

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
October 17, 2013

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION (Revised)¹

**BACKGROUND AND
PROCEDURAL HISTORY**²

Student is a seventeen year-old young man, who presently is being detained by the Department of Youth Rehabilitation Services (“DYRS”). On August 2, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public Schools. On August 14, 2013, DCPS filed its Response to the Complaint.

The parties waived the Resolution Meeting on August 30, 2013. Therefore, the 45-day timeline began on August 31, 2013 and will end on October 14, 2013, which is the HOD deadline.

On September 17, 2013, the hearing officer conducted a prehearing conference and determined, in a September 20, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner’s Claims:*** (i) Alleged failure to timely and accurately provide evaluations/reevaluations in all areas of suspected disabilities; (ii) Alleged failure timely identify the seriousness of the emotional and deaf disabilities and other health impairment (“OHI”), with the result that Student deteriorated and continued to be repeatedly sent home early; (iii) Alleged failure to provide and implement an appropriate individualized education plan (“IEP”); and (iv) Alleged failure to provide an appropriate placement and location of services for Student, who is deaf, emotionally disturbed (“ED”) and OHI. ***DCPS Defenses:*** (i) DCPS disputes the allegations of the Complaint; (ii) DCPS has sufficiently evaluated Student in all areas of suspected disability, it developed an appropriate IEP and placement that addresses the concerns of Parent and the rest of the team, and the IEP is being appropriately implemented; (iii) Student was most recently placed at a DCPS senior high school and had a 30-day review on 6/3/13; (iv) The resolution session meeting on the initial Complaint was held on 8/13/13 and the parties are working together to resolve the matter; (v) Location of services is a purely administrative issue within the discretion of DCPS, and Student’s IEP can be implemented at the

¹ This HOD has been revised to correct the typographical error in Paragraph 1 of the Order by changing 6/13/12 to 1/13/12, and to correct the typographical errors in Paragraph 2 of the Order by inserting the phrase "for the remainder of SY 2013/14" after the word "placed" and inserting the word "facility" after the words "residential treatment."

² This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

proposed location; (vi) Student is currently being detained for behavior that is not school-related and there is no indication when he will be released; and (vii) The case is premature given that placement is being reevaluated. **Relief Requested:** (i) Placement in a full-time residential treatment center similar to the one that is the alternate private school; and (ii) compensatory education.

By their respective letters dated September 25, 2013, Petitioner disclosed eighty-two documents (Petitioner's Exhibits 1-82) and DCPS disclosed five documents (Respondent's Exhibits 1-5). Petitioner also disclosed three additional documents subsequent to the five-day disclosure deadline (Petitioner's Exhibits 83-85).

The hearing officer convened the due process hearing on October 1, 2013, as scheduled.³ All documents disclosed by DCPS were admitted into the record without objection. Petitioner voluntarily withdrew Exhibit 84, and the hearing officer excluded Petitioner's Exhibits 83 and 95 on DCPS's lateness objection; Petitioner's remaining documents were all admitted into the record.⁴

Thereafter, the parties requested permission to go off the record and engage in further settlement negotiations, and the hearing officer granted the request. Upon concluding that the parties were not going to settle the matter, the hearing officer resumed the hearing and allowed the parties to bypass opening statements so as to ensure the receipt of sufficient testimony. Thereafter, the hearing officer received testimonial evidence from Petitioner and adjourned the hearing for the day.

The hearing officer reconvened the hearing on October 3, 2013, as scheduled, and received additional testimonial evidence from Petitioner. After Petitioner had used all of the time allotted for its case, DCPS declined to present any witness testimony. The hearing officer allowed Petitioner to present the testimony of one additional witness, but the testimony was redundant of other testimony that had been provided by multiple witnesses. Thereafter, the hearing officer received closing statements and brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS fail to timely and accurately provide evaluations/reevaluations in all areas of suspected disabilities?
2. Did DCPS fail to timely identify the seriousness of the emotional and deaf disabilities and OHI?
3. Did DCPS fail to provide and implement an appropriate IEP?

³ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

⁴ DCPS attempted to lodge other objections to Petitioner's documents, but as the objections were raised for the first time at the hearing, the hearing officer overruled the objections as untimely.

4. Did DCPS fail to provide an appropriate placement and location of services for Student?

FINDINGS OF FACT⁵

1. Student is a seventeen year-old male, who presently is being detained by DYRS.
2. Student's most recent IEP is dated April 20, 2013. The IEP indicates that Student has multiple disabilities, and it requires Student to receive 24 hours per week of specialized instruction outside general education, 180 minutes per month of behavioral support services outside general education, and 30 minutes per month of occupational therapy consultation services.⁶
3. On September 6, 2013, DCPS convened an IEP meeting for Student and determined, *inter alia*, to update Student's IEP by changing the placement to provide for a residential placement. The team also clarified that Student's disabilities are Deafness (not hearing impaired), ED and OHI.⁷
4. Also on September 6, 2013, DCPS issued a Prior Written Notice ("PWN") that amended Student's IEP by changing his placement to a residential placement.⁸ However, as of October 2013 when the due process hearing for this case was held, DCPS had not yet assigned a residential placement for Student to attend.
5. Student has been diagnosed with bipolar disorder, not otherwise specified; attention deficit hyperactivity disorder; oppositional-defiant disorder; borderline intellectual functioning; and bilateral auditory impairment. Student was initially diagnosed as deaf at the age of 8 months old.⁹
6. Student's academic functioning is below grade level, as he currently functions on a second grade level.¹⁰
7. Student's most recent assessments include a March 4, 2013 psychological evaluation, a March 14, 2013 functional behavior assessment ("FBA"), and a June 12, 2013 behavior intervention plan ("BIP"). Student's previous assessments consisted of psychiatric and psychological assessments conducted in 2011.¹¹
8. Student struggles with feeling connected because of his hearing impairment. Student needs a residential placement facility that has a totally deaf or mostly deaf population, because he feels more connected in a more homogeneous population, and he engages more easily with peers and adults who sign. Moreover, such an environment will allow

⁵ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Petitioner's Exhibit 7; Respondent's Exhibit 4.

⁷ Petitioner's Exhibits 65-66.

⁸ Respondent's Exhibit 5.

⁹ Petitioner's Exhibit 9; testimony of Parent.

¹⁰ See Petitioner's Exhibits 2 at 6.

¹¹ Petitioner's Exhibits 8, 11-13.

Student to learn to function in and become proficient in the deaf environment before he transitions back to the hearing world.¹²

9. Student gets very upset when limits are set for him, and he tends to act out. Student has a mindset that he is entitled and deserves to be treated differently because of his hearing impairment, and this interferes with his ability to follow rules and feel connected.¹³
10. When Student was initially diagnosed as deaf at 8 months old, he was enrolled in a parent and infant program at an elementary school for the deaf. Thereafter, Student attended elementary school at the same school, where all of the students were deaf, most of the teachers were deaf, and all of the teachers used sign language. Student had friends at that elementary school and enjoyed attending there; however, his negative and aggressive behaviors resulted in his having to leave the school in 5th grade. The school stated that it could no longer meet Student's needs because of his behavior. Student's deaf peers from the elementary school have since gone on to a high school for the deaf and potentially are eligible to attend a university for the deaf. Student cannot attend the high school for the deaf because they are afraid of him due to his aggressive behaviors. Student will not be able to apply to attend the residential program on that campus until he exhibits good behavior for one to two years.¹⁴
11. After leaving the elementary school for the deaf, Student attended a private school, where he was provided with interpreters and was the only deaf student. Student then attended a DCPS middle school, where there were hard of hearing students and he was also provided with interpreters.¹⁵
12. At the start of SY 2011/12, Student was assigned to attend DCPS high school 1 for the first time. Student was placed in the deaf program, which included one deaf/blind student and two hard of hearing students, in addition to Student. Student had a counselor that he met with once per week at the school. He also had a signing teacher, who worked in the deaf program, and he was provided with interpreters for the mainstream classes he took. However, the work was too advanced for Student, he wasn't able to communicate with the other students, and having to constantly look back and forth between the interpreter and the teacher/board led to frustration and made Student tired. Over time, Student's anger began to surface.¹⁶
13. At the end of January 2012, Student's behavior had escalated to the point that he required emergency psychiatric hospitalization. On February 10, 2012, Student's insurance company moved him to an out-of-state residential treatment program. Student was placed at the residential program by a health services agency, not DCPS. At the time, Student's primary problem areas were physical aggression towards others and property destruction, and mood instability. Student was provided with educational services in the program. Student also received an IEP at the facility that required him to receive ASL interpreting services, specialized instruction, behavioral support services, occupational therapy services, and audiology services. There was a lot of fighting among the residents at the residential facility. Student's physical hygiene suffered while he was at the

¹² Testimony of director of social work; testimony of special education advocate/psychoeducator; testimony of community support worker.

¹³ *Id.*

¹⁴ Testimony of Student; testimony of Parent.

¹⁵ Testimony of Student.

¹⁶ Testimony of Student; testimony of Parent.

residential facility. His hair was unkempt, and he wasn't bathing or brushing his teeth regularly. Student remained at the program until his discharge on November 10, 2012. No IEP meeting was held prior to Student's discharge to determine what school he would attend after discharge. Subsequent to his discharge, Student went to the hospital and it was determined that he had feces backed up in his chest cavity and wrapped around his intestines.¹⁷

14. After his discharge from the residential program, Parent called DCPS high school 1 and was told that Student would have to attend his neighborhood school, which was DCPS high school 2. So, Parent took Student to DCPS high school 2. There was no offer of evaluations at that time. Student was the only deaf student at the school, and he was provided with interpreters. However, Student could not understand the teachers' explanations because everything was so quick and too advanced for him. Moreover, none of the staff was familiar with deaf culture, as Student was the first deaf student to attend the school. Student would get frustrated at the school and misbehave when he did not know how to do the work. However, when he began receiving academic assistance outside of school from social work interns trained in deaf instruction, he demonstrated marked improvement on his in-class assignments.¹⁸
15. On January 13, 2012, DCPS convened an MDT meeting for Student, at which it was determined (i) to change Student's disability to multiple disabilities for deafness and ED, (ii) to request a behavior specialist to work with the staff at DCPS high school 1 by providing professional development training with respect to Student's behavior challenges and to revise, if necessary, and implement Student's BIP, (iii) to assign a psychologist fluent in sign language and with knowledge about the deaf culture to provide direct service to Student twice per week for 30 minutes each session and to provide 15 minutes per week consultation with the social worker; and (iv) to provide Student with specialized time with the teacher of the deaf and hard of hearing.¹⁹
16. On March 18, 2013, DCPS convened another MDT meeting for Student. DCPS acknowledged Students below average ASL skills, below grade academic functioning, and his poor behavioral skills. DCPS recommended that Student be transferred to DCPS high school 1 because it is the only DCPS school with a deaf and visually impaired program. However, the staff at that school expressed concerns about how it would deal with Student's behavior issues. The team agreed that Student would not move to DCPS high school 1 until the staff there was properly trained. DCPS indicated that in the fall of 2013, Student will be provided with 2 interpreters at DCPS high school 1, that the school will have self-contained classrooms for the deaf and hard of hearing, as well as a Learning Lab, that each class will have two instructional aides, and that additional deaf culture specially trained staff will be deployed at the school. DCPS indicated that although it could not provide Student with two interpreters at the time of the meeting, Student would be provided with one adult interpreter at all times who would be trained in providing behavior supports. Student agreed to remain at DCPS high school 2 for the remainder of the current school year.²⁰

¹⁷ Petitioner's Exhibit 9-10, 27; testimony of special education advocate/psychoeducator; testimony of resource coordinator; testimony of Parent.

¹⁸ Testimony of Student; testimony of Parent; testimony of resource coordinator.

¹⁹ Petitioner's Exhibit 2 at 9-10.

²⁰ Petitioner's Exhibit 2 at 6-8.

17. Student returned to DCPS high school 1 in April of 2013. Student was once again placed in the deaf program with the one deaf/blind student and the two hard of hearing students who were there before. The signing teacher in the deaf program was still there as well, and Student was provided with interpreters for his mainstream classes. Student also received counseling at the school. Student was dismissed from school early on a fairly frequent basis at this high school – sometimes because he was pretending to be sick; other times, because the school staff would call Parent and say Student wouldn't go to class and couldn't be left walking the halls so they wanted to send him home. During one such early dismissal, Student and a friend were caught stealing at a mall. During this period, Student was also smoking synthetic marijuana.²¹
18. By June 2013, Student's behaviors began to escalate. He started receiving juvenile charges, some of which were due to medication adjustments. Then he was unable to participate in the summer job program because of a juvenile charge, which led to disappointment and further misbehavior. Eventually, student received a juvenile charge that landed him in a psychiatric facility in June 2013, but his behavior was so disruptive and out-of-control that he was eventually put out of the psychiatric facility and taken into custody by DYRS, where he presently remains.²²
19. On June 17, 2013, DCPS convened another MDT meeting for Student. Student's advocate suggested a therapeutic 1-on-1 who is certified in deaf and hard of hearing, and the team agreed to the suggestion. The team noted that an ideal situation for Student would be for him to attend a school with other deaf and ED students.²³
20. Student finds it easier to learn from teachers who use sign language. When the teacher does not sign and Student has to rely upon an interpreter, Student has to constantly look back and forth between the interpreter and the teacher, which gets tiring and makes it hard to take notes.²⁴
21. Student's emotional and social development issues have been exacerbated by the many school placements he has attended over the years. Moreover, some of the school placements were inappropriate, such as DCPS high school 2, where Student was enrolled in a traditional 9th grade curriculum despite the fact that he functions on a much lower level.²⁵
22. Student has been accepted to attend an out-of-state residential treatment facility that services deaf student with emotional and behavioral disorders (the "preferred private school"). All of the students in the facility have an educationally significant hearing problem. All the students sign, and the teacher signs and uses his voice as well, so that the students also gain experience with English. All the administrators and staff at the school sign, including the staff in the dining hall. The school offers a diploma track, and the students have access to a career center about a mile and a half from the school. The annual tuition for the school is approximately \$300,000.00 (Three Hundred Thousand Dollars) per year.²⁶

²¹ Testimony of Student; testimony of Parent; testimony of resource coordinator.

²² Testimony of Student; testimony of resource coordinator.

²³ Petitioner's Exhibit 2 at 2.

²⁴ Testimony of Student.

²⁵ Testimony of special education advocate/psychoeducator.

²⁶ Testimony of director at preferred private school.

23. Student has also been accepted to attend another out-of-state residential treatment facility that services students from 10 to 21 years old, twenty percent of whom are deaf (the “alternate private school”). The students at the school have a variety of issues ranging from drug/alcohol issues to abuse/neglect. Student would be assigned to live in a cottage designed for deaf and hard of hearing children. There are presently three deaf/hard of hearing boys and other hearing boys as well in the cottage, for a total of 11 students, but the numbers change due events such as graduation. The counselor and staff are all sign qualified, Student would have a certified deaf education teacher for his homeroom, and he would receive approximately 75% of his teaching through sign language. However, the facility is not a primary deaf facility, so Student will receive some instruction through an interpreter. The school does not have a specific job training program. The cost of the program is \$150 per day for school, \$165 per day for mental health services, and \$235 per day for residential. The program is in operation 365 days per year for purposes of residential and mental health services, and there are 200 to 255 school day per year. Hence, the total cost of the program would be approximately \$183,500 per year based on school year of 250 days.
24. Petitioner is requesting compensatory education in the form of a mentor to help Student when he transitions home from his residential facility for school breaks and to help Student reintegrate into the community and enter the workplace for the first six months after his discharge from his residential facility.²⁷

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner’s claims.

Evaluations/Reevaluations

A public agency must ensure that a reevaluation of each child with a disability is conducted if the agency determines a reevaluation is warranted based on the child’s educational or related services needs, or if the child’s parent or teacher requests a reevaluation. *See* 34 C.F.R. § 300.303(a). Such a reevaluation may not occur more than once a year unless the parent and public agency agree otherwise, and must occur at least once every 3 years unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b).

In the instant case, Petitioner contends that Student should have been reevaluated upon his discharge from the out-of-state residential treatment program in November 2012, and when he was moved from DCPS high school 2 back to DCPS high school 1 in April 2013. With respect to November 2012, however, Petitioner has failed to present any evidence whatsoever indicating that DCPS determined a reevaluation of Student was warranted at that time, or that either Parent or a teacher requested a reevaluation of Student at that time. Hence, there is no basis for holding

²⁷ Testimony of special education advocate/psychoeducator.

DCPS liable for failing to conduct a reevaluation of Student upon his discharge from the residential treatment facility. The same analysis applies with respect to Student's transfer from one DCPS high school to another in April 2013, and in addition the evidence reveals that Student had just received psychological and functional behavior assessments in March 2013. Under these circumstances, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

Alleged Failure to Identify the Seriousness of Student's Disabilities

With respect to this claim, Petitioner asserts that DCPS's failure to timely identify the seriousness of Student's emotional, deaf and OHI disabilities resulted in Student's deterioration, such that he was repeatedly sent home early from DCPS high school 1, and also resulted in improper programming because DCPS failed to follow the recommendations of Student's psychological evaluation regarding the need for sufficient interpreters, ASL instruction and behavior technicians.

Upon careful consideration of this claim, the hearing officer has determined that the portion of this claim alleging that Student was repeatedly sent home early from school will be better addressed in the analysis of claim number four alleging improper educational placements, and the portion of the claim alleging a failure to program in accordance with Student's psychological evaluation will be better addressed in the analysis of claim number three alleging an inappropriate IEP. As there is no other independent claim being asserted there, the hearing officer will proceed to Petitioner's remaining claims.

Provision and Implementation of an Appropriate IEP

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *See Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d).

The requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Hence, the IEP, and therefore the personalized instruction, . . . should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 203-4.

In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009). However, it must be kept in mind that a school district is not required to furnish every special service necessary to maximize each handicapped child's potential, because IDEA is designed to provide only a "basic floor of opportunity" to handicapped children. *See Rowley, supra.*

With respect to implementation of an IEP, "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007). *See also Schoenbach v. District of*

Columbia, 309 F. Supp. 2d 71, 83 n.10 (D.D.C. 2004) ("[F]ailure to implement all services outlined in an IEP does not constitute a per se violation of the IDEA.").

In the instant case, Petitioner argues that Student's April 10, 2013 IEP is inappropriate because it fails to incorporate the recommendations of Student's March 2013 evaluation calling for greater exposure to deaf children, two interpreters, ASL instruction and a behavior technician. Petitioner also asserts that Student's IEP goals in math are inappropriate. Finally, Petitioner asserts that DCPS failed to implement Student's IEP by failing to provide the required behavioral support services.

As an initial matter, the hearing officer notes that Petitioner did not present any evidence to support its assertion that Student's math goals, which require Student to demonstrate an understanding of the Order of Operations and to add, subtract, multiply and divide, are inappropriate. Therefore the hearing officer determines that Petitioner has failed to meet its burden of proof on this aspect of its claim regarding the IEP.

With respect to Petitioner's claim that the IEP is inappropriate for failure to incorporate recommendations from Student's March 2013 psychological assessment, the hearing officer notes as an initial matter that it is a disabled student's IEP team, and not an evaluator, which is charged with determining what needs to be included in the disabled child's IEP. *See* 34 C.F.R. § 300.324. Nevertheless, a review of the evidence in this case reveals that Student's IEP team determined in January 2012, prior to the March 2013 psychological assessment, that Student needed, *inter alia*, a behavior specialist to work with the staff at DCPS high school 1 by providing professional development training with respect to Student's behavior challenges, a psychologist fluent in sign language and with knowledge about the deaf culture to provide direct service to Student twice per week for 30 minutes each session and to provide 15 minutes per week consultation with the social worker, and specialized time with the teacher of the deaf and hard of hearing. Moreover, at Student's March 18, 2013 MDT meeting, the team acknowledged that Student needs two interpreters and deaf culture specially trained staff, but DCPS indicated that those items would be provided in Fall 2013 and DCPS specifically stated that it was unable to provide Student with two interpreters prior to that time. The team also acknowledged at that same meeting that Student has below average ASL skills, below grade academic functioning, and poor behavioral skills. Despite these determinations by the team, a review of Student's April 2013 IEP reveals that none of these accommodations and services are included on Student's IEP. As a result, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide him with an appropriate IEP on April 10, 2013. Hence, the hearing officer will order DCPS to reconvene Student's MDT to revise his IEP, taking into account the team determinations and the recommendations of the March 2013 psychological assessment.

With respect to Petitioner's claim that Student's IEP was not implemented because DCPS failed to provide the behavioral support services listed on the IEP, the 4/10/13 IEP requires Student to receive 180 minutes per month of behavioral support services outside general education, which amounts to 45 minutes per week of behavioral support services. The evidence in this case proves only that Student received counseling at DCPS high school 1 after returning to that school in April 2013. There is no evidence about exactly how much counseling Student received at the school, with the result that the hearing officer is unable to determine whether DCPS failed to implement the IEP in this respect in a manner that was more than *de minimis*. As a result, the hearing officer concludes that Petitioner failed to meet its burden of proof on the implementation aspect of this claim.

Placement/Location of Services

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115.

In the instant case, Petitioner asserts that Student's educational placements at the out-of-state residential facility, DCPS high school 1 and DCPS high school 2 were inappropriate locations of services for Student. DCPS disagrees and points out in particular that Student was placed at the residential facility by a medical insurance company and not by DCPS.

With respect to the residential treatment facility, the evidence in this case proves that Student was placed at that facility for medical reasons by an insurance company. Much was made of whether and to what extent DCPS had a duty to monitor Student while he was at that facility. However, the hearing officer finds it unnecessary to weigh in on that issue, because the evidence in this case proves that Student received educational services at the facility and he was provided with an IEP that required him to receive ASL interpreting services, specialized instruction and various related services. Petitioner failed to present any evidence at all that Student did not receive appropriate educational services at the residential facility. As a result, despite Petitioner's evidence that Student's hygiene and medical care suffered at the facility, this hearing officer concludes that Petitioner failed to meet its burden of establishing that DCPS denied Student a FAPE because the residential facility was an inappropriate educational placement for Student.

With respect to DCPS high school 1, the evidence in this case proves that Student was the only deaf student at the school, none of the staff was familiar with deaf culture, Student was unable to understand the instruction provided because it was too advanced for him, and Student would get frustrated and misbehave at the school when he did not know how to do the work. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by sending him to DCPS high school 1 because the school was an inappropriate location of services for Student.

With respect to DCPS high school 2, the evidence in this case proves that Student was placed in the deaf program, which included one deaf/blind student and two hard of hearing students, in addition to Student. Student had a counselor that he met with once per week at the school. He also had a signing teacher, who worked in the deaf program, and he was provided with interpreters for the mainstream classes he took. However, the work was too advanced for Student, he wasn't able to communicate with the other students, and having to constantly look back and forth between the interpreter and the teacher/board led to frustration and made Student tired. Moreover, when Student returned to the school in April 2013, the school began dismissing him early on a fairly frequent basis when he refused to remain in class instead of addressing the

behavior issue through appropriate interventions. Based on this evidence, the hearing officer further concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by sending him to DCPS high school 2 because, although the school had a deaf program, it proved to be an inappropriate location of services for Student.

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, the parties do not disagree that the least restrictive environment (“LRE”) for Student is a residential program. Accordingly, DCPS has already issued a PWN that amended Student’s IEP to reflect that the LRE is a residential program. However, the PWN was issued on September 6, 2013, and as of the October 1 and 3, 2013 hearings in this case, DCPS still had not assigned a particular residential program for Student to attend. Petitioner has requested a private placement at either the preferred private school, or the alternate private school. However, although the preferred private school can provide the services and primarily deaf setting for ED students that Student requires, at \$300,000 per year, the cost of the school is much too high for the school to qualify as an appropriate educational placement for Student. Moreover, although the alternate private school is much less expensive, that school is not a primary deaf facility and, therefore, cannot provide the totally deaf or mostly deaf environment Student requires at this time. Therefore, that school is not an appropriate educational placement for Student either. As neither of the requested private schools is appropriate for Student, the hearing officer will order DCPS to place Student in an appropriate residential program without further delay.

Petitioner has also requested compensatory education in the form of a mentor to help Student when he transitions home from his residential facility for school breaks and to help Student reintegrate into the community and enter the workplace for the first six months after his discharge from his residential facility. The hearing officer concluded herein that DPCS provided Student with an inappropriate IEP on 4/10/13, and that DCPS provided Student with inappropriate educational placements/locations of services at DCPS high school 1, which Student attended from the start of SY 11/12 to January 2012 and from April 1, 2013 to June 2013, and at DCPS high school 2, which Student attended from November 2012 to April 2013. As a result of these denials of FAPE, Student’s ASL and academic skills remain below level, his emotional and social development issues have been exacerbated, he has received juvenile charges during time periods when he should have been in school, and his misbehavior has increased to the point where he has had to be placed in psychiatric hospitalization. Based on this evidence of the harm Student has suffered as a result of the denials of FAPE identified herein, the hearing officer concludes that the requested compensatory education services, if provided by a mentor who signs, together with the ordered private placement, will be sufficient to return Student to the place he would have occupied but for the denials of FAPE. Hence, the hearing officer will award the requested compensatory education.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 10 calendar days of the issuance of this Order, DCPS shall convene an IEP meeting to (1) revise Student's IEP in accordance with the 1/13/12 and 3/18/13 IEP team determinations of Student's needs and taking into account the recommendations of the March 2013 psychological assessment, and (2) discuss and determine a residential treatment facility for Student to attend that can implement the IEP and that offers a totally deaf or mostly deaf environment.
2. DCPS shall ensure that Student is placed for the remainder of SY 2013/14 in the residential treatment facility identified in the meeting to be held pursuant to Paragraph 1 within 7 calendar days of the meeting.
3. DCPS shall provide Student with a mentor who signs to help Student when he transitions home from his residential facility for school breaks and to help Student reintegrate into the community and enter the workplace for the first six months after his discharge from his residential facility.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 10/16/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer