

██████████ AND ██████████,

PARENTS,

ON BEHALF OF ██████████,

STUDENT,

v.

BEFORE MARC NACHMAN,

AN ADMINISTRATIVE LAW JUDGE

OF THE MARYLAND OFFICE

OF ADMINISTRATIVE HEARINGS

OAH No.: MSDE-HOWD-OT-23-31522

HOWARD COUNTY PUBLIC SCHOOL

SYSTEM

DECISION

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STATEMENT OF THE CASE

The Student, ██████████,¹ is a sixth-grade student who is eligible for special education under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. §§ 1400-1419 (2017).² The Student's disability is coded as a Specific Learning Disability, specifically ██████████. The Student started receiving services through an Individualized Education Program (IEP) in second grade. The Student is currently enrolled at the ██████████ (██████████), the Parents,³ ██████████ and ██████████, having advised the Howard County Public School System (HCPSS) of the Student's unilateral placement at ██████████ for the 2023-2024 school year.

On November 30, 2023, the Parents filed a Due Process Complaint (Complaint) with the

¹ In the interest of confidentiality, I shall refer to the young man who is subject of this matter as "the Student." I recognize, however, that the Student has a name and I mean no disrespect by referring to him in this manner.

² U.S.C.A." is an abbreviation for the United States Code Annotated.

³ Because the Student's mother testified in this case, when appropriate, I will refer to her in the singular as the Parent.

Office of Administrative Hearings (OAH) on the Student's behalf, requesting a hearing to review the placement of the Student by HCPSS under the IDEA. The Complaint alleges that the HCPSS violated the IDEA by denying the Student a free appropriate public education (FAPE).

On January 12, 2024, the parties attended session the required resolution. 34 C.F.R. 300.510(a). On January 22, 2024, the HCPSS notified the OAH that they did not resolve their dispute. The case proceeded to prehearing procedures.

PRE-HEARING CONFERENCE, THE HCPSS MOTION, AND THE TWO PRE-HEARING ORDERS.

On January 29, 2024, I conducted a video pre-hearing conference (Conference) in the captioned matter. Ashley VanCleaf, Esquire, Law For Parents, LLC, represented the Student and his Parents. David Burkhouse, Esquire, PK Law, represented the HCPSS.

At the Conference, the HCPSS announced its intention to file a motion regarding the timeliness of issues raised by the Parents (Motion), and by order February 5, 2024, I set a schedule for filing the Motion and a response, to which the parties agreed. The Motion was timely filed and the Parents filed no response to the Motion. By order dated March 18, 2024, I precluded the Parents' claims relating to the 2019-2020 and 2020-2021 school years, including claims regarding the Extended School Year (ESY) services for those years.

To reflect the narrowed scope of the hearing, I issued a First Amended Prehearing Order on March 18, 2024, which limited the issues to those listed below.

THE DECISION DUE DATE

The parties anticipated needing six days to present this case, i.e., three days for each party's presentation, including anticipated cross-examinations. By agreement, one extra day was added to the hearing schedule should the additional day be necessary to conclude the hearing.

In scheduling this hearing, I took into consideration the following: the time needed to file, answer, and rule on the Motion; the time needed for the parties to choose, prepare, and exchange documents in conformity with the five-day disclosure rule after the Motion was decided;⁴ the need to coordinate the schedules of counsel, the ALJ, and the parties; and the recognition by both parties and the ALJ that the hearing should be conducted on contiguous days for the sake of continuity. At the Conference, we agreed that, considering those imperatives, the earliest practicable day to start the hearing was after I issued a ruling on the Motion, and after the parties had an opportunity to factor that ruling into their five-day disclosures,⁵ which we then contemplated would be April 1, 2024.

Accordingly, the hearing was scheduled to start on Friday, April 5, 2024, and was to continue on April 8, 9, 15, 16, 17, and 18, with an additional day scheduled for April 19, 2024, if needed to conclude the hearing. The hearing was conducted on all of those dates but did not conclude within that period of time, accordingly, the parties anticipated that two additional hearing dates would be required. On the penultimate scheduled hearing date, the parties reviewed their respective calendars on the record, and agreed that the earliest possible dates for concluding the hearing, based on counsel's prior commitments, including their hearing and trial schedules, was Thursday and Friday, May 30 and 31, 2024, with closing arguments and a review of the exhibits set for Tuesday, June 4, 2024.⁶ The parties did not require the hearing date scheduled for Friday, May 31, 2024.

⁴ See 34 Code of Federal Regulations (C.F.R.) § 300.512(a), (b).

⁵ 34 C.F.R. § 300.512(b).

⁶ Exhibits not previously admitted into evidence were moved into evidence on June 4, 2024, concluding the record.

At the Conference, I advised the parties of the federal forty-five-day timeline for issuing a decision:

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

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

34 C.F.R. § 300.515(a). As indicated, the forty-five-day timeline ordinarily begins to run at the end of a thirty-day resolution period triggered by the filing of a due process complaint. *Id.* § 300.510(b)(2).

Under the regulatory timeline, the decision in this case normally would have been due on Tuesday, February 13, 2024, which is forty-five days after the expiration of the thirty-day resolution period. 34 C.F.R. §§ 300.510(b)(2), 300.515(a). However, the regulations authorize me to grant a specific extension of time at the request of either party. *Id.* § 300.515(c). Monday, April 1, 2024, would have been the first day available for the hearing after the HCPSS filed its Motion, for the Parents to file a response to the Motion, and for me to rule on the Motion. Even without the Motion, the first date that counsel would have been available for a hearing was in April 2024, after the forty-five day period for issuing a decision expired. The Parents' counsel asked that I issue my decision outside the statutory period, but no more than thirty days after the conclusion of the hearing; the HCPSS joined in that request.

I acceded to that request, and with the concurrence of the parties, I agreed to issue this decision within thirty days of the end of the hearing. However, the thirtieth day would have been July 4, 2024, which is the Independence Day holiday. Therefore, the decision is being issued within twenty-nine days, the day before that holiday, on July 3, 2024.

THE HEARING

I held the hearing on the following dates: April 5, 8, 9, 15, 16, 17, 18, and 19, 2024; May 30, 2024; and June 4, 2024. Attorney Ashley VanCleaf represented the Parents. Attorney David Burkhouse represented the HCPSS.

Procedure is governed by the contested case provisions of the Administrative Procedure Act; the Education Article; the Maryland State Department of Education (MSDE) procedural regulations; 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. For the 2023 Extended School Year (ESY), did the HCPSS fail to offer an IEP with services and placement that provided for the Student to receive a FAPE based on his unique disability-related needs?
2. For the 2023-2024 school year, did the HCPSS fail to have an IEP in effect when the school year started or fail to offer an appropriate alternative?
3. For the 2023-2024 school year, did the HCPSS fail to offer an appropriate placement that could implement the services and programming that the Student requires based on his unique disability-related needs?

SUMMARY OF THE EVIDENCE

EXHIBITS

I admitted the following exhibits on behalf of the Parents:

| | |
|---------------|--|
| Parents Ex. 1 | Curriculum Vitae (CV) [REDACTED] |
| Parents Ex. 2 | CV [REDACTED] |
| Parents Ex. 3 | Email from [REDACTED], January 28, 2019 |
| Parents Ex. 4 | [Not admitted] |
| Parents Ex. 5 | IEP, June 20, 2020 |
| Parents Ex. 6 | Email from the Parent, November 23, 2020 |
| Parents Ex. 7 | [REDACTED], Quarter 4 Report Card, June 2021 |
| Parents Ex. 8 | [Not admitted] |
| Parents Ex. 9 | IEP, February 19, 2021 |

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| Parents Ex. 10 | IEP Notes, February 19, 2021 |
| Parents Ex. 11 | The Student's work, March 29, 2021 (only page 11-0016 was admitted) |
| Parents Ex. 12 | ██████ Testing, April 15, 202 |
| Parents Ex. 13 | IEP, May 26, 2021 |
| Parents Ex. 14 | Email from ██████████, HCPSS, June 15, 2021 |
| Parents Ex. 15 | Representation Letter from Parents' counsel, February 16, 2023 |
| Parents Ex. 16 | Consent for Assessments, March 30, 2023 |
| Parents Ex. 17 | Prior Written Notice, March 30, 2023 |
| Parents Ex. 18 | [Not admitted] |
| Parents Ex. 19 | Educational Assessments, April 2023 |
| Parents Ex. 20 | Prior Written Notice, May 26, 2023 |
| Parents Ex. 21 | IEP, June 13, 2023 |
| Parents Ex. 22 | [Not admitted; no document was marked for identification and submitted] |
| Parents Ex. 23 | Prior Written Notice and Supplements, June 2023 |
| Parents Ex. 24 | ██████████ response to unilateral placement, August 26, 2023 |
| Parents Ex. 25 | Prior Written Notice, August 8, 2023 |
| Parents Ex. 26 | [Not admitted, but identical to HCPSS Ex. 31] |
| Parents Ex. 27 | [Not admitted] |
| Parents Ex. 28 | [Not admitted] |
| Parents Ex. 29 | CEPT ⁷ Letter, August 25, 2023 |
| Parents Ex. 30 | Email from ██████████, August 25, 2023 |
| Parents Ex. 31 | Emails between the Parent and ██████████, August 26, 2023 |
| Parents Ex. 32 | ██████████ Data, March 2024 |
| Parents Ex. 33 | Report Cards [only pages 33-0003 through 0015] |
| Parents Ex. 34 | Academic Data (without pages 0032-0043) ⁸ |
| Parents Ex. 35 | Payments [page 34-0001 withdrawn, but marked for identification] |
| Parents Ex. 36 | [Not admitted] ⁹ |
| Parents Ex. 37 | [Not admitted] |
| Parents Ex. 38 | HCPSS 2023-2024 calendar |
| Parents Ex. 39 | ██████████ (██████) standards |
| Parents Ex. 40 | [Not admitted] |
| Parents Ex. 41 | [Not admitted] |
| Parents Ex. 42 | [Not admitted] |
| Parents Ex. 43 | [Not admitted] |
| Parents Ex. 44 | [Not admitted] |
| Parents Ex. 45 | [Not admitted] |
| Parents Ex. 46 | [Not admitted] |
| Parents Ex. 47 | [Not admitted] |
| Parents Ex. 48 | [Not admitted] |
| Parents Ex. 49 | [Not admitted] |
| Parents Ex. 50 | [Not admitted] |

⁷ Central Education Placement Team.

⁸ See TR. V2 (Pages 342:18 to 343:8).

⁹ This exhibit was not admitted into evidence, and counsel for HCPSS objected to its inclusion in the record. I have nevertheless included the document in the record but have neither reviewed it nor considered any part of it, as Mr. Burkhouse suggests that it involves a proposed settlement, which is not admissible in evidence.

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|-----------------|---|
| Parents Ex. 51 | [Not admitted] |
| Parents Ex. 52 | MANSEF ¹⁰ entries regarding [REDACTED] |
| Parents Ex. 53 | IDA Recognized Programs |
| Parents Ex. 54 | [Not admitted] |
| Parents Ex. 55 | Roster of [REDACTED] Special Education Teachers |
| Parents Ex. 56 | [Not admitted] |
| Parents Ex. 57 | Woodcock Johnson (WJ) Manual Chapter 3 |
| Parents Ex. 58 | WJ Manual Chapter 5 |
| Parents Ex. 58A | MANSEF listing for [REDACTED] |
| Parents Ex. 58B | MANSEF listing for [REDACTED] |
| Parents Ex. 59 | WJ Approval Email |

I admitted the following exhibits on behalf of the HCPSS:

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| HCPSS Ex. 1 | Psychological Evaluation, August 1, 2019 |
| HCPSS Ex. 2 | WJ IV Score Report, June 26, 2019 |
| HCPSS Ex. 3 | Educational Evaluation, August 7, 2019 |
| HCPSS Ex. 4 | [Duplicate of HCPSS Ex. 3] |
| HCPSS Ex. 5 | Reading A-Z, January 15, 2021 |
| HCPSS Ex. 6 | Progress Report, April 14, 2021 |
| HCPSS Ex. 7 | Oral Reading, March 5, 2021 |
| HCPSS Ex. 8 | IEP Meeting Report, March 26, 2021 |
| HCPSS Ex. 9 | 50 High Frequency Words Assessment, April 12, 2021 |
| HCPSS Ex. 10 | [REDACTED] Test Results and Recommendations, April 15, 2021 |
| HCPSS Ex. 11 | [Not admitted] |
| HCPSS Ex. 12 | IEP Meeting Report, May 26, 2021 |
| HCPSS Ex. 13 | Maryland Transfer/Withdraw Notification, June 9, 2021 |
| HCPSS Ex. 14 | [Not admitted] |
| HCPSS Ex. 15 | [Not admitted] |
| HCPSS Ex. 16 | E-mail from [REDACTED], March 24, 2023 |
| HCPSS Ex. 17 | Teacher Report for Student, March 28, 2023 |
| HCPSS Ex. 18 | [Not admitted] |
| HCPSS Ex. 19 | [Not admitted] |
| HCPSS Ex. 20 | [Not admitted] |
| HCPSS Ex. 21 | [Not admitted] |
| HCPSS Ex. 22 | [Not admitted] |
| HCPSS Ex. 23 | 2022-2023 School Year [REDACTED] Data |
| HCPSS Ex. 24 | [Not admitted] |
| HCPSS Ex. 25 | [Not admitted] |
| HCPSS Ex. 26 | [Not admitted] |
| HCPSS Ex. 27 | [Not admitted] |
| HCPSS Ex. 28 | [Not admitted] |
| HCPSS Ex. 29 | [Not admitted] |

¹⁰ Maryland Association of Nonpublic Special Education Facilities.

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|--------------|--|
| HCPSS Ex. 30 | E-mails between the [REDACTED] and [REDACTED], August 24, 2023 |
| HCPSS Ex. 31 | E-mail between the Parent and [REDACTED], August 21-23, 2023 |
| HCPSS Ex. 32 | [Not admitted] |
| HCPSS Ex. 33 | [Not admitted] |
| HCPSS Ex. 34 | CV [REDACTED] |
| HCPSS Ex. 35 | CV [REDACTED] |
| HCPSS Ex. 36 | CV [REDACTED] |
| HCPSS Ex. 37 | CV [REDACTED] |
| HCPSS Ex. 38 | CV [REDACTED] |
| HCPSS Ex. 39 | Camp Enrollment Form, dated December 4, 2022 |
| HCPSS Ex. 40 | [REDACTED] raw test data |
| HCPSS Ex. 41 | [REDACTED] invoice, dated April 11, 2024 |
| HCPSS Ex. 42 | Inventory |
| HCPSS Ex. 43 | Special Needs Assessment |
| HCPSS Ex.44 | Excerpts from WJ manual |

TESTIMONY

The Parents presented the following witnesses:

- The Parent.
- [REDACTED], Head of School at [REDACTED], who was accepted as an expert in [REDACTED], special education instruction for students with [REDACTED] and other language-based learning, and special education.
- [REDACTED], Educational Consultant, who was accepted as an expert in [REDACTED], [REDACTED], educational assessment with special education, instructing students with language-based learning disabilities.
- [REDACTED], Director, [REDACTED] ¹¹
- [REDACTED], HCPSS Coordinator for Special Education Compliance and Dispute Resolution.
- [REDACTED].

¹¹ Attorney Todd Mohink, who appeared at the start of the third day of the hearing on April 9, 2024, submitted a Motion to Quash Subpoena, etc., on behalf of [REDACTED] and [REDACTED] responding to Ms. Vancleef’s subpoena. The matter was resolved in private discussions and placed on the record.

The HCPSS presented the following witnesses:

- [REDACTED], CEPT Facilitator, who was accepted as an expert in special education.
- [REDACTED], HCPSS Special Education Teacher, who was accepted as an expert in special education.
- [REDACTED], HCPSS Resource Teacher, Nonpublic Services, who was accepted as an expert in special education.
- [REDACTED], HCPSS Instruction & Intervention Resource Teacher, who was accepted as an expert in special education and reading.

FINDINGS OF FACT

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

GENERAL BACKGROUND

1. The Student is twelve years old and lives with his parents and three siblings; he is the second of the Parents' four children.
2. The Student and his parents live in Howard County, Maryland.
3. The Student has been diagnosed with a Specific Learning Disability (SLD), specifically [REDACTED].
4. The Student attended the following schools:
 - a. For first grade (the 2018-2019 school year), the Student attended [REDACTED] ([REDACTED]), a HCPSS school;
 - b. For second grade (the 2019-2020 school year), the Student continued at [REDACTED]; [REDACTED];

- c. For third grade (the 2020-2021 school year), the Student attended [REDACTED] [REDACTED] ([REDACTED]), a HCPSS school;
- d. For fourth grade (the 2021-2022 school year), the Student attended [REDACTED];
- e. For fifth grade (the 2022-2023 school year), the Student continued at [REDACTED];
- f. For the summer of 2023, the Student attended the [REDACTED] summer program; and
- g. For sixth grade (the 2023-2024 school year), the Student continued at [REDACTED].

5. On November 30, 2023, the Parent filed the Complaint claiming that the HCPSS violated the IDEA by denying the Student a FAPE, seeking tuition reimbursement for the Student's 2023 summer program attendance at [REDACTED] as well as his sixth grade education at [REDACTED] for the 2023-2024 school year.¹²

6. The Student first received special education services after his first grade teacher at [REDACTED] suggested that he be evaluated for an IEP.

7. The Student was evaluated on June 16, 2019, the IEP team analyzed the evaluation report on August 7, 2019, and the Student's first IEP was issued on June 20, 2020.

8. The Student was found to have an SLD and was determined to be eligible for special education services under the IDEA. The IEP team established goals and objectives, which the IEP was designed to meet.

9. During the 2020-2021 school year, the IEP team met again on February 19, 2021.

10. At that meeting, the Parent suggested that outside testing be performed.

11. On April 21, 2021, the Student was evaluated by [REDACTED], an Educational Consultant and Certified Structured Literacy [REDACTED] at [REDACTED], who performed a battery of tests on the Student.

¹² [REDACTED] does not use the term "ESY" when referring to this program.

12. [REDACTED] diagnosed the Student as [REDACTED] and made certain recommendations to the Parents concerning the Student's education.

13. Among those recommendations were enrolling the Student in a specialized school for [REDACTED] students (naming [REDACTED] and two other schools) and having specific Orton-Gillingham (OG) tutoring with a one-on-one tutor. In her report, [REDACTED] also provided the Parents with a list of advocates they could retain to assist them.

14. At a May 26, 2021 IEP team meeting, the team reviewed [REDACTED] report.

15. Also at that meeting, the Parents advised the team that they would withdraw the Student from the HCPSS and enroll him at [REDACTED] for the 2021-2022 school year.

16. On June 9, 2021, the Parents submitted the Student's Maryland Transfer/Withdrawal Notification, disenrolling the Student from HCPSS schools.

17. The Student was enrolled at [REDACTED] for the 2021-2022 school year for fourth grade and the subsequent 2022-2023 school year for fifth grade.

18. The Student attended the [REDACTED] summer program in the summer of 2023 and continued to sixth grade for the 2023-2024 school year. Both the summer program and the Student's sixth grade year are the subject of the Parents' Complaint.¹³

ESY FOR SUMMER 2023

19. On February 16, 2023, Parents' counsel sent the HCPSS a letter requesting an IEP team meeting to consider ESY services for the summer of 2023 as well as special education during the 2023-2024 school year.

¹³ As is stated above, the Complaint contained issues relating to the 2019-2020 and 2020-2021 school years. Those issues were struck as a result of the HCPSS Motion and the resulting First Amended Prehearing Order issued on March 18, 2024.

20. A virtual IEP team meeting was convened on March 30, 2023. At that meeting, the team received some documents from [REDACTED] concerning interventions that [REDACTED] provided the Student as well as benchmark data concerning those interventions.

21. Because the team did not find that the documents were sufficient to determine continued special education eligibility, they recommended that the Student undergo an additional educational assessment.

22. The Parents consented to that assessment on March 30, 2023.

23. [REDACTED] administered the assessment - the WJ-IV Test of Achievement - on April 18 and 26, 2023.

24. [REDACTED] advised the Parents that ESY services for the Summer 2023 program could be considered if the Student were enrolled in the HCPSS.

25. The Parents' counsel advised the HCPSS that the Student's last day at [REDACTED] for the 2023-2024 school year was May 24, 2023, and that the Student could be enrolled in [REDACTED], his home school, the following day, May 25, 2023.

26. The Student was not enrolled in the HCPSS on May 25, 2023, or at any time thereafter.

27. A subsequent IEP team meeting was scheduled for May 26, 2023.

28. At the May 26, 2023 IEP team meeting, the results of the April 18 and 26, 2023 educational assessment was reviewed and the Student was determined to be eligible for special education and related services.

29. An IEP team meeting was scheduled for June 13, 2023 to review a draft IEP.

30. At the June 13, 2023 IEP team meeting, the Parents' counsel advised the team that the Student would attend the summer program at [REDACTED] and they would be filing a notice of unilateral placement for that summer program.

31. The HCPSS did not offer the Student ESY services for the 2023 school year.

32. On December 4, 2022, the Parents enrolled the Student in the [REDACTED] summer program and paid [REDACTED] a non-refundable deposit for that program. The Parents did not inform the HCPSS that of that enrollment or deposit.

THE STUDENT'S PLACEMENT AT THE BEGINNING OF THE 2023-2024 SCHOOL YEAR

33. At the IEP team meeting on June 13, 2023, the team developed the Student's goals and objectives and the amount of services needed for the Student to receive a FAPE for the 2023-2024 school year.

34. At that meeting, the team determined that the Student needed more services than could be provided at his home school, the [REDACTED] ([REDACTED]) so the IEP team rejected [REDACTED] as a permanent placement for the Student.

35. The Student was referred to the Central Educational Placement Team (CEPT), which considers a continuum of services for students who cannot receive a FAPE in the HCPSS, including placement in a private or public separate day school. A CEPT meeting was to be held over the summer.

36. The CEPT met on August 8, 2023.

37. The CEPT agreed with the Student's IEP team that placement at [REDACTED] would be inappropriate because it could not provide the intensity of services needed to address the Student's goals.

38. The CEPT then considered and rejected the Intensive Resource [REDACTED], a HCPSS regional program, and determined that it could not provide the required service hours that the Student required to reach his reading goals and objectives.

39. The CEPT then considered public, separate day schools located in Howard County.

- a. The CEPT rejected placement at the [REDACTED], which provides programs for students with Autism and cognitive, physical, and comprehensive disabilities. The CEPT team determined that the [REDACTED] would not be appropriate because it did not teach grade level standards or have a Maryland high school diploma track.
- b. The CEPT rejected placement at [REDACTED] at the [REDACTED], which is designated for students with therapeutic and internalized behavior issues, because the Student did not require the level of therapeutic support that the school provided.

40. The CEPT then considered private, separate day schools that were not part of the HCPSS but were located in Howard County.

- a. The CEPT rejected placement at the [REDACTED] because it educated students with emotional disabilities rooted in conduct and did not offer any structured academic intervention in their program.
- b. The CEPT rejected placement at the [REDACTED] as it programmed for autistic students and did not support teaching grade level standards necessary for a diploma track and would not be provide the Student with an adequate peer group.

c. The CEPT favored a referral to the [REDACTED] [REDACTED]

[REDACTED].

41. The CEPT favored [REDACTED] for a referral because it could provide intensive academic interventions in accordance with students' existing IEP. [REDACTED] instructs students with SLDs like the Student's and has interventions to meet his goals, objectives and service hour needs as outlined in his IEP.

42. [REDACTED] teaches the grade level curriculum and has a diploma track.

43. The Parents were not in favor of placing the Student at [REDACTED].

44. The Parents suggested a placement at [REDACTED] where the Student was already attending.

45. The CEPT rejected [REDACTED] because it was not approved by the MSDE as a school to serve students with special needs.

46. [REDACTED] is not required to implement the Student's IEP or report to the HCPSS its progress reaching the Student's set goals and objectives.

47. [REDACTED] develops and follows "treatment plans" for its students. The content and structure of [REDACTED] treatment plans are incompatible with IEPs.

48. The HCPSS does not place special education students at [REDACTED].

49. [REDACTED], the HCPSS CEPT Facilitator, indicated that she would send a referral package to [REDACTED] for its consideration within a week of the CEPT meeting. She expected [REDACTED] response within two weeks of the referral.

50. The CEPT considered the possibility that the referral process would not be completed prior to the start of the HCPSS school year on August 28, 2023.

51. If the referral process were not completed prior to the start of the school year, the CEPT determined that [REDACTED] would be able to support the student's IEP on a temporary basis. This would be a location, and not a placement under the IDEA.

52. [REDACTED] sent the referral to [REDACTED] on August 14, 2023.

53. Prior to August 21, 2023, [REDACTED], Director at [REDACTED], advised [REDACTED] that [REDACTED] would be able to implement the Student's IEP with the required service hours, that the Student was an appropriate student to be referred to their program, and that the school had the capacity to enroll the Student.

54. On August 21, 2023, [REDACTED] also sent the Parents an email inviting them to discuss the program and schedule a school visit.

55. Neither the visit nor a school shadow day for the Student was required for enrollment, although the school wanted to meet the Student and his family to get a better sense of how to serve them.

56. On the following day, August 22, 2023, the Parent wrote to [REDACTED] requesting additional information about [REDACTED] "OG services" before scheduling a visit.

57. [REDACTED] responded the next day, August 23, 2023, explaining that their teachers were OG trained and certified in OG Plus, the program used at [REDACTED].

58. [REDACTED] wrote that he was attaching "some program brochures" for the Parents to review; however, no such items were attached to the email.

59. In his email, [REDACTED] encouraged the Parents to contact the school if they had any additional questions and to schedule a tour.

60. The Parents never responded to [REDACTED] email or advised him that his email did not contain the promised attachments. The Parents did not communicate with [REDACTED] after his August 23, 2023 email.

61. The Parents' failure to continue communicating with [REDACTED] effectively ended the referral process so that no permanent placement was established prior to the start of the school year.

62. The Parents made no further attempts to enroll the Student at [REDACTED].

63. [REDACTED] could have enrolled the Student after the first day of the HCPSS school year as it operated on a rolling admission process, where students can be enrolled anytime during the 11-month school year. If the Student started on August 28, 2023, he would not have missed any non-summer education.

64. A school system cannot force a parent to engage in the referral process.

65. On August 10, 2023, two days after the CEPT meeting, the Parents signed an enrollment form to place the Student at [REDACTED] for the 2023-2024 school year.

66. The Parents paid [REDACTED] a non-refundable deposit of \$ [REDACTED] and obligated themselves to tuition payments for that school year. They made no attempt to negotiate a return of the deposit or release from their contractual obligation if the referral process resulted in the Student's placement in a satisfactory (or actually any) program.

67. On or about August 25, 2023,¹⁴ prior to the first day that HCPSS classes were to begin, the Parents advised the HCPSS that they enrolled the Student at [REDACTED] for the 2023-2024 school year and sought tuition reimbursement for their unilateral placement.

68. On August 26, 2023, [REDACTED] rejected the Parents' request for tuition reimbursement.

¹⁴ [REDACTED] letter rejecting the Parents' request for tuition reimbursement was sent on August 26, 2023.

PLACEMENT¹⁵

69. [REDACTED] teaches Student with SLDs such as the Student's.
70. [REDACTED] has OG plus interventions, which is the same program used at [REDACTED].
71. In the prior two years, the HCPSS has placed 15-20 students at [REDACTED].
72. All of the HCPSS students at [REDACTED] have IEPs.
73. [REDACTED] has evidence-based strategies for reading and math available to the Student.
74. The HCPSS monitors [REDACTED] compliance with the HCPSS's students' IEPs.
75. The HCPSS monitors the progress of students with IEPs at private placements at least quarterly and addresses the education of those students who are not making progress.
76. [REDACTED] can implement the Student's June 13, 2023 IEP.

DISCUSSION

A. APPLICABLE LAW

1. 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 Parents are seeking relief and bear the burden of proof to show that the challenged actions by the HCPSS did not meet the requirements of the law.

¹⁵ Many of the facts found above apply to this issue as well.

2. FAPE UNDER THE IDEA

The identification, evaluation, and placement of students in special education are governed by the IDEA. 20 U.S.C. §§ 1400-1482; 34 C.F.R. pt. 300; Educ. §§ 8-401 through 8-417; COMAR 13A.05.01. The IDEA offers States federal funds to assist in educating children with disabilities. In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a FAPE to all eligible children.

The IDEA requires “that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C. § 1400(d)(1)(A); *see also* Educ. § 8-403. To be eligible for special education and related services under the IDEA, a student must meet the definition of a “child with a disability” as set forth in section 1401(3) of the U.S.C. and the applicable federal regulations.

The Supreme Court addressed the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that a FAPE is satisfied if a school district provides “specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 458 U.S. at 201 (1982) (footnotes omitted). The Court identified a two-part inquiry to analyze whether a local education agency satisfied its obligation to provide a FAPE: first, whether there has been compliance with the procedures set forth in the IDEA; and second, whether the IEP, as developed through the required procedures, is reasonably calculated to enable the child to receive educational benefit. *Id.* at 206-07.

In 2017, the Supreme Court revisited the meaning of a FAPE, holding that for an educational agency to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a student to make progress appropriate in light of the student's circumstances. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). Consideration of the student's particular circumstances is key to this analysis; the Court emphasized that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001.

The "reasonably calculated" qualification recognizes that crafting an appropriate education program requires a prospective judgment by school officials. The IDEA contemplates that this fact-intensive exercise will involve consideration not only of the expertise of school officials but also the input of the child's parents or guardians. Any review of an IEP must include the recognition that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* at 999. Directly adopting language from *Rowley*, and expressly stating that it was not making any "attempt to elaborate on what 'appropriate' progress will look like from case to case," the *Endrew F.* Court instructs that the "absence of a bright-line rule . . . should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" *Id.* (quoting *Rowley*, 458 U.S. at 206). At the same time, the *Endrew F.* Court wrote that in determining the extent to which deference should be accorded to educational programming decisions made by public school authorities, "[a] reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002; *see also R.F. by and through E.F. v. Cecil Cnty. Pub. Sch.*, 919 F.3d 237 (4th Cir. 2019).

3. DEFERENCE

School officials should be afforded deference based on their expertise, and the IDEA “vests these officials with responsibility for decisions of critical importance to the life of a disabled child.” *Endrew F.*, 137 S. Ct. at 1001. *See also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist. (Lessard II)*, 592 F.3d 267, 270 (1st Cir. 2010) (“The standard of review is thus deferential to the educational authorities, who have ‘primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs.’”).

However, this respect and deference is not limitless. *See, Cnty. Sch. Bd. of Henrico Cnty. v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005) (“Nor does the required deference to the opinions of the professional educators somehow relieve the [judge] of the obligation to determine as a factual matter whether a given IEP is appropriate.”). Therefore, “the factfinder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate.” *Id.*; *See also Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993). “Indeed, if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary.” *Id.* at 1467. Such a process “would render meaningless the entire process of administrative review.” *Sch. Bd. of Prince William Cnty., Va. v. Malone*, 762 F.2d 1210, 1217 (4th Cir. 1985) (citation omitted).

4. PLACEMENT VS. LOCATION

There is a distinction between an educational placement and the location or site of an educational program. Regarding this distinction, the court in *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003), wrote:

“Educational placement,” as used in the IDEA, means educational program—not the particular institution where that program is implemented. *E.g.*, *Sherril A.D. v. Kirby*, 975 F.2d 193 (5th Cir.1992) (“educational placement” not a place, but a program of services); *Weil v. Board of Elem. & Secondary Educ.*, 931 F.2d 1069 (5th Cir.1991) (transfer of child to another school was not a change in “educational placement”).... *The provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such technical details as the projected date for the beginning of services, their anticipated frequency, and their duration. See 20 U.S.C. § 1414(d)(1)(A)(vi).*

White, 343 F.3d at 379 (emphasis added).

The distinction between placement and location was further explained by the hearing officer in *District of Columbia Public Schools, District of Columbia State Educational Agency 2011-1217*, 112 LRP 30086 (2012), p. 4:

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP. *See, Laster v. District of Columbia*, [349] F. Supp. 2d 60 (D.D.C. 2005).¹⁶ Hence, “‘placement’ refers to the overall educational program offered, not the mere location of the program.” *Roher v. District of Columbia*, 1989 WL 330800, pp. 2-3 (D.D.C. 1989); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989).

¹⁶ In addressing the placement of a student in a stay put situation, the court made a distinction between “placement” and the physical location of a program:

Although the IDEA does not define the term “then-current educational placement,” the meaning of the term “falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP.” *Bd. of Educ. of Cmty High Sch. Dist. No. 218*, 103 F.3d at 548; *see also Spilsbury*, 307 F.Supp.2d at 26–27 (explaining that “the IDEA clearly intends ‘current educational placement’ to encompass the whole range of services that a child needs” and that the term “cannot be read to only indicate which physical school building a child attends.”)

Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 64–65 (D.D.C. 2005).

5. LRE

In addition to the IDEA's requirement that a disabled child receive educational benefit, the child must be placed in the least restrictive environment (LRE) to achieve a FAPE, meaning that, ordinarily, disabled and non-disabled students should, when feasible, be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. §§ 300.114(a)(2)(i), 300.117. Indeed, mainstreaming children with disabilities with non-disabled peers is generally preferred if the disabled student can achieve educational benefit in the mainstreamed program. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989). At a minimum, the statute calls for school systems to place children in the "least restrictive environment" consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5)(A). Placing disabled children into regular school programs may not be appropriate for every disabled child, and removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved.

Because including children with disabilities in regular school programs may not be appropriate for every child with a disability, the IDEA requires public agencies like HCPSS to offer a continuum of alternative placements that meet the needs of children with disabilities. 34 C.F.R. § 300.115. The continuum must include instruction in regular classes, special classes, special schools, home instruction, hospitals, and institutions, and it must make provision for supplementary services to be provided in conjunction with regular class placement. *Id.* § 300.115(b); COMAR 13A.05.01.10B(1).

Consequently, removal of a child from a regular educational environment may be necessary when the nature or severity of a child's disability is such that education in a regular classroom cannot be achieved. COMAR 13A.05.01.10A(2). In such a case, a FAPE might require placement of a child in a nonpublic school setting that would be fully funded by the child's public school district.

6. UNILATERAL PLACEMENT

The Supreme Court has upheld the right of parents to unilaterally place a learning disabled child in a private school and to recover reimbursement from the local educational agency (LEA) when the educational program offered by school authorities is not reasonably calculated to provide a FAPE. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985). However, the IDEA does not require a LEA to pay for the cost of private education if the agency has made a FAPE available to the child and the parents have nevertheless elected to place the child in a private school. 34 C.F.R. § 300.148(a). Parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (*citing Burlington*, 471 U.S. at 373-74). Parents may recover the cost of private education only if they satisfy a two-pronged test: (1) the proposed IEP was inadequate to offer the child a FAPE and (2) the private education services obtained by the parent were appropriate to the child's needs. *Burlington*, 471 U.S. at 370.

Equitable considerations only come into play when both prongs are met and the court is charged with determining an appropriate remedy. 20 U.S.C. § 1415(e)(2). “[E]quitable considerations are relevant in fashioning *relief*,” *Burlington*, 471 U.S., at 374 (emphasis added).

7. PROCEDURAL VIOLATIONS.

Regarding procedural violations, the IDEA states:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C.A. Section 1415(f)(3)(E)(ii).

The existence of a procedural violation does not necessarily establish the presence of a substantive one. In *MM ex rel. DM v. School District of Greenville County*, 303 F.3d 523 (4th Cir. 2002), the Fourth Circuit Court of Appeals explained: "When such a procedural defect exists, we are obliged to assess whether it resulted in the loss of an education opportunity for the disabled child, or whether, on the other hand, it was a mere technical contravention of the IDEA. . . . If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations." *Id.* at 533-34. *T.B. Jr. by and through T.B., Sr. v. Prince George's Cnty. Bd. of Educ.*, 897 F. 3d 566, 573 (4th Cir. 2018). *See also Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir.1997) ("[T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.").

B. GENERAL BACKGROUND

The Parent testified about the Student and his family. The Student is twelve years old, the second of four children in the family. TR. V1 (Pages 35 to 36). The Student first entered special education in first grade at HCPSS at [REDACTED]. In January 2019, his first-grade teacher, [REDACTED], suggested that the Student be evaluated for an IEP. TR. V1 (Pages 37:13 to 38:3); Parents Ex. 3. The evaluation took place on June 26, 2019, (HPCSS Ex. 2); it was analyzed in a report dated August 7, 2019 (HCPSS Ex. 3) and was the subject of an IEP issued on June 20, 2020. Parents Ex. 5. The Student was determined eligible for special education services under the IDEA because he had an SLD. Goals and objectives were set and a program was established for special education services in the school.

For the 2020-2021 school year, the Student attended [REDACTED], another HCPSS school, where he had another IEP team meeting on February 19, 2021. Parents Exs. 9 and 10. At that meeting, the Parent suggested that she would have outside testing performed on the Student and, on April 21, 2021, [REDACTED], an Educational Consultant at [REDACTED], performed that testing. As an Educational Consultant and Certified Structured Literacy [REDACTED] Interventionist, [REDACTED] worked with [REDACTED] students such as the Student. Parents Ex. 12 and HCPSS Ex. 10. [REDACTED] testified that the Student was “one of the more severe [REDACTED] I’ve seen in my practice. He was significantly behind.” TR. V4 (Page 877:14 to 877:15).

The Parent testified that this was the first time that she had heard the term [REDACTED] applied to the Student; he had previously been described as SLD without further explanation. TR. V1 (Page 52:20 to 53:14). As a result of that testing, [REDACTED] suggested that the Student enroll in a specialized school for [REDACTED] students, using the OG approach.¹⁷ TR. V1 (Page

¹⁷ In her report, [REDACTED] described the OG approach as a “multi-sensory systemic structured literacy” method of teaching reading and writing to [REDACTED] and other, similarly challenged students.

53:15 to 53:25); Parents Ex. 11 and HCPSS Ex. 10 (“10: Schools to consider - [REDACTED] in [REDACTED], and the [REDACTED].”). Her recommendations also included a list of “advocates” to assist the Parents. This report was reviewed at the IEP team meeting on May 26, 2021, at which time the Parent advised the team that they were enrolling the Student at [REDACTED]. Parents Ex. 13, p. 0015 (The Parent “shared that [the Student] would be attending a different school in the fall. [The Student] will be attending the [REDACTED] school to help him with his [REDACTED] and this d [REDACTED].”) That enrollment was set in motion by the Maryland Transfer/Withdrawal Notification submitted by the Parent on June 9, 2021. HCPSS Ex. 13.¹⁸

The Student attended [REDACTED] for the fourth and fifth grades, in the 2021-2022 and 2022-2023 school years. On February 16, 2023, the Parents, through their counsel, sent a letter to [REDACTED]¹⁹ at HCPSS to schedule an IEP team meeting to address ESY services for the summer of 2023 and special education services for the 2023-2024 school year, both of which are at issue in this case. Parents Ex. 15. That meeting was held virtually on March 30, 2023, and the subsequent events leading to this dispute will be addressed below.

C. ISSUES

As noted above, three issues remain from the Parents’ Complaint after the HCPSS’ Motion for Summary Decision was granted and the resulting First Amended Prehearing Conference Order was issued on March 18, 2024. The remaining issues have separated the HCPSS failures into three issues. The first issue is whether the HCPSS failed to provide the Student with ESY services in summer 2023, thereby denying him a FAPE for that summer.

¹⁸ No request for reimbursement for the 2021 unilateral placement at [REDACTED] appears in the record.

¹⁹ [REDACTED] is an instructional facilitator with the HCPSS Department of Special Education . TR V5 (Page 1014:15 to 1014:16).

The second issue is whether the HCPSS failed to have an IEP in effect when the 2023-2024 school year began and failed to offer an appropriate alternative to his beginning the school year at ██████████ pending the completion of a referral process. The third issue is whether the HCPSS offered the Student an appropriate placement for the 2023-2024 school year that could implement the educational programming and services the Student required to provide him with a FAPE. I will address each of these issues in turn.²⁰

It is equally important to discuss what is not at issue in this case. The content of the June 13, 2023 IEP is not at issue – the HCPSS and the Parent agreed to the goals and objectives and required services; this is the IEP that would be in effect for the 2023-2024 school year. The parties agreed that none of the HCPSS public schools was an appropriate placement for the Student, and that a program outside the public school system would be necessary to provide the Student with a FAPE. They disagree, however, regarding which private placement was appropriate for the Student.

DID THE HCPSS FAIL TO PROVIDE THE STUDENT WITH ESY SERVICES FOR SUMMER 2023, THEREBY DENYING HIM FAPE FOR THAT SUMMER.²¹

²⁰ Some of the issues overlap, but I will be careful to separate the facts and law accordingly.

²¹ At the close of the Parents' case, the HCPSS moved for judgment pursuant to COMAR 28-02.01.12 E:

E. Motion for Judgment.

(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of any opposing party's case.

(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the ALJ may:

- (a) Proceed to determine the facts and to render judgment against an opposing party; or
- (b) Decline to render judgment until the close of all evidence.

Even considering ██████████'s testimony which was elicited in the Parents' case in chief, I question whether the Parents proved a *prima facie* case. Nevertheless, I “decline[d] to render judgment until the close of all evidence” and am deciding the remaining issues raised in the Complaint here.

THE PARENTS' CONTENTIONS²²

The Parents contend that the HCPSS failed to offer the Student ESY programming for the summer of 2023. In response to that alleged failure, the Parents provided the HCPSS with a notice of unilateral placement at [REDACTED] for their summer program where they claim the Student received appropriate educational programming.

The Parents requested ESY programming for the 2023 summer in counsel's letter of representation dated February 16, 2023 (Parents Ex. 15), seeking an IEP team meeting in March 2023. The Parents assert that they again requested that the HCPSS provide the Student with ESY programming in June 2023. The Parents contend that the HCPSS originally advised them that to qualify for ESY services, the Student would have to be enrolled in a HCPSS school, which the Parents indicated they would do. The Parents assert that the HCPSS ultimately erroneously determined that the Student would not be offered ESY as he had not attended a HCPSS school for the preceding school year.

The Parents contend that as late as the June 13, 2023 IEP team meeting, the Student could have attended the ESY program had it been offered to him. Because the HCPSS did not offer the Student ESY services, the Parents did not enroll the Student in the HCPSS. The Parents contend that the failure to provide the Student with the requested ESY programming denied him a FAPE for the summer of 2023.

THE HCPSS'S CONTENTIONS²³

The HCPSS contends that ESY services would only be necessary to provide a student with a FAPE when, if the Student is not provided with an educational program during the

²² The HCPSS chose to present its closing argument orally, and the Parents' chose to present a written closing argument which they filed on June 4, 2024, immediately before the HCPSS's oral closing argument. I derived the Parents' contentions from the Parents' written closing argument as well as their orally presented rebuttal to the HCPSS's oral closing arguments presented on June 4, 2024.

²³ The HCPSS's contentions were derived from their orally presented closing argument on June 4, 2024.

summer months, the benefits that the Student gained during a regular school year would be “significantly jeopardized,” thereby “substantially thwart[ing] the goal of ‘meaningful progress.’” *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 538 (4th Cir. 2002) (citing *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988), which required a showing of “more than *de minimis*” regression). The HCPSS conceded that regression could be proven through expert testimony. *Id.* Nevertheless, the HCPSS contends that none of the experts testifying in this matter presented probative evidence that any regression the Student might experience would thwart the Student’s meaningful progress or that his gains would be “significantly jeopardized.”

The HCPSS further asserts that the Parents had already submitted written notice on June 13, 2023, advising the IEP team that the Student would attend ██████ for the summer (Parents Ex. 23, p. 0001). Furthermore, as early as December 4, 2022, prior to that IEP team meeting that was called to address summer ESY programming, the Parents had already enrolled the Student in the ██████ summer program. HCPSS Ex. 39. The Parent paid ██████ a nonrefundable deposit, indicating that they had no intention to accept any HCPSS ESY placement.

FACTUAL AND LEGAL ANALYSIS

At the March 30, 2023 IEP team meeting, the Parents requested reevaluation, planning, and consideration of ESY for the upcoming summer. ██████, a HCPSS special education teacher, shared that she received some documents from ██████ containing benchmark data in reading and math interventions, but she did not believe that those documents were sufficient to determine continued eligibility, so the team recommended that educational testing be administered to answer that question. The Parents consented to this educational testing. Parents Ex. 16.

With regard to ESY, [REDACTED] shared that ESY eligibility would be considered if and when the Student re-rolled in HCPSS. Parents Ex. 17. The Parents, through their counsel, stated that the last school day at [REDACTED] was May 24, 2023, and that the Student could enroll at [REDACTED] on the following day, May 25, 2023. The ESY discussion would take place after the Student's re-enrollment.

A subsequent IEP team meeting was held on May 26, 2023. Parents Ex. 20. The Student's evaluation was reviewed and the Student was determined to still be eligible for special education and related services. The next meeting was scheduled for June 13, 2023, to discuss the draft IEP. Parents Ex. 21. The notes of that meeting memorialized that the Parents' counsel advised the team that the Student would attend the 2023 [REDACTED] summer program. Parents Ex. 23. The Parent explained the basis for that announcement:

I know one of the main reasons for that was that ESY, or extended school year, for [the Student]. Since he wasn't at [REDACTED] for the fifth-grade year, they couldn't extend that school year. So since they weren't able to technically offer that then, we decided to put him in the program at [REDACTED].

TR. V1 (Page 81:19 to 81:24 and Pages 165:19 to 166:17).

This statement, however, was contrary to that expressed by the HCPSS staff in the May 26, 2023 IEP team meeting. [REDACTED], the HCPSS representative at that meeting, said that the Student could be considered for ESY if he was reenrolled; there was no precondition that the Student had to be a fifth grade student at [REDACTED] prior to the start of the ESY program.²⁴

²⁴The Parents' contention is illogical. Offering the Student reenrollment would have been pointless and futile if the Student's enrollment at [REDACTED] for the previous school year were a condition of ESY eligibility. If this were such a precondition, the Student would have inevitably been ineligible for ESY services, as he was at [REDACTED] for his fifth grade year.

The Parents never reenrolled the Student in the HCPSS. Instead, at the June 13, 2023 IEP team meeting, the Parents' counsel advised that the Student would attend the [REDACTED] summer program. Parents Ex. 23; Testimony of [REDACTED], TR. V8 (Pages 1708:16 to 1709:1).

On June 13, 2023, the IEP team met as scheduled. [REDACTED] recalls that there was no offer of ESY for the summer of 2023 because the Parents unilaterally placed the Student in the [REDACTED] summer program. TR. V8 (Page 1818:17 to 1818:21).

[REDACTED], Head of School at [REDACTED], testified on behalf of the Parents and offered about the appropriateness of the Student's participation in the [REDACTED] summer program, she was not asked to render any opinion – and indeed she did not – regarding the need for ESY services. In fact, she never uttered the term “ESY” during her testimony. Accordingly, I gave little weight to [REDACTED] testimony as it did not speak to the Student's need for ESY services provided by the HCPSS.

Similarly, the Parents' witness, Educational Consultant [REDACTED], offered little testimony regarding whether the Student required ESY services in the summer of 2023. Indeed, [REDACTED] was asked only one question regarding the student's need for ESY services during her cross-examination by the HCPSS:

Q. And what is your opinion as to him being a student who would require extended school year services?

A. I hope everybody would agree that reading is a critical life skill. So in order to be able to continue those services it would need to be year round. So he would, so sorry, to answer your question, he should be considered for -- he should receive extended school year services. Yes.

TR. V4 (Page 939:16 to 939:23). [REDACTED] answer, however, did not address whether the benefits that the Student gained during a regular school year would be “significantly

jeopardized,” thereby “substantially thwart[ing] the goal of ‘meaningful progress’” expressed as the relevant test in *MM*, 303 F.3d at 538. Rather, [REDACTED] testimony spoke only of her preference that reading instruction be provided to the Student year-round.

[REDACTED] and [REDACTED] offered expert testimony on the severity of the Student’s memory issues, but neither witness sufficiently explained how the Student’s progress would have been “severely jeopardized” or how his “meaningful progress” would have been thwarted by not attending the ESY program. *MM*, 303 F.3d at 538. [REDACTED] also commented on the Student’s memory issue and the need for reinforcement, but she did not render an opinion supporting the need for the ESY program.

Accordingly, I conclude that the Parents did not meet their burden to prove that the Student required ESY services to ensure that he received a FAPE for summer 2023. *Shaffer, supra*.

There are alternate reasons for denying the Parents’ claim regarding ESY services for summer 2023.

First, [REDACTED] made it clear that before the Student could participate in ESY services, he was required to enroll as a student with the HCPSS. Parents Ex, 17, p. 0001 In response, Parents’ Counsel advised the HCPSS that as the Student’s last day at [REDACTED] for the 2023-2024 school year was May 24, 2023, the Student could be enrolled in [REDACTED], his home school, the following day, May 25, 2023. *Id.* The Student, however, never enrolled with HCPSS. The Parents do not dispute that they were aware that enrollment was a prerequisite for ESY consideration. I conclude that by failing to meet the patent condition precedent for the HCPSS to refer the Student for ESY services, the Student abandoned any argument that the HCPSS improperly denied him the opportunity to participate in HCPSS ESY services.

Secondly, the preponderance of the evidence merits the conclusion that in the summer of 2023, the Parents intended for the Student to attend the [REDACTED] summer program to the exclusion of any HCPSS ESY program. At the IEP team meeting on June 13, 2023, the Parents declared that the Student would attend the [REDACTED] program for the summer. Parents Ex. 26, p. 0001. On December 4, 2023, well before their February 2023 request for ESY services, the Parents paid a nonrefundable deposit to [REDACTED] for that program .,

The Parent testified that she would have foregone the [REDACTED] summer program deposit had the HCPSS offered the Student an ESY program that would meet his needs. TR. V2 (Pages 251:19 to 252:2). I find that the Parent's testimony on this issue is disingenuous. Had the deposit the Parent's paid to [REDACTED] been refundable, I might have credited the Parent's testimony that she would have not sent the Student to the [REDACTED] summer program and placed him in an ESY program proposed by the HCPSS. It makes little sense that, having paid for the Student to participate in the summer program at [REDACTED], the Parents' preferred placement for the Student, they would abandon that deposit, possibly remaining contractually obligated to [REDACTED] for the balance, despite sending the Student to an ESY program proposed by the HCPSS.

For the aforementioned reasons, the Parents have not proven by a preponderance of the evidence that the HCPSS failed to provide the Student ESY services for the summer of 2023, denying him a FAPE for that summer.

DID THE HCPSS FAIL TO HAVE AN IEP PLACEMENT IN EFFECT WHEN THE SCHOOL YEAR STARTED OR FAIL TO OFFER AN APPROPRIATE ALTERNATIVE?

THE PARENTS' CONTENTIONS

The parties agree that the Student's IEP for the 2023-2024 school year provided appropriate goals and objectives, services, with placement in a private separate day school. The Parents complained, however, that the HCPSS failed to have an IEP placement in effect when

the school year began and offered no appropriate alternative placement. They complain that the CEPT did not meet until August 8, 2023, and that they did not have a placement in place when the 2023-2024 school year started on August 28, 2023. The Parents assert that the CEPT's placement at and referral to [REDACTED] was unsatisfactory.

When the HCPSS acted on the Student's placement, it only made one referral to [REDACTED], and the Parents claim that they were informed a week before the HCPSS school year started for HCPSS and after the school year started at [REDACTED]. The Parents contend that the referral to [REDACTED] did not occur in a timely fashion which would have allowed the Student to start in a placement when school started, or alternatively allow the Parents to secure an alternate placement by the beginning of the school year if they were dissatisfied with the placement at [REDACTED].

The Parents contend that, despite the referral, [REDACTED] never accepted the Student, even though [REDACTED] testified that the Student would have been accepted without an interview and a "shadow day" process. The Parents were not informed that they were "required" to participate in a visit to [REDACTED] to receive an acceptance or denial of the placement.

The Parents also complained that they did not receive the prior written notice regarding the decision of the CEPT until October 20, 2023. Parents Ex, 25, p. 00002)

The Parents contend that because the HCPSS could not provide a placement at the start of the school year, it chose to temporarily place the Student at [REDACTED], where the IEP team had already determined was not an appropriate placement for the Student.

The Parents argue that the "temporary" placement that was already determined by the IEP team to be an inappropriate placement could have lasted a quarter of the school year during which the Student would not have received a FAPE. The Parents also contend that programming

at [REDACTED] would have been “retrospective decision making” proscribed by several reported cases. *Fuhrmann v. E. Hanover Bd. Of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993); *R.E. v. N.Y.C Dep’t of Education*, 694 F.3d 167, 195 (2d Cir. 2012) cert. denied, 113 LRP 24542 (U.S. 06/10/13).

The Parents also contend that the absence of programming for the Student on Canvas, the HCPSS schedule website, as proof that no programming was in place for the Student at [REDACTED] when the 2023-2024 school year began.

THE HCPSS’S CONTENTIONS

Regarding this issue, the HCPSS relies on the appropriateness of the unchallenged IEP of June 13, 2023 (Parents Ex. 21) and the need to refer the Student to the CEPT²⁵ which met on August 8, 2023 (Parents Ex. 25). At the CEPT meeting, the HCPSS conceded that [REDACTED] was rejected as a permanent placement but asserted that implementing the Student’s IEP temporarily at [REDACTED] only became necessary after the Parents rejected, through their inaction, the HCPSS referral to [REDACTED]. [REDACTED] told the IEP team that the Student could be supported at [REDACTED], implementing all of the services and supports mandated by his IEP, until the private placement was finalized. The HCPSS asserts that it is not uncommon for a Student to have a temporary placement while a permanent placement is being finalized, which it contends may take time to accomplish. The HCPSS contends that the Parents have not presented evidence to challenge this practice.

²⁵ [REDACTED] explained the function of the CEPT as “an IEP Team that meets to consider the continuum of services that Howard County offers” and if the student needs a “more or different” than what HCPSS has to offer, they consider the student’s placement in a private separate day or public separate day school, with attention to the Least Restrictive Environment (LRE). TR. V5 (Page 1007:10 to 1007:24)

Additionally, the HCPSS contends that it committed itself to providing the necessary resources for the Student to receive a FAPE pending the referral, but the Parents expressed no interest in permitting the HCPSS to make those provisions, having unilaterally placed the Student at [REDACTED] before the HCPSS school year started. The HCPSS asserts that the Parents have not put on any evidence to show that [REDACTED] wasn't prepared, couldn't be prepared, and that resources couldn't be allocated to implement that IEP while the nonpublic placement could be put in place.

FACTUAL AND LEGAL ANALYSIS

At the June 13, 2023 IEP team meeting, the program for the 2023-2024 school year was discussed. Parents Ex. 23, p. 0003. Due to the level of services the Student needed, [REDACTED],²⁶ the [REDACTED] representative at the meeting, offered that, although [REDACTED] is the Student's home school, it could not meet the service hours needed. Other programs were discussed. [REDACTED] said that although [REDACTED], a HCPSS school, had intensive block programming, it still could not accommodate the two intensive blocks that the Student required, making that program inappropriate as well. Accordingly, [REDACTED] stated that the next step would be to go to a CEPT meeting during the summer of 2023, where the team would discuss placement outside the HCPSS.

The CEPT meeting was held on August 8, 2023, with the Parents and their counsel present. Parents Ex. 25. [REDACTED] conducted the meeting. The team first considered HCPSS schools. The team reiterated that [REDACTED] could not provide the academic support that the Student needed because it was "not able to provide the intensity of services he needed,

²⁶ [REDACTED] is the Instructional Team Leader at [REDACTED] who oversees the special education Team. TR. V5 (Page 1011:2 to 1011:9)

specifically the amount of time outside of general education, to address the academic goals in the IEP given that there were three sections of reading foundational skills goals.” TR. V6 (Page 1378:12 to 1378:18).

It also rejected the Intensive Resource Classroom at [REDACTED], a [REDACTED] within the HCPSS, as it also could not provide the intensity of reading intervention that the Student needed to reach his reading goals and objectives due to the number of hours that it would take to do so. TR. V6 (Pages 1378:19 to 1379:2).

As alternatives, the team first considered public, separate day schools located in Howard County. The team rejected the [REDACTED] programs for students with Autism and cognitive, physical and comprehensive disabilities. That program would not be appropriate for consideration, especially as it is primarily for students who are not seeking a Maryland high school diploma. Specifically, due to the intensity of the program for that student population, it could not provide any curriculum that would teach grade level standards or have a high school diploma program. TR. V6 (Pages 1379:14 to 1380:3). [REDACTED] at the [REDACTED] [REDACTED] for students in middle and high school with therapeutic and internalized behavior issues was also rejected as those students require “an intense level of therapeutic support throughout their school day in a smaller environment,” which the Student did not require. TR. V6 (Page 1380:8 to 1380:9).

The team then considered private, separate day schools that were not HCPSS schools, but were funded by HCPSS and included transportation. These three schools - [REDACTED], [REDACTED] [REDACTED] and [REDACTED] - were MSDE approved and were required to implement the local schools’ IEPs.

The team first rejected the [REDACTED], which educated student with emotional disabilities rooted in conduct. [REDACTED] did not “offer any structured academic intervention as a part of their program.” TR. V6 (Page 1381:4 to 1381:8). The team then rejected the [REDACTED], as it educated students with Autism. [REDACTED] testified that that school’s program did not support teaching grade level standards. She also questioned the inadequacy of the Student’s peer group, as the Student would not have a “social group that would have been commensurate with his social skills.” TR. V6 (Page 1381:10 to 1381:16).

Neither of those programs was found to be appropriate. The Parents’ expert witness, [REDACTED], agreed. TR.V4 (Pages 920:12 to 921:10).

The team then considered [REDACTED], which provided academic intervention with students with SLDs, including reading intervention programs. [REDACTED] discussed the reasons that the team supported the choice to send a referral package to [REDACTED]:

...We talked about [REDACTED] ability to provide intensive academic intervention for students who have needs in that area as outlined in their IEP. In [the Student’s] case, his primary disability is a specific learning disability, though there are students who attend in the program, as has been discussed, who don’t have that profile. What we look at in terms of placement is all of the implementation of the student’s goals and objectives, the service hours as agreed to by the team, and any provision of supplementary aids and services. And so all of the supports that are a part of [the Student’s] IEP as developed with the team at [REDACTED] would have been able to be implemented in the program at [REDACTED].

TR. V6 (Pages 1381:20 to 1382:9). [REDACTED] confirmed this later in her testimony. TR. V7 (Page 1546:12 to 1546:24).

██████████ testified about the referral timeline, explaining that the referral was sent before the end of the week and that she expected a response in two weeks. This response came in the form of ██████████ email to the Parent on August 21, 2023. TR. V6 (Pages 1382:14 to 1383:5).

At the meeting, the Parents’s counsel questioned whether ██████████ could implement the IEP and provide the student with a FAPE, which the school personnel confirmed. ██████████ recognized that the Student was entitled to attend school on the first day of school just like his non-disabled peers, and to do so, the HCPSS had to have a plan in place “to ensure that [his] needs are being met, whether that’s in the placement that we have proposed where their IEP can be implemented in full or if we need to add additional resources into an existing option until that other situation is realized.” TR. V6 (Page 1384:8 to 1384:21).

To assure compliance, the August 8, 2023 meeting minutes indicate that a case manager would be assigned to monitor the implementation of the IEP and attend all IEP meetings, continuing: “the case manager will ensure the least restrictive environment and placement are considered at least once annually and at [the Student’s] annual IEP meeting.” Parents Ex. 25, p. 0002.

The Parent questioned the CEPT’s placement of the Student at ██████████, suggesting one of her own:

[The Parent] requested for consideration ██████████. ██████████ shared this is a private school that is not approved by MSDE to serve students with special needs, *nor are they required to implement the IEP.*²⁷ ██████████ shared the Parents’ rights to disagree with the team’s decision.... ██████████ stated the family could provide

²⁷ The Parent confirmed her understanding that HCPSS proposed that ██████████ “would not be a good consideration, since they don’t implement the IEPs.” TR. V1 (Page 89:22 to 89:24). ██████████ testified that the HCPSS places no students at ██████████ through the IEP process. TR. V7 (Pages 1532:24 to 1533:6). At ██████████, instead of an IEP, the Student’s education progresses according to a “treatment plan,” which is created by the OG tutor in conjunction with the head of the reading department and sometimes the head of school. This treatment plan establishes the areas that the child is going to work on for the year or at least begin, which can be revised during the trimesters. TR. V2 (Page 335:7 to 335:19). The structure and contents of those documents, as wells the means to track the Student’s progress, differ significantly from an IEP, so the “treatment plan” is not compatible or comparable to the IDEA required IEP that the HCPSS must follow.

notification of unilateral placement to [redacted] [r]e, coordinator special education compliance, non public service and family support. [The Parents' counsel] shared that this has been shared prior to [the Student] beginning the summer program at [redacted].

Parents Ex. 25, p. 0003 (emphasis added). The Parent expressed that she was “not interested” in having the student attend [redacted], even pending completion of the referral. TR. V7 (Pages 1445:25 to 1446:6).

Regardless of the Parents' stated intention not to send the Student to a cooperating HCPSS sponsored placement after completing the referral process, the team still considered the possibility that the referral might not occur on the first day of school, making arrangements to educate the Student in that event. Specifically:

The team discussed a school *location* for [the Student] should he not have a nonpublic placement on the first day of school. [redacted] shared that [redacted] [redacted] . . . is prepared to support [the Student] until placement. [The Parent] disagreed with placement at [redacted]. She does not feel that they are able to support [the Student] and this would be counterproductive to [the Student's] progress.

Id. (emphasis added). The import of these entries is that the team would utilize the same IEP programming at [redacted], which was only considered to be an interim *location* where the Student's would receive educational instruction in concert with his IEP, and not an educational *placement*. The distinction between placement and location was discussed above; the IEP programming would be the same but at a different location, [redacted]. Furthermore, the Parent had already acted on her intention that the Student would not attend any program recommended by the IEP team, choosing instead, as she had already done, to enroll the Student at [redacted].

Notwithstanding the Parent's preferred placement at [REDACTED], following the meeting, the CEPT sent the referral package to [REDACTED] which [REDACTED], its director, reviewed. He received the referral packet on August 14, 2023 reviewed it and contacted the Parent by email on August 21, 2023. TR. V5 (Pages 1044:20 to 1045:3). [REDACTED] testified that after a review of the referral documentation, he believed that [REDACTED] could implement the Student's IEP, that the Student was appropriately referred for placement in the [REDACTED] program; and that [REDACTED] had capacity to accept him. TR. V5 (Pages 1097:17 to 1098:6).

The following email chain ensued between [REDACTED] and the Parent. Parents Ex. 27.

On Aug 21, 2023, at 2:00 PM, [REDACTED] wrote to the Parents:

We recently received a referral for [the Student] from HCPSS. If you would be interested in discussing our program and/or scheduling a day and time to visit our school, please respond to this email or give me a call at your convenience.

The Parent responded the following morning at 7:14 a.m.:

Thank you for reaching out. We would like to know more about your Orton Gillingham services before moving forward with scheduling a visit.

[REDACTED] responded the following morning:

Our teachers have received training and certification in Orton-Gillingham Plus, as well as other phonics and OG based interventions. I have also attached some program brochures for your reference. Please feel free to contact the school if you have any additional questions and/or would be interested in scheduling a tour.

However, the brochures were not attached, and the Parent discontinued communicating with [REDACTED], testifying that she was too busy to follow up, as she is getting her children ready for school which was starting August 28, 2023. TR. V1 (Page 100:1 to 100:7). In addition, the Parent testified that because [REDACTED] failed to attach the brochures, she did not ask for them as '*she shouldn't have to,*' which was one of the rationales for her terminating correspondence with him. TR. V1 (Pages 213:6 to 214:1)(emphasis added).

██████████ sent an email to the Parents on August 25, 2023, advising them of the referral progress and that the Parents should have received communication from the Special Education Department at ██████████. Parents Ex. 29. The following day, ██████████ confirmed the Parents' stated intention for unilateral placement at ██████████, denying them payment they sought for that placement.²⁸ Parents Ex. 31.

I conclude that by failing to participate in its enrollment process, the Student could not attend ██████████. TR. V5 (Pages 1105:16 to 1106:7). By their inaction, the Parents scuttled the ██████████ referral process initiated by the CEPT.

██████████ works with students in private placements.²⁹ She places the responsibility for the Student not having a program in place on the first day of school squarely on the Parents for their lack of cooperation with the process. TR. V5 (Page 1021:6 to 1021:11). As ██████████ pointed out, there is nothing that the HCPSS or any school system could do to force a parent to accept a non-public school placement. TR. V7 (Page 1524:12 to 1524:17). ██████████ also testified that the HCPSS has no means to “force” a parent to engage in the referral process. TR. V5 (Page 1027:20 to 1027:22). Although ██████████ confirmed that a parent visit and shadowing is not required, “We look to and expect to meet with someone from the family during our process. . . .” TR. V5 (Page 1094:9 to 1094:16). To have “gotten to the point where [██████████] would have issued an acceptance letter” the Parents would have had to [p]articipat[e] in our intake process, visiting the school” either in person or virtually. TR. V5 (Page 1105:20 to 1105:24).

²⁸ No copy of the referenced letter was submitted into evidence.

²⁹ ██████████ is presently the HCPSS Coordinator for Special Education Compliance and Dispute Resolution. TR. V5 (Page 1001:4 to 1001:5). In August 2023, she was the Facilitator of Special Education Compliance and prior to that, she was Resource Teacher for Non-Public Services in Special Education Compliance. TR. V5 (Page 1026:1 to 1026:5).

The purpose of that visit was also for the school to make a decision:

...just so that we can, as a school and administrative team, learn more about the student. I always tell parents that there's only so much you can learn about a person from reading files, as opposed to meeting with the family and the parents, engaging in that process. And then we would have been able to determine and make a decision about whether or not the student was appropriate.

TR. V5 (Pages 1105:25 to 1106:7). [REDACTED] further testified that he could not “tell you a time where [he] issued any sort of acceptance to a student who[se]...parents did not participate, did not visit the school, or, you know, engage in our intake process.” TR. V5 (Pages 1107:23 to 1108:4).

The Parents eschewed even the basic interest in the placement by not introducing themselves to the school, even after the HCPSS school year started (the [REDACTED] program operates on a rolling admission, and students can enter at any time during the school year).³⁰ Because during the summer months [REDACTED] does not teach grade level standards and curriculum, if the Student started at [REDACTED] at the end of August, he would not miss engaging in diploma track classes, i.e., curriculum-based education toward his goals and objectives. TR. V5 (Page 1103:10 to 1103:14).

Although [REDACTED] was admittedly not an appropriate placement for the long term, which is why it was rejected, [REDACTED] testified that it still could put resources in place to implement the services and supports on that IEP on a temporary basis.

³⁰ [REDACTED] is on a rolling eleven-month calendar, with the start date for teachers July 1, 2023, and classes beginning four days later. Although the school year started, the Student could start at any time after that: “...As I mentioned, we're open enrollment, and students are referred to the program, and are accepted and enrolled throughout the school year.” TR. V5 (Page 1100:6 to 1100:12). He would only have missed the summer programming, which [REDACTED] testified was “predominantly more intervention based, as opposed to grade level standards and curriculum” so he would not be behind in his educational progress. TR. V5 (Pages 1102:8 to 1103:14). He testified that after the summer session in July through early August, and after a two week break, the school year (i.e., non-summer) programming starts “usually at the end of August.” TR. V5 (Pages 1102:21 to 1103:2).

Indeed, ██████ explained that she was familiar with times when an IEP had to be implemented in a temporary location while a non-public placement was being secured. TR. V5 (Pages 1026:25 to 1027:7). ██████ makes the distinction between the expediency of a short-term location versus a long term placement where the Student could be provided FAPE. TR. V5 (Page 1028:1 to 1028:7).

██████ questioned whether ██████ as a middle school pending the private placement as she did not believe that “they could service his needs in a public school to the extent that ██████ needs for remediation.” TR.V4 (Page 922:12 to 922:22). Although that is her ultimate opinion, I did not find that the basis of that opinion was expressed. ██████ concentrated on the Student’s program at ██████, largely bypassing the first prong of *Burlington*.

After the CEPT meeting, the Parent testified that she contacted ██████ to see if she could enroll the Student. TR. V1 (Page 135:1 to 135:14). On August 10, 2023, two days after the CEPT meeting, the Parent electronically signed an “Enrollment Agreement,” paying a non-refundable registration fee of \$██████ for the 2023-2024 school year at ██████. ██████ had access to ██████ data as its head of school and confirmed this payment. TR. V3 (Page 692:5 to 692:10). Under that agreement,³¹ the Parents also agreed to make payments for the balance of the Student’s tuition at ██████ for the 2023-2024 school year every 2, 4, 6 or 10 months. Parents Ex. 35, p. 0002.

³¹ Neither the Parent nor ██████ testified that the Parents asked if they could be released from their contractual obligation to ██████ if the referral process resulted in a placement that the Student would attend. This lapse confirms the Parents’ intention to eschew the referral process and continue sending the Student to ██████ for the 2023-2024 school year.

If no such election were made by August 20, 2023 (which was after the unilateral placement was announced to the HCPSS), the entire tuition would be due by August 20, 2023. Id.³²

Despite the Parent's testimony that her payment was only intended to reserve a space if the proposed placement did not occur, by signing the Enrollment Agreement and paying the deposit she indicated her intention to forgo the HCPSS placement and reenroll the Student at ██████████.³³ The Student did not attend ██████████ on the first day of school, defeating the IEP and the placement decision. TR. V6 (Page 1385:10 to 1385:14). The Parents confirmed their intention not to send the Student to the placement when they requested tuition reimbursement from the HCPSS for their previously decided – August 10, 2023 - unilateral placement. Parents Ex. 24.³⁴

The Parent complained that she did not see any schedule listed for the Student on the HCPSS Canvas website. TR. V1 (Pages 103:16 to 104:4). But that is immaterial, as she had already enrolled the Student at ██████████ and was not sending him to ██████████, even on a temporary basis.

I conclude that the HCPSS did have an IEP placement in effect which was to be implemented temporarily at ██████████ when the school year started. Although all of the

³² ██████████ testified that the Enrollment Agreement is a five-page document, but it was not submitted into evidence or reviewed by ██████████ in her testimony. TR. V3 (Page 688:2 to 688:4).

³³ The Parent testified that despite the due date of August 20, 2023, stated in the Enrollment Agreement, no tuition was paid until September 2023. TR. V2 (Pages 253:18 to 254:5). I find that this later date is not significant, as despite the later payment of the tuition, the obligation stated in the Enrollment Agreement the full amount of the tuition was due on August 20, 2023, and there was no testimony that the due date was extended for any reason. In fact, ██████████ testified that when the deposit is made, the Parents are enrolled in ██████████, a tuition payment service, by which the tuition is paid on a periodic basis. TR. V3 (Pages 679:23 to 680:8). It is my interpretation of the contract as well as the payment process that by signing the enrollment agreement, the Parents were obligated to pay the full amount of the Student's tuition at ██████████ and signed up for ██████████ to meet that obligation.. As ██████████ testified, the deposit payment activated the account. TR. V3 (Page 687:17 to 687:17)

³⁴ The Parents' communication prompting ██████████ rejection of their request for tuition reimbursement was not in the record, although none of the parties denied that it was sent.

parties acknowledge that the Student's IEP could not be sustained at [REDACTED] on a long term basis, the CEPT recognized the possibility that the placement located at a private separate day school might not be ready for the first day of school for HCPSS students, and in the minutes of the CEPT meeting, that possibility was addressed. Parents Ex. 25, p. 0002.

There was ample evidence that the HCPSS was willing and prepared to put the Student's IEP services in place at [REDACTED], even if only on a temporary basis pending a permanent referral placement. But they never got the chance to do so, as the Student didn't report to [REDACTED] on the first day of school. So there was no evidence that the IEP could not be implemented there. The Parents did not prove that the temporary location of this placement was not reasonably calculated to enable a student to make appropriate progress in light of the Student's circumstances. *Andrew F., supra*. Those "circumstances" included the ongoing referral process, the need to educate the Student on the first day of class regardless of the Parents' frustration of the CEPT referral process, and the Parents' resistance to the temporary location of the Student's educational program at [REDACTED] for even a short time pending the completion of the referral process, which the Parents scuttled by enrolling the Student at [REDACTED] within days of the CEPT meeting.

I also find no "retrospective decision making" at [REDACTED] claimed by the Parents. *Fuhrmann v. E. Hanover Bd. Of Educ., supra*, and *R.E. v. N.Y.C Dep't of Education, supra*. The goals and objectives were already set out in the existing IEP, the services that were reasonably calculated to provide a FAPE were ordered, and the programming was already in place (or being established for when the Student arrived) to address the Student's goals and objectives at [REDACTED], and the HCPSS stood ready to insure that the resources were in place as well. They never got the chance, however, to prove their ability to do so, as the Parents had (on

August 10, 2023, within two days after the CEPT meeting), enrolled the Student at [REDACTED].

The Parents had abandoned the referral process already started by “ghosting”³⁵ [REDACTED] [REDACTED] communications. Instead, prior to August 25, 2023, the Parents expressed their intention to seek a tuition payments for their unilateral placement.³⁶

Therefore, the Parents have not proven by a preponderance of the evidence that the HCPSS failed to have an IEP in effect when the school year started or failed to offer an appropriate alternative.

DID THE HCPSS FAIL TO OFFER THE STUDENT AN APPROPRIATE PLACEMENT FOR THE 2023-2024 SCHOOL YEAR THAT COULD IMPLEMENT THE SERVICES AND PROGRAMMING THE STUDENT REQUIRED, THEREBY DENYING HIM FAPE?

THE PARENTS’ CONTENTIONS

The Parents contend that for the 2023-2024 school year, the HCPSS failed to offer the Student an appropriate placement that could implement the services and programming that he requires based on his unique disability related needs. They claim that [REDACTED] would be unable to offer the Student a FAPE for several reasons.

The Parents contend that the HCPSS witnesses did not observe the Student at either [REDACTED] or [REDACTED] and did not know what methods [REDACTED] would be using to teach the Student. The HCPSS witnesses were not as able as [REDACTED] or [REDACTED] to assess the class sizes needed for the Student, i.e., one-on-one OG instruction, followed up with a small ratio class for review, versus a larger ratio that they claim would not benefit the Student.

³⁵ “Ghosting,” a term that Mr. Burkhouse used in his closing argument, is “the practice of ending a personal relationship with someone by suddenly and without explanation withdrawing from all communication.” “ghosting,” <https://www.oxfordlearnersdictionaries.com> (last accessed June 15, 2024).

³⁶ The Parents’ filing of a form indicating their unilateral placement decision might not have been necessary, as the Student had been out of the HCPSS system since his initial enrollment at [REDACTED] on June 9, 2021 (HCPSS Ex. 13). This conclusion is also supported by the Parents not reenrolling the Student in May 2023 as they had expressed their interest in doing so for the ESY consideration..

The Parents claim that [REDACTED] could not provide the Student with the required research-based reading, writing, and math interventions required to meet his unique circumstances, there being no evidence presented regarding [REDACTED] use of these interventions with its students. They point to the testimony of [REDACTED] Director, and his response to the Parents' subpoena to prove that [REDACTED] does not have research-based writing and math interventions, there being no documentation produced under subpoena that contained any information concerning anything other than the school's reading and writing interventions. In support of that contention, the Parents argue that [REDACTED], HCPSS Instruction and Intervention Resource Teacher, could not name any research-based programs that she knew [REDACTED] used other than naming two programs she had seen listed on its response to an MPIA request during the 2020 COVID school closures. Accordingly, the Parents also contend that [REDACTED] did not have first-hand knowledge of the programs in which [REDACTED] staff were trained. They contend that neither [REDACTED] nor [REDACTED] could testify or document [REDACTED] use of any writing or math interventions.

The Parents also contend that if [REDACTED] were able to implement the Student's IEP, it would have issued the Student a letter of acceptance, as the [REDACTED] admission process did not require a parental visit or shadow day as [REDACTED] testified. TR. V5 (Page 1046:17 to 1046:22). That, however, is not the process; some parental involvement is required.

Acknowledging that they paid a deposit to [REDACTED] on August 10, 2023 after the CEPT meeting, the Parents claim that this was merely to assure some manner of placement at the start of the 2023-2024 school year; they claim that it did not show their intention to eschew the CEPT placement at [REDACTED], and that they were open to the CEPT process. The Parents further testified that with three days before the start of the school year, and with other children in the

household to prepare for the start of school, they did not have the time to participate in the [REDACTED] application process. They enrolled the Student at [REDACTED] immediately to assure that he had an appropriate school to attend; they had not signed a contract before that date, as [REDACTED] confirmed after a record search.

The Parents also claim that [REDACTED] serves student with a variety of disabilities and does not specialize in teaching [REDACTED] students, which is the Student's SLD. They contend that the CEPT rejected other programs which, like [REDACTED], also educate students on the Autism spectrum as well as those with emotional disabilities. They point to the [REDACTED] student population of which only seventeen students have the same SLD as the Student.

After claiming to have successfully shown that [REDACTED] was not an appropriate placement for the Student, and that the HCPSS had not made FAPE available to the Student in a timely manner, the Parents seek reimbursement for the Student's unilateral placement at [REDACTED]; the Parents claim to have proven the second prong of *Burlington*, i.e., that their unilateral placement of the Student at [REDACTED] complied with the IDEA's minimum standard of appropriateness and that it was reasonably calculated to provide the Student with an educational benefit. *Burlington, Carter*, and 20 IDELR 532 (U.S. 1993).

The Parents maintain that [REDACTED] has already proven that, by providing the educational instruction and research-based interventions specially designed to meet the Student's unique needs as a student with [REDACTED] and SLDs in reading, writing and math required by the IEP, that [REDACTED] is an appropriate placement for the Student and that they should be reimbursed for the [REDACTED] tuition. The Parents rely on *CL. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836 (2d. Cir. 2014) (quoting *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 365 (2d. Cir. 2006) for the proposition that this unilateral private placements was appropriate because the

“placement provides educational instruction specially designed to meet the unique needs of a [disabled] child, supported by such services as are necessary to permit the child to benefit from instruction.” Citing *Rowley* and *Frank G.*, 459 F.3d at 364, the Parents want me to make my decision favorable to them after considering the “totality of the circumstances,” without focusing on any one factor.

To that end, they contend that [REDACTED] provides small classes, specialized instruction in all areas of intervention required by the IEP by highly trained staff. In that program, the Parents argue that the Student will continue to make academic progress. Although [REDACTED] is not a certified special education school, they maintain that credentialing is not required for the placement to be considered appropriate. The Parents contend that they “need not show that a private placement furnishes every special service necessary to maximize their child’s potential,” but rather “need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child.” *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011); *Bellflower Unified Sch. Dist. v. Lua*, No. 19-55912, at 4 (9th Cir. Oct. 26, 2020). The Parents argue that their witnesses and documentary evidence proved beyond a preponderance of the evidence that the Student has made progress in all areas of the IEP at [REDACTED] and has not fallen behind other students as the HCPSS claims.

THE HCPSS’S CONTENTIONS

The HCPSS contends that it completed the Student’s IEP prior to the start of the 2023-2024 school year and made a referral to [REDACTED]. Its placement for the 2023-2024 school year at [REDACTED] was appropriate, as it could implement the services and programming the Student

required, providing him with FAPE. Instead, the Parents rejected that placement, choosing instead to claim a unilateral placement.

The HCPSS further asserts that, after being sent the referral, [REDACTED] Director, [REDACTED], reviewed it, and determined that [REDACTED] would be able to implement the Student's IEP. The HCPSS argues that instead of following through with the [REDACTED] referral process or arranging to visit [REDACTED] to determine if it could provide the Student with an educational program commensurate with his IEP, the Parents "ghosted" [REDACTED] and signed an enrollment agreement with [REDACTED] two days after the CEPT meeting on August 10, 2023. Parents Ex. 35, p. 0002.

The HCPSS contends that even before it contacted [REDACTED] and before [REDACTED] sent the Parent his first email, the Parent had already determined that the Student would attend [REDACTED] for the 2023-2024 school year. It argues that the Parents' claimed reasons for rejecting the placement at [REDACTED] is "sophistry" as the decision to continue the Student's enrollment at [REDACTED] had already been made, irrespective of any flaws they subsequently identified in the [REDACTED] program.

The HCPSS asserts that any failure to provide an appropriate placement was due to the Parents' lack of cooperation. *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002). Furthermore, the HCPSS contends that any procedural defect did not result in a loss of educational opportunity for the Student because the Parents would not have accepted at [REDACTED] or really any other placement than [REDACTED], where the Student was already enrolled at the start of the school year.

Reimbursement for a unilateral placement requires first failure of a school to provide a FAPE under an IEP that was reasonably calculated to enable the Student to make progress appropriate in light of his unique circumstances. *Andrew F., supra.* The HCPSS challenged [REDACTED] opinion as she never observed the Student in any school setting or since evaluating him in April 2021, bringing into question her opinions about 1) the amount of transition at [REDACTED], 2) the consistency of implementation of interventions, 3) the required size and ratio of the reading group, and 4) her concerns about the Student getting “what he needs” at [REDACTED]. Furthermore, the HCPSS asserts that [REDACTED] was only familiar with [REDACTED] through its website; thus she has insufficient information to support her opinion that implementing the Student’s educational placement at [REDACTED] is inappropriate and fails to provide the Student with a FAPE. Furthermore, the HCPSS also questions [REDACTED] potential bias, as [REDACTED] is a referral source for her.

The HCPSS also challenged the Parents’ assertion that, even if the Parents had succeeded in proving the first prong of *Burlington and Carter*, it failed to meet the second prong of those cases. It argued that the Student failed to make appropriate progress while enrolled at [REDACTED], widening the gap from his grade level peers. During the Student’s almost three years at [REDACTED], including summers, the HCPSS asserts that his progress was one-third to one-half of the progress made by his grade level peers, and academic material presented to the Student at [REDACTED] had already been covered and mastered by the Student prior to his admission at [REDACTED]. The HCPSS also questioned the lack of standardized assessments to identify whether and how much the Student achieved.

FACTUAL AND LEGAL ANALYSIS

This case does not present the usual *Burlington* controversy, where the proponent first must prove that school system's proposed educational program in their public school was not reasonably calculated to provide the student with a FAPE. Except for the specific location of the educational placement, both parties agreed with the contents of the IEP (goals, objectives, services, etc.).

There is no dispute that the IEP developed at the June 2023 IEP team meeting was developed to provide the student with a FAPE in light of the Student's academic profile. There is also no dispute that the LRE for the Student's academic placement is a separate private day school. The Parents must prove that the HCPSS's proposed placement of the Student at [REDACTED] cannot provide the Student with a FAPE. If they meet that bar, the Parents then must prove that the academic program at [REDACTED] is appropriate to provide the Student with a FAPE.

To prove their contention that that the HCPSS placement at [REDACTED] was inappropriate, the Parents presented the testimony of [REDACTED], who described her experience with [REDACTED] when her son, who had a diagnosis of Autism, was a student there in 2012-2013, and in 2019-2020 when she was head of the Glenwood Academy and had a student transfer to her school from [REDACTED]. TR. V6 (Pages 1206:22 to 1207:11). She was also present at [REDACTED] in May 2023 for a meeting about a student who an employee of hers was tutoring. TR. V6 (Page 1230:6 to 1230:10). These "observations" were too remote in time and too lacking in relevant detail to be of any probative value.

The Parents also presented the testimony of [REDACTED], who is the Head of School at [REDACTED]. She was accepted as an expert in special education, generally, with special knowledge in [REDACTED] and special education instruction for students with [REDACTED] and other language-based learning disabilities.

[REDACTED] described the Student as intelligent with “quite high” verbal scores, meaning that he has good listening comprehension skills, but lacks phonological awareness, like many students with [REDACTED]. TR. V2 (Pages 298:14 to 299:5). Based on her testimony, there is no question that the Student has been properly diagnosed with an SLD, i.e., [REDACTED].

[REDACTED] spent much of her testimony addressing the Student’s program and progress at [REDACTED],³⁷ which goes to the second – and not the first – prong of *Burlington*. Nor was that information before the IEP team when making its placement decision. For reasons discussed below, that evidence is not germane to the appropriateness of the Student’s proposed placement at [REDACTED]. TR. V2 (Page 324:18 to 324:23)

Most significantly, however, the Parents’ conceded that, even after direct and a most thorough cross-examination, [REDACTED] did not address the first prong of *Burlington* – whether the HCPSS proposed a placement that was reasonably designed to provide a FAPE to the Student: “...what the school system offered hasn’t been discussed with the witness.” TR. V3 (Page 722:19 to 722:21).³⁸

³⁷ [REDACTED] described the Student’s program at [REDACTED] as follows: he is in a class of eight in his homeroom; a 45-minute daily one-to-one trained OG tutor; a half-hour of OG reinforcement in the classroom with eight students; education in fluency, phonics skills, and sight words; 45-minute of written language instruction focusing on sentence construction and paragraph development; an hour and a half of math intervention with one, two, or three students with a classroom teacher and an instructional aide; breaks through the day; daily specials such as art, music or gym; a block of science or social studies depending on the term; a literature language arts block where he is listening to grade-level novels and working through vocabulary and comprehension strategies at the level at which he can think; and an opportunity for afterschool clubs. TR. V2 (Pages 306:13 to 308:9).

³⁸ Parents’ counsel conceded this point when she stated “I didn’t ask [REDACTED] about the school system offering a FAPE. That’s beyond the scope. I asked her about progress and how [the Student] was making progress at [REDACTED].” TR. V3 (Page 723:16 to 723:19).

██████████ was not asked to render any opinion – and indeed she did not – regarding the appropriateness of the Student’s placement at ██████████.

██████████ came closer to offering an opinion about ██████████ when she testified about the appropriateness of an educational program for the Student that does not include the provision of one-on-one OG instruction:

...and one on one I think is probably one of the most important things for [the Student] because his pace is slow, and he will gain skills and lose skills and gain skills and lose skills. So he needs a lot of repetition that other -- if he were in a group with other children, he would not be able to keep pace with or the teacher or interventionist would have a hard time pacing students, you know, in a group with him.

TR.V4 (Page 908:12 to 908:19).

██████████ offered her opinion about ██████████ as a placement for students she saw professionally:

Q,...Was the ██████████ ever a school that you recommended to the family and why or why not?

A. No, it was not. I don’t recommend the ██████████ Academies to families typically. I don’t think I ever have actually. Due to the multiple disabilities that are serviced at ██████████, the small group instruction of interventions, the inconsistencies of the types of programming are used, it’s not that they’re not using Orton Gillingham, but it could be one program to a different program, depending on the interventionist. And looking again and then his needs would not be a match for him.

TR. V4 (Page 909:12 to 909:23).

██████████ questioned whether ██████████ was an appropriate placement for the Student due to its student composition. Although she acknowledged that ██████████ does teach students with SLDs, and provides OG as a reading intervention, she questioned whether ██████████

program was “specifically aligned with language-based learning differences.” TR.V4 (Page 922:3 to 922:11). She did not explain, however, how the presence of other disabled students would detract from the education that the Student would receive from his instructors.³⁹

But [REDACTED] testimony concerning the [REDACTED] programming was undercut by her concession that she was unaware what intervention was taught there:

- Q. Isn't [REDACTED] an O.G. Plus intervention, one that is also available at [REDACTED]?
- A. I think it may be one of the options. Yes.
- Q. Do you know?
- A. I don't know.

TR. V4 (Page 945:7 to 945:11). [REDACTED] lack of knowledge of the [REDACTED] program also weakened the impact of her concerns that the Student would suffer from “too much transition” at [REDACTED]:

- Q. When's the last time you were at the [REDACTED] [REDACTED]?
- A. I have not been to the [REDACTED].
- Q. Never been there?
- A. Nope.

TR. V4 (Pages 945:24 to 946:4). [REDACTED] questioned the consistency of OG programming with the Student's current education at [REDACTED], but she offered no information or basis from which she could draw that conclusion. TR.V4 (Page 946:16 to 946:19)

I find that [REDACTED] opinion about the [REDACTED] OG program is based on conjecture, as [REDACTED] candidly admitted that she had never observed the program on site, having only read about it online. TR.V4 (Pages 921:15 to 922:2) and TR.V4 (Page 946:6 to 946:12).

³⁹ [REDACTED] championed the Student's progress at [REDACTED] with regard to the second prong of *Burlington*. But when questioned whether [REDACTED] had student with other than SLD diagnoses, which was her criticism of the [REDACTED] placement, she acknowledged that [REDACTED] also had student with other disabilities. TR.V4 (Pages 976:24 to 979:2)

I contrast [REDACTED] testimony to that of [REDACTED], who visited [REDACTED] twice this year before the Parents filed their Complaint where she observed another student enrolled there who was receiving OG reading intervention, TR.V7 (Page 1436:15 to 1436:22) and 1437:14to 1438:2). I give more weight to [REDACTED] testimony that the OG program, as provided at [REDACTED], is appropriate for the Student than [REDACTED] unsupported and wavering testimony that it is not. This is particularly so because [REDACTED] conceded that in addition to her lack of clarity on the OG program offered at [REDACTED], she had also not observed the Student's instruction at [REDACTED] either, having last seen him in 2021. TR.V4 (Page 948:2 to 948:5). [REDACTED], whose office monitors the 15 to 20 students on IEPs who are placed at [REDACTED] in the prior two years, found no such concern. TR. V7 (Pages 1542:25 to 1543:11).

The Parents also attempted to prove the placement inappropriate through HCPSS's [REDACTED] and [REDACTED]. Although both of these witnesses have expertise in their fields because they were not designated as experts prior to the hearing, the HCPSS objected to them being qualified as such for their testimony on this point. I sustained the objection to [REDACTED] being qualified as an expert witness by the Parents. TR. V5 (Page 1005:11 to 1005:25). I derived nothing more from her testimony that would assist me in addressing this or any other issue.

The Parents also presented the testimony of [REDACTED], Director at [REDACTED], who testified that [REDACTED] does have a reading interventionist who is a former certified special education teacher and provides additional reading support and instruction outside of the regular classroom setting. TR. V5 (Pages 1050:21 to 1051:14).

According to [REDACTED], [REDACTED] also employs a Director of Academics who is completed the 60-hour OG Plus training in 2021 and who coaches staff members.⁴⁰ TR. V5 (Page 1052:10 to 1052:25 and Page 1055:18 to 1055:25). The Parents submitted into evidence a list of interventionists at [REDACTED] that included only reading interventions. Parents Ex. 55. However, that list was derived from negotiations between Parents' counsel, [REDACTED], and [REDACTED] attorney, [REDACTED]. The Parents contend that the document show that the school lacks OG trained individuals. But OG is just one reading intervention, and the school is charged with "choosing the educational method most suitable to the child's needs." (*Lessard II*), 592 F.3d at 270. I do not find that Parents Ex. 55 provides probative evidence that [REDACTED] could not provide appropriate reading intervention instruction to provide the Student with a FAPE.

Moreover, [REDACTED] was extensively questioned on teachers using the OG approach. The evidence of what other programming that the school offers - e.g., research-based interventions to teach the Student writing, math, science, social studies, etc. - was lacking. [REDACTED] would have been the most authoritative witness for the Parents to prove the lack of programming, but he was not asked those question. Recognizing that the Parents have the burden of proof in this case, the lack of special education providers on that list is not probative of what [REDACTED] can provide.

There was evidence that [REDACTED] uses those interventions. [REDACTED], the chair of the CEPT meeting, supported [REDACTED] as an appropriate placement:

A. All of the supplementary aids that are part of the program were able to be implemented. The reading goals did not specify a specific reading program, but stated that he needed to be engaged in a research-based intervention. [REDACTED] *has a variety of research-based interventions at their disposal and they actually do a full battery of assessments to determine which of those will be most appropriate as students enter*

⁴⁰ [REDACTED] testified that he asked the Director of Admissions, who is not his subordinate, for a copy of the certification; no such document was submitted.

their program. The services are all outside of general education, which would have been required as part of the IEP. He did not have any additional related services that would not have been able to be provided and it's as close to his home as we could have possibly gotten for a private separate day school.

TR. V6 (Pages 1398:2 to 1398:15) (emphasis added). In addition to being able to implement all portions of the IEP, ██████ noted that the Student's June 2023 IEP did not require the applied reading intervention to be OG Plus. TR. V7 (Pages 1416:4 to 1416:9 and Page 1416:15 to 1416:17). The educators have latitude as to the method of reaching the Student's goals and objectives; OG and OG Plus is certainly a method they have available to them, but until they see the Student, they cannot make this decision. "The standard of review is . . . deferential to the educational authorities, who have 'primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs.'" *Lessard II*, 592 F.3d at 270 .

█████ also considered – and discounted – concerns about the Student receiving his special education in a school with students with disabilities other than SLD. Her opinion was that the nature of the other students' disabilities was not as important as the required programming that would be in place for the student to make meaningful progress. TR. V6 (Page 1398:16 to 1398:25).

█████ was partly responsible for assuring that the placement could follow the Student's IEP, and testified that in doing so, she relies on the referral school – in this case ██████ – to advise them whether it can implement the IEP. ██████ is familiar with the school, and ██████ testified that ██████ could do so. TR. V7 (Page 1515:16 to 1515:24).

██████████, a special educator who monitors nonpublic placements for the HCPSS and for the MSDE, testified about this means of monitoring is important to the HCPSS:

Q. So ██████████, if [the Student] is at ██████████ and he's not making progress in a small group in his OG Plus intervention, what are IEP teams required to do when there's not adequate progress?

A. If there's not adequate progress in an intervention that it's addressing IEP goals, the team is required to report it quarterly; potentially sooner, and required to meet to address the Student not making progress.

TR. V9 (Page 1935:18 to 1935:25); see also TR. V9 (Page 1947:16 to 1947:22). A student's progress towards meeting their goals and objectives is monitored under their IEP; if the school does not follow the IEP process, the HCPSS cannot determine whether the student is meeting his goals and objectives, so that adjustments can be made if necessary. The IDEA requires this process, and that manner of information is not available from schools like ██████████ that do not monitor the student's goals and objectives under their IEPs.

██████████ also testified that ██████████ did have evidence-based strategy in reading and math. TR. V9 (Page 1952:8 to 1952:24). No relevant evidence proved otherwise.

I conclude that the Parents did not prove that the Student's placement at ██████████ was not reasonably calculated to provide the Student FAPE. HCPSS monitoring was in place to assure its success.

Moreover, the Parents chose not to cooperate with the referral and announced – and acted on – their unilateral placement decision, making the placement at ██████████ superfluous. The Parents withdrew from IEP the placement process before they learned about how ██████████ intended to implement the Student's IEP. The Parents' rejection of the referral to anywhere other than ██████████ was discussed at length in the section above and need not be repeated here.

The HCPSS argument evoking “sophistry” is apt. Even if I were to discount the HCPSS contention that the Parents’ announced their unilateral placement at the August 8, 2023 CEPT meeting (Parents Ex. 25, p. 0002), there was ample evidence that they never intended to remove the Student from [REDACTED] and have him attend either [REDACTED], [REDACTED], or any other program other than the one at [REDACTED]. The Parents were satisfied with the Student’s progress at [REDACTED], and doubted whether the Student would make the same progress elsewhere. They re-enrolled the Student at [REDACTED] on August 10, 2023, two days after the CEPT meeting, paying a nonrefundable \$ [REDACTED] enrollment fee to [REDACTED]. Parents Ex. 35, p. 0002. Per the terms of that Enrollment Agreement, the Parents obligated themselves to pay [REDACTED] tuition per the terms of their enrollment agreement. The terms of that agreement were unambiguous – payment was due on a schedule, and there was no evidence that the Parents sought to change the terms of that agreement in the event that an acceptable placement was found. Although neither the Parents or [REDACTED] could produce an executed contract, the absence of such an agreement is self-serving – the agreement to enroll and pay tuition was set in motion on August 10, 2023, and it telegraphed their intentions not to participate in any program established by the HCPSS. This intention was furthered by the Parents “ghosting” [REDACTED] (Parents Ex. 27) and then seeking tuition reimbursement from [REDACTED] days before school started. Parents Ex. 31.

The Parents did not prove that the HCPSS failed to offer the Student an appropriate placement for the 2023-2024 school year that could implement the services and programming the Student required, thereby denying him a FAPE.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that

1. The HCPSS did not fail to provide the Student ESY services for the 2023-2024 ESY or deny him FAPE for that summer;
2. The HCPSS did not fail to have an IEP in effect when the school year started or failed to offer an appropriate alternative; and
3. The HCPSS offered the Student an appropriate placement for the 2023-2024 school year that could implement the services and programming the Student required.

ORDER

I **ORDER** that the Parent's Complaint is DISMISSED.

July 3, 2024
Date Decision Issued

Marc Nachman
Administrative Law Judge

MN/sh
#212213

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) (Supp. 2023). 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 To:

[REDACTED]

Ashley VanCleaf, Esquire

[REDACTED]

David Burkhouse, Esquire
Pessin Katz Law, P.A.

[REDACTED]

[REDACTED]

[REDACTED]

██████████ AND ██████████,
PARENTS,
ON BEHALF OF ██████████,
STUDENT,
v.

BEFORE MARC NACHMAN,
AN ADMINISTRATIVE LAW JUDGE
OF THE MARYLAND OFFICE
OF ADMINISTRATIVE HEARINGS
OAH No.: MSDE-HOWD-OT-23-31522

HOWARD COUNTY PUBLIC SCHOOL
SYSTEM

FILE EXHIBIT LIST

I admitted the following exhibits on behalf of the Parents:

| | |
|----------------|---|
| Parents Ex. 1 | Curriculum Vitae (CV) ██████████ |
| Parents Ex. 2 | CV ██████████ |
| Parents Ex. 3 | Email from ██████████, January 28, 2019 |
| Parents Ex. 4 | [Not admitted] |
| Parents Ex. 5 | IEP, June 20, 2020 |
| Parents Ex. 6 | Email from the Parent, November 23, 2020 |
| Parents Ex. 7 | ██████████, Quarter 4 Report Card, June 2021 |
| Parents Ex. 8 | [Not admitted] |
| Parents Ex. 9 | IEP, February 19, 2021 |
| Parents Ex. 10 | IEP Notes, February 19, 2021 |
| Parents Ex. 11 | The Student's work, March 29, 2021 (only page 11-0016 was admitted) |
| Parents Ex. 12 | ██████████ Testing, April 15, 2021 |
| Parents Ex. 13 | IEP, May 26, 2021 |
| Parents Ex. 14 | Email from ██████████, HCPSS, June 15, 2021 |
| Parents Ex. 15 | Representation Letter from Parents' counsel, February 16, 2023 |
| Parents Ex. 16 | Consent for Assessments, March 30, 2023 |
| Parents Ex. 17 | Prior Written Notice, March 30, 2023 |
| Parents Ex. 18 | [Not admitted] |
| Parents Ex. 19 | Educational Assessments, April 2023 |
| Parents Ex. 20 | Prior Written Notice, May 26, 2023 |
| Parents Ex. 21 | IEP, June 13, 2023 |
| Parents Ex. 22 | [Not admitted; no document was marked for identification and submitted] |
| Parents Ex. 23 | Prior Written Notice and Supplements, June 2023 |
| Parents Ex. 24 | ██████████ response to unilateral placement, August 26, 2023 |
| Parents Ex. 25 | Prior Written Notice, August 8, 2023 |

| | |
|-----------------|---|
| Parents Ex. 26 | [Not admitted, but identical to HCPSS Ex. 31] |
| Parents Ex. 27 | [Not admitted] |
| Parents Ex. 28 | [Not admitted] |
| Parents Ex. 29 | CEPT ¹ Letter, August 25, 2023 |
| Parents Ex. 30 | Email from [REDACTED], August 25, 2023 |
| Parents Ex. 31 | Emails between the Parent and [REDACTED], August 26, 2023 |
| Parents Ex. 32 | [REDACTED], March 2024 |
| Parents Ex. 33 | [REDACTED] Report Cards [only pages 33-0003 through 0015] |
| Parents Ex. 34 | [REDACTED] Data (without pages 0032-0043) ² |
| Parents Ex. 35 | [REDACTED] Payments [page 34-0001 withdrawn, but marked for identification] |
| Parents Ex. 36 | [Not admitted] ³ |
| Parents Ex. 37 | [Not admitted] |
| Parents Ex. 38 | HCPSS 2023-2024 calendar |
| Parents Ex. 39 | [REDACTED] standards |
| Parents Ex. 40 | [Not admitted] |
| Parents Ex. 41 | [Not admitted] |
| Parents Ex. 42 | [Not admitted] |
| Parents Ex. 43 | [Not admitted] |
| Parents Ex. 44 | [Not admitted] |
| Parents Ex. 45 | [Not admitted] |
| Parents Ex. 46 | [Not admitted] |
| Parents Ex. 47 | [Not admitted] |
| Parents Ex. 48 | [Not admitted] |
| Parents Ex. 49 | [Not admitted] |
| Parents Ex. 50 | [Not admitted] |
| Parents Ex. 51 | [Not admitted] |
| Parents Ex. 52 | MANSEF ⁴ entries regarding [REDACTED] |
| Parents Ex. 53 | IDA Recognized Programs |
| Parents Ex. 54 | [Not admitted] |
| Parents Ex. 55 | Roster of [REDACTED] Special Education Teachers |
| Parents Ex. 56 | [Not admitted] |
| Parents Ex. 57 | Woodcock Johnson (WJ) Manual Chapter 3 |
| Parents Ex. 58 | WJ Manual Chapter 5 |
| Parents Ex. 58A | MANSEF listing for [REDACTED] |
| Parents Ex. 58B | MANSEF listing for [REDACTED] |
| Parents Ex. 59 | WJ Approval Email |

¹ Central Education Placement Team.

² See TR. V2 (Pages 342:18 to 343:8).

³ This exhibit was not admitted into evidence, and counsel for HCPSS objected to its inclusion in the record. I have nevertheless included the document in the record but have neither reviewed it nor considered any part of it, as Mr. Burkhouse suggests that it involves a proposed settlement, which is not admissible in evidence.

⁴ Maryland Association of Nonpublic Special Education Facilities.

I admitted the following exhibits on behalf of the HCPSS:

| | |
|--------------|--|
| HCPSS Ex. 1 | Psychological Evaluation, August 1, 2019 |
| HCPSS Ex. 2 | WJ IV Score Report, June 26, 2019 |
| HCPSS Ex. 3 | Educational Evaluation, August 7, 2019 |
| HCPSS Ex. 4 | [Duplicate of HCPSS Ex. 3] |
| HCPSS Ex. 5 | Reading A-Z, January 15, 2021 |
| HCPSS Ex. 6 | Progress Report, April 14, 2021 |
| HCPSS Ex. 7 | Oral Reading, March 5, 2021 |
| HCPSS Ex. 8 | IEP Meeting Report, March 26, 2021 |
| HCPSS Ex. 9 | 50 High Frequency Words Assessment, April 12, 2021 |
| HCPSS Ex. 10 | ██████ Test Results and Recommendations, April 15, 2021 |
| HCPSS Ex. 11 | [Not admitted] |
| HCPSS Ex. 12 | IEP Meeting Report, May 26, 2021 |
| HCPSS Ex. 13 | Maryland Transfer/Withdraw Notification, June 9, 2021 |
| HCPSS Ex. 14 | [Not admitted] |
| HCPSS Ex. 15 | [Not admitted] |
| HCPSS Ex. 16 | E-mail from ██████████, March 24, 2023 |
| HCPSS Ex. 17 | Teacher Report for Student, March 28, 2023 |
| HCPSS Ex. 18 | [Not admitted] |
| HCPSS Ex. 19 | [Not admitted] |
| HCPSS Ex. 20 | [Not admitted] |
| HCPSS Ex. 21 | [Not admitted] |
| HCPSS Ex. 22 | [Not admitted] |
| HCPSS Ex. 23 | 2022-2023 School Year ████████ Data |
| HCPSS Ex. 24 | [Not admitted] |
| HCPSS Ex. 25 | [Not admitted] |
| HCPSS Ex. 26 | [Not admitted] |
| HCPSS Ex. 27 | [Not admitted] |
| HCPSS Ex. 28 | [Not admitted] |
| HCPSS Ex. 29 | [Not admitted] |
| HCPSS Ex. 30 | E-mails between the ██████████ and ██████████, August 24, 2023 |
| HCPSS Ex. 31 | E-mail between the Parent and ██████████, August 21-23, 2023 |
| HCPSS Ex. 32 | [Not admitted] |
| HCPSS Ex. 33 | [Not admitted] |
| HCPSS Ex. 34 | CV ██████████ |
| HCPSS Ex. 35 | CV ██████████ |
| HCPSS Ex. 36 | CV ██████████ |
| HCPSS Ex. 37 | CV ██████████ |
| HCPSS Ex. 38 | CV ██████████ |
| HCPSS Ex. 39 | Camp Enrollment Form, dated December 4, 2022 |
| HCPSS Ex. 40 | ██████ raw test data |

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|--------------|-------------------------------|
| HCPSS Ex. 41 | invoice, dated April 11, 2024 |
| HCPSS Ex. 42 | Inventory |
| HCPSS Ex. 43 | Special Needs Assessment |
| HCPSS Ex.44 | Excerpts from WJ manual |