

[REDACTED],
STUDENT
v.
HOWARD COUNTY
PUBLIC SCHOOL SYSTEM

BEFORE JOY L. PHILLIPS,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-HOWD-OT-23-20721

DECISION

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STATEMENT OF THE CASE

On August 10, 2023, [REDACTED] (Parent), on behalf of her child, [REDACTED] (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Howard County Public School System (HCPSS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2017);¹ 34 C.F.R. § 300.511(a) (2021);² Md. Code Ann., Educ. § 8-413(d)(1) (2022);³ Code of Maryland Regulations (COMAR) 13A.05.01.15C(1). Specifically, the Parent objected to the proposed placement of the Student under the most recent Individualized Education Program (IEP), as amended, wherein the HCPSS recommended a non-public placement for the 2023-2024 school year.

¹ “U.S.C.A.” is an abbreviation for the United States Code Annotated. All citations herein to the U.S.C.A. are to the 2017 bound volume.

² “C.F.R.” is an abbreviation for the Code of Federal Regulations. All citations herein to the C.F.R. are to the 2022 bound volume.

³ Unless otherwise noted, all citations herein to the Education Article are to the 2022 Replacement Volume of the Maryland Annotated Code.

I held a telephone prehearing conference on September 6, 2023. The Parent was present and represented herself. Kathy L. Stump, Esquire, represented the HCPSS.

I held the remote hearing on October 16, 17, and 25, and November 2, 2023, via a videoconferencing platform. COMAR 28.02.01.20B(1). The Parent represented herself. Ms. Stump represented the HCPSS on the first three days of the hearing. Craig S. Meuser, Esquire, represented the HCPSS on the fourth day of hearing.⁴

Under the applicable law, a decision in this case normally would be due by Friday, October 20, 2023, forty-five days after the date of the mediation session on September 6, 2023, which marked the end of the resolution period.⁵ 34 C.F.R. §§ 300.510(b)(2), (c), 300.515(a); Educ. § 8-413(h); COMAR 13A.05.01.15C(14). However, the parties requested hearing dates outside that timeframe due to scheduling issues. 34 C.F.R. § 300.515(c); Educ. § 8-413(h). Based on the collective scheduling conflicts,⁶ the parties requested that I extend the timeline to allow the case to be heard on the selected dates and to allow sufficient time for me to consider the evidence, evaluate legal arguments, and draft a decision. *Id.* § 300.515(c). “A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.” *Id.* (emphasis added). Accordingly, based on the scheduling conflicts, I found that there was good cause to extend the regulatory timeframe. *Id.* The parties requested that I issue a decision within thirty days after the conclusion of the hearing, and I have done so.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education procedural regulations;

⁴ Mr. Meuser entered his appearance on October 11, 2023, on behalf of the HCPSS. He observed the hearing on October 25, 2023, and represented the HCPSS on November 2, 2023, in Ms. Stump’s absence.

⁵ The 45th day after September 6, 2023, is Saturday, October 21, 2023. For my decision to be issued within the regulatory timeframe, it would have been due on Friday, October 20, 2023.

⁶ Ms. Stump had previously scheduled conferences, hearings, and meetings throughout September and October. Ms. █████ asked that the hearing be scheduled on days she does not work. I had a number of specially scheduled hearings in October. The earliest possible day we could schedule the first two days consecutively was October 16-17, 2023. We opted to start the hearing at 9:00 a m., however, Ms. Stump and her substitute counsel both had medical events on the morning of October 16, 2023. Thus, we started the hearing at noon on that day.

and the Rules of Procedure of the OAH. Educ. § 8-413(e)(1); Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021 & Supp. 2023); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

1. Did the HCPSS provide a free, appropriate, public education to the Student for the 2023-2024 school year by developing an IEP and placement appropriate to meet the unique needs of the Student in the least restrictive environment?
2. If not, what is the appropriate remedy?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Student:

Student Ex. 1 Email from the Parent to Dr. [REDACTED], September 27, 2023

Student Ex. 2 Email from [REDACTED], J.D., Ed.D., to the Parent, with copies to two [REDACTED] High School ([REDACTED] HS) staff, September 27, 2023

Student Ex. 3 Email from [REDACTED] to the Parent, September 28, 2023

Student Ex. 4 Email from the Parent to HCPSS counsel, October 2, 2023

Student Ex. 5 Report Card, [REDACTED] High School ([REDACTED] HS), 2022-2023 school year

Student Ex. 6 Email from the Parent to [REDACTED] HS staff, February 3, 2023

Student Ex. 7 Photograph of the Student's hand, December 14, 2022

I admitted the following exhibits on behalf of the HCPSS:

HCPSS Ex. 1 Behavior Intervention Plan, November 11, 2021

HCPSS Ex. 2 Notice of IEP team meeting and IEP team meeting report, March 4, 2022

HCPSS Ex. 3 Educational Assessment Report, May 2, 2022

HCPSS Ex. 4 Notice of IEP team meeting and IEP team meeting report, June 10, 2022

HCPSS Ex. 5 IEP, June 10, 2022

HCPSS Ex. 6 Psychological Evaluation Report, July 7, 2022

HCPSS Ex. 7 Notice of IEP team meeting and IEP team meeting report, July 15, 2022

HCPSS Ex. 8 Notice of IEP team meeting and IEP team meeting report, August 5, 2022

HCPSS Ex. 9 Notice of IEP team meeting and IEP team meeting report, August 24, 2022

HCPSS Ex. 10 Functional Behavioral Assessment & Behavior Intervention Plan, August 24, 2022

HCPSS Ex. 11 IEP, August 24, 2022

HCPSS Ex. 12 Discipline Record, 2021-2022 school year

HCPSS Ex. 13 Report Card, 2021-2022 school year

HCPSS Ex. 14 Notice of IEP team meeting and IEP team meeting report, September 30, 2022

HCPSS Ex. 15 Notice of IEP team meeting and IEP team meeting report, January 10, 2023

HCPSS Ex. 16 Interim Alternative Educational Setting IEP, February 16, 2023

HCPSS Ex. 17 Notice of IEP team meeting and IEP team meeting report, February 17, 2023

HCPSS Ex. 18 Notice of IEP team meeting and IEP team meeting report, March 15, 2023

HCPSS Ex. 19 IEP, March 15, 2023

HCPSS Ex. 20 IEP team meeting report, April 18, 2023

HCPSS Ex. 21 Letter from Dr. [REDACTED] to the Parent, April 21, 2023

HCPSS Ex. 22 IEP team meeting report, May 3, 2023

HCPSS Ex. 23 Time Out of Class chart, 2022-2023 school year

HCPSS Ex. 24 Discipline Record, 2022-2023 school year

HCPSS Ex. 25 Report Card, 2022-2023 school year

HCPSS Ex. 26 Transcript, 2022-2023 school year

HCPSS Ex. 27 IEP team meeting report, July 20, 2023

HCPSS Ex. 28 Referral Letter from [REDACTED] to [REDACTED], [REDACTED], [REDACTED],
July 20, 2023

HCPSS Ex. 29 Resume, [REDACTED]

HCPSS Ex. 30 Resume, [REDACTED]

HCPSS Ex. 31 Resume, [REDACTED]

HCPSS Ex. 32 Resume, [REDACTED]

HCPSS Ex. 33 Resume, [REDACTED]

HCPSS Ex. 34 Student's Attendance and Grades

Testimony

The Parent testified and presented the following witnesses:

- Dr. [REDACTED], J.D., Ph.D., Community Superintendent for Area [REDACTED],
HCPSS
- [REDACTED], Student Conduct and Engagement Officer, [REDACTED]
High School ([REDACTED] HS)
- Brandon Garry, Resource Teacher, Department of Special Education, HCPSS
- The Student

The HCPSS presented the following witnesses:

- [REDACTED], admitted as an expert in school psychology
- [REDACTED], Assistant Principal at [REDACTED] HS, admitted as an expert in school
administration
- [REDACTED], Special Education teacher,⁷ admitted as an expert in special
education
- [REDACTED], Instructional Facilitator, admitted as an expert in special
education and special education administration.

⁷ Mr. [REDACTED] was assigned to [REDACTED] MS in 2022-2023. He now teaches at [REDACTED] High School.

- [REDACTED], Facilitator, Central Education Placement Team, admitted as an expert in special education, special education placements, and nonpublic special education placements.

FINDINGS OF FACT

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

1. During the 2021-2022 school year, the Student was enrolled as an 8th grader at [REDACTED] Middle School, in [REDACTED] County. The Student had an IEP. That IEP did not specifically include crisis intervention measures. The Student was coded with a specific learning disability. The Student was first identified with this disability in 2017.
2. The [REDACTED] County IEP included a Behavior Improvement Plan (BIP) for noncompliance and work refusal.
3. In January 2022, the Student and his family moved from [REDACTED] County to Howard County. The Student enrolled in 8th grade at [REDACTED] Middle School. He brought with him the [REDACTED] County IEP.
4. In March 2022, his teachers at [REDACTED] Middle School reported problems in the area of relationships, emotional regulation, and behavior, as follows:
 - Mood changes; self-control; consistent performance; self-reliance; aggression toward others; interpreting social cues; accepting responsibility for own behavior; easily influenced by others; following established rules or procedures; disregarding others' rights.

5. His teachers also reported problems in the area of attention and learning

behaviors, as follows:

- Sustaining attention; distractibility; organization; turning in assignments; losing or forgetting work or materials; overactive; completing homework assignments; test performance; completing class assignments; participating in class.

6. In March 2022, the HCPSS added adult support and crisis intervention to his IEP as supports for the Student because by that time, the Student had missed six days of school due to out of school suspensions and missed about 1,200 minutes of instructional time. He had had nine major behavioral incidents.

7. The Student's final grades⁸ and teacher comments from 8th grade at [REDACTED]

[REDACTED] Middle School were:

- Reading Comprehension D
(Student needs to show consistent effort. Student needs to turn in classwork.)
- Careers D
- Health D
(Student needs to improve work habits.)
- Physical Education A
- Science III E
(Student needs to be less social and more focused on work. Student needs to show consistent effort.)
- Mathematics 8 C
(Student needs to show consistent effort. Student needs to work to potential.)
- US History E
(Student needs to be less social and more focused on work. Student needs to turn in classwork.)

⁸ In HCPSS, grades are assigned as follows:

- A 90-100% Student performs at highest level
- B 80-89% Student performs at high level
- C 70-79% Student performs at acceptable level
- D 60-69% Student performs at low level
- E <60% Student performs at unacceptable level

- English Language Arts C
(Absences impede progress. Student always exhibits great effort.)
- Visual Art Studio B
(Student does not participate in classroom activities. Student needs to show consistent effort.)

8. The Student had undergone a battery of tests in 2019 while at ██████ Middle School, in ██████ County, and the IEP Team decided to update the tests in 2022 while he was still at ██████ Middle School, in Howard County. Those included educational and psychological assessments, a classroom observation, and a Functional Behavioral Assessment.

- In 2019, the Student showed a Full Scale IQ (FSIQ) of 72. In 2022, he showed a FSIQ of 73.⁹
- In 2019 and again in 2022 the Student scored 76 on the Verbal Comprehension test, in the very low range.
- In 2019, the Student scored 75 on the Visual Spatial Index. In 2022, he scored 81, in the low average range.
- In 2019, the Student scored 69 on the Fluid Reasoning test. In 2022, he scored 82, in the low average range.
- In 2019, the Student scored 79 on the Working Memory test. In 2022, he scored 88, in the low average range.
- In 2019, the Student scored 86 on the Processing Speed test. In 2022, he scored 60, in the extremely low range.

9. In June 2022, the Student's IEP was prepared for his transition to high school.

The IEP called for 12 hours, 45 minutes in general education in English, Algebra 1, and Social

⁹ ██████ HS School Psychologist ██████ testified the Student underwent the Wechsler Intelligence Scale for Children (WISC) in August 2015, at which time he showed a FSIQ of 59. In November 2015, the Student was tested again using the WISC and showed a FSIQ of 84. Dr. ██████ testified that the WISC should not have been administered again in November 2015, as not enough time passed to ensure accurate scores.

Studies, and 12 hours, 45 minutes outside of general education, for Tutorial, Math, and Integrated Reading and Writing. The IEP provided for three 30-minute sessions with the school psychologist, and specialized transportation (i.e., smaller bus).

10. The June 2022 IEP included two additional diagnoses. In addition to specific learning disability, the Student was diagnosed with other health impairment (Attention Deficit Hyperactivity Disorder) and emotional disability. Another meeting was scheduled for August 5, 2022, to determine which one was the primary disability.

11. The Student refused to ride the smaller bus, as he felt it stigmatized him in the eyes of other students.

12. The IEP Team met on July 15, 2022, August 5, 2022, and August 24, 2022, when it decided to give the Student a “Code 10,” meaning multiple disabilities, because each disability became prominent depending on the time of day and the circumstances. Therefore, they had a concomitant impact. A Code 10 alerts all staff to be aware of a student’s various disabilities. Given this decision, the IEP was revised to reflect additional psychological counseling hours and self-behavioral goals.

13. The August 2022 Amended IEP included the following:

- Special education instruction outside of general education classes for approximately 60% of the time (these are not pull-out hours; instead, this instruction would take place in a separate classroom but during the same hours as regular classes, thereby avoiding the stigma of being pulled out of class)
- Use of a calculation device and math tools
- 1.5 extended time for tests
- Supplementary Aids and Services:
 - Instructional Supports: check for understanding; allow use of organizational aids; have student repeat and/or paraphrase information; use of spelling device, use of work bank; use of manipulatives;
 - Program Modification: chunk texts; break down assignments; check-in/check-out; break down directions into single steps
 - Social/Behavioral Supports: adult support; ask for assistance; frequent eye contact/proximity control, as needed; use of positive/concrete reinforcers, as needed; crisis intervention, periodically
 - Physical/Environmental Supports: preferential seating

- Adult support was included in the IEP, requiring adults to keep the Student in “line of sight,” but not providing 1:1 adult support. Line of sight calls for teachers to watch students during transitions between classes but not escort students.
- The Student was to check in with the school psychologist three to four times monthly.
- A Functional Behavior Assessment and BIP were adopted. They assist in identifying antecedents to poor behavior, that is, what happened just before, during and after the behavior. Teachers were still targeting the same behaviors as were previously included in the Student’s BIP, namely, non-compliance and work refusal. Target behaviors were developed with “replacement behavior goals” identified to replace the target behaviors with more adaptive behaviors.
- The IEP included a “2x10 strategy,” which directs teachers and staff to spend two minutes per day for the first ten days he is in school to get to know him.
- The Student was on the high school diploma track.

14. The Student moved to ██████ HS for the 9th grade, the 2022-2023 school year.

15. As of August 24, 2022, the date of an IEP meeting, ██████ HS believed it could implement the IEP.

16. An IEP Team meeting was convened on September 30, 2022. Teachers shared that the Student was doing fairly well, although he needed frequent reminders to stay on task, and needed to arrive at class on time. He generally got along with teachers and other students, although he used inappropriate language. Mr. ██████ checked in on the Student throughout the day and noticed that he was usually on task.

17. In November and December 2022, the Student began missing more classes, arriving late to class, getting into fights, and generally refusing to follow instructions.

18. The Student is triggered by increasingly rigorous academic subjects and requirements, particularly in science and math. He may act out by tearing up paper, lashing out at others, or leaving class. He does not like to feel “stupid” in front of other students. He becomes aggressive when he does not understand the material and when classes are moving faster than he can keep up. As each school year progresses, the Student requires more frequent breaks to calm down after being faced with new or difficult classwork.

19. At the beginning of the 2022-2023 school year, the Student maintained a good relationship with [REDACTED], the school psychologist. She saw him regularly throughout the school year.

20. The Student far exceeded his allotted check-in meetings with Ms. [REDACTED], who continued to see him throughout the school year, even after he started attending evening school. As the year progressed, he became emotionally unable to access her support. He was too angry and emotional, and eventually was no longer receptive to her help.

21. Throughout the 2022-2023 school year, [REDACTED], a special education teacher at [REDACTED] HS, spent a great deal of time checking in with the Student, providing him a safe place to talk and calm down, assisting him with academic issues, and responding to his texts or radio alerts. He would even leave his classroom to check on the Student, find him, and return him to class. Mr. [REDACTED] checked in on the Student multiple times per class period and the check-ins increased as the year went on.

22. On September 1, 2022, the Student possessed a lighter at school, which was prohibited. On or about November 18, 2022, the Student slapped another student. On November 21, 2022 the Student was involved in a fight with other students following comments made on social media or in a group chat. He received a five-day suspension. On December 14, 2022, the Student failed to return immediately from an evacuation fire drill and later, left class without permission. On December 20, 2022, the Student was late to class and after lunch, was late again.

23. On December 14, 2022, a student from another school came to [REDACTED] HS with a knife and stabbed the Student after the 6th period. An adult paraeducator was standing with him when that occurred. After that, the Student felt threatened and did not feel safe. He was very distracted and could not focus on school.

24. An IEP Team meeting was convened on January 10, 2023, to review the Student's IEP. The Parent was dismayed that the Student could not be kept safe at [REDACTED] HS, after the incident on December 14, 2022. The Parent was primarily concerned about his safety and believed he was beginning to have problems at school because he did not feel safe.

25. At the January 10, 2023, meeting, the IEP Team offered [REDACTED] High School as a safer alternative for the Student, but the Parent turned it down. The Parent requested a 1:1 adult for the Student to keep him safe. She was told that the HCPSS does not provide a 1:1 adult or an escort solely for safety reasons and that it was policy to not require a teacher or staff member to intervene in a volatile situation to protect a student.

26. By the third quarter of the 2022-2023 school year, February 2023, the Student's emotional wellbeing had further deteriorated. On February 1, 2023, he was walking around the building instead of being in class. On February 2, 2023, he threatened other students and was suspended for two days. On February 8, 2023, he missed class after lunch and refused to follow directives. On February 10, 2023, he threatened another student with a weapon, by saying he would pistol-whip him, and the school was placed into a modified lockdown. The Student received a three-day suspension.

27. Between December 5, 2022, and February 10, 2023, teachers documented twenty-three occasions when he was late to class or absent from class, representing missed instruction. The Student often left class without a pass, which meant he was not kept in line of sight, but not due to the fault of the HCPSS personnel.

28. On February 17, 2023, a manifestation determination meeting was held for three behaviors or events involving drugs, threats, or disruption. The team determined the Student's actions were not a manifestation of his disabilities. He was suspended and assigned to evening school. Once the suspension ended, in consultation with [REDACTED] HS staff, the Student decided to

remain in evening school for the rest of the school year for safety reasons. Evening school met for three to three-and-a-half hours, three evenings per week.

29. At evening school, the Student required a great deal of individual support. Classes were very small (5-8 students) and initially, the Student did better than at [REDACTED] HS. He turned in work for History but generally did not turn in Math assignments.

30. At an IEP Team meeting held on March 15, 2023, the Team discussed that the Student was working on math skills aligned to the 4th grade level. He was working on reading comprehension skills aligned to a 3rd grade level. He was working on written language skills aligned to the 4th grade level. The Team noted that the Student performed better in the smaller classes and while working closely with an adult. Still, he was often off-task.

31. At the April 18, 2023, IEP Team meeting, the Team was concerned his IEP could not be implemented at [REDACTED] HS because of the extent of close adult supervision the Student required, and the difficulty created by his need for lengthy crisis interventions.

32. In the May 3, 2023, IEP Team meeting, the Team determined [REDACTED] HS could no longer implement the Student's IEP. On average, the Student needed 39 minutes to de-escalate, as documented from December 12, 2022, to February 10, 2023. The Team decided he needed more therapeutic supports, smaller classes, 1:1 dedicated staff, a "calming space," which is not offered at [REDACTED] HS,¹⁰ and a smaller building. The Team determined the Student required an escort with a trusted staff member, not just line of sight supervision, however, the job of the escort was not to protect the Student from danger from other students wanting to fight him but to ensure he arrived in class.

¹⁰ [REDACTED] HS used an office or the hallway as the Student's calming space, as there is not a dedicated room available.

33. At the end of the 2022-2023 school year, the Student was retained in the 9th grade. He attempted seven credits but received only three. His cumulative GPA was 1.14. He received the following grades:

- Integrated Reading D (This class was taught by a special education teacher with a paraeducator and had about five students.)
- History C (This class was taught by the Student's football coach with the same paraeducator from Integrated Reading)
- Algebra I E
- Health I C
- English 9 E
- Lifetime Fit 9 A
- Principles of Math E (This is a support class for students with math as a specific IEP goal. It also has a paraeducator and is a small class. The Student earned As in the first two quarters and Es in the last two quarters.)
- Tutorial C (Mr. ██████ taught this class. This is a small study support class with a paraeducator there. The Student received assistance with homework. Mr. ██████ was able to conduct emotional check-ins and provide a break from academics.)

34. In the summer of 2023, the Parent requested a special transfer out of ██████ HS, where, she believed, he could not be kept safe. Her priority was the Student's safety over academics, although she would like to see him graduate from high school.

35. Once the IEP Team at ██████ HS determined it could no longer meet the Student's needs or implement his IEP, the Student was referred to a Central Education Placement Team (CEPT), which met on July 20, 2023. The CEPT considered regional programs. Regional programs have designated crisis intervention rooms and staff, but they are large, comprehensive, general education high schools and the classes are not always supported for special education students. The CEPT determined the Student's needs could not be met in such large, general education schools.

36. The CEPT next considered private separate day schools, which are smaller and allow the Student to receive more individualized attention. It ruled out specific schools that were not appropriate for the Student because, for example, the school focused on students with autism or severe cognitive disabilities. Recognizing that this decision meant the Student would no longer be educated with non-disabled peers, the CEPT ultimately recommended the Student be moved to a private, non-public, separate day program for the 2023-2024 school year and suggested three potential schools.

37. Before deciding the Student required a non-public placement, the HCPSS exhausted all other options and resources in attempting to implement his IEP.

38. The Student is currently enrolled at [REDACTED] High School ([REDACTED] HS), pursuant to an agreement made by the parties following the September 6, 2023, prehearing conference. Dr. [REDACTED], Community Superintendent, assisted in accomplishing the Student's transfer to [REDACTED] HS. [REDACTED] HS is his stay put school. [REDACTED] HS was chosen to provide him with a safe location to attend school, not because it could implement the Student's IEP.

39. [REDACTED] HS and [REDACTED] HS are general education high schools. The Student cannot receive the small classroom size he needs at either school. [REDACTED] HS and [REDACTED] HS do not offer the academic and emotional supports the Student needs. Neither school can implement the Student's IEP.

40. The Student will not be able to obtain a diploma if he attends a general education high school.

41. The Student did well at [REDACTED] HS initially, as he generally does at each new school he attends. However, the high school curriculum becomes more rigorous as the school year progresses. As he has also demonstrated previously, when he is unable to keep up with the work,

he acts out and engages in disturbances or leaves class. The Student is currently falling further behind at ■■■ HS.

42. The Student's last reported grades, which included both grades from ■■■ HS and ■■■ HS for the first quarter of the 2023-2024 school year as of the date of the hearing, were:

- English/Language Arts¹¹ 61.11
- Algebra I 61.17
- Strategic Reading I 91.48
- Biology 31.07
- American Government 54.55
- Tutorial 30
- Theatre Arts I 100

43. The Student is taking an evening school course, "Innovative Pathways," to recover his 9th grade English credit. He is not currently passing this course; his last available score was 27.94.

44. At ■■■ HS, between September 28 and October 23, 2023, the Student was absent one full day (September 28, 2023), had seven excused tardies, was in court one full day (October 10, 2023), had one early dismissal, and one unexcused tardy (October 19, 2023).

45. The Parent refuses to send the Student to a school that uses restraint protocols, even where they are not part of the Student's IEP, where they are used as a last resort, where they are used in accordance with very strict State protocols, and where restraints are not warranted by the Student's behavior. The Student will refuse to attend any school that uses restraints.

¹¹ This is a 10th grade English class and is taken along with the recovery credit English course discussed in the next Finding of Fact, which is offered to help the Student recover his 9th grade English credit. Ms. ■■■ explained that unlike Math, the English courses do not build on each, but stand alone.

46. The Student turned 16 in [REDACTED] 2023.

47. A non-public school may reject a student where it cannot work collaboratively with the Parent over an issue such as use of restraints. This has already occurred with the Parent and at least one school that was considered. The Parents intends to sue any school that uses restraints on the Student.

DISCUSSION

Burden of Proof

The standard of proof in this case is a preponderance of the evidence. COMAR 28.02.01.21K(1). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered. *Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002). The burden of proof rests on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005). The Parent is seeking relief and bears the burden of proof to show that IEP and placement the HCPSS developed for the Student for the 2023-2024 school year failed to provide a FAPE to the Student in the least restrictive environment.¹²

FAPE

The identification, assessment, and placement of students in special education are governed by the IDEA. 20 U.S.C.A. §§ 1400-1482; 34 C.F.R. pt. 300; Md. Code Ann., Educ. §§ 8-401 through 8-417; 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)(A).

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.

¹² After the Parent presented her case, the HCPSS moved for a directed verdict. I took it under advisement and proceeded to hear the merits of the case. *See* COMAR 28.02.01.12E(2)(b). Given my analysis of the merits of the case and my ruling in favor of the HCPSS, I will not further address the motion for a directed verdict.

Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined 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 (footnote omitted). 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,¹³ and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive some educational benefit. *Id.* at 206-207. See also *A.B. ex rel. D.B. v. Lawson*, 354 F. 3d 315, 319 (4th Cir. 2004). An IEP is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the applicable law, detailed below. 20 U.S.C.A. § 1414(d)(1)(A).

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 some educational benefit. The United States Court of Appeals for the Fourth Circuit declined to interpret the 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

¹³ The Parent did not allege any procedural violations.

more than minimal or trivial, from special instruction and services.” *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F. 3d 354, 360 (4th Cir. 2015).

As discussed in *Rowley*, educational benefits that can be obtained by one student may differ dramatically from those obtained by another student, depending on the needs that are present in each student. *Rowley*, 458 U.S. at 202. In *Andrew F. v. Douglas County School District*, 580 U.S. 386 (2017), the Court upheld the standard it established in *Rowley*, specifically that “a child has received a FAPE, if the child’s IEP sets out an educational program that is ‘reasonably calculated to enable the child to receive educational benefits.’” 580 U.S. at 394 (quoting *Rowley*, 458 U.S. at 207).

The Court explained, “For children receiving instruction in the regular classroom, this would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” *Id.* at 394 (quoting *Rowley*, 458 U.S. at 204). The Court noted that the student in *Rowley* was making excellent progress in the regular education classroom with the wireless transmitter and hearing aid provided by the school, but it declined to order a sign-language interpreter. *Id.* at 392. The Court found the IDEA “guarantees a substantively adequate program of education to all eligible children.” *Id.* at 394.

The Court in *Andrew F.* explicitly rejected the Tenth Circuit’s diluted interpretation of *Rowley* that had found “a child’s IEP is adequate as long as it is calculated to confer an ‘educational benefit [that is] merely . . . more than de minimis.’” *Andrew F.*, 580 U.S. at 397 (quoting the 10th Circuit in *Andrew F.*, 798 F.3d 1329, 1338). The Court held, “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate *in light of the child’s circumstances.*” *Andrew F.*, 580 U.S. at 399. The Court declined to define what appropriate progress would be in a given case, noting that courts should not “‘substitute their own notions of sound educational policy for

those of the school authorities which they review.” *Id.* at 404 (quoting *Rowley* 458 U.S. at 206). Moreover, under *Rowley*, appropriate progress will look different depending on the Student’s capabilities. *Andrew F.*, 580 U.S. at 400.

Least Restrictive Environment

In addition to the IDEA’s requirement that a child with a disability receive some educational benefit, the child must be placed in the “least restrictive environment” to the maximum extent appropriate, meaning that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i).

Instructing children with disabilities with non-disabled peers is generally preferred if the student with disabilities can achieve educational benefit in the general education program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989). Placing children with disabilities 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 placement is better for the student but whether the school district has offered a FAPE.

Positions of the Parties

The Parent is primarily concerned with the Student’s safety at school and believes that the HCPSS is responsible for ensuring his safety by assigning a 1:1 adult to be with him throughout the school day. She said the problems all started after the Student was “jumped” by a student from another school on December 14, 2022, and that, had he been better protected, he would not be so worried about his safety, would not be so distracted that he could not perform in school, and would be able to have his IEP implemented at his stay put school, ■■■ HS.

The Parent asserted that she will never enroll the Student in a school where use of restraints is an option and disagreed with the HCPSS witnesses who testified that restraint protocols are rarely used, especially where, as in the Student's case, they are specifically not an option under his IEP, and that in an extreme situation where they must be used, there are strict reporting requirements that apply and would prevent restraints from being used except when absolutely required. The Parent will not agree to a "██████" school, that is, a non-public placement, because she is convinced the staff will lay hands on and physically restrain the Student.

The HCPSS argued that despite providing numerous supports to the Student and as much adult supervision and support as was possible, the Student did not make meaningful educational progress in ██████ HS and is not making meaningful educational progress in ██████ HS, both large, comprehensive general education high schools. To make educational progress, the Student requires small classes, a small student to teacher ratio, and a dedicated crisis intervention space and team that can address his unique emotional and behavioral needs. His lack of progress has been demonstrated through his poor grades and missed instruction. He is not yet passing the majority of his 9th grade classes. He is working at the 4th grade level. The HCPSS argued that the non-public placements currently recommended in the Student's IEP would provide him with the individualized, supportive instruction he requires.

For the following reasons, I conclude the Parent has failed to meet her burden of proof.

Review of the evidence

The Student is a likeable young man who generally responds well to close adult supervision by an adult whom he trusts. He is now sixteen and is struggling to transition to the rigors of a high school curriculum and environment. He acts out when he is academically frustrated by misbehaving, leaving class, arriving late, and not turning in assignments. This occurs more frequently as each school year progresses, as he generally fares better at the

beginning of the school year. He makes friends and is sociable, but responds with animosity and toughness when he feels disrespected. Some relationships he engages in are volatile and he does not feel safe, which further distracts him from schoolwork and makes him not want to attend school. He still has difficulty regulating his emotions.

The witnesses from the HCPSS laid out the many ways the staff at [REDACTED] HS has tried to work with the Student to keep him in the classroom, calm him down when his emotions are spiraling, keep him focused on the class material, and help him make educational progress. I was impressed with the level of attention paid to the Student by special educator [REDACTED] and school psychologist [REDACTED]. They worked tirelessly to provide the Student space to decompress and calm down and encouraged him to return to class. But the general education high schools do not provide for a crisis intervention space and staff do not have the time the Student demands to calm down. Mr. [REDACTED] used the hallway or an office to sit with the Student to help him decompress; neither location is satisfactory. Given their schedules and the Student's needs, what Mr. [REDACTED] and Ms. [REDACTED] did to assist the Student at [REDACTED] HS is not sustainable.

The HCPSS assigned the Student to evening school in response to the suspensions that were imposed in March 2023. The Student remained at evening school to the end of the school year because he felt safer there. The classes were small, and he received personalized attention. He participated in his History class and turned in assignments but did not turn in assignments in Math. Despite the personal assistance, he did not obtain enough credits to move on to the 10th grade.

In the fall of 2023, he returned to 9th grade at [REDACTED] HS and was quickly transferred to [REDACTED] HS at the request of the Parent to ensure his safety. [REDACTED] HS does not have a dedicated crisis

intervention team or calming space for the Student to use. He testified he is doing well there but his grades show otherwise. (HCPSS Ex. 34; Findings of Fact 42-43).

The Parent is primarily concerned with what the HCPSS is doing to keep the Student safe. She believes the Student needs a 1:1 adult with him at all times to protect him. She is opposed to the current IEP because it places the Student at a non-public school, what she refers to as a [REDACTED] school.

What this case must focus on, however, is whether the current IEP, that is, the March 2023 IEP, as reviewed by the Team on May 3, 2023, and amended by the CEPT on July 20, 2023, is reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. Those circumstances include his need for close adult supervision at all times to help him regulate his emotions, focus on his schoolwork, and stay in class. The Student has unique needs which cannot be met in a general education high school. The HCPSS attempted to educate the Student with his non-disabled peers by admitting him to [REDACTED] HS and then to [REDACTED] HS, but the Student is not making meaningful educational progress. Not only did he have to repeat the 9th grade, but he persisted in the behaviors that result in missed instruction, that is, absenting himself from class and not completing assignments. At this point, the Student is far behind where he should be performing academically. He works at the 4th grade level. To leave him in a general education high school would consign him to not receiving a high school diploma and would deprive him of a FAPE. The Parent has failed to show how this outcome satisfies the requirements of the IDEA, *Rowley*, and *Andrew F.* On the contrary, the HCPSS has developed an IEP that addresses the Student's individual circumstances of needing constant and close adult supervision to keep him on task, help him manage his emotions, and provide him with educational support. Although the Parent frequently brought up the phrase "least restrictive environment," she is not actually concerned that he will be placed in a school with only disabled

peers. Instead, she is primarily concerned about the use of restraints.¹⁴ This concern fails to show the IEP does not comply with the IDEA.

Final Observation

It is very concerning to me that the Parent came into the hearing holding the position that she would refuse to send the Student to any non-public placement and persisted in her belief that in order to comply with the IDEA, the HCPSS must provide the Student with 1:1 adult supervision in order to keep him safe. The Student testified that if he is required to go to a [REDACTED] school, he will simply drop out. But the Student and the Parent cannot simply hold the school system hostage by threatening to drop out of school if they do not get their own way. Again, the IEP and the HCPSS' actions are an attempt to allow the Student to make progress in light of his circumstances. *Andrew F.*, 580 U.S. at 399.

CONCLUSION OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the HCPSS provided a free, appropriate, public education to the Student for the 2023-2024 school year by developing an IEP and placement appropriate to meet the unique needs of the Student in the least restrictive environment. 20 U.S.C.A. § 1412(a)(1)(A) and (5) (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); 34 C.F.R. § 300.114(a)(2)(i); *Andrew F. v. Douglas Cnty. Sch. Dist.*, 580 U.S. 386 (2017).

¹⁴ In the Due Process Complaint, the Parent asserted that the HCPSS only sought to move the Student after he was jumped (on December 14, 2022) and she requested a transfer. She said the proposed schools are out of bounds (making transportation more difficult) and do not have a [REDACTED] team. As a single mother, she did not think this was right. As she did not repeat those assertions at the hearing, I have focused on her arguments regarding safety and least restrictive environment.

ORDER

I **ORDER** that Parent’s August 10, 2023, Due Process Complaint is without merit and is hereby **DISMISSED**.

November 17, 2023
Date Decision Issued

Joy L. Phillips
Administrative Law Judge

JLP/dlm
#207902

REVIEW RIGHTS

A party aggrieved by this final decision may file an appeal within 120 days of the issuance of this decision with the Circuit Court for Baltimore City, if the Student resides in Baltimore City; with the circuit court for the county where the Student resides; or with the United States District Court for the District of Maryland. Md. Code Ann., Educ. § 8-413(j) (2022). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence.

A party appealing this decision 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 appeal. The written notification must include the case name, docket number, and date of this decision, and the court case name and docket number of the appeal.

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

Copies Mailed and Emailed To:

[REDACTED]

[REDACTED]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[REDACTED]

STUDENT

v.

HOWARD COUNTY

PUBLIC SCHOOL SYSTEM

BEFORE JOY L. PHILLIPS,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-23-20721

FILE EXHIBIT LIST

I admitted the following exhibits on behalf of the Student:

Student Ex. 1 Email from the Parent to Dr. [REDACTED], September 27, 2023

Student Ex. 2 Email from [REDACTED], J.D., Ed.D., to the Parent, with copies to two [REDACTED] High School ([REDACTED] HS) staff, September 27, 2023

Student Ex. 3 Email from [REDACTED] to the Parent, September 28, 2023

Student Ex. 4 Email from the Parent to HCPSS counsel, October 2, 2023

Student Ex. 5 Report Card, [REDACTED] High School ([REDACTED] HS), 2022-2023 school year

Student Ex. 6 Email from the Parent to [REDACTED] HS staff, February 3, 2023

Student Ex. 7 Photograph of Student's hand, December 14, 2022

I admitted the following exhibits on behalf of the HCPSS:

HCPSS Ex. 1 Behavior Intervention Plan, November 11, 2021

HCPSS Ex. 2 Notice of IEP team meeting and IEP team meeting report, March 4, 2022

HCPSS Ex. 3 Educational Assessment Report, May 2, 2022

HCPSS Ex. 4 Notice of IEP team meeting and IEP team meeting report, June 10, 2022

HCPSS Ex. 5 IEP, June 10, 2022

HCPSS Ex. 6 Psychological Evaluation Report, July 7, 2022

HCPSS Ex. 7 Notice of IEP team meeting and IEP team meeting report, July 15, 2022

HCPSS Ex. 8 Notice of IEP team meeting and IEP team meeting report, August 5, 2022

- HCPSS Ex. 9 Notice of IEP team meeting and IEP team meeting report, August 24, 2022
- HCPSS Ex. 10 Functional Behavioral Assessment & Behavior Intervention Plan, August 24, 2022
- HCPSS Ex. 11 IEP, August 24, 2022
- HCPSS Ex. 12 Discipline Record, 2021-2022 school year
- HCPSS Ex. 13 Report Card, 2021-2022 school year
- HCPSS Ex. 14 Notice of IEP team meeting and IEP team meeting report, September 30, 2022
- HCPSS Ex. 15 Notice of IEP team meeting and IEP team meeting report, January 10, 2023
- HCPSS Ex. 16 Interim Alternative Educational Setting IEP, February 16, 2023
- HCPSS Ex. 17 Notice of IEP team meeting and IEP team meeting report, February 17, 2023
- HCPSS Ex. 18 Notice of IEP team meeting and IEP team meeting report, March 15, 2023
- HCPSS Ex. 19 IEP, March 15, 2023
- HCPSS Ex. 20 IEP team meeting report, April 18, 2023
- HCPSS Ex. 21 Letter from Dr. [REDACTED] to Parent, April 21, 2023
- HCPSS Ex. 22 IEP team meeting report, May 3, 2023
- HCPSS Ex. 23 Time Out of Class chart, 2022-2023 school year
- HCPSS Ex. 24 Discipline Record, 2022-2023 school year
- HCPSS Ex. 25 Report Card, 2022-2023 school year
- HCPSS Ex. 26 Transcript, 2022-2023 school year
- HCPSS Ex. 27 IEP team meeting report, July 20, 2023
- HCPSS Ex. 28 Referral Letter from [REDACTED] to [REDACTED], [REDACTED], [REDACTED],
July 20, 2023
- HCPSS Ex. 29 Resume, [REDACTED]
- HCPSS Ex. 30 Resume, [REDACTED]
- HCPSS Ex. 31 Resume, [REDACTED]

HCPSS Ex. 32 Resume, [REDACTED]

HCPSS Ex. 33 Resume, [REDACTED]

HCPSS Ex. 34 Student's Attendance and Grades