routine, and math tutoring. She recommended that he remain in [SCHOOL 1]. (*Id.* at 29.)

102. On September 16, 2015, the IEP Team reviewed Dr. XXXX's report and ordered OT, assistive technology, speech-language, and more educational assessments. (Ex. 115.)

103. On October 13, 2015, [SCHOOL 1] special education teacher Strother conducted an educational assessment on the Student and found that he had a weakness in written language and a significant disability in handwriting. (Ex. 116.)

104. On October 16, 2015, XXXX XXXX conducted an OT assessment. (Ex. 117.) As no request was made to conduct a sensory assessment, Ms. XXXX did not do one. Ms. XXXX found that the Student's gross motor skills were below average because of the slow speed with which he worked. The Student scored in the average range in the handwriting skills test and received some below average scores in dictation and copying words. He received an average score in the area of fine motor integration. She found the Student had the ability to write legibly when he wrote slowly. She observed the Student in class and saw that he used fidget tools, and required a few prompts, but otherwise, received no individualized instruction.

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<sup>14</sup> That is, whether TCPS used the Discrepancy Model or the Response to Intervention Model. Ms. XXXX testified TCPS uses the Discrepancy Model. (T. 1127.)

105. On November 2, 2015, XXXX XXXX, Speech-Language Pathologist, conducted an assistive technology assessment. (Ex. 187.) She found the Student was well aware that others could not read his handwriting, so he completed all of his work on the computer, with which he was extremely skilled. He did not like to use voice-to-text software. Ms. XXXX recommended continued use of the computer with use of calendar and reminder features.

106. On November 12, 2015, the Parent requested an IEE for sensory issues, and refused to authorize a TCPS OT assessment tailored to sensory issues. (Ex. 189.) On December 3, 2015, TCPS denied the request for an IEE. (Ex. 190.)

107. On November 20, 2015, Dr. XXXX conducted a non-standardized written language assessment, TOWL 4, allowing the Student to type his answers. He wrote for only four of the allotted fifteen minutes. He achieved a standard score of 100. (Ex. 123.)

108. At the November 22, 2015 IEP meeting during which these assessments were discussed, TCPS offered to conduct a sensory assessment, but the Parent declined. The Parent had arranged for a private OT assessment, which was conducted by XXXX XXXX on November 21, 2015. (Ex. 191.) Once TCPS established that Ms. XXXX had never met the Student or observed him in school, but based her opinions solely on documentation submitted by the Parent, TCPS refused to use her report.

109. At the December 11, 2015 IEP meeting, convened to review the recent assessments, Dr. XXXX XXXX and XXXX XXXX were present, along with the Parent and her attorney. The Parent was offered information on due process rights and procedural safeguards, but declined. (Ex. 124.)

110. The Team listened to Ms. XXXX's account of the Student's educational experience at [SCHOOL 1] and accepted her description of the specialized instruction given to the Student. In conjunction with Dr. XXXX's report, the Team found that the Student had a

specific learning disability in the area of written language.<sup>15</sup> It found no evidence of an emotional disability, a determination with which Dr. XXXX, who was at the meeting, concurred, and Dr. XXXX's report supported. Dr. XXXX said the Student should be coded as Multi-Handicapped. The Parent's attorney expressed disagreement with the decision that the Student did not need specialized instruction for Autism Spectrum Disorder. (Ex. 124.)

111. The IEP Team convened on January 6, 2016 to review and correct the draft IEP. Neither Dr. XXXX nor Ms. XXXX was present. The IEP listed the primary diagnosis as specific learning disability that affected the Student in the areas of assistive technology, written language expression, fine motor skills, and physical sensory processing. The Parent's attorney objected, saying Autism should be the primary diagnosis. Ms. XXXX expressed her opinion that the Student did not need OT services, but the Parent disagreed, saying he needed OT services for fine motor skills such as handwriting and tying his shoes. The Team determined that he should be provided some OT services, and Ms. XXXX agreed that OT could provide some educational benefit so long as the Student also engaged in home handwriting practice. The Parent made no substantive corrections to the sensory profile section of the IEP. The Parent emphasized that the staff at [SCHOOL 1] understood how to talk to the Student and therefore, staff training was added to the IEP to train staff at [SCHOOL 4] how to respond to the Student when he has difficulties with social communication.

112. The IEP that was proposed on January 6, 2016 provided the Student with the following: (Ex. 126.)

- a. General education setting for twenty-seven hours and thirty minutes per week at [SCHOOL 4], which has a smaller student population than his home school.

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<sup>15</sup> TCPS policy defines specific learning disability, in relevant part, as, "A disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." (Ex. 196.)

- b. Five hours per week of special education related to written language, within the general education classroom. Goals included constructing three well developed paragraphs and revising/editing written work.
- c. OT services for thirty minutes per week. OT goals included increasing functional communication by legibly filling out a job application, a check, and a time sheet, and making notes.
- d. Approximately twenty minutes per day, or a total of one hour, forty minutes per week, of social skills work outside of the classroom. Social skills goals included increasing the appropriateness of his social interaction skills by selecting two target skills to focus on and then evaluate daily with a staff member.
- e. A special bus that had fewer students on board.
- f. Supplementary Aids and Services, including use of word processor in all subjects, including spell-check, extended time to complete work, small group setting, prompts and cues, homework completion reminders, use of fidgets to address attentional and sensory needs, 25% reduction in work load, use of graphic organizer, checklist and assistance with revising and editing, support when social communication breaks down, break pass and break place provided, monitor use of agenda book and/or progress report, encourage asking for assistance when needed, use of headphones, sweatshirt hood and light defusing covers over lights, advance warnings of transitions, and preferential seating.

113. A Transition Guide was provided to the Parent to assist in helping the Student transition into college. Other transition services were offered, such as a referral to the Division of Rehabilitative Services.

114. After the meeting had concluded, the Parent returned to the room to tell the Team that the Student would quit school if he had to return to [SCHOOL 4]. (Ex. 125, pg. 6.) The Student would not have accepted any TCPS placement. (T. 923, 994.)

115. During the Student's senior year at [SCHOOL 1], he continued to struggle with completing his homework. He continued to need regular prompts to do his work. (Exs. 137, 203.) He greatly improved his social interactions with other students and teachers and was less anxious. He continued to need breaks from class. His absences decreased.

116. The Student graduated with a regular high school diploma in the spring of 2016. He entered the [School 2] in the fall of 2016, taking regular, for-credit classes in psychology and communication, and taking remedial math as a non-credit class. (T. 997.)

117. On June 24, 2016, the Parent filed a due process complaint.

## **DISCUSSION**

### **Background**

In the Due Process Complaint filed on June 24, 2016, the Parent complained that TCPS failed to identify the Student as eligible for services under the IDEA throughout his educational career and failed to provide appropriate services pursuant to the Student's Section 504 Plan. She seeks tuition reimbursement for the three years the Student was enrolled in the [SCHOOL 1], from which the Student graduated with a high school diploma. The Parent also included a request for compensatory education, which request she withdrew at the hearing, and attorney's fees and costs, and any other appropriate relief. During the Prehearing Conference, the Parent agreed to withdraw any Section 504 Plan claim.

The burden of proof in an administrative hearing under IDEA is placed upon the party seeking relief, in this case, the Parent. *Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The burden of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014).

For the reasons discussed below, I find in favor of TCPS.

### Legal framework

The identification, assessment, and placement of students in special education is governed by the IDEA. 20 U.S.C.A. §§ 1400-1487 (2010); 34 C.F.R. Part 300; Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 and Supp. 2016); and COMAR 13A.05.01. The IDEA provides that all children with disabilities have the right to a FAPE. 20 U.S.C.A. § 1412(a)(1) (2010). Courts have defined the word “appropriate” to mean personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. Clearly, no bright line test can be created to establish whether a student is progressing or could progress educationally. Rather, the decision-maker must assess the evidence to determine whether the Student’s IEP and placement were reasonably calculated to enable him to receive appropriate educational benefit. *See In Re Conklin*, 946 F.2d 306, 316 (4<sup>th</sup> Cir. 1991).

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

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

*Rowley*, 458 U.S. at 200-201. In *Rowley*, the Supreme Court set out a two-part inquiry to determine if a local education agency satisfied its obligation to provide a FAPE to a student with disabilities. First, a determination must be made as to whether there has been compliance with the procedures set forth in the IDEA, and second, whether the IEP, as developed through the

required procedures, is reasonably calculated to enable the child to receive educational benefit. *Id.* at 206-207. See also *Sellers v. Sch. Bd. of City of Manassas*, 141 F.3d 524, 527 (4th Cir.) (“[T]he touchstone of IDEA is the actual provision of a free appropriate public education.”), cert. denied, 525 U.S. 871 (1998); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004).

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

Determining whether a student has received educational benefit is not solely dependent on a finding that a student has advanced from grade to grade, or has received passing marks, since it is quite possible that a student can advance in grade from year to year, yet not gain educational benefit. See *Conklin, supra*, (finding that a student’s passing grades and advancement does not resolve the inquiry as to whether a FAPE has been afforded to the student). Similarly, a finding that a student is not progressing at the same speed as his or her peers does not shed light on whether a student has failed to gain educational benefit. As discussed in *Rowley*, educational benefits that can be obtained by one student may differ

dramatically from those obtained by another student, depending on the needs of each student. *Rowley*, 458 U.S. at 202.

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

#### The Student's years at TCPS<sup>16</sup>

The Parent learned of the Student's diagnoses when he was in the first grade. She learned about Asperger's Disorder and then Autism Spectrum Disorder. She implemented strategies at home to assist the Student in managing his symptoms. She enrolled him in schools in which she worked to enable him to be close to her when he experienced meltdowns in class and needed to find her to calm down. She provided his teachers with information about how best to interact with him and address his symptoms during the school day. She requested that TCPS evaluate the Student, first in 2004, then in 2006, 2009, 2013, and finally in 2015. She attended all of the scheduled IEP meetings. When she talked with educators, her primary concern was his

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<sup>16</sup> I have included a discussion of the Student's public school history, because the parties focused so much on it during the presentation of their cases.

poor handwriting, his disorganization and his lack of social skills. At each meeting, the Parent received or was offered written procedural safeguards giving her notice of due process rights in the event she was dissatisfied with TCPS' response.

The Student progressed from year to year in elementary and middle school, maintaining average or above average grades and MSA scores. His SST Section 504 Plans included accommodations to help him access the curriculum, including, by the ninth grade, extended time to complete work, small group testing, checks for clarity and understanding of directions, checks for expected work completion, checks for content of assignments, repeated directions, preferential seating, reminder to self-check work, chunking of assignments, word banks, verbal responses for longer written assignments and tasks, short breaks when frustrated or tired, and reduced workload up to 20% to enhance quality over quantity. (Ex. 46.<sup>17</sup>) He was also allowed to use the computer for all of his assignments. Additionally, XXPS was involved in his therapy, setting behavioral and emotional goals.

Dr. XXXX, Ms. XXXX, the Parent, and the Student testified about "meltdowns" the Student experienced in school. The Student provided the clearest description, saying the meltdowns occurred when he felt so frustrated that he had to leave the classroom. He said when it takes him too long to understand a concept, he clenches his fists, tears up, breathes heavily, crumples paper, and gives up. He said this happened in the ninth grade two or three times a week, usually in Math and Tech Ed. He felt the stress of the ninth grade emotionally drained him to the point where he sometimes could not get out of bed to go to school. He also experienced meltdowns in the tenth grade and testified that it was because he had difficulty trusting his teachers and administrators at [SCHOOL 1]. On the rare occasions when he got into trouble with staff, it would "freak" him out. He said the meltdowns decreased considerably in

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<sup>17</sup> Exhibit 46 is for the Student's ninth grade year, even though it erroneously states it was for his tenth year.

the eleventh and twelfth grades because he had adjusted to the new school environment by that point.

TCPS staff did not think the meltdowns were occurring as often as the Parent and the Student reported at the hearing. The Parent testified they were occurring sometimes twice a day, but at least two to three times per week during the ninth grade. This surprised TCPS employees at the hearing, who testified they were aware of the Student leaving class on occasion to calm down, something he was allowed to do under his SST and Section 504 Plans, and that the Student sometimes visited his mother during those breaks, but they believed these were infrequent and did not last long. The Parent implied that TCPS was at fault for not recognizing the severity of the meltdowns, but the evidence shows that they were not as easily observed as the Parent suggested. For example, in April 2015, the Parent had the therapist, Ms. XXXX, write a letter documenting the numerous “outbursts” the Student experienced while in TCPS. (Ex. 138.) But she did not have Ms. XXXX write such a letter while the Student was still enrolled in TCPS. In the memo the Parent wrote to the Student’s ninth grade teachers to introduce him to them, the only reference she made to “meltdowns” was:

[The Student] tends to get frustrated or overstimulated. If this should happen [the Student] needs to take a break and regroup. He should be reminded to use his coping skills. He is able to be left alone or walk to destinations to regroup alone. [The Student] is working on identify[ing] his needs before he gets to a “meltdown” point. If [the Student] does melt down, and leaves the classroom, he comes to my classroom at Daycare in [School 3].

(Ex. 37.)

This description of “meltdowns” would not have put the school on notice of such a terrible problem that it should automatically trigger an IEP meeting, as suggested by Dr. XXXX, but reflects what was already addressed by the Student’s Section 504 Plan. Nor did the Parent correct the IEP minutes when she believed they contained errors about these meltdowns or correct the XXXX report that the Student was doing well in the ninth grade.

Ms. XXXX described increased meltdowns and outbursts during the Student's ninth grade year. During the ninth grade year, the Student told his therapist that he was miserable at the school and wanted to drop out. He reported feeling overwhelmed in school and different from other students. Ms. XXXX suggested updated educational testing to see whether the Student would be eligible for an IEP. (Ex. 42.) The Parent made that request in February 2013, at the same time the Student applied to [SCHOOL 1]. (Ex. 58.) Although Ms. XXXX said she spoke to someone in school guidance once about the meltdowns/outbursts, she did not know who that person was and her notes were not ever provided to TCPS. Ms. XXXX did attend a Section 504 meeting on November 14, 2012, soon after beginning therapy with the Student, and was at the school when the Student had a meltdown. With this personal knowledge, she agreed at the meeting that the Section 504 Plan could be effective if it were followed, but recommended that an OT evaluation and a sensory profile be done. (Exs. 45, 46.) Ms. XXXX' therapy with the Student was clearly very helpful to him. The Student credited the therapy as an important piece to his success once he settled in at [SCHOOL 1]. Ms. XXXX testified that the only reason she wrote the April 3, 2015 letter to TCPS outlining the Student's issues was to assist the Parent in pursuing her claim for tuition reimbursement. (Ex. 138; T. 593.)

There is no dispute that the Student had difficulty adjusting to his first year of high school at [SCHOOL 4]. Several of the professionals testified to the common experience of students getting lower grades in the ninth grade while they are adjusting to high school. In part, this difficulty is due to the imposition of stricter educational standards. Expectations for work are higher. More information is provided in class. Grades generally come back up in the tenth grade, once the student matures and adjusts, the witnesses noted. In the Student's situation, he was removed from TCPS after the ninth grade and enrolled in [SCHOOL 1], so we do not know how he would have adjusted to tenth grade had he stayed in [SCHOOL 4].

The Student's MSA scores were always proficient or advanced. His W-J scores showed him to be of average intelligence with average or higher achievement in the areas of math and reading, and were commensurate with his grades, which, with the exception of the Tech Ed class in the second semester of his ninth grade year, were passing.<sup>18</sup> He was tested with a full scale IQ of 100 in 2005, a score that was negatively affected by the Student's lower PSI (Ex. 2). On the test for GAI, believed by the psychologists to more accurately rate his intellectual ability than an IQ test, he scored a 112 in 2006 (Ex. 10), 115 in 2013 (Ex. 74) and 113 in 2015 (Ex. 112), placing him in the average to high average range of overall intellectual ability. Given these scores and the progress he was making in school until the ninth grade, using the discrepancy model, TCPS found that the Student was not eligible for special education services.

XXXX XXXX' testimony was helpful in explaining the process of assessing a child and determining eligibility for special education services. This was an important issue in this case because of the Parent's insistence that from the time the Student was in the first grade onward, his medical diagnoses and OT needs qualified him for special education services. The evidence revealed that TCPS personnel had explained to the Parent the process for obtaining an IEP and OT services at each IEP meeting. The Student's poor handwriting, slow processing speed and deficiencies in writing fluency were evident to all of the professionals who tested or taught the Student throughout his life. But his grades, which were comparable to his peers, and his scores on the statewide assessments, which were proficient, if not advanced, repeatedly led the IEP teams to find no specific learning disability.

Ms. XXXX reviewed the Student's grades and scores and noted that there was no educational impact from his disabilities from the first through the eighth grades. Without a

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<sup>18</sup> Dr. XXXX testified that in Tech Ed, the students built aircraft-type projects. Because it was a project-based class, once a student gets behind or has incomplete work, it is very hard to get caught up. I noticed the Student had an interim grade of 81, higher than in three other academic classes, but his final grade dropped to 48. (Exs. 68, 80.)

doubt, however, his grades dropped in the ninth grade. While in the ninth grade in TCPS, the Student was enrolled in Pre-AP English, which was, at that time, the most advanced English class available to ninth graders. Despite the Student's heightened anxiety and unhappiness at school, he received a passing grade on his Algebra statewide assessment test.

The Parent was so dissatisfied with the Student's educational experience she applied for him to attend [SCHOOL 1] and enrolled him there in July 2013. She did not file a due process hearing request at that time, nor did she notify TCPS of her intention to seek tuition reimbursement.

#### The Student's years at [SCHOOL 1]

The evidence showed that the Student had a rocky start to the tenth grade but did well overall in [SCHOOL 1]. He did not overcome all of his obstacles. He did not do perfectly, as Ms. XXXX noted. His grades improved, he learned to trust others, he socialized more, and he gained confidence. He was able to write essays and paragraphs by the time he graduated, having incorporated the organizational tools offered by the EmPower program. He learned to cope with sensory disruptions by wearing headphones or asking others to quiet down. His therapy sessions tapered down to an as-needed basis. At the same time, even into his senior year he continued to struggle with incomplete homework; had moments of frustration, which were exhibited either by a meltdown, or by taking exit breaks from the classroom; and showed inattention to work. An email from the Parent to XXXX XXXX, the Dean of Students at [SCHOOL 1], revealed the Student was failing Music Theory and was receiving less than a C in English.<sup>19</sup> (Ex. 202.)

I was impressed by the Student's testimony during the hearing. He formulated his thoughts clearly in response to the questions. In a personal essay he wrote about his three years at [SCHOOL 1], he described his delight in the support he received at [SCHOOL 1] and in the

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<sup>19</sup> The email refers to Mrs. XXXX. Other evidence indicates she is the English teacher.

teachers who profoundly influenced him. (Ex. 129.) His recognition of and appreciation for the social growth he made at [SCHOOL 1] was genuine. He testified that some of the accomplishments that gave him the greatest satisfaction included setting up a recording booth for students, participating in drama and soccer, attending social functions, and being a leader among the students. (T. 989-994.)

XXXX XXXX, the Executive Director of [SCHOOL 1], testified that [SCHOOL 1] is a general education, private school that focuses on students who have been diagnosed with ADHD and/or with being on the Autism Spectrum. She said all students at [SCHOOL 1] have learning differences. [SCHOOL 1] is able to provide these students with something they cannot receive in most general education schools: extremely small class sizes, resulting in highly individualized attention. During his senior year, the Student's classes ranged between four and nine students. (Ex. 143.)

What became clear from Ms. XXXX's testimony is that [SCHOOL 1] offers individualized instruction, but not specialized instruction, as that term is defined in COMAR 13A.05.01.03B(71) ("adaption of content, methodology, or delivery of instruction to address the unique needs of a student with a disability to ensure access to the general curriculum, so that the student can meet the educational standards that apply to each student within the jurisdiction of the public agency.") For instance, Ms. XXXX testified that each [SCHOOL 1] student is taught to use the EmPower program and that the program is used throughout [SCHOOL 1] classes. Students are permitted to use XtraMath, a math practice program. The Student used XtraMath, but there is no evidence that it was used as specialized instruction at [SCHOOL 1].

After the Student had been at [SCHOOL 1] for a semester, [SCHOOL 1] developed SDPs in four areas: writing fluency, calculation, math fluency, and social/emotional. In the first three academic areas, meeting the goals was rated by an increase of three standard score points in the

Student's achievement rating. Teachers were allowed to write comments on the SDPs.

Additional goals were added to the Student's SDPs in each area.

In writing fluency, the goal included "increased production of written work, meeting at least basic criteria, in all ... classrooms." (Exs. 91, 118.) The accommodation for achieving this goal was use of the EmPower writing program. A teacher noted in the comments that chunking assignments helped the Student and that, so long as he used the EmPower program, the Student was able to express scientific content, elaborate paragraphs and complex sentences.

In calculation, the goal was to "demonstrate an improvement in ... ability to successfully calculate long division and addition of mixed numbers." (Exs. 92, 119.) The accommodation for achieving this goal was "dedicated time to practice these targeted skills." (*Id.*) A teacher noted that so long as the Student slowed down and paid attention, he was able to be accurate nearly 100% of the time. By October 2015, one teacher noted that the Student had met his goal.

In math fluency, the goal was to "increase ... overall fluency in solving basic math calculation while avoiding any unnecessary increase in ... anxiety level[.]" (Exs. 94, 120.) The accommodation for achieving this goal was "dedicated time in class to practice the math calculation accuracy/timing." (*Id.*) In June 2014, a teacher noted that the Student had been using XtraMath to improve his math fluency goals. In November 2014, another teacher noted that he had no trouble with basic math calculations in physics class with the aid of a calculator. In October 2015, a teacher noted that the Student had met his goal.

In the SDP for social/behavioral, the goals were for the Student to continue to demonstrate observable improvement in "sustained, productive interactions with peers and adults" and "in his ability to choose his topics of conversation and/or verbal interventions with appropriate, age level discretion." (Ex. 93.) Accommodations included teacher prompts, verbal praise, "friendly teacher reminders," and "where appropriate, quiet explanations regarding how

[the Student] might better handle a situation.” (*Id.*) Teacher comments generally show that the Student improved in these areas over time, but one note on June 2, 2015, revealed that twice the Parent had been called to the school due to “significant incidents.”

In defending the vagueness of the SDP goals and the lack of identified specialized instruction, Ms. XXXX testified that private schools are not required to develop them at all. She said [SCHOOL 1] uses them to keep teachers and parents informed about a student’s progress, but the Parent testified that until documents had been compiled in preparation for this hearing, she had never seen the Student’s SDPs. (T. 903.) When asked how we could know whether the Student was getting what he needed, Ms. XXXX answered, “Because he was.” (T. 700.)

XXXX XXXX’ testimony was very helpful in explaining the difference between specialized instruction and accommodations. She explained that specialized instruction relates to *how* one is teaching a student and the method is individualized to meet the student’s need, which is different from the general student population. By contrast, an accommodation is something that is provided to the student to help them access the curriculum by remediating the disability. Her explanation was much clearer than that provided by Ms. XXXX, who repeated that all of the [SCHOOL 1] students receive specialized instruction because they receive individual instruction. Ms. XXXX also explained that “differentiated instruction” refers to differentiating between sub-groups in a classroom; for example, a teacher might use visual clues for some students and a kinesthetic approach for a different group.

Ms. XXXX testified that [SCHOOL 1] was originally located at the campus of [School 2], a nearby XXXX. [SCHOOL 1] students would mingle with XXXX students and use the same cafeteria and hallways, for example. [SCHOOL 1] did not move to its new, independent location until 2014, the Student’s second year at the school, which means that the Student was located at the college grounds for his first year at [SCHOOL 1]. The new school building

addresses sensory issues, such as softer lighting and wooden floors (without carpets that have been glued down.) The new building uses no bells, and noise is kept to a minimum. But while the Student attended school at [School 2], he faced the myriad sensory issues that Dr. XXXX testified he simply would not be able to face. Dr. XXXX testified the Student would not be able to attend school in a general education setting, but required a special education setting. (T. 128, 133, 141, 209.) The Student is enrolled now at [School 2] as a XXXX student. He has some accommodations similar to what he received at TCPS.

Ms. XXXX said that the Student's greatest area of improvement was in the emotional area, because he learned to trust people, including those in authority, learned to better manage his anxiety, and was able to have many friends and socialize by his senior year. She also referred to struggles the Student had during his senior year, saying he had "senioritis," extra demands on his time, stress over TCPS testing and observations, and stress over the prom. (T. 700.) She said he was especially challenged in the area of executive functioning and time management. She testified that he made progress, but was not "cured." (T. 750.) I appreciated how proud Ms. XXXX was of the progress the Student made while at [SCHOOL 1]. His growth during the final years of high school was profound.

Dr. XXXX is a special education professional who consulted in the Student's case beginning at the end of 2015. Dr. XXXX met with the Student for about thirty minutes at [SCHOOL 1] in December 2015 and reviewed the documentation that had been compiled on the Student over the years. He also attended an IEP meeting in December 2015. (Ex. 124.) At the time of that meeting, Dr. XXXX opined that the Student should be coded with the disability of multi-handicapped, because he did not know which disability should be considered primary. At the hearing, Dr. XXXX said the primary disability should be Autism Spectrum Disorder. (T. 101.) He believes the Student's executive functioning issues should take precedence in formulating a

placement decision and that the Student can only have those issues addressed in small classes. He said the Student was miserable in school while at TCPS and “completely freaked out by the school setting.” (T. 133.) Dr. XXXX said the Student missed a lot of school because he was overwhelmed, but Dr. XXXX was not able to specifically point to the number of absences that occurred because of that emotional response as opposed to some other reason, such as therapy appointments. As I have noted above, despite the Student’s standardized scores and grades, Dr. XXXX said the Student could not possibly have remained at [SCHOOL 4] and that he needed a small school environment such as [SCHOOL 1], where he could receive individualized instruction.

Dr. XXXX conceded that the goals written in [SCHOOL 1]’ SDPs for the Student were “not great,” but he believed they were on target. (T. 191.) He recognized that the accommodations included in the SDPs were similar to those included in the Student’s Section 504 Plans, but emphasized that it is the “environment” that is “key,” referring to the small class sizes offered by [SCHOOL 1]. (T. 209.) Dr. XXXX testified that the three standard score points used by the [SCHOOL 1] to measure progress in the SDPs were not statistically significant and would only tell part of the story of a student’s progress. Dr. XXXX defined “specialized instruction” as any accommodation provided by a special education teacher. (T. 207.)

Dr. XXXX focused on the sensory overload experienced by children on the Autism Spectrum who attend a general education school. He acknowledged having no legal authority for saying that educational benefit includes toleration for the school environment, but simply said that he had seen other “bright kids who couldn’t tolerate the environment.” He added, “That’s what we want for all of our kids and that’s something that is important.” (T. 156-157.)

I found Dr. XXXX’s testimony to be very generalized, and he tended to ignore the data produced in this matter. For instance, he outright dismissed the Parent’s comment on the [SCHOOL 1] application filed in January 2015 that the Student’s behavior was good, saying that

that one line did not change his opinion that the Student was miserable and experiencing frequent meltdowns. (T. 125.) He testified he had opinions about the Student's sensory issues regardless of what the OT profile said. (T. 171.) In response to Dr. XXXX's not documenting sensory issues in her report, he said that typically children on the Autism Spectrum have sensory issues even if there is no profile. (T. 171-173.) He said the Student was neurologically unavailable in the classroom regardless of his grades and test scores. (T. 128, 132-133.) Regarding the Student's meltdowns, Dr. XXXX conceded that he knew no specifics regarding what the Student actually experienced or how often or in what context. (T. 170.) Regarding the report from XXXX in December 2012 about how well the Student was doing, Dr. XXXX first did not remember having seen it and then discounted Dr. XXXX's comment, despite the fact that Dr. XXXX was the Student's treating psychiatrist and had a long history of seeing the Student. (T. 176.) In essence, Dr. XXXX believes the small school environment allowed the Student to "relax enough to learn." (T. 225.) I was left with the impression that he thinks all children on the Autism Spectrum should attend a small school as a matter of course, due to their sensory and executive functioning issues, without regard to the educational progress they are able to make in a general education setting.

There was much discussion at the hearing about the Student's absences from school. Some years, the number of absences from classes rose as high as twenty. Many of the absences were explained by TCPS as hours when the Student was at therapy with Ms. XXXX. I did note that his therapy time was changed from noon to evening hours after he enrolled in [SCHOOL 1]. I have no doubt many absences were due to his anxiety and unhappiness with school, as he testified. He also left class when he became frustrated, something he was permitted to do pursuant to his Section 504 Plan and under the [SCHOOL 1] exit tickets. His absences decreased after he entered [SCHOOL 1], but it is impossible to know exactly how many

absences he had there because, Ms. XXXX testified, they had a glitch in their computer system when they transitioned from one statistics program to another. Similar to TCPS' practice, [SCHOOL 1] did not record the number of times the Student exited the class out of frustration. Certainly, his absences over the years impacted his educational progress, but I note again that his grades continued to be good until he reached the ninth grade. As is evident from the following discussion, this issue does not change the decision in this case, however.

#### Statute of limitations and its impact on the claim for 2013-2014

Prior to and again during the hearing, TCPS argued that the Parent's claim for tuition reimbursement for the 2013-2014 school year is barred by the statute of limitations, regardless of my decision regarding FAPE.

The IDEA establishes that when parents or the public agency request an impartial due process hearing, the request must be filed within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or if the State has an explicit time limitation for requesting such a hearing, in such time as required by State law. 20 U.S.C.A. §1415(f)(3)(C) (2010). Maryland law also sets the limitations period for filing a due process complaint at two years. Md. Code Ann., Educ. § 8-413(d) (2014). “[O]nce a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the ‘knew or should have known’ date. If it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied.” *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 620-621 (3d. Cir. 2015).

The Parent contends that she did not know, or have reason to know, that the Student was not receiving a FAPE until she received Dr. XXXX's findings from the August 2015 psychological evaluation. The Parent argues, “[o]nly then was it clear to her that TCPS' years

of assertions that [the Student] was not entitled to special education because [there] was not a significant discrepancy between his cognitive ability and academic achievement were not the whole story.” (Parent’s Closing Argument, pg. 18.) She asserts that because she believed and trusted the TCPS representatives, she had no reason to know she had a claim.

“Parents and guardians play a significant role in the IEP process.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Accordingly, IDEA “provides a panoply of procedural rights to parents to ensure their involvement in decisions about their disabled child's education.” *Sellers*, 141 F.3d at 527. Through these procedures, IDEA ““guarantee[s] parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate.”” *AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 678 (4th Cir. 2004) (brackets in original) (quoting *Honig v. Doe*, 484 U.S. 305, 311–12 (1988)).

If parents are dissatisfied with the results of an evaluation conducted by the school system, or the school system’s refusal to evaluate the child, they are permitted to seek an IEE at public expense through due process procedures. *Rowley*, 458 U.S. 176, 183 n. 6 (1982); see also 20 U.S.C. §1415(b)(1) (2010) and 34 C.F.R. §300.502(b) (2014). When a due process complaint is filed pursuant to this regulation, “the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing...” 20 U.S.C. § 1415(f)(1)(a) (2010).

TCPS argues that the Parent did, in fact, know or should have known of a basis for a due process claim over many years and that this is supported by the evidence. TCPS correctly asserts that the Parent was advised by XXXX in 2005 to seek the advice of an educational advocate (Ex. 5), and that XXXX told her in 2005 that the Student was being denied either an IEP or a 504 Plan. (Ex. 151.) In 2007, XXXX informed the Parent of the Student’s lateral lisp and suggested

he might benefit from a specific articulation intervention. (Ex. 15.) IEP meetings were convened at the Parent's request in 2004, 2006, 2009, 2013 and 2015, and the Parent participated in every meeting. She was provided information related to due process rights and procedural safeguards at each meeting. None of the relevant educational decisions was made without her knowledge and input. The Student's therapist, Ms. XXXX, testified that she repeatedly expressed her concern to the Parent that the Student's educational needs were not being met and Ms. XXXX attended one Section 504 Plan meeting in November 2012. The Parent even discussed with Ms. XXXX moving the Student to a private school sometime in February 2013. (Ex. 57.) The Parent knew the Student's grades were declining during his ninth grade year, his meltdowns were increasing, and he was miserable in school. She was so concerned that she investigated private schools, applying for the Student's admission to [SCHOOL 1] on January 15, 2013, and unilaterally placing him in [SCHOOL 1] in July 2013.

The Parent essentially argues that despite all of this evidence, she either had no basis for filing a due process hearing request, or should not be deemed to have known she had a basis for filing the request until she received a professional opinion from Dr. XXXX that the Student had an educational disability.

In support of her position, the Parent cites to *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11th Cir. 2008), for the proposition that "the student's parents did not have the facts necessary to know that the school system's misdiagnosis and misplacement of Draper caused injury to him until five years after the actions that formed the basis of their complaint." (Parent's Closing Argument, pg. 17.) In *Draper*, the hearing officer found that the student's evaluation that had been performed by the school system was "spectacularly deficient." *Draper*, 518 F.3d at 1288. The evaluation found that the child had an IQ of 63, but failed to measure his phonological processing levels, and his receptive and expressive levels, despite the

school having noticed his dyslexia. The Court held that there was substantial evidence to support the hearing officer's conclusion that the school system had misdiagnosed the child and it was not until the child was properly diagnosed that the parents had the facts necessary to file a complaint.

I was impressed by the Parent. She is a tireless, tenacious advocate for her son, and she showed sophistication in her understanding of special education issues. She has studied her son's diagnoses and learned how best to help her son thrive despite the limitations they pose.

I understand the Parent's testimony that she relied on TCPS to discern what services the Student needed, which explains why she agreed to the Student's SST and Section 504 Plans throughout the years. Nevertheless, she also had access to XXXX professionals, private therapists,<sup>20</sup> test results, and the Student's own accounts of school. The law does not require the Parent to have the same level of sophisticated knowledge regarding special education as the professionals who were teaching and evaluating the Student, but it also does not allow her to hide behind her non-professional status in defending her failure to file a due process request throughout the entire length of the Student's education despite being so clearly dissatisfied with the education afforded by TCPS.

The numerous assessments conducted on the Student between 2004 and 2015 were not "spectacularly deficient." In fact, they were quite sophisticated and detailed. Numerous subtests were given, each requiring lengthy interpretations in the reports or at the hearing. Experts disagreed about the meaning of the results. Several witnesses testified to how complicated the Student's profile was. Even the Parent's special education expert, Dr. XXXX, admitted that when he attended the December 2015 IEP meeting, he was not sure whether the correct diagnosis should be Multi-Handicapped or something else, and that it was only later that he concluded the Student's disability was Other Health Impairment.

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<sup>20</sup> The Student saw another therapist, XXXX XXXX, prior to seeing Ms. XXXX.

Further complicating the issue is that at the hearing, after listening to the testimony of the Parent's witnesses, Dr. XXXX and Ms. XXXX said they now believe the Student did not, in fact, have a specific learning disability requiring specialized instruction. They testified that they had been unduly persuaded at the 2015-2016 IEP meetings by Ms. XXXX's descriptions of the instruction provided to the Student at [SCHOOL 1] and that, having heard her testimony, they no longer believed that the instruction provided by [SCHOOL 1] constituted specialized instruction.

Although the Parent cast aspersions on their changed opinion, I, too, conclude after listening to the evidence, that the instruction described by Ms. XXXX did not constitute specialized instruction, but only individualized instruction. All of this shows that unlike in *Draper*, diagnosing the Student was complicated, even for the professionals. However, even without a definitive diagnosis in hand, the Parent had a plethora of other reports and expert opinions upon which to base a due process complaint. She knew her right to file a complaint and she knew or should have known the basis for a complaint at multiple times throughout the Student's history. In the last semester of the Student's ninth grade, TCPS declined to find that the Student had a specific learning disability and the Parent disagreed to the point that she removed the Student from TCPS and enrolled him in [SCHOOL 1]. This response yields only one conclusion, and that is, the Parent knew or should have known then she had a basis for filing a complaint. Despite this, she waited three more years until after the Student had graduated from high school before filing her complaint.

I denied the prehearing motion for partial dismissal of the complaint because at that time there were insufficient facts to allow me to decide whether the complaint was barred by the statute of limitations for the 2013-2014 school year. Given the evidence presented and the analysis above, I now conclude that it is. Accordingly, the Parent's complaint as to the 2013-2014 school year, which occurred more than two years prior to the June 24, 2016 filing date, is dismissed.

### Notice of unilateral placement

In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), the Supreme Court held that parents who believe that the education proposed by the public school system is inappropriate may unilaterally place their child in a private school. The Court held that parents are entitled to reimbursement from the state for tuition and expenses if it is later determined that the school system failed to comply with its statutory duties and that the unilateral private placement provided an appropriate education. *Id.* at 370. See also *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Tuition is an equitable remedy and therefore, “equitable considerations are relevant in fashioning relief.” *Burlington*, 471 U.S. at 374.

Prior to unilaterally placing their children in private placements due to a dispute over FAPE, parents are required to give a school system notice of the disagreement so the parties can attempt to resolve the dispute. 20 U.S.C.A. §1412(a)(10)(C) (2010). As an equitable remedy, tuition reimbursement may be reduced or denied if,

- (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- (bb) 10 business days (including holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa); ...

20 U.S.C.A. §1412(a)(10)(C)(iii)(I) (2010). There are other factors to consider, as follows:

- (iv) Exception  
Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement--  
(I) shall not be reduced or denied for failure to provide such notice if--  
(aa) the school prevented the parent from providing such notice;  
(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

- (cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and
- (II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if--
  - (aa) the parent is illiterate or cannot write in English; or
  - (bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

TCPS argues that the Parent is not entitled to reimbursement because she failed to provide TCPS with notice of her rejection of their proposed placement, her concerns with the proposed placement, and her intent to enroll the Student in a private school at public expense, as required by 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I), set forth above. TCPS also asserts that none of the statutory exceptions applies in this case.

The Parent concedes that notice is generally required under the law and that the Parent did not provide notice to TCPS, but argues that this requirement does not apply to her because at the time the Parent removed the Student from TCPS, the Student was not a child with a disability as defined under the IDEA. Under this novel argument, because TCPS had not found the Student to be a child with a disability in need of an IEP prior to the Parent removing him from [SCHOOL 4] and placing him in private school, the Parent was not required to provide notice of her intention to seek tuition reimbursement or give TCPS the opportunity to address her concerns prior to withdrawing the Student from enrollment there.

I find this argument to be illogical, at best. The Parent is on the one hand arguing that the Student *was* disabled throughout his tenure with TCPS, yet TCPS failed to properly assess him and identify him as a child in need of special education services, and at the same time she argues the Student was *not* disabled until Dr. XXXX, in August of 2015, found him to be disabled. This narrow construction of the notice provision of the law defies the equitable considerations underlying the law.

It also fails under the reasoning of *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009), in which the United States Supreme Court held that,

[The] IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted.

*Id.* at 247.

In other words, the rules governing unilateral private placement at public expense apply to all students, whether previously provided special education services or not. In all cases, the remedial purposes of the IDEA mandate that the parent advise the school system of the parent's dissatisfaction with the school's placement or the failure to provide a FAPE so that the school system can remediate the basis for the complaint *before* private school tuition is paid. Instead, here the Parent withdrew the Student from TCPS enrollment in the summer of 2013 and enrolled him in [SCHOOL 1] without notifying TCPS of the reason. This is the Parent's prerogative, but she cannot then argue that she was not required to provide notice that she intended to seek reimbursement for the cost of that placement.

The Parent also argues that she was not required to give notice prior to enrolling the Student in [SCHOOL 1] because "she had no idea that she might have a claim against TCPS for reimbursement." (Parent's Closing Argument, pg. 20.) As I have discussed above, the Parent knew or should have known that she had a basis for filing a complaint before and up to the day she removed him from TCPS, and she had notice of what to do if she disagreed with TCPS. This argument has no merit.

Despite the Parent's concession that she gave no notice of intent to seek reimbursement, I will make the following observations. I found two indications in the exhibits that she might seek reimbursement. The first was in a letter dated July 27, 2015, in which the Parent wrote that she intended to later request reimbursement should TCPS not provide an IEP by the beginning of the school year, and that she would keep the Student at [SCHOOL 1] for the 2015-2016 school year and "will ask [TCPS] to pay for his tuition." (Ex. 175.) Negotiations over updated assessments, observations and the IEP spanned May 2015 to January 2016. During the September 16, 2015 IEP meeting, the Parent's attorney informed the IEP Team that the Parent would be asking TCPS to pay for the Student's tuition at [SCHOOL 1], but the attorney for TCPS explained that first a student has to be assessed, then found eligible for services, and an IEP must be written that includes placement at the private school. Thus, the Parent's comment and the attorney's comment were premature, and I do not find they satisfied the requirements of 20 U.S.C.A. §1412(a)(10)(C). Finally, even after rejecting the January 6, 2016 IEP and its placement of the Student at [SCHOOL 4], the Parent provided no notice, as she had said she would. (Ex. 125.) It was not until after the Student graduated from high school and the due process complaint was filed that TCPS was notified in writing that the Parent was seeking reimbursement.

My second observation is this. Ms. XXXX and the Parent told TCPS at the May 27, 2015 meeting that they were seeking transition services for after the Student graduated so that he might use accommodations when he took the SAT and while he was in XXXX. (Ex. 174.) Thus, while in some situations it might be self-evident that a parent is going to seek tuition reimbursement, in this case, it was not.<sup>21</sup> I believe the Parent's primary reason for seeking assessments and an IEP was for transition services, not for actual use during the Student's senior year. The Parent made it quite clear to TCPS that the Student would never return to [SCHOOL

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<sup>21</sup> See for example, *D.B., et al., Bedford County School Board*, 708 F.Supp.2d 564 (W.D. VA, 2010).

4] to complete his senior year and would only accept an IEP that included [SCHOOL 1] as the Student's placement, and it is reasonable to conclude, given the many meetings that had taken place by the date of the final IEP meeting in January 2016, the Parent had a good idea that TCPS would not recommend placing the Student at [SCHOOL 1]. Thus, I conclude TCPS had no reason to assume the Parent would seek reimbursement, which could, some might reason, excuse the Parent's failure to provide notice.<sup>22</sup>

For all of these reasons, both the statute and equitable considerations dictate that the Parent is not entitled to be reimbursed the tuition paid for [SCHOOL 1]. 20 U.S.C.A. §1412(a)(10)(C) (2010).

The January 6, 2016 IEP provided the Student with a FAPE

An IEP is the "primary vehicle" through which a public agency provides a disabled student with a FAPE. *M.S. ex rel Simchick v. Fairfax County School Bd.*, 553 F. 3d 315, 319 (4th Cir. 2009). The IEP "must contain statements concerning a disabled child's level of functioning, set forth measurable annual achievement goals, describe the services to be provided, and establish objective criteria for evaluating the child's progress." *M.M. v. School District of Greenville County*, 303 F. 3d 523, 527 (4th Cir. 2002); see 20 U.S.C.A. § 1414(d)(1)(A) (2010). "At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP." 20 U.S.C.A. § 1414(d)(2)(A) (2010).

An IEP team collaborates to develop and review an IEP. Parents, teachers, and others who have knowledge or special expertise regarding the child are included in the team. 34 C.F.R. § 300.321(a) (2014). An IEP shall include "[a] statement of the child's present levels of

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<sup>22</sup> One of the issues raised by the parties was the amount of reimbursement that should be ordered, if any, given that the Parent received substantial financial aid from [SCHOOL 1], enabling the Student to attend the private school for a fraction of the total cost. The Parent asserted she should be reimbursed the full amount of tuition because she contracted with [SCHOOL 1] to repay any amounts reimbursed from a third party. (Ex. 200.) TCPS countered that such an order would unduly enrich either the Parent or [SCHOOL 1]. Given my other conclusions in this matter, I need not reach this issue.

academic achievement and functional performance, including” and, specifically, “[h]ow the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).” 34 C.F.R. § 300.320(1) (2014). If a child’s behavior impedes his or her learning or that of others, the IEP team, in developing the child’s IEP, must consider, if appropriate, development of strategies, including positive behavioral interventions, strategies and supports to address that behavior, consistent with 34 C.F.R. 34 C.F.R. § 300.324(a)(2)(i) (2014).

Even had I not found that the Parent failed to establish a claim for tuition reimbursement because she failed to provide notice of her intent to seek reimbursement, for the following reasons, I would have found that the IEP proposed by TCPS provided a FAPE to the Student for the 2015-2016 school year.<sup>23</sup>

As has been discussed by many courts, the IDEA does not promise an ideal education, but an appropriate one.

It requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. ..the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential...an IEP which places a pupil in a regular public school program will ordinarily pass academic muster as long as it is reasonable calculated to enable the child to achieve passing marks and advance from grade to grade.

*Lenn v. Portland Sch. Comm.*, 998 F. 2d 1083, 1086 (1<sup>st</sup> Cir. 1993). Further, an IEP which places a pupil in a regular public school program will ordinarily pass academic muster as long as it is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.*, quoting *Rowley*, 458 U.S. at 204.

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<sup>23</sup> Because the Parent withdrew her challenge to the Section 504 Plan, which was in place when the Student was still enrolled in TCPS as a ninth grader and would have continued through high school, and because the Parent did not request an IEP for the 2014-2015 school year, I will only address FAPE in regards to the year she did request an IEP, the 2015-2016 school year.

At the Parent's request, the Student was assessed for special education services during his senior year at [SCHOOL 1]. The process began when the Parent made her request in May 2015, a week before the end of the Student's junior year. At the May 28, 2015 IEP meeting, all of the parties agreed it would be best to wait until the fall to conduct observations of the Student in his [SCHOOL 1] classes. Observations needed to be done because the Student had not been enrolled in a TCPS school for two years. During the summer, the Parent requested that an IEE be conducted by Dr. XXXX and TCPS agreed.

Dr. XXXX conducted a comprehensive evaluation in August 2015. Dr. XXXX concluded that the Student's scores on the W-J IV were in the high average range, but in a subtest of written expression, the Student showed difficulty in the areas of punctuation, organization and pragmatic use of language. (Ex. 112.) Numerous other evaluations were also conducted, including an OT evaluation (Ex. 116A), an assistive technology evaluation (Ex. 187), a speech-language evaluation (Ex. 117), and two educational assessments. (Exs. 116, 123.) The Parent would not consent to a sensory assessment as part of the TCPS OT evaluation but insisted on an independent sensory assessment. This was not agreed to by TCPS. Other than the sensory assessment, the Student was exhaustively evaluated. In developing the proposed IEP, the Team weighed all of those evaluations and input from the Student's current teachers, as well as input from the Parent and her team of professionals.

The IEP that was proposed on January 6, 2016 provided the Student with a general education setting for twenty-seven hours and thirty minutes per week at [SCHOOL 4], five hours per week of special education related to written language, within the general education classroom, OT services for thirty minutes per week, one hour, forty minutes per week of social skills work outside of the classroom, a special bus that had fewer students on board, and supplementary aids and services as set forth in the Findings of Fact. (Ex. 126.)

The accommodations and services provided to the Student pursuant to the IEP include those used by teachers at [SCHOOL 1]. As I have noted above, I do not find that the instruction offered by [SCHOOL 1] constituted specialized instruction, as is required under an IEP. What is different is that all of the students at [SCHOOL 1] have diagnoses similar to the Student's, and the school is so small that each student receives individualized attention.

[SCHOOL 4], the proposed location for the Student, has class sizes that are smaller than recommended by XXXX for what would be appropriate for the Student. (Ex. 155.) By placing the Student in a school with smaller class sizes, the IEP satisfies the IDEA's requirement that students be educated to the greatest extent possible with their nondisabled peers. The Student preferred being educated in a setting where he did not feel different. From what I heard and read, I believe the biggest obstacle to the Student's receiving educational benefit at [SCHOOL 4] is his emotional dread of returning to that school after having finally adjusted to [SCHOOL 1]. Despite [SCHOOL 1] being a general education high school, it accepts only students who have been diagnosed as being on the Autism Spectrum or having ADHD. There is no evidence of nondisabled students attending [SCHOOL 1]. Thus, [SCHOOL 1] is not the least restrictive environment.

I recognize that the Student would have preferred remaining at [SCHOOL 1] and that he did well in that environment. Nevertheless, I find that under the proposed IEP, with the services and accommodations the Student was offered in the smaller school setting, there is every reason to believe the Student would have received educational benefit in the least restrictive environment. *O.S. v. Fairfax Cty. School Bd.*, 804 F.3d 354, 360 (4th Cir. 2015). The IEP was written for the Student's senior year, not his freshman year, and adequately addressed his needs at that time. Because I find the proposed IEP would have offered the Student FAPE, I need not reach the issue of whether [SCHOOL 1] was the appropriate placement for the Student.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Parent is barred from seeking relief for the 2013-2014 school year by the statute of limitations. 20 U.S.C.A. §1415(f)(3)(C) (2010); Md. Code Ann., Educ. § 8-413(d) (2014).

I further conclude as a matter of law that the Parent failed to provide required notice of intent to seek tuition reimbursement following unilateral placement in a private school and is therefore foreclosed from seeking that remedy for the 2014-2015 and 2015-2016 school years. 20 U.S.C.A. § 1412(a)(10)(C)(iii)(I) (2010).

I further conclude as a matter of law that the IEP and placement by TCPS for the 2015-2016 school year was reasonably calculated to offer the Student a FAPE in the least restrictive environment. 20 U.S.C.A. § 1412(a)(5) (2010); 34 C.F.R. §§ 300.114(a)(2)(i); 300.117 (2014). *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993).

## ORDER

I **ORDER** that the June 24, 2016 Due Process Complaint filed by the Parent on behalf of the Student is hereby **DISMISSED**.

November 10, 2016  
Date Report and Order Issued

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Joy L. Phillips  
Administrative Law Judge

JLP/dlm

## **REVIEW RIGHTS**

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

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

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