

XXXX XXXX,

STUDENT

v.

HOWARD COUNTY PUBLIC

SCHOOLS

*** BEFORE MARY SHOCK,**

*** AN ADMINISTRATIVE LAW JUDGE**

*** OF THE MARYLAND OFFICE**

*** OF ADMINISTRATIVE HEARINGS**

*** OAH No: MSDE-HOWD-OT-13-45116**

*** * * * ***

DECISION

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ORDER

STATEMENT OF THE CASE

On November 26, 2013, [Father] and [Mother] (Parents), on behalf of their child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the identification, evaluation, or placement of the Student by Howard County Public Schools (HCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1415(f)(1)(A) (2010).

On December 4, 2013, the parties agreed in writing to waive the resolution meeting. 34 C.F.R. § 300.510(a)(3)(i). On December 4, 2013, the parties moved that I determine the Student's educational placement during these proceedings.

On December 6, 2013, I held a telephone conference. Wayne Steedman, Esquire, represented the Parents. Jeffrey A. Krew, Esquire, represented HCPS. HCPS requested a hearing on the issue of the Student's current educational placement; the Parents agreed.

On December 13, 2013, I held a hearing at the HCPS office. Mr. Steedman represented the Parents. Mr. Krew represented the HCPS. On December 18, 2013, I issued a decision finding that the Student's educational placement during the pendency of these proceedings was the [School 1] in [City 1], Maryland.

Based on the availability of the attorneys and the parties' witnesses, the hearing was scheduled for January 9, 10, and 31, 2014, and February 4, 5 and 6, 2014.¹ The hearing dates requested by the parties fell more than forty-five days after the December 4, 2013 written notice of waiver of the resolution meeting, which would have been January 18, 2014. As such, a decision could not be issued within forty-five days as required by the federal regulations. 34 C.F.R. §§ 300.510(b)-(c), 300.515(a) (2013). Accordingly, the parties waived the forty-five day requirement and agreed that I would issue a decision within thirty days from the close of the record. 34 C.F.R. § 300.515(c); Md. Code Ann., Educ. § 8-413(h) (2008). The record closed on February 6, 2014, and the decision is due by March 7, 2014.

On the dates scheduled, but for February 5, 2014, I held a hearing on the merits at the HCPS office. Mr. Steedman represented the Parents. Mr. Krew represented the HCPS.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.511(a) (2013); Md. Code Ann., Educ. § 8-413(e)(1); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; the Maryland State Department of Education procedural regulations; and the Rules of Procedure of the Office of Administrative Hearings. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2013); COMAR 13A.05.01.15C; COMAR 28.02.01.

¹The hearing scheduled for February 5, 2014, was cancelled due to inclement weather.

ISSUES

1. Was there a delay from October 22, 2012 to February 5, 2013, in transferring the Student from placement in the [Program 1] ([Program 1]) program to placement in the [School 1] program at [School 2]?
2. If so, did the delay interfere with the provision of a Free Appropriate Public Education (FAPE) to the Student?
3. Did HCPS commit any procedural errors in developing the October 21, 2013 Individualized Education Program (IEP) because HCPS:
 - a. predetermined the Student's placement;
 - b. failed to reach a consensus among team members on placement;
 - c. excluded the Parents from participation because it amended the IEP without the Parents' input; and/or
 - d. deferred determination of eligibility and services for the Extended School Year (ESY)?
4. If HCPS committed any procedural errors did those errors significantly impede the Parents' right to participate in the decision-making process, or interfere with the provision of a FAPE to the Student?
5. Does the October 21, 2013 IEP with placement at the [Program 2] program at [School 2] provide the Student with a FAPE?
6. If the delay, procedural errors, and/or placement at the [Program 2] program under the October 21, 2013 IEP interfered with the provision of a FAPE to the Student, or does not provide a FAPE, is the [School 1] in [City 1], Maryland, an appropriate placement?

SUMMARY OF THE EVIDENCE

Exhibits²

The Parents submitted the following documents:

- P-1A IEP, November 22, 2011
- P-2 [Program 1] Staffing Notes, February 15, 2012
- P-3 Assistive Technology Trial Summary, February 15, 2012
- P-4 IEP Amended, March 21, 2012
- P-7 Annual Goals Progress Report, January 20, 2012 to July 19, 2012
- P-9 Collaborative Evaluation Report, HCPS, October 15, 2012
- P-10 IEP, October 22, 2012
- P-11 IEP Goals, June 6, 2012
- P-12 IEP Team Meeting Report, November 27, 2012
- P-13 IEP Team Meeting Report, January 9, 2013
- P-14 IEP Amended, January 9, 2013
- P-16 IEP Amended, June 5, 2013
- P-17 IEP Team Meeting Report, June 5, 2013
- P-19 Progress Report of IEP Goals, June 5, 2013
- P-21 IEP Team Meeting Report, June 12, 2013
- P-24 IEP Amended, July 30, 2013
- P-27 IEP Draft, October 14, 2013
- P-28 IEP, October 21, 2013
- P-30 IEP Team Meeting Report, October 21, 2013
- P-40 Curriculum Vitae, XXXX XXXX, M.A., Speech and Language Pathology, Board Certified Behavioral Analyst
- P-41 Curriculum Vitae, XXXX XXXX, M.S. Education, Board Certified Behavioral Analyst
- P-42 Curriculum Vitae, XXXX XXXX, M.A., Special Education
- P-44 Curriculum Vitae, XXXX XXXX, M.A., Speech Language Pathology
- P-46 Central Education Placement Team, Developmental and School History, December 5, 2012

HCPS offered the following documents:

- B-1 IEP Team Meeting Report, September 5, 2012
- B-4 IEP, October 22, 2012
- B-5 Letter from Parent to XXXX XXXX, HCPS, November 27, 2012
- B-6 IEP Amended, January 9, 2013
- B-7 Letter from XXXX XXXX, [School 1], to HCPS, February 1, 2013
- B-9 IEP Team Meeting Report, June 5, 2013
- B-10 IEP Amended, June 12, 2013

²I admitted or excluded documents as numbered by the parties. Gaps in the exhibit numbers means that the party did not offer that numbered exhibit.

- B-11 [School 1], Functional Behavioral Assessment, July 8, 2013
- B-12 IEP Amended, July 30, 2013
- B-13 [School 1], Behavior Intervention Plan, July 31, 2013
- B-14 Current Assistive Technology/Communication Status, XXXX XXXX, M.A., October 14, 2013
- B-16 IEP, October 21, 2013
- B-17 Proposed Transition Plan, November 8, 2013
- B-18 Emails, between XXXX XXXX, HCPS, and Parent, November 18, 2013
- B-19 Behavior Intervention Plan Checklist, November 18, 2013
- B-20 Frequency Data Graphs, September 4, 2013 to November 13, 2013
- B-21 Letter from [School 1], November 25, 2013
- B-25 Email from HCPS attorney to Parents' attorney, December 6, 2013
- B-26 Email from HCPS attorney to Parents' attorney, December 9, 2013
- B-27 [School 2], Program/Service Descriptions, 2013-2014 School Year
- B-28 [Program 2] Program Component Checklist, July 2013
- B-29 [Program 2] Program, Power Point, undated
- B-30 [Program 2] Training Outline, August 19 to December 4, no year provided
- B-31 The XXXX Institute, Description, December 13, 2013
- B-32 [School 1], 2013-2014 School Year Calendar
- B-33 HCPS, 2013-2014 Approved School Calendar
- B-34 Chart, [School 1] and HCPS School Days, 2013-2014 School Year
- B-35 Feedback Re Assistive Tech Report, XXXX XXXX, Special Education Teacher, HCPS, undated
- B-38 XXXX Clinic, Effective Teaching Procedures Evaluation Form, undated
- B-39 XXXX Clinic, Natural Environment Teaching Evaluation Form, undated
- B-40 Curriculum Vitae, XXXX XXXX, M.S., Early Childhood Special Education
- B-41 Curriculum Vitae, XXXX XXXX, M.Ed., Early Childhood Education and Early Childhood Special Education
- B-42 Curriculum Vitae, XXXX XXXX, M.S., Special Education
- B-43 Curriculum Vitae, XXXX XXXX, SLP.D.
- B-44 Curriculum Vitae, XXXX XXXX, M.S., Special Education
- B-47 Curriculum XXXX XXXX, B.S., Accounting
- B-48 Excluded
- B-49 Curriculum Vitae, XXXX XXXX, B.S., Photographic Imaging and Digital Arts
- B-50 Physical Dimensions of [School 2] Classrooms, undated
- B-51 Excluded
- B-52 Email from Parent to HCPS, January 16, 2014
- B-53 Email from Parent to HCPS, January 28, 2013
- B-56 Email from [School 1] to Parents, July 26, 2013
- B-58 Email from [School 1] to Parents, November 25, 2013
- B-61 Chart of Student's Progress, October 31, 2012 to October 21, 2013

Testimony

The Parents presented the testimony of the following:

1. XXXX XXXX, M.Ed., Special Education Teacher, HCPS
2. XXXX XXXX, M.A., Special Education, accepted as an expert in special education
3. XXXX XXXX, M.S., Instructional Facilitator, HCPS
4. XXXX XXXX, M.A., Speech Language Pathology, accepted as an expert in speech language pathology
5. XXXX XXXX, M.A., Speech and Language Pathology, Board Certified Behavioral Analyst, accepted as an expert in SLP, autism, Applied Behavioral Analysis/Verbal Behavioral Analysis (ABA/VBA)
6. XXXX XXXX, M.S. Education, Board Certified Behavioral Analyst, accepted as an expert in special education, with an emphasis on autism and ABA/VBA
7. XXXX XXXX, Consultant, [School 1]
8. [Mother], Student's mother

HCPS presented the testimony of the following:

1. XXXX XXXX, M.Ed., Special Education Teacher, HCPS, accepted as an expert in special education and autism
2. XXXX XXXX, M.S., Autism Specialist, HCPS, accepted as an expert in special education and autism
3. XXXX XXXX, M.S., Instructional Facilitator, HCPS, accepted as an expert in special education with an emphasis on placement of special needs children
4. XXXX XXXX, SLP.D., Speech Language Pathologist, HCPS, accepted as an expert in SLP
5. XXXX XXXX, M.S., Behavior Specialist, HCPS, accepted as an expert in special education, autism, and behavioral programming for special needs children

FINDINGS OF FACT

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

1. The Student is a seven-year-old boy, born on XXXX, 2006. (P-1A.)
2. The Student is diagnosed with autism. (P-1A.)
3. The Student's disability affects him in the areas of: articulation, expressive and receptive language; cognitive/intellectual functioning; social/emotional functioning; fine motor skills; sensory motor skills; and attention/concentration. (P-1A, 10, and 28.)

4. The Student has been eligible for special education and related services since he began school.

5. The Student first received services under an Individual Family Service Plan. Beginning 2010, he began receiving services under an IEP. His goals and objectives generally address the areas of: language, early literacy and articulation; communication; personal and social development; mathematical thinking; personal care/toileting; fine motor strength and dexterity; and self-management. (P-1A and P-28.)

6. In school, the Student exhibits the following behaviors: tantrums – continuous crying or screaming; aggression – hitting, scratching, pinching, kicking, hair-pulling; and sensory – covering eyes and placing fingers in ears. (B-11.) He also drops to the floor and throws objects.

7. On November 22, 2011, the IEP team held an annual review of the Student's program. The team determined that the Student would receive instruction in the general education setting for eleven hours a week and outside the general education setting for thirteen hours a week. The team placed the Student in the [Program 1] program at [School 3]. (P-1A.)

8. On March 21, 2012, the IEP team met and found that the Student was eligible for ESY. (P-4.)

9. By June 8, 2012, the Student was showing increased verbal stimulation, increased grabbing and throwing, and decreased attention to task compared to the previous semester. He was responding to yes-no questions in the natural environment with less consistency. On July 19, 2012, the Student's vocalizations remained unintelligible. (P-7, p. 2 of 9.)

10. From January 20, 2012 through July 19, 2012, during the 2011-2012 school year and the ESY program, HCPS staff found that the Student was making sufficient progress to meet his annual goals. (P-7.)

11. In October 2012, when the Student was five years old, turning six on XXXX, 2012, HCPS conducted assessments to determine the Student's current levels of functioning in the areas of cognitive development, personal and social development, communication, fine and gross motor skills, and adaptive skills. (P-9.)

12. In October 2012, the Student demonstrated the following levels and skills (P-9):

- a. Literacy – skills at the 1-2 year-old age level, with scattered skills to 2-3 year old level;
- b. Mathematical Thinking – skills at the 2-3 year-old level, with scattered skills at the 3-4 year-old level;
- c. Personal and Social Development – delay in social interaction skills and atypical social behaviors;
- d. Communication – severe speech and language delays in all areas of communication;
- e. Fine Motor – skills scattered from 3-4 year-old level;
- f. Gross Motor (Sensory Processing and Self-Regulations) – problems with touch, body awareness, balance and motion, planning and ideas; and
- g. Adaptive – skills from borderline to extremely low range.

13. On October 22, 2012, the IEP team held a meeting to review the assessments. (P-10.)

14. On October 31, 2012, IEP team held the annual review. The Student had progressed or regressed on his goals during the first semester as follows (P-10):

- a. Academic: Early Childhood Skills
 - i. Language and Literacy – mastered one out of four objectives
His mean length of utterance had regressed from 2.5 to 1.5
 - ii. Alternative/Augmentative Communication Skills – regressed using Assistive Technology (AT), a 32-cell voice output device
 - iii. Mathematical Thinking – mastered one out of three objectives
 - iv. Personal and Social Development – mastered two out of six objectives

- b. Academic: Speech – Articulation, Speech and Language – achieved goal of giving his name, but unintelligible, achieved goal of following two step directions, regressed in attention to task and responsiveness to instruction, regressed in independent vocabulary
- c. Physical: Physical Development and Health
 - i. Fine Motor – able to hold a fat marker in fingertip grasp, button with minimal to moderate assistance
 - ii. Sensory – problems with coordinated movement
 - iii. Physical Therapy – accesses the educational environment independently, walks up and down stairs in school and on the playground
- d. Behavioral: Self-Management/Behavior – demonstrates negative behaviors including throwing, body dropping, grabbing or scratching, attention to task decreased from an average of 90% to 60-70%.

15. The team continued the meeting to November 27, 2012. (P-12.)

16. At the November 27, 2012 meeting the IEP team developed goals and objectives for the Student. In addition to the supports set out in the previous IEP, dated November 22, 2011, the IEP team added: work tasks interspersed with reinforcing activities; child led/instructor directed play; access to one-on-one table work throughout the day; tactile cuing; and capturing and contriving motivating opportunities to encourage speech production. (P-1A and P-10.)

17. At the November 27, 2012 meeting the team decided to refer the placement decision to the HCPS Central Education Placement Team (CEPT) because the Student was not progressing in the [Program 1] program. (P-12.)

18. After the November 27, 2012 IEP team meeting, HCPS staff began to implement the IEP developed on that date.

19. On January 9, 2013, the CEPT met and determined that the Student's proper placement was in the [School 1] program at [School 2]. (P-13.)

20. [School 1] is a private school in [City 1], Maryland. The [School 1] program offers comprehensive services for children with autism and related communication disorders.

During the 2012-2013 school year the [School 1] program operated in partnership with HCPS at [School 2], a public school.

21. On January 18, 2013, HCPS staff reported that the Student was making sufficient progress on his IEP goals. (P-19.)

22. The Student began attending the [School 1] program at [School 2] on February 5, 2013.

23. On March 28, 2013, [School 1] program staff reported that the Student was making sufficient progress to meet his IEP goals. (P-19.)

24. On June 5, 2013, the IEP team met to review the Student's IEP. While in the [School 1] program, the Student was making sufficient progress to meet the following goals: speech and language articulation; receptive language; multi-modal communication system; and fine motor. The Student was not making sufficient progress to meet the following goals: mathematical thinking; interaction with others; prewriting; and self-regulation. (P-19.)

25. On June 5, 2013, the IEP team decided to conduct a Functional Behavioral Analysis (FBA) and develop a Behavior Intervention Plan (BIP) for the Student. (P-17.)

26. On June 5, 2013, the team revised the goals and objectives and determined that the Student was eligible for ESY services. The Student did not attend an ESY program at HCPS because he was enrolled in the [School 1] program, which ran for twelve months. (P-16.)

27. On June 12, 2013, the CEPT team met to review the Student's IEP and placement. The team considered that the [School 1] program would not be offered at [School 2] for the 2013-2014 school year. The team considered placing the Student in the [Program 2] program at [School 2], a HCPS program modeled on the [School 1] program. The team rejected that action based on the short time the Student had been in the [School 1] program and because he had not

had enough time to mand-pair³ in the program. The team placed the Student in the [School 1] program at [City 1]. (P-21.)

28. The Student began attending [School 1] at [City 1] on August 26, 2013.

29. By October 21, 2013, the Student achieved his fine motor goal. He was not making sufficient progress to meet the following goals: articulation; receptive language objectives; multi-modal form of communication systems; mathematical thinking; interaction with others; self-regulation; and prewriting. (B-12.)

30. On October 21, 2013, the IEP team met for the annual review of the Student's program. The team developed an IEP that provides that the Student will have the following (P-28.):

- a. Special considerations and accommodations: BIP; visual independent work system; maintenance system for mastered skills; follow-through on demands; introduction of new skills one-on-one; mixing and varying instructional demands; data tracking and reviews; adult support; manipulatives and/or sensory activities; encourage/reinforce appropriate behavior; adaptive equipment; sensory diet; access to communication support system; AT consult, 32-cell voice output device and/or language board; support for school staff; and parent counseling and/or training.
- b. Goals and objectives in the areas of: speech and language articulation; communication; early literacy; mathematics; social interaction skills; behavior – self management; fine motor; and physical – independent community living.
- c. Services: classroom instruction outside general education setting 26 hours, 15 minutes a week, occupational therapy (OT) one hour a week, and speech language (SL) therapy two hours a week, all outside the general education classroom for 46 weeks.

31. The HCPS [Program 2] program first opened for the 2013-2014 school year. Services available in the [Program 2] program at [School 2] include special education instruction

³ “Pair” means to become familiar with a teacher so the teacher can exert instructional control. “Mand” means to communicate wants and needs. See Discussion below.

and related services, including physical therapy (PT), OT, SL therapy, a behavior specialist and an AT team. (B-27.)

32. [School 2] is a self-contained special education public day school. The [Program 2] program classroom and the [School 2] are accessible to the Student.

33. Both the [Program 2] and [School 1] programs use the ABA/VBA method.

34. The [School 1] program in [City 1] is in session twelve months of the year and is approximately twenty-eight miles from the Student's home.

35. The [Program 2] program is in session eleven months of the year. [School 2] is approximately six miles from the Student's home.

36. On October 21, 2013, members of the IEP team determined that the Student's proper placement was in the [Program 2] program at [School 2]. The team did not reach a consensus on placement. (P-28.)

37. On October 21, 2013, the IEP team reviewed the criteria for ESY eligibility and determined that the Student was eligible for ESY services. (P-30.) The ESY section of the IEP states that the ESY "Decision Deferred." (P-28.)

38. On November 7, 2013, XXXX XXXX, Autism Specialist with HCPS, developed a transition plan for the Student for his move to the [Program 2] program. The plan called for the [Program 2] staff to: observe the Student at [School 1]; meet with [School 1] staff; review current data; provide the Parents with registration materials; meet with the family to discuss the Student's transition; encourage the Parents to observe the [Program 2] program; and review a list of the Student's reinforcers and preferred items and purchase items as appropriate. (B-17.)

39. As part of the Student's transition plan, HCPS authorized payment to a [School 1] staff member to accompany the Student to [Program 2] for his first day in the program in order to support the Student in acclimating to the new environment. (B-21.)

DISCUSSION

I. Background.

The Student is a seven-year-old boy with autism. He has received special education and related services since he began school. He requires one-on-one instruction. To make educational progress, he must "pair" with his teachers and service providers, which means that he must become familiar with them so they can exert the instructional control required to teach him skills. His communication deficits require that he learn to "mand," which is to communicate his wants and needs either through vocalizations, low-tech word boards, or high-tech devices like a 32-cell voice out-put device. The Student's behavior of tantrums, throwing, dropping to the floor, and screaming interferes with his learning. He requires sensory breaks.

In October 2012, HCPS conducted assessments for the Student's three-year evaluation for special education eligibility. 20 U.S.C. § 1414(a)(2)(B)(ii). The IEP team met on October 22, 2012, October 31, 2012, and November 27, 2012. The team determined that the Student was regressing rather than progressing in his placement and referred the placement decision to CEPT. On January 9, 2013, the CEPT team, headed by XXXX XXXX, Instructional Facilitator, HCPS, decided to transfer the Student to the [School 1] program, a private school housed at [School 2], a public school. HCPS had entered into a partnership with [School 1] for the school to provide its program in the county. On February 5, 2013, the Student transferred to the [School 1] program.

The Student remained in the [School 1] program at [School 2] through August 2, 2013, when that program was no longer offered through HCPS. On June 12, 2013, before the end of the

program at [School 2], the IEP team met and decided that the Student should attend the [School 1] program in [City 1] through the remainder of his October 2012 to October 2013 IEP. Then the team would discuss all placement options. (P-21.) The Student entered the [School 1] program at [City 1] on August 26, 2013.

On October 21, 2013, the IEP team met. HCPS staff was represented by two people, Ms. XXXX and XXXX XXXX, Autism Specialist. The Student's mother, [Mother] (Parent), attended the meeting with XXXX XXXX, the Parents' consultant. [School 1] staff attended. HCPS staff determined that the [Program 2] program at [School 2] was an appropriate placement for the Student. The Parent disagreed. [School 1] staff did not offer an opinion on the appropriateness of the placement because none of its members had seen the [Program 2] program. The October 21, 2013 IEP offers the Student placement in the [Program 2] program. The IEP states that the team had deferred a decision on the Student's eligibility for ESY.

The Parents filed a request for due process hearing alleging that: the delay in transferring the Student to [School 1] interfered with the provision of a FAPE; HCPS predetermined placement, failed to reach a consensus on placement, amended the IEP without their knowledge, and improperly deferred the ESY decision; and the IEP with placement in the [Program 2] program fails to offer the Student a FAPE. The Parents maintain that the [School 1] program is appropriate for the Student and they request that HCPS fund the private placement. The Parents bear the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005).

II. Legal Framework.

The IDEA provides every disabled child the right to a FAPE, which is defined as special education and related services that: are provided at public expense, under public supervision; meet the standards of the State educational agency; include appropriate education; and are

provided in conformity with the child's IEP. 20 U.S.C.A. § 1401(9)(2010). An IEP is substantively satisfactory if it is "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

An educational agency is required to have an IEP in effect for each disabled child by the beginning of the school year. 20 U.S.C. § 1414(d)(2)(A). The IEP must include a statement of the special education and related services, and supplemental aids and services to be provided a student. The IEP must also include a statement of the program modifications or supports for school personnel that will be provided for the child. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

Additionally, the IEP must state the projected date for the beginning of the services and modifications described, and the anticipated frequency, location, and duration of those services and modifications. 20 U.S.C. § 1414(d)(1)(A)(i)(VII).

In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself. Expanding the scope of a school district's offer to include what is not stated, for example, the location of services, undermines the important policies served by the requirement of a formal written offer, namely, creating a clear record of the educational placement and other services offered to the parents. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007) (IEP must include location of services).

The IEP team must include the parents, a regular education teacher, a special education teacher, an individual who can interpret the instructional implications of evaluation results, related services personnel as appropriate, the student as appropriate, and a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction, is knowledgeable about the general education curriculum, and "is knowledgeable about the availability of resources of the local educational agency." 20 U.S.C. §

1414(d)(1)(B). Finally, the local educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. 20 U.S.C. § 1414(e).

In addition to the IDEA's requirement that a disabled child receive educational benefit, the law mandates that the child be placed in the "least restrictive environment" (LRE). This means that, ordinarily, disabled and non-disabled students should be educated in the same classroom. 20 U.S.C.A. § 1412(a)(5)(A) (2010). The LRE provisions of the federal regulations also provide that a child's educational placement should be as close to the child's home as possible. 34 C.F.R. § 300.116(b)(3).

The IDEA further provides procedural safeguards to insure the full participation of parents and proper resolution of substantive disagreements. *School Committee of Burlington v. Dep't of Ed. of Massachusetts*, 471 U.S. 359, 368 (1985). As is relevant here, those safeguards include the opportunity of parents with a disabled child to participate in meetings with respect to the identification, evaluation and educational placement of the child. 20 U.S.C.A. § 1415(b)(1). Before relief may be granted for a procedural violation, however, there must be showing that the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. 20 U.S.C.A. § 1415(f)(3)(E)(ii).

On the issue of predetermination of IEP decisions, courts have found that school personnel can prepare for IEP meetings and that preparation is not synonymous with predetermination. While the law prohibits a school system from forcing an IEP on parents, school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action as long as they are willing to listen to the parents and the parents have the

opportunity to make objections and suggestions. *M.C.E. v. Board of Ed. of Frederick Co.*, 57 IDELR 44 (U.S. District Ct., Md. (2011)).

Finally, if a school district fails to offer a student a FAPE either substantively or due to procedural errors, it must fund an appropriate private placement. An appropriate private placement is one that can provide the student a FAPE. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993).

III. ISSUES.

1. Was there a delay from October 22, 2012 to February 5, 2013, in transferring the Student from placement in the [Program 1] program to placement in the [School 1] program at [School 2]?

The Parents maintain that the Student lost educational benefit and regressed between the time of the IEP team meeting on October 22, 2012, when the team determined that the Student's needs could no longer be met in the [Program 1] program, and his transfer to [School 1] on February 5, 2013.

As two related issues, the Parents argue that because the team did not have a member who could commit resources for a private placement at the October 22, 2012 meeting, the IEP team composition failed to comply with the law. Additionally, because the October 22, 2012 IEP was not completed at the time of the annual review, the IEP was not developed in accordance with the law.

First, the law does not require that an IEP team include a member authorized to commit district resources for private placement. Instead, there must be a member who is knowledgeable about the availability of resources of the local educational agency. 20 U.S.C. § 1414(d)(1)(B). There is no evidence that the October 22, 2012, October 31, 2012, or November 27, 2012⁴ teams

⁴In this decision I will refer to the IEP that the team developed on October 22, 2012, October 31, 2012, November 27, 2012, and January 9, 2013, as the October 22, 2012 IEP.

lacked such a member. The Parents have failed to show a violation of IDEA based on the composition of the IEP team.

Second, as stated above, an educational agency is required to have an IEP in effect for each disabled child by the beginning of the school year. 20 U.S.C. § 1414(d)(2)(A). There is no evidence that the Student will not have an IEP for the beginning of the 2014-2015 school year, or that he did not have an IEP by the beginning of the 2013-2014 school year. Maryland regulations provide that an IEP team must meet to develop and IEP within thirty days of an evaluation and the team must meet at least annually to review and revise the IEP. COMAR 13A.05.01.08A(1) and B(1). The regulations do not state, as the Parents argued, that an IEP must be finalized within thirty days of the meeting to review assessments or the annual review meeting. Instead, the IEP team must meet, which occurred in this case. The Parents have failed to show a violation of the law because an IEP was not finalized within thirty days of re-evaluation based on the assessments or by the date of the annual review.

On the issue of the delay, the evidence demonstrates that the IEP team met on October 22, 2012 to review the Student's assessments. The team reconvened on October 31, 2012 for the annual review. The team met again on November 27, 2012 to continue the annual review and made the referral to CEPT at that time. On January 9, 2013, CEPT met. On February 5, 2013, the Student began in the [School 1] program.

HCPS sought to place the responsibility for the delay on the Parents for failing to submit a questionnaire, and on the [School 1] program for failing to accept the Student until February 1, 2013. No one explained the reason for the delay from November 27, 2012 to January 9, 2013, except that the holidays fell during that period. As discussed above, while the law does not preclude the HCPS's system of referring placement decisions to CEPT, that system has a built-in

risk of delay; the IEP team must reschedule and reconvene to decide what could have been decided at the original IEP team meeting. Thus, HCPS bears the responsibility for the delay. The Parents established that from October 22, 2012 to February 5, 2013, there was a delay in transferring the Student from the [Program 1] program to the [School 1] program.

2. Did the delay interfere with the provision of a FAPE to the Student?

Although HCPS is responsible for the delay in transferring the Student to the [School 1] program, the Parents are not entitled to relief because they failed to prove that the delay interfered with the provision of a FAPE to the Student.

The Parents argue that the Student suffered educational detriment because he remained in an inappropriate program for several months. HCPS contends that staff implemented the Student's October 22, 2012 IEP up until the Student's transition to the [School 1] program and he made progress on his goals during that time. Thus, the delay did not interfere with the provision of a FAPE to the Student.

XXXX XXXX, M.Ed., Special Education Teacher, HCPS, accepted as an expert in special education and autism, testified that the Student was beginning to progress on the October 22, 2012 IEP goals and objectives. She was the Student's teacher. She stated that before transfer to [School 1], HCPS provided the Student a high level of intensive teaching and support. Ms. XXXX noted that the team had made changes including providing more one-on-one instruction, less time in large groups, and more sensory breaks. By January 18, 2013, the staff had five weeks of data and the Student was making minimal but sufficient progress to meet his goals by the end of the IEP period. However, the [Program 1] program could not sustain that level of one-on-one instruction and HCPS continued to have concerns with the Student's overall growth, so the CEPT placement decision went forward. (T. 109-110 and 924-925.)

XXXX XXXX, M.S., Autism Specialist, HCPS, accepted as an expert in special education and autism, testified that after the November 27, 2012 IEP team meeting, staff increased the Student's one-on-one instruction, decreased his time in large groups, and increased his sensory breaks. She stated that it is unusual for [Program 1] to provide so much one-on-one instruction, so the Student could not continue in that program even though he had begun to progress on achieving his goals. (T. 976-977.)

The Parents contend that minimal progress on January 18, 2013, as Ms. XXXX described, is not meaningful educational benefit. However, I believe Ms. XXXX was describing annual progress as of that date, after the first semester of school, rather than reciting the IDEA legal standard that a student must make more than trivial progress in order to receive a FAPE. *See, Polk v. Central Susquehanna*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). The Student had made minimal but sufficient progress in order to meet his annual goals. With increased one-on-one instruction and smaller groups, the Student was receiving meaningful educational benefit under the October 22, 2012 IEP.

Additionally, the evidence in this case shows that on March 28, 2013, after transfer to [School 1], the Student was continuing to make sufficient progress on his goals. (P-19.) Only on June 5, 2013, did [School 1] staff report that the Student was not making sufficient progress on some of his goals. (P-19.) I cannot attribute that later lack of progress in June 2013 to the earlier delay in transfer when there was an intervening period of progress at [School 1]. The Parents failed to prove that the delay in transferring the Student interfered with the provision of a FAPE.

3. **Did HCPS commit procedural errors in developing the October 21, 2013 IEP because HCPS:**
 - a. **predetermined the Student's placement;**
 - b. **failed to reach a consensus among team members on placement;**

- c. **excluded the Parents from participation because it amended the IEP without the Parents' input; and/or**
- d. **deferred determination of eligibility and services for ESY?**

The Parents maintain that HCPS committed procedural errors in developing the October 21, 2013 IEP because it predetermined placement, failed to reach a consensus on placement, amended the IEP without the Parents' input, and failed to determine if the Student was eligible for ESY services for the summer of 2014.

Conversely, HCPS contends that staff did not predetermine placement, that a consensus is not required, that it did not amend the IEP, and that the decision to defer ESY was a scrivener's error. Moreover, HCPS argues that the Parents did not show that the alleged procedural violations impeded their right to participate in the process or interfered with the provision of a FAPE to the Student.

a. Predetermination.

The Parents alleged that HCPS, specifically, Ms. XXXX, determined that the Student would be placed at [Program 2] before the October 21, 2013 meeting. They point to Ms. XXXX's remarks at the June 12, 2013 meeting where she stated that that [Program 2] staff could implement the Student's IEP at that time. After the team determined that the Student should attend [School 1] at [City 1] beginning in August 2013, Ms. XXXX stated that placement would be discussed again at the annual review in October 2013. (P-21.)

The Parent testified that many things were different at the October 21, 2013 IEP team meeting. First, the team went through each and every goal and objective and Ms. XXXX asked very specifically if the Student met the objective. That had never been done in an IEP meeting before. Also, Ms. XXXX was in attendance. The Parent stated that she always associated Ms. XXXX's attendance with a placement change. Ms. XXXX had been present at the meeting

where the team decided to move the Student into the [Program 1] program and she was also at the meeting where the team decided to move the Student from [Program 1] to the [School 1] program. (T. 797-798.)

Additionally, the Parent stated that at the October 21, 2013 meeting there were lengthy discussions about the IEP, yet when it came time to talk about placement, the discussion was very short. Ms. XXXX went through the different options and when she came to [Program 2], Ms. XXXX said that [Program 2] was the appropriate placement. (T. 798.)

Finally, the Parent testified that she expressed concerns with the change in placement at the October 21, 2013 meeting. She stated that she was concerned that the Student would have to transition for a third time in less than a year to another program. Again, he would lose time and be required to learn a new system. She testified that Ms. XXXX dismissed her input by stating that [Program 2] could implement the IEP and that the Parent was allowed to disagree. Ms. XXXX stated that if the Parent disagreed, she had certain rights, and she gave the Parent a Parents' Rights booklet. (T. 798-799.)

XXXX XXXX, M.S. Education, Board Certified Behavioral Analyst, accepted as an expert in special education, with an emphasis on autism and ABA/VBA, testified for the Parents. She is the Director for Educational Services at [School 1]. She attended the October 21, 2013 meeting. Ms. XXXX believed that placement was predetermined because there was no discussion of whether it would be appropriate to move the Student at that time. However, she went on to testify that she raised her concern that the Student would have to move again and that he had not had a consistent educational program and placement for a full year. (T. 695-696.)

XXXX XXXX, M.S., Instructional Facilitator, HCPS, accepted as an expert in special education with an emphasis on placement of special needs children, denied predetermining the

Student's placement. She considered what the Parent said about transitions, but found that the Student had made successful transitions in the past and that [Program 2] could implement his IEP. (T. 373 and 387, 1084-1085.) Ms. XXXX further testified that because the IEP team would discuss the [Program 2] program at the meeting, she invited Ms. XXXX as a member of the [Program 2] staff. (T. 1086.) Ms. XXXX testified on cross-examination that she had not seen the [Program 2] program by October 21, 2013, although she had participated in some development meetings. (T. 1099.)

Although Ms. XXXX may have had a pre-formed opinion about the appropriateness of the [Program 2] program on October 21, 2013, there is no evidence that she did not listen to the Parents and other team members as she did on June 12, 2013, or that the Parents did not have an opportunity to make objections and suggestions. *M.C.E. v. Board of Ed. of Frederick Co.*, 57 IDELR 44 (U.S. District Ct., Md. (2011)). By the Parent's own testimony, she raised her objections to a third transfer within a year and Ms. XXXX heard the Parent's suggestion that the Student remain at [School 1] in [City 1]. Ms. XXXX also heard Ms. XXXX's concerns with transferring the Student after he had just come to [City 1]. As a result, HCPS complied with the requirements of the law. The Parents failed to prove that HCPS predetermined placement.

b. Consensus.

The Parents failed to point to any statute, regulation, or case law that provides that failure of a team to come to a consensus on the terms of an IEP is a procedural error. Rather, the procedural safeguards of IDEA, for example, mediation and due process hearings, are in place because the cooperative IEP development approach of the law will not always produce a consensus. *Burlington v. Dep't of Ed. of Massachusetts*, 471 U.S. at 368. The Parents failed to

prove that HCPS committed a procedural error because the team did not arrive at a consensus on placement.

c. Amended IEP.

The Parent testified that HCPS changed an October 14, 2013 draft IEP by omitting in the October 21, 2013 IEP, a statement describing how the Student's disability affects his learning. (P-27 and P-28.) She testified that the statement is significant because it describes how the Student reacts to his surroundings and the difficulties he experiences with noise and large groups, which in turn, is relevant to whether the [Program 2] program is appropriate. The Parent testified that Ms. XXXX stated that the language was not appropriate for an IEP, but did not explain why. (T. 791-795.)

While it is accurate that a statement of how the Student's disability affects his learning was omitted from the October 21, 2013 IEP, there is no evidence that the statement was removed after the meeting and without the Parents' knowledge. Instead, the Parent knew of the change and questioned the omission. The Parents failed to prove that HCPS committed a procedural violation by amending the IEP without the Parents' input.

d. ESY Deferred.

The HCPS's failure to document ESY eligibility is an error. The first question is whether it is a substantive or procedural deficiency. As stated above, a court generally must limit its consideration to the terms of the IEP itself. Expanding the scope of a school district's offer to include what is not stated, for example, ESY services, undermines the important policies served by the requirement of a formal written offer. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d at 682.

XXXX XXXX, M.A., Education Director for the [School 1] program, accepted as an expert in special education, testified that she attended the October 21, 2013 IEP team meeting

and performed the task of entering information in the IEP on the computer. The IEP was projected on the wall so the team could see the entries. (T. 196.) Generally, when an IEP is complete, Ms. XXXX asks HCPS if she can close the document. The IEP is final when it is closed. On the Student's October 21, 2013 IEP, Ms. XXXX stated that she did not enter "Decision Deferred" in the ESY section. Instead, the team addressed the questions on the form and determined that the Student qualified for ESY services. (T. 197-198.) Ms. XXXX testified that Ms. XXXX stated at the meeting that the ESY decision should be deferred and she told her not to close the IEP because she had to put her notes into the document. (T. 202-203.)

Ms. XXXX testified that she attended the October 21, 2013 meeting as part of the [School 1] staff. She understood that the Student was eligible for ESY services, but that such services might not be applicable if the Student was in a twelve-month program. (T. 684.)

Ms. XXXX testified that the team discussed ESY at the October 21, 2013 meeting and determined that the Student was eligible. The IEP team meeting report states that ESY was approved. (P-30.) Ms. XXXX stated that she could not explain how the "Decision Deferred" notation was entered onto the IEP. (T. 388-389.) She explained that the IEP was on the Maryland online system rather than the HCPS system because [School 1] could only gain access to the document if it was on the Maryland system. She stated that she did not close the IEP. Instead, she emailed [School 1] that the document was ready to close. (T. 389-390.)

The evidence demonstrates that the team discussed ESY on October 21, 2013 and found the Student eligible for services. The team went through the eligibility criteria. The Student had been eligible in past years, and the exact services for the summer had been identified in the spring, nearer the ESY period so the teachers could address goals and objectives particularly relevant for the Student's progress. (P-4 and P-16.) In the October 21, 2013 IEP, ESY was not

denied. Unlike the IEP in *A.K.*, where the school district intentionally failed to provide a location for services, deferring ESY in this case was an error. It was not a deficiency in what HCPS offered, but an error in the procedure by which the team developed or conveyed the IEP. Therefore, the ESY deferral was a procedural error and the Parent's must prove educational harm.

4. If HCPS committed any procedural errors did those errors interfere with the provision of a FAPE to the Student?

ESY services for the summer 2014 have not yet occurred. There is no evidence that the Student has lost any educational benefit as a result of the team's failure to include ESY eligibility and services on the October 21, 2013 IEP. The Parents failed to prove that the ESY error interfered with the provision of a FAPE to the Student.

5. Does the October 21, 2013 IEP with placement at the [Program 2] program at [School 2] provide the Student with a FAPE?

The Parents challenge the IEP developed at the meeting on October 21, 2013 with placement in the [Program 2] program. They contend that in order to receive a FAPE, the Student must be enrolled in a twelve-month program, like the [School 1] program. The Student cannot be out of school for more than two weeks at a time and cannot have different teachers and settings for the summer, as happens with ESY services through HCPS. Additionally, during the summer, the [School 1] program would address all the Student's goals, not just a selected few, again, like ESY services through HCPS.

In addition to the summer transition encompassed in ESY, the Parents contend that the October 21, 2013 IEP fails to offer the Student a FAPE because it requires him to move to a different school after he has been moved from [Program 1] to [School 1] at [School 2] to [School

1] at [City 1]. Transitioning the Student again, they allege, would result in the Student's inability to receive educational benefit going forward.

Further, the Parents maintain that the [Program 2] program cannot implement the IEP because staff cannot execute the VBA method with fidelity. Also, the Parents note that the October 21, 2013 IEP states the duration of services is 46 weeks. [Program 2] only runs for 36 weeks, plus four weeks for ESY. Thus, HCPS is unable to implement an IEP calling for a 46-week program in 40 weeks.

The Parents also note that HCPS was concerned with the fifty goals and objectives identified by [School 1] staff in the October 21, 2013 IEP. HCPS staff stated that, if necessary, the team could meet and reduce the goals. The Parents argue that those remarks show that HCPS is writing an IEP to fit the [Program 2] program rather than the Student.

Finally, the Parents argue that the [School 2] is not a facility in which the Student will be able to learn.

HCPS maintains that [Program 2] is able to implement the IEP, that VBA is a method it uses, and that if the Student requires a twelve-month program in order to receive educational benefit, the team can approve services for those months.

The parties do not otherwise dispute the appropriateness of the goals and objectives or services set out in the October 21, 2013 IEP.

a. Twelve-Month Program.

The Parents' main argument is that the [Program 2] program cannot provide the Student with a FAPE because it is not a twelve-month program. The Parents presented the testimony of [School 1] staff to establish that, based on the nature and extent of the Student's disability, he has extreme difficulty with transitions. As a result, he loses educational ground during school breaks.

He requires a consistent setting, with the same teachers and services providers and he must work on all his goals year-round in order to progress.

Ms. XXXX testified that four weeks for ESY, with a long break until the beginning of the school year, is insufficient for the Student. The longest break at [School 1] is approximately two weeks. If the Student were without instruction for a number of weeks, he could potentially regress. (T. 208.) Additionally, in Ms. XXXX's opinion, if staff only addressed some of the Student's goals during the summer, rather than all his goals, then the Student would not maintain his skills. (T. 205.) Ms. XXXX testified that the program at [School 1] is the same in the summer as during the school year; therefore, Student would work on all his goals and have no transitions.

XXXX XXXX, M.A., accepted as an expert in SLP, is the Student's SL therapist at [School 1]. In her opinion, it would not be in the Student's best interest to miss SL therapy during the summer. (T. 473.) She stated that the Student's suffers from apraxia of speech and he requires frequent, intense SL therapy. (T. 473.) Ms. XXXX based her opinion on her experience with the Student after he returned from a two-week Thanksgiving break; he was unable to do some things he could do before the break. (T. 469-470.) Additionally, Ms. XXXX stated that when the Student moved to [School 1] at [City 1], it took him four months to become accustomed to her. Thus, it is her opinion that if the Student had a different SL therapist in the summer, it would take four or five weeks for the Student to become acquainted with the different therapist and arrive at a working level such that she experiences with the Student. (T. 479.)

Ms. XXXX stated that the Student requires a twelve-month program. He is a learner who is performing multiple years below age expectations and has a difficult time transitioning to new environments or recouping skills even after a short break. She feels that he needs year-round programming to make appropriate progress and to be constantly achieving goals and objectives.

(T. 705.) In Ms. XXXX's opinion, if ESY services involve a change of provider and setting, then ESY could be a terrible waste of time for the Student. (T. 706.)

XXXX XXXX, M.A., Speech and Language Pathology, Board Certified Behavioral Analyst, was accepted as an expert in SLP, autism, ABA/VBA, testified that especially for early learners, it is imperative that they have consistency with the teaching environment and their teachers. In her opinion, if the Student does not have consistency and if he is pulled out, it would be detrimental to his progress. She testified that it takes awhile for the Student to develop rapport and for new instructors and new staff members to gain instructional control. (T. 637.)

While a twelve-month program with no changes in teachers or programming during the year may benefit the Student, the evidence does not support a finding that the Student will fail to make educational progress in a ten or eleven-month program, with the possibility of bridge services if required. The testimony of the Parents' witnesses was too general. While Ms. XXXX, Ms. XXXX and Ms. XXXX stated that they based their opinions on the time it took the Student to acclimate after the transition to [City 1] and after school breaks, they did not sufficiently explain how the Student was different from or similar to other students at [School 1], such that he would require a twelve-month program with no changes. Instead, all the witnesses agreed that children with autism have difficulty with transition.

With regard to Ms. XXXX's testimony, there is some question of whether she has the experience and first-hand knowledge of the Student that would make her opinion reliable. Ms. XXXX never taught a special education class where she was not supervised, and she only taught as a certified special educator for three months. (T. 170-171.) She was not the Student's teacher at [School 1], and she never evaluated him or gathered any data. (T. 225-226.) Eighty to ninety percent of her duties at [School 1] are administrative; she spends one to two hours a week in the

classroom. (T. 246-247.) With that background, I found her testimony insufficient to prove that the Student would regress in a ten-month program or that the Student must work on all his goals and objectives during the summer or he would fail to make educational progress in the following school year.

Ms. XXXX's testimony was more persuasive. I believed her testimony that she worked with the Student for four months before he became used to her. Yet, Ms. XXXX has only known the Student since August 2013. She does not know how the Student reacted to changes in SL therapists in previous years. Her testimony that because the Student has apraxia of speech he requires intensive SL therapy was too general. She did not state specifically why or if the nature and extent of the Student's condition made him different or similar to other children with apraxia. I believe it is more likely than not that Ms. XXXX would testify that all children with apraxia require frequent intense SL therapy.

Additionally, Ms. XXXX's opinion was expressed in answer to questions based on no services over the summer. For example, she was asked if she could offer an opinion on whether the Student would require SL services to be "continued through the summer." (T. 469.) Also, she was asked if the Student would be able to meet his goals and objectives if he "did not receive services over the summer of 2014." (T. 270.) The form of the questions made Ms. XXXX's opinions vague.

Ms. XXXX was also a good, straightforward witness. However, her testimony that the Student requires a twelve-month program in the same setting because he requires consistency was too general. Again, I believe it is more likely than not that she would say the same of most autistic children. If she would not, then she failed to explain why and failed to sufficiently differentiate the Student from other students. Significantly, [School 1] is a twelve-month

program, so the staff and/or management must believe that a year-round program is required or, at least, is best for students with autism and communication disorders. Ms. XXXX and the other [School 1] staff did not testify, for example, that not all of their students have the Student's profile or have his severity of profile, not all require the twelve-month program, and not all have difficulty with transitions such that they would regress or not progress after a break.

I was left with the impression that the witnesses from [School 1] and Ms. XXXX believe that all children with autism require a twelve-month program, because they are children with autism. That testimony fails to prove that a shorter program with ESY would not provide the Student, specifically, with a FAPE.

The Parents also argue that by October 22, 2012, after the Student had participated in an ESY program, he had regressed. Thus, the Student will regress again if re-enrolled in a HCPS program with ESY. While the evidence does establish that the Student had regressed by October 22, 2012, and he had been in an ESY program during the summer of 2012, there were suggestions of difficulty before the summer break. For example, Ms. XXXX testified that before and during the summer of 2012, the teachers and service providers had noticed and documented some concerns with the Student's progress. (T. 128.) The Student's progress notes corroborate that testimony. For example, on June 8, 2012, Ms. XXXX noted that the Student was responding to yes/no questions in the natural environment with less consistency. On that same date, the Student's SL therapist stated that the Student had shown an increase in verbal stimulation, grabbing, and throwing, and a decrease in attention to tasks. (P-7.) On June 8, 2012 and July 19, 2012, staff noted, as it had consistently noted, that the Student's vocalizations were unintelligible; he was making little progress in that regard. (P-7).

Also, as noted above, on March 28, 2013, after the Student transferred to [School 1], he was making sufficient progress on his goals. (P-19.) By June 3, 2013, however, and without any breaks or transitions, [School 1] staff reported that the Student was not making sufficient progress on some of his goals. (P-19.) The evidence demonstrates that Student's progress or lack of progress is variable and regression or lack of progress is not consistently tied to breaks and transitions alone.

I find that the evidence is insufficient to prove that the regression the Student's displayed by October 2012, is tied specifically to ESY services and the summer break. The evidence fails to establish that if the Student has a four-week break during the summer of 2014, he will be unable to make educational progress during the 2014-2015 school year.

b. Transitions.

[School 1] staff agreed that the Student experienced a period of transition when he came to [City 1]. Ms. XXXX, for example, stated that the Student had tantrums when transferred to [School 1]; he experienced difficulty paring with his one-on-one instructor, he was not motivated and he required a lot of prompting. Ms. XXXX estimated that it took three weeks for the Student to settle down after the transition. (T. 212, 214-216.)

Ms. XXXX testified that she met the Student when he came to [School 1] at [City 1] on August 26, 2013. She provides the Student two hours SL therapy a week. Initially, the Student threw objects at least five to ten times per session. He dropped to the floor, had tantrums, and screamed. Those behaviors decreased over time. (T. 438-441.) Ms. XXXX stated that it took approximately four weeks for the Student to adjust to her. (T. 460.) Moving him would interrupt the momentum she has been able to build with the Student. (T. 463-464.)

Ms. XXXX, however, first met the Student on August 26, 2013, when he came to [School 1] at [City 1]. She could not gauge how the Student had responded to transitions in the past, for example, from [Program 1] to [School 1] at [School 2]. She could not state whether his initial behavior was different or worse than on previous transitions.

Ms. XXXX testified that it took the Student approximately two weeks to start mastering objectives or targets at a rate that was at all similar to what he had been doing previously. (T. 698.) Ms. XXXX explained the relatively short two-week adjustment period. She stated that on the move to [City 1], the Student's environment did change, but one of his two instructors and his OT provider remained the same. Also, staff packed up all of his teaching materials and took them to [City 1]; so the Student had the same teaching materials that he had at [School 2]. (T. 701-702.) On cross-examination, Ms. XXXX acknowledged that if the Student returned to [School 2], the Student would already know the school and would know Ms. XXXX. (T. 728.)

Ms. XXXX testified that on the move from [Program 1] to [School 1] at [School 2], staff did not report any problems with the Student's transition. (T. 1070-1071.) On the Student's transfer to [School 1] at [City 1], Ms. XXXX stated that she believed the Student would have the same teacher. Instead, he had a new teacher. (T. 1074-1075.) He also entered a new school at a different location, further from his home. Yet, he made a relatively good transition. (T. 1085.) Thus, he is equipped to transition back to [School 2]. (T. 412.)

Additionally, Ms. XXXX testified that HCPS took steps to assist the Student's transition, drawing up a transition plan and arranging for a [School 1] staff member to accompany the Student to the [Program 2] program for the first day of school. (T. 1095-1096.) (B-17 and B-21.)

Ms. XXXX stated that she was not aware of any difficulty with the Student moving from [Program 1] to [School 1] at [School 2], when nothing was the same. (T. 989-990.) He also was

progressing at [School 1] at [City 1] when she observed him at school on October 1, 2013. (T. 1011.)

While [School 1] staff noted that the Student took several weeks to settle after he began school on August 26, 2013, there is also evidence that his behavior was erratic throughout the year and interfered with his progress. (B-20.) Also, by October 21, 2013, eight weeks after the Student came to [School 1] at [City 1] and a month after the initial four-week transition period, he was not making sufficient progress on a number of his goals. (B-12.) None of the witnesses from [School 1] tied that lack of progress to the Student's transition from [School 1] at [School 2] to [School 1] at [City 1]. The [School 1] staff did not address the cause of the lack of progress by October 21, 2013 and state whether it was due to the August 26, 2013 transition, the manner in which [School 1] is implementing the IEP, or some other reason.

As stated above, the witnesses agree that it is very typical for students with autism to have difficulty transitioning and that transitions result in a potential regression of skills and a resurgence of behaviors that may have been eliminated. That difficulty cannot be erased, but it does not mean that the Student cannot transition.

The Parents are concerned that the Student has made three moves in one year. Their concerns are certainly legitimate; that many moves would be difficult for any student. HCPS, however, has proposed a transition plan and transition services to assist the Student. Similar to the [School 1] transition technique of packing up teaching materials and moving them with the Student, the HCPS plan includes purchasing the Student's reinforcers and preferred items for use at [Program 2]. The transition plan also calls for observations of the Student and a series of meetings with [School 1] staff, [Program 2] staff, and the Parents. (B-17.) Finally, transition services include funding for a [School 1] staff member to accompany the Student to school on

his first day at [Program 2]. (B-21.) HCPS's plan is reasonably calculated to lessen the impact of the transition on the Student.

The Parents failed to present sufficient evidence to show a pattern of regression or increased negative behaviors with transitions such that the Student would be unable to receive educational benefit from attending the [Program 2] program with the transition plan and services in place.

c. [Program 2] Program.

The parties agree that the Student responds well to VBA. Ms. XXXX testified that she observed both the [School 1] and [Program 2] programs. She found that the [Program 2] program was not an effective VBA program. She based her opinion on her observation of a manding session where she saw an instructor forcefully presenting two food choices to a student who did not want either. (T. 631-633.) In Ms. XXXX's opinion, if the actions she observed at [Program 2] were used with the Student, the strategies would not allow him to develop communication skills. (T. 634.)

Ms. XXXX observed the program for only one hour, but she stated that was sufficient time to form an opinion. If a program is following VBA, the components of that program should be performed all the time, during every hour, and she would have observed VBA during that hour if staff was properly implementing VBA. (T. 633-634.)

On cross-examination, Ms. XXXX stated that her hour observation concerned whether [Program 2] staff was performing VBA properly, not whether [Program 2] can implement the Student's IEP. (T. 645.) She also testified that she only observed an instructor, not the teachers in the program. She did not know if the instructor she observed was implementing the student's

IEP. (T. 645-646.) With regard to the Student, she did not see his FBA or BIP. (T. 653-654.) She did not know anything about ESY services through HCPS. (T. 661.)

Ms. XXXX testified that at the October 21, 2013 meeting [School 1] staff expressed no opinion in response to Ms. XXXX's and Ms. XXXX's position that [Program 2] was an appropriate placement. They could not speak to the appropriateness of the placement because they had not observed the program. They had no real knowledge of the program beyond a cursory explanation of what the program was going to entail. (T. 695-696.) Ms. XXXX stated that she had not seen the [Program 2] program and could not testify whether the program was appropriate or not. (T. 723.)

Ms. XXXX testified for HCPS that [Program 2] can implement the Student's IEP. She described the program stating that there is a limit of six students in the program, each with a one-to-one aide or instructor. A SL therapist is in the classroom three days a week, two hours on Monday and Wednesday, and four hours on Friday. There is an OT. There is a support team for the program that includes a behavior specialist, an autism specialist, and an instructional facilitator. Instruction takes place in the natural environment. (T. 38-42.) The program uses other rooms besides the [Program 2] classroom including a motor room, activity room, and sensory room. Staff also uses the hallways, the playground and outside spaces. (T. 45.) Staff undergo training, including VBA training. (T. 52.)

Ms. XXXX testified that she developed the [Program 2] program, with parent groups, to replicate the services available in the [School 1] program. (T. 990-991 and 994.) The program uses intensive teaching trials, natural environment, and data collection, which is critical to any VBA program. (T. 994 and 996.) She stated that staff is trained in VBA and she described ongoing training. (T. 997-999.)

Also, Ms. XXXX testified that [Program 2] is now an eleven-month program running five weeks during the summer, five days a week, for the full day. There is no reduction in the students' goals and objectives during that time. (T. 1004-1005.) Ms. XXXX stated that all the program components to implement the Student's IEP are in place at [Program 2]. (T. 1023.).

Ms. XXXX also stated that the [Program 2] program will run for five weeks, for full days. If the Student requires additional services, bridge services are available. She stated that there is a four-week break during the summer if there are no bridge services. (T. 1083-1084.)

XXXX XXXX, SLP.D., Speech Language Pathologist, HCPS, accepted as an expert in SLP, testified that she observed the Student at [School 1]. She stated that from a SL perspective, the [Program 2] program is capable of implementing the Student's IEP. It can work on the goals and objectives, provide services required, and provide AT as it relates to the Student's SL goals. (T. 1144-1145.)

XXXX XXXX, M.S., Behavior Specialist, HCPS, accepted as an expert in special education, autism, and behavioral programming for special needs children, testified concerning [Program 2] staff training. She stated that she trains staff in implementing BIPs, teaches them how to respond to behaviors using modeling sessions, coaching sessions with contemporaneous feedback through a microphone system, independent practice, data collection, and follow-up. (T. 1181-1182.)

In Ms. XXXX's opinion, [Program 2] can implement the Student's IEP and he will make meaningful educational progress in the program. (T. 1090-1092.) Additionally, the staff is able to implement the Student's BIP. (T. 1092.) It will document the Student's behavior using antecedent-behavior-consequence (ABC) data, for a minimum of two weeks, and then review the

IEP and BIP. Ms. XXXX testified that [Program 2] staff is trained in implementing BIPs using fidelity checklists. (T. 1230-1231.)

The Parents failed to prove that [Program 2] staff cannot implement VBA effectively and with fidelity. Ms. XXXX's one hour observation was too short and she observed only one student and an instructor. As a result, I was not persuaded by her testimony that VBA strategies used by the [Program 2] staff would not allow the Student to develop communication skills. Instead, HCPS has a qualified staff that is trained in VBA and is able to provide the Student with the accommodations required under the IEP, teachers and instructors that are able to instruct the Student on his goal and objectives, and related service providers who are able to provide SL therapy and OT.

With regard to the duration of 46 weeks, the evidence demonstrates that the [Program 2] program will run for at least 41 weeks (36 weeks with five weeks ESY) with the possibility of bridge services to make up the 46 weeks. Thus, HCPS can offer a program 46 weeks in duration and it had not yet failed to do so. As a result, it is premature to find that HCPS failed to implement the IEP as written. The Parents cannot show, prospectively, that the HCPS failed to implement the IEP.

Also the Parents offered evidence that HCPS staff was concerned that [School 1] had included fifty goals and objectives in the IEP when the Student had been struggling with fewer goals. Ms. XXXX testified that she was concerned with the number of goals because the Student was not progressing on the fewer number under the previous IEP. (T 1021-1022.) As a result, staff would take data on the Student's progress on the fifty goals and objectives to determine if the IEP should be revised. (T. 1025-1026.) That approach is acceptable under the law where continual IEP review and revision is contemplated. 20 U.S.C. § 1414(d)(4).

Additionally, as the October 21, 2013 IEP now stands there are fifty goals and objectives, and the Parents failed to present evidence to prove that the [Program 2] program cannot implement that number of goals and objectives. Moreover, if HCPS intends to write the IEP to fit the [Program 2] program by reducing the goals, which I do not believe is the case, it has not done so yet. No relief is available for alleged prospective violations of IDEA.

Finally, IDEA requires that students be educated in the LRE and that distance to the child's school is one factor to consider when determining the LRE placement. Here, [School 1] at [City 1] is much farther away than [School 2], making [Program 2] a less restrictive environment.

The October 21, 2013 IEP provides for personalized instruction with sufficient support services to permit the Student to benefit educationally from instruction with placement in the [Program 2] program at [School 2].

d. [Program 2] Facility.

XXXX XXXX, a consultant at the [School 1] program at [School 2], testified for the Parents. She stated that at [School 2] she could hear staff members from other classrooms using profanity, and yelling and shouting at students. At times, this carried over into the classroom so much that the students would have difficulty hearing the instructors and interacting with other students. She stated that the noise was close to a treatment room that the Student needed to utilize because it was a room with few distractions. [School 1] staff could not use the room during times when it was too loud. (T. 768.)

Ms. XXXX also testified that she observed a staff member running after a student. The staff member grabbed the student by the shirt and then, as the student was resisting and went to bite, she slapped his hand. She reported the incident to the principal and to Child Protective

Services. (T. 769-770.)

The Parent testified that she observed a student outside [School 2] without shoes and socks or a coat, and it was winter. An aide was encouraging the student to board the bus. Another person came along and aggressively told the child to get on the bus. (T. 785-786.) In another instance, the Parent's mother was at [School 2] to pick up the Student when she observed two aides escorting a student between classrooms and they were having a long conversation about their weekend rather than paying attention to the child. (T. 786-786.)

With regard to the [Program 2] facility, the Parent testified that the classroom is too big with many students and teachers. If there are six students in the class, each with a one-on-one instructor, the teacher, and other service providers, the room is very crowded. The Parent testified that the Student could not learn in such a crowded room. Also, the school is shared with at least another hundred students. (T. 794.)

The Parent further explained that there is a kitchen in the classroom. The Student would be distracted by the water in the kitchen and the refrigerator door, which he would repeatedly open and close. All of those people, the noise, and the water nearby would be a distraction for the Student. (T. 805-807.)

Ms. XXXX testified concerning the classroom arrangement at [Program 2]. (T. 1175.) She stated that each area serves a different purpose. There are changes in presentation of different areas of the room so the students will know what will happen in each area. Ms. XXXX testified that in the back area of the kitchen there are cabinets used for teaching sensory and fine motor skills. The front of the kitchen is used for snack and lunch; it is a natural use of space. If the Student has difficulty with the kitchen, staff will look at the behavior first and then maybe alter the set-up. However, a kitchen is the part of any home and using a kitchen at school to teach

kitchen routines will help the Student generalize his behavior, which is consistent with VBA methods. (T. 1176-1178.)

The Parents failed to prove that [School 2] is a facility or building in which the Student's IEP cannot be implemented. The incidents described by Ms. XXXX and the Parent may be alarming, and I note that Ms. XXXX took the correct action by reporting the incident she witnessed, but the episodes do not mean that HCPS cannot implement the IEP at the school.

Significantly, [School 1] implemented its program at [School 2] through August 2, 2013. Despite Ms. XXXX's testimony about the noise, there is no evidence that the Student failed to make progress on his goals and objectives as a result, or did not receive SL therapy and OT during that time. Further, Ms. XXXX's did not give any dates for the occurrences she described. She did not explain how she knew specifically that the Student could not use a treatment room when she was not his teacher or services provider. Her testimony that teachers could be loud, without more, is insufficient to prove that the facility is defective or inaccessible.

Additionally, I found Ms. XXXX's testimony about the classroom areas persuasive and believe that staff could take steps if the kitchen proves a distraction for the Student. Finally, it is misleading to add up the number of students, teachers, instructors and related services providers to find that the classroom would be crowded. While it is possible everyone could be in the classroom at the same time, the evidence, for example, Ms. XXXX's testimony, establishes that the providers use different treatment rooms and spaces to teach the students.

6. If the delay and/or procedural error interfered with the provision of a FAPE to the Student, or if placement at the [Program 2] program under the October 21, 2013 does not provide a FAPE, is [School 1] in [City 1], Maryland an appropriate placement?

Because I have found that the delay and procedural error regarding ESY did not interfere with the provision of a FAPE to the Student, and because placement at the [Program 2] program

under the October 21, 2013 provides a FAPE to the Student, I will not address whether [School 1] at [City 1] is an appropriate placement.

CONCLUSIONS OF LAW

I conclude as a matter of law that:

1. There was a delay from October 22, 2012 to February 5, 2013, in transferring the Student from placement at in the [Program 1] program to placement in [School 1] program at [School 2], but the delay did not interfere with the provision of a FAPE to the Student. *Polk v. Central Susquehanna*, 853 F.2d 171 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989);
2. In developing the October 21, 2013 IEP, HCPS did not predetermine placement, improperly fail to reach a consensus on placement, or exclude the Parents from participation because it amended the IEP without their input. *School Committee of Burlington v. Dep't of Ed. of Massachusetts*, 471 U.S. 359 (1985); *M.C.E. v. Board of Ed. of Frederick Co.*, 57 IDELR 44 (U.S. District Ct., Md. (2011)); 20 U.S.C. § 1414;
3. In developing the October 21, 2013 IEP, HCPS committed a procedural error when ESY was deferred, but the error has not interfered with the provision of a FAPE to the Student. *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672 (4th Cir. 2007); 20 U.S.C. § 1414; and
4. The October 21, 2013 IEP with placement at the [Program 2] program at [School 2] provides the Student with a FAPE. *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); 20 U.S.C. § 1414.

ORDER

I **ORDER** that the Parent's request to have the Student placed at the [School 1] in [City 1] at Howard County Public Schools' expense is **DENIED**.

March 4, 2014
Date Decision Mailed

Mary Shock
Administrative Law Judge

MKS/kkc

REVIEW RIGHTS

Within 120 calendar days of the issuance of the hearing decision, any party to the hearing may file an appeal from a final decision of the Office of Administrative Hearings to the federal District Court for Maryland or to the circuit court for the county in which the student resides. Md. Code Ann., Educ. §8-413(j) (2008).

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

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