

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

**IN THE MATTER OF:**

**Docket No.: 18-012122**

**Michigan Department of Education - Office  
of Special Education,  
Petitioner**

**Case No.: 18-00053**

**Agency: Education**

**v**

**Case Type: Ed Sp Ed Expedited**

**Fenton Area Public Schools, J.S. o/b/o E.V.,  
Respondent**

**Filing Type: Appeal**

---

**Issued and entered  
this 31<sup>st</sup> day of August 2018  
by: Kandra Robbins  
Administrative Law Judge**

**DECISION AND ORDER**

**PROCEDURAL HISTORY**

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 et seq. On or about May 9, 2018, Petitioner filed a Due Process Hearing Request with the District in docket number 18-009590. MDE forwarded the Due Process Hearing Request to the Michigan Administrative Hearing System for hearing. It was assigned to Administrative Law Judge (ALJ) Kandra Robbins. Several Pre-trial hearings were held, and two days of the Due Process Hearing were held. Because of the complexity of the issues as well as the timelines involved, the parties stipulated to the Petitioner withdrawing the Due Process Complaint docket number 18-009590 and refiling the Due Process Hearing Request<sup>1</sup>.

On June 7, 2018, Petitioners refiled the Due Process Hearing Request in this matter. A Prehearing Conference was held on June 7, 2018 in this matter. Again, all prehearings, all orders issued, and all testimony and evidence admitted in Docket number 18-009590 were admitted as part of the record and bound in to the testimony of this matter. The dates for hearing in this matter were selected.

On July 30, 2018, the hearing in this matter was convened. Attorneys Leigh M. Manasevit and Monica Munin appeared on behalf of Petitioners. Attorneys

---

<sup>1</sup> In the Order of Dismissal in Docket Number 18-009590, all orders issued and testimony taken including admitted exhibits were bound into the record in this matter.

Jeffrey J. Butler and Vickie L. Coe appeared on behalf of Respondent Fenton Area Schools. Respondents J.S. and D.S. appeared on behalf of E.V. Ms. Janis Weckstein, Assistant Director of Special Education, MDE and Ms. Natalie Grupido, Michigan School for the Deaf (MSD) Principal appeared on behalf of Petitioners. Dr. Courtney Szucs, Director of Special Education at Fenton Schools appeared on behalf of Fenton Schools. Mr. David Stuckless, Ms. Mala Voyce and Sonja Harrison<sup>2</sup> served as proceeding interpreters. Additionally, Mr. David Lawer and Ms. Sandra Maloney served as table interpreters for Petitioners.

At the beginning of the hearing on July 30, 2018, the transcripts from June 4 and June 5, 2018 and all admitted exhibits were bound into the record as testimony in this matter.

The following exhibits were offered by Petitioner and admitted into evidence unless otherwise indicated:

1. Petitioner Exhibits 1 through 7 were not offered.
2. Petitioner Exhibit 8 (pages 1-9<sup>3</sup>) is a Functional Behavior Assessment.
3. Petitioner Exhibit 9 is a Functional Behavior Assessment.
4. Petitioner Exhibit 10 is a Seclusion and Restraint Documentation Form, dated October 10, 2017.
5. Petitioner Exhibit 11 was not offered.
6. Petitioner Exhibit 12 is a Michigan School for the Deaf Enrollment Packet, dated December 18, 2017.
7. Petitioner Exhibit 13 is a Michigan School for the Deaf Contract for Services, dated January 9, 2018.
8. Petitioner Exhibits 14 is an Individualized Education Program Amendment, dated January 2, 2018.
9. Petitioner Exhibit 15 is an Individualized Education Program Amendment, dated March 22, 2018.

---

<sup>2</sup> Ms. Voyce served as an interpreter for hearing days June 4 and 5. Ms. Harrison served as an interpreter for hearing days July 30-August 2. Mr. Stuckless served as an interpreter for the entire hearing.

<sup>3</sup> Page 10 of Exhibit 8 was not admitted.

10. Petitioner Exhibit 16 is an Individualized Education Program Amendment, dated April 18, 2018.
11. Petitioner Exhibit 17 is an Individualized Education Program incomplete.
12. Petitioner Exhibit 18 is a Michigan School for the Deaf Functional Behavioral Assessment, dated January 25, 2018.
13. Petitioner Exhibits 19 is a Michigan School for the Deaf Behavior Intervention Plan, dated February 8, 2018.
14. Petitioner Exhibit 20 is a Michigan School for the Deaf Behavior Intervention Plan, dated April 22, 2018.
15. Petitioner Exhibit 21 is a Michigan School for the Deaf Behavior Intervention Plan, dated May 3, 2018.
16. Petitioner Exhibit 22 is a Crisis Plan, dated February 20, 2018.
17. Petitioner Exhibit 23 is a Crisis Management Plan, dated May 3, 2018.
18. Petitioner Exhibit 24 is an Incident Document, dated May 4, 2018.
19. Petitioner Exhibit 25 is an Incident Document, dated May 3, 2018.
20. Petitioner Exhibit 26 is an Incident Document, dated May 2, 2018.
21. Petitioner Exhibit 27 is an Incident Document, dated May 1, 2018.
22. Petitioner Exhibit 28 is an Incident Document, dated April 30, 2018.
23. Petitioner Exhibit 29 is an Incident Document, dated April 27, 2018.
24. Petitioner Exhibit 30 is an Incident Document, dated April 26, 2018.
25. Petitioner Exhibit 31 is an Incident Document, dated April 25, 2018.
26. Petitioner Exhibit 32 is an Incident Document, dated April 19, 2018.
27. Petitioner Exhibit 33 is an Urgent Care Report for Cassandra Conklin, dated April 23, 2018.
28. Petitioner Exhibit 34 is an Incident Document, dated April 18, 2018.

29. Petitioner Exhibit 35 is an Incident Document, dated April 16, 2018.
30. Petitioner Exhibit 36 is an Incident Document, dated April 11, 2018.
31. Petitioner Exhibit 37 is an Incident Document, dated April 9, 2018.
32. Petitioner Exhibit 38 is an Incident Document, dated March 29, 2018.
33. Petitioner Exhibit 39 is an Incident Document, dated March 28, 2018.
34. Petitioner Exhibit 40 is an Incident Document, dated March 27, 2018.
35. Petitioner Exhibit 41 is an Incident Document, dated March 19, 2018.
36. Petitioner Exhibit 42 is an Incident Document, dated March 15, 2018.
37. Petitioner Exhibit 43 is an Incident Document, dated March 14, 2018.
38. Petitioner Exhibit 44 is an Incident Document, dated March 13, 2018.
39. Petitioner Exhibit 45 is an Incident Document, dated March 12, 2018.
40. Petitioner Exhibit 46 is an Incident Document, dated March 9, 2018.
41. Petitioner Exhibit 47 is an Incident Document, dated March 8, 2018.
42. Petitioner Exhibit 48 is an Incident Document, dated March 7, 2018.
43. Petitioner Exhibit 49 is an Incident Document, dated March 6, 2018.
44. Petitioner Exhibit 50 is an Incident Document, dated March 5, 2018.
45. Petitioner Exhibit 51 is an Incident Document, dated February 28, 2018.
46. Petitioner Exhibit 52 is an Incident Document, dated February 20, 2018.
47. Petitioner Exhibit 53 is an Incident Document, dated February 15, 2018.
48. Petitioner Exhibit 54 is an Incident Document, dated February 1, 2018.
49. Petitioner Exhibit 55 is an Incident Document, dated January 31, 2018.

50. Petitioner Exhibit 56 is an Incident Document, dated January 30, 2018.
51. Petitioner Exhibit 57 is an Incident Document, dated January 26, 2018.
52. Petitioner Exhibit 58 is an Incident Document, dated January 25, 2018.
53. Petitioner Exhibit 59 is an undated statement from Natalie Grupido.
54. Petitioner Exhibit 60 is an Incident Document, dated January 19, 2018.
55. Petitioner Exhibit 61 is an Incident Document, dated January 11, 2018.
56. Petitioner Exhibit 62 is an Incident Document, dated January 4, 2018.
57. Petitioner Exhibit 63 is an Incident Document, dated January 3, 2018.
58. Petitioner Exhibit 64 is a written document summarizing incidents.
59. Petitioner Exhibit 65 is a Threat Assessment and Response Protocol, dated May 4, 2018.
60. Petitioner Exhibit 66 was not offered.
61. Petitioner Exhibit 68 is correspondence to J.S. from Natalie Grupido, dated February 28, 2018.
62. Petitioner Exhibit 69 is a Michigan School for the Deaf Manifestation Determination Review (MDR), dated May 15, 2018.
63. Petitioner Exhibit 70 was not offered.
64. Petitioner Exhibit 71 is a letter to J.S. from Ms. Grupido, dated May 18, 2018.
65. Petitioner Exhibit 72 was not offered.
66. Petitioner Exhibit 73 is a Michigan School for the Deaf Report Card.
67. Petitioner Exhibit 74 was not offered.
68. Petitioner Exhibit 75 is progress on IEP goals.
69. Petitioner Exhibit 76 is an attendance record for Student.

70. Petitioner Exhibit 77 is a letter from J.S., dated May 15, 2018.

71. Petitioner Exhibit 78 was not offered.

72. Petitioner Exhibit 79 is a Review of Existing Evaluation Data, dated December 15, 2017.

73. Petitioner Exhibit 80 was not offered.

74. Petitioner Exhibit 81 is a curriculum vitae for Janis Weckstein.

75. Petitioner Exhibit 82 is a CD of the MET.

76. Petitioner Exhibits 83 through 85 were not offered.

77. Petitioner Exhibit 86 is an Invitation to Attend an Individualized Education Program Team Meeting for May 15, 2018.

The following exhibits were offered by Petitioner and not admitted after objection:

1. Petitioner Exhibit 67 is a police report.

The following exhibits were offered by Respondent and admitted into evidence unless otherwise indicated:

1. Respondent Exhibit 1 is a curriculum vitae for Courtney Szucz.
2. Respondent Exhibit 2 is a curriculum vitae for Christine Russell.
3. Respondent Exhibit 3 is an Individualized Education Program, dated May 12, 2017.
4. Respondent Exhibit 4 was not offered.
5. Respondent Exhibit 5 is an Invitation to Attend an Individualized Education Program Team Meeting for February 14, 2018.
6. Respondent Exhibit 6 was not offered.
7. Respondent Exhibit 7 is a Potential Needs for Student document.
8. Respondent Exhibits 8 through 10 were not offered

9. Respondent Exhibit 11 is a Draft Michigan School for the Deaf Behavior Intervention Plan.
10. Respondent Exhibit 12 is a Michigan School for the Deaf Behavior Intervention Plan, dated May 3, 2018.
11. Respondents Exhibit 13 is a Behavior Consultant Report.
12. Respondent Exhibit 14 was not offered.
13. Respondent Exhibit 15 is Social Work Services Log beginning on March 23, 2018.
14. Respondent Exhibits 16 through 18 were not offered.
15. Respondent Exhibit 19 is an email chain, dated January 2018.
16. Respondent Exhibit 20 is an email chain, dated January 10, 2018.
17. Respondent Exhibit 21 is a series of emails.
18. Respondent Exhibits 22 through 24 were not offered.
19. Respondent Exhibit 25 is an email from Linda Stumpo, dated January 17, 2018.
20. Respondents Exhibits 26 through 32 were not offered.
21. Respondent Exhibit 33 is an email chain.
22. Respondent Exhibit 34 is an email chain between Ms. Woodard and Mr. Vernon.
23. Respondent Exhibit 35 was not offered.
24. Respondent Exhibit 36 is an email from Jill Odette, dated February 26, 2018.
25. Respondent Exhibits 37 through 40 were not offered.
26. Respondent Exhibit 41 is an email from Christine Russell, dated March 5, 2018.
27. Respondent Exhibit 42 is an email from Dr. Szucs to Ms. Russell, dated March 5, 2018.

28. Respondent Exhibit 43 is an email chain regarding the Functional Behavioral Assessment.
29. Respondent Exhibit 44 is an email chain between Ms. Russell and Mr. Vernon.
30. Respondent Exhibit 45 was not offered.
31. Respondent Exhibit 46 is a Communication Document, dated March 7, 2018.
32. Respondent Exhibit 47 is an email from Mr. Vernon.
33. Respondent Exhibit 48 was not offered.
34. Respondent Exhibit 49 is an email chain regarding social work services.
35. Respondent Exhibits 50 and 51 were not offered.
36. Respondent Exhibit 52 is an email regarding an incident, dated April 9, 2018.
37. Respondent Exhibit 53 is an email from Ms. Grupido, dated April 11, 2018.
38. Respondent Exhibit 54 is an email chain dated April 24, 2018.
39. Respondent Exhibit 55 is an email with updated PLAAF and goal attachments, dated April 17, 2018.
40. Respondent Exhibit 56 is an email from Jennifer Sopka to Mr. Vernon, dated April 18, 2018.
41. Respondent Exhibit 57 is an email chain dated April 17, 2018.
42. Respondent Exhibit 58 is an email chain between Ms. Russell and Mr. Vernon, dated April 17, 2018.
43. Respondents Exhibits 59 and 60 were not offered.
44. Respondent Exhibit 61 is an email from Dr. Szucs to Mr. Vernon, dated May 9, 2018.
45. Respondent Exhibit 62 was not offered.
46. Respondent Exhibit 63 is an email chain between Mr. Vernon and Ms. Woodard, dated May 10, 2018.



47. Respondent Exhibit 64 was not offered.
48. Respondent Exhibit 65 is an email from Ms. Weckstein to Ms. Russell, dated May 22, 2018.
49. Respondent Exhibit 66 was not offered.
50. Respondent Exhibit 67 is an email from Ms. Russell to Mr. Vernon, dated May 24, 2018.
51. Respondent Exhibit 68 was not offered.
52. Respondent Exhibit 69 is Michigan School for the Deaf Operational Procedures, dated April 2010.
53. Respondent Exhibit 70 is Settlement Agreement in the matter of Fenton Area Schools and J.S. obo E.V. v. Michigan Department of Education, Michigan State Board of Education, and Superintendent of Public Instruction, Docket No. 17-025059 and 17-025217, dated January 9, 2018.
54. Respondent Exhibits 71 through 73 were not offered.
55. Respondent Exhibit 74 consists of three CDs.
56. Respondent Exhibit 75 was not offered.
57. Respondent Exhibit 76 is a Review of Existing Evaluation Data, updated April 18, 2018.
58. Respondent Exhibits 77 through 80 were not offered.
59. Respondent Exhibit 81 is a Psycho-Educational Evaluation Report, dated June 13, 2018.
60. Respondent Exhibit 82 is a Multidisciplinary Evaluation Team Report, Emotional Impairment, dated July 16, 2018.
61. Respondent Exhibit 83 is an Individualized Education Program, dated July 16, 2018.
62. Respondent Exhibit 84 is a CD of the July 2018 IEP meeting.

63. Respondent Exhibit 85a is various emails.

64. Respondent Exhibit 85b is an email and attachments of Fenton School Records.

65. Respondent Exhibit 85c is an email and attachments of Flint School Records.

66. Respondent Exhibit 85d is an email and attachments of medical records.

67. Respondent Exhibits 85e and 85f were not offered.

The following individuals testified in this matter:

1. Teri Chapman, MDE Director of Special Education
2. Linda Stumpo, IEP Coordinator
3. Jill Odette, Licensed Professional Counselor
4. Rex Vernon, Special Education Teacher
5. J.S., Respondent
6. Natalie Grupido, Principal, MSD
7. Micki Lewis, school disciplinarian
8. Cassandra Conklin, teacher aide
9. Janis Weckstein, MDE Assistant Director of Special Education
10. Jan Cox, Assistant Principal at Elmer Knopf Learning Center
11. Heike Woodward, School Social Worker
12. Christine Russell, Genesee Intermediate School Behavior Specialist
13. Courtney Szucs, Fenton Schools Director of Special Education

At the end of the hearing, it was determined that the parties would be permitted to file written briefs and closing arguments by August 24, 2018. On August 24, 2018, the deadline was extended to August 27, 2018. Each party filed a timely closing argument and brief.

**ISSUE and APPLICABLE LAW**

During the Prehearing Conference, the following issues were identified for the hearing:

- A. Is Student a danger to himself or others requiring an interim alternative educational setting?
- B. Did MSD place Student in an appropriate interim alternative educational setting?
- C. Is MSD an appropriate placement for Student?

The Petitioner has the burden of persuasion on all issues raised in this matter. *Schaffer v Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); *Doe v Defendant I*, 898 F2d 1186 (CA 6, 1990).

The Code of Federal Regulations, 34 CFR 300.39 defines "special education" as follows:

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including— (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. 34 CFR 300.39

Michigan Administrative Rule for Special Education, R 340.1701c(c) defines "special education" as follows:

"Special education" means specially designed instruction, at no cost to the parents, to meet the unique educational needs of the student with a disability and to develop the student's maximum potential. Special education includes instructional services defined in R 340.1701b (a) and related services.

The Federal Regulations define "specially designed instruction" as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and

- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR 300.39(b)(3)

Students protected by the provisions of IDEA are entitled to be appropriately identified, evaluated, placed, and provided a free appropriate public education (FAPE) that includes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC 1400(d); 34 CFR 300.1.

In *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.*, at 206-07. This standard has been further clarified in *Endrew F.* where the U.S. Supreme Court stated that a student's "educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Endrew F v Douglas County School District* 137 S. Ct. 988 (2017)

In determining whether the District provided a free appropriate public education in the least restrictive environment for the student in this case, it must first be asked whether the District has complied with the procedures set forth in the IDEA in developing the IEP, and second, whether the IEP developed through those procedures was reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Endrew F.* 137 S. Ct. 988.

The IEP team for a child who is deaf or hearing impaired must "consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." 34 CFR 300.324 (a)(2)(iv). OSERS has stated that "any setting that does not meet the communication and related needs of a child who is deaf does not allow for the provision of [FAPE] and cannot be considered the LRE for that child."

Additionally, the Code of Federal Regulations provides for determining educational placement as:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-

(a) The placement decision-

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement-

- (1) Is determined at least annually;
- (2) Is based on the child's IEP; and
- (3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR §300.116

Additionally, the Regulations provide that each public agency must ensure that (i) to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2)

Both IDEA and the Federal Regulations contain specific protections to be afforded to students who receive special education services and have disciplinary concerns.

34 CFR § 300.530. Authority of school personnel

(a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) General.

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536 ).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must-

(i) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior

violation so that it does not recur.

- (2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.
  - (3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.
  - (4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under §300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.
  - (5) If the removal is a change of placement under §300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.
- (e) Manifestation determination.
- (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine-
    - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
    - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.
  - (2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

- (3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.
- (f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must-
- (1) Either-
    - (i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
    - (ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
  - (2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.
- (g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child-
- (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;
  - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
  - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.
- (h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and



provide the parents the procedural safeguards notice described in §300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

- (1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).
- (2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
- (3) Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
- (4) Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

#### 34 CFR § 300.531. Determination of setting

The child's IEP Team determines the interim alternative educational setting for services under §300.530(c), (d)(5), and (g).

#### 34 § 300.532. Appeal

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§300.507 and 300.508(a) and (b).

(b) Authority of hearing officer.

- (1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.
- (2) In making the determination under paragraph (b)(1) of this section, the hearing officer may-
  - (i) Return the child with a disability to the placement from

which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

- (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

- (3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) Expedited due process hearing.

- (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.507 and 300.508(a) through (c) and §§300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

- (2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

- (3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in §300.506 -

- (i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

- (ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

- (4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the

timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§300.510 through 300.514 are met.

- (5) The decisions on expedited due process hearings are appealable consistent with §300.514.

#### 34 CFR § 300.533. Placement during appeals

When an appeal under §300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in §300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

#### 34 CFR § 300.536. Change of placement because of disciplinary removals

- (a) For purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if-

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern-
  - (i) Because the series of removals total more than 10 school days in a school year;
  - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
  - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

- (b)

- (1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.
- (2) This determination is subject to review through due process and judicial proceedings.

**FINDINGS OF FACT**

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established:

E.V. is currently 12 years old. For the 2017/2018 school year, he was in the fifth grade. He resides with J.S. and D.S. They are his legal guardians under a Family Court Order. They are the adoptive parents of E.V.'s biological father. [Tr. Vol. IV, pgs. 775-777]

The family reside within the Fenton Area Schools District.

Since 2009, Student has received special education services under the Category of Deaf and Hard of Hearing (formerly Hearing Impaired).

The Michigan School for the Deaf is a public school located in Flint, Michigan operated by the State Board of Education and the Michigan Department of Education. It is the only school for the deaf located within the State of Michigan. [MCL 393.21 and MCL 393.1]

The Michigan School for the Deaf is a required educational placement that must be considered on the total continuum of educational placements for every deaf or hard of hearing student within the State of Michigan. [MARSE R 340.1721e(5)]

E.V.'s biological parents have significant personal issues. These issues have resulted in the neglect and abuse of E.V. prior to residing with J.S. and D.S. [Tr. Vol. IV, pgs. 776 and 777]

Currently, E.V. has little to no interaction with either of his biological parents. [Tr. Vol. IV, pg. 777]

Beginning in April 2018, the family began working with Wraparound services. Ms. Healy is the coordinator working with the family. Additionally, Cindy Liske with Easterseal provides in-home therapy to Student. Ms. Liske has been working with the family since May 2017. [Tr. Vol. IV, pgs. 777 and 778]

Student has previously been seen by U of M medical staff. Student is currently prescribed Zoloft, Depakote, Intuniv and Seroquel. The medications make Student very tired. This is a concern to the family and is being discussed with his medical prescriber. [Tr. Vol. IV, pg. 779]

Student has profound bilateral hearing loss whose primary means of communication is American Sign Language (ASL). Additionally, he has been diagnosed with Attention

Deficit Hyperactivity Disorder (ADHD), Tourette's and Post-Traumatic Stress Disorder (PTSD). [Resp. Ex. 81]

Student attended the Michigan School for the Deaf (MSD) as a preschool and kindergarten student. For first grade, he attended Fenton Public Schools at the Tomek Eastern Elementary School participating in the resource room program. Next, Student attended the countywide hearing-impaired program housed at Durant-Tuuri-Mott (DTM) in Flint. He repeated first grade and continued to fourth grade. For the first two years Student attended DTM it was a countywide program operated by the ISD. However, the student population was mostly Flint public school students; as a result the program operation changed to the Flint Public schools. Student attended as a school of choice student for his last two years. Once the program began operating by Flint Public Schools it included cognitive impaired / hearing impaired students in addition to hearing-impaired students. Student attended this program during the 2016/2017 school year. [Tr. Vol. IV, pgs. 715-717]

During the 2016/2017 school year, J.S. and D.S. as well as Student's teacher determined the Flint Hearing Impaired classroom was no longer an appropriate placement for Student. Fenton Area Schools were contacted to determine a new placement.

The family wanted Student to attend to MSD. Because Fenton is the resident district, Flint (as the school of choice) would no longer be involved in the Student's placement decisions. [Tr. Vol. IV, pg. 727]

An IEP team meeting was held in March 2017 at the MSD. However, no IEP was completed. During the meeting MSD staff requested additional records including an updated FBA and evaluations. [Tr. Vol. IV, pg. 730]

Flint staff agreed to complete and provide the requested records. Another IEP meeting was held in May of 2017. No one from the MSD attended the IEP meeting despite being invited and knowing that the MSD was being considered as the educational placement for Student. [Resp. Ex. 85c]

The May 2017 IEP continued the Student's placement at the Flint Hearing Impaired classroom. Again, no representative from the MSD attended the IEP meeting. However, the family still wanted Student to attend MSD for the following school year. In July, Dr. Szucs sent an email to MSD staff to inquire as to the current status of Student's enrollment. On August 9, 2017, Ms. Grupido contacted MDE staff indicating that MSD was not the appropriate placement for Student and seeking MDE's assistance. MSD's concern was that the Student's behavioral incidents indicated that he was a student with an Emotional Impairment and would not be appropriately placed at MSD despite his hearing impairment. [Resp. Ex. 85a]

In August 2017, Student was enrolled at the Fenton Area Schools. Student is one of three deaf or hard of hearing students enrolled in the Fenton schools and the only one in the elementary school. Fenton Area Schools does not operate a hearing-impaired classroom. [Tr. Vol. IV, pg. 737]

Upon enrollment in the Fenton Area Schools, Student was placed in a resource room setting with an interpreter until an IEP meeting could be held within 30 days. Fenton staff still believed that MSD was the appropriate placement for Student in part because he would have (ASL speaking) peers at MSD. [Tr. Vol. IV, pg. 738]

Dr. Szucs testified that MSD was refusing to participate in an IEP meeting regarding Student. MDE staff indicated that MSD is not part of the continuum of educational placements.

The resource room placement was not successful. [Tr. Vol. IV, pg. 743]

On October 12, 2017 an IEP team meeting was held.

A Functional Behavior Assessment / Behavior Intervention was completed by Fenton Area Schools on October 2, 2017. This BIP was provided to MSD Staff on October 4, 2018. [Pet. Ex. 8] Another Functional Behavior Assessment / Behavior Intervention was completed on November 28, 2017. This plan was provided to the MSD staff on January 25, 2018. [Pet. Ex. 9]

On December 15, 2017, A REED was completed. As part of the REED, it was determined that Genesee Intermediate School District (ISD) Behavioral Consultant would conduct a file review, student observations and assist with completing a FBA and BIP. [Pet. Ex. 79]

The parties stipulated that MSD and MDE were resistant to have Student enrolled at MSD. There was a previous case filed in which the parties reached a settlement agreement. MSD and MDE agreed to the enrollment of Student on December 15, 2017.

Student was enrolled in MSD on January 3, 2018. As part of the Settlement Agreement, MSD agreed to provide the programs, services and supports listed in the October 12, 2017 IEP. [Resp. Ex. 70]

A Contract for Services was entered between Fenton Area Schools and the MSD on January 9, 2018. The Contract called for base tuition, a one-on-one aide, and social work services for 20-30 minutes sessions 3-4 times a month to be provided to Student. [Pet. Ex. 13]

On January 2, 2018, an IEP Amendment was issued. Because Student would be attending MSD, a language rich environment in which all staff used ASL, the interpreter called for in the October 2017 IEP would no longer be necessary. [Pet. Ex. 14]

Student was placed in Mr. Rex Vernon's fourth/fifth grade hearing impaired classroom. Mr. Vernon is a certified teacher of the hearing impaired. He has an aide assigned to work with him. There were eight students in the classroom. [Tr. Vol. II (June 4), pg. 327]

Mr. Vernon testified that Student's behavior difficulties initially started with failure to complete work or follow directions. It eventually escalated into physical aggression towards other people. [Tr. Vol. II, (June 5), pgs. 329-330]

Despite having the October 4, 2017 BIP in their possession, MSD staff did not implement the BIP. [Tr. Vol. II (June 5), pg. 359]

On January 3, 2018, Danny Kennedy was the aide assigned to work with Student. At approximately 2:01 p.m., while another student was making a joke, Mr. Kennedy laughed. Student asked why he was laughing and Mr. Kennedy explained why he was laughing. Student said, "I don't like you to laugh, if you keep up I'll slap your face". Mr. Vernon spoke to Student about the comment. No further disciplinary action was taken. [Pet. Ex. 63]

On January 4, 2018, Cassandra Conklin was the aide with Student. At approximately 11:45 a.m., Student stated he did not like his burger and oranges. Ms. Conklin offered to let him choose something else. Student refused. Student then dumped his oranges on the table and floor and smashed them. Student then flicked chunks toward Ms. Conklin. She moved his tray. Student then flipped her off (gave her the finger). As disciplinary action, Student lost his recess time. [Pet. Ex. 62]

Student's next disciplinary action occurred on January 11, 2018. There was a substitute teacher in the classroom. Student began by leaving his chair and dropping a note on another student's desk. He then lied to the teacher about his actions. Student began signing "Poop" under the table and attempting to leave his chair. The substitute teacher kept telling Student that was not appropriate. Student then threw a pencil across the room. He proceeded to start finding other things to throw. The other students were removed from the classroom and taken to the library. Student was sent home. [Pet. Ex. 61]

On January 19, 2018, Student was working on his math when the GISD Behavior Specialist came for her observations. Student became distracted and became defiant. He began to write "poop" on the desk and signing it to the other students. When asked to stop, Student's behavior began to escalate. The other students were removed from

the classroom. Student began to scream and write on the cabinets. He attempted to destroy a lamp. Student was able to calm down after about an hour to an hour and a half. Student cleaned up and then was sent home. [Pet. Ex. 60]

On January 25, 2018, another student noticed that Student was writing an inappropriate word on a piece of paper. He refused to give the paper to the teacher when directed. The teacher was finally able to get the paper from him and Student had written the word "poop" on it in two places. He blamed another student for writing the words and then began to throw his folders and papers to the floor. He began to cry and stick his tongue out at the teacher. He began to throw other objects and the other students had to be cleared from the classroom. This began about 9:30 a.m. Student fell asleep about 10:12 and at about 10:30 was ready to clean up. [Pet. Ex. 58]

On January 25, 2018, MSD convened a meeting to discuss a Functional Behavioral Assessment. Present were J.S. and D.S.; Janis Weckstein, MDE Assistant Director; Natalie Grupido, MSD Principal; Rebecca Calaman, MSD Student Support Services; Linda Stump, IEP Coordinator; Rex Vernon, MSD special education teacher; Jill Odette, MSD Licensed Professional Counselor; Deborah Calandrino, Advocate; Christine Russell, GISD Behavioral Specialist; Heike Woodard, Fenton School Social Worker; Courtney Szucs, Fenton Special Education Director; Janet Jurus, interpreter; and Kim Crump, interpreter. [Pet. Ex. 18]

A Behavior Intervention Plan (BIP) was developed on February 8, 2018. [Pet. Ex. 19] It is unclear from the record if this BIP was implemented with any fidelity. As Mr. Vernon noted, many of the strategies are generic and not specifically designed to address Student's behaviors. Additionally, this BIP was created by Mr. Vernon who testified that he had very little experience with BIPs and Ms. Odette who is a licensed counselor but not a certified school social worker. It is unclear the extent of her qualifications or experience to draft FBAs or BIPs. [Tr. Vol. II (June 5), pg. 360]

Student's behavior resulted in similar behavior incidents on January 26, 30, 31, February 1, 15, 20, 28, March 5, 6, 7, 8, 9, 12, 13, 14, 15, and 19. [Pet. Exs. 49-57]

On February 20, 2018, MSD implemented a crisis plan. This document is not signed. It is not related in any manner to the Functional Behavior Assessment. The purpose of this document is unclear beyond being used to send Student home from school rather than address his behaviors in any meaningful way. [Pet. Ex. 22]

Despite the IEP's requirement for School Social Worker Services and the Contract for Services requirement for School Social Worker Services, the MSD never provided the required services following the Student's enrollment on January 3, 2018. MSD does not have a certified School Social Worker on staff. They were unable to hire a certified School Social Worker.



While Student attended Fenton Schools in the Fall of 2017, he was receiving social worker services from Heike Woodard, a certified school social worker. On March 23, 2018, Ms. Woodard began to provide services to Student at MSD since MSD was never able to arrange the social worker services. [Tr. Vol. III, pg. 554/ Resp. Ex. 15]

Student's behaviors continued. He had additional behavior incidents on March 27, 28, 29, April 9, 11, 16 and 18. [Pet. Exs. 34-41]

On April 19, 2018, Student did not want to do math. He ran out of the classroom, down the hall. He went to a water cooler and poured water onto the floor. He ran into a couple of empty classrooms. He ran back to the water cooler and threw a tray. He ran back into his own classroom and threw a tray hitting another student on the arm. The other students were removed from the classroom. Student began taking things off the shelves and throwing them. He hit one person in the leg with a bookshelf. Student kicked another person in the knee several times. When the people left the room and Student started yelling "no jail" and "I don't want to go to jail". He was yelling "give me a game or I'll kill you". They went to the office. J.S. was there and told Student he had to go clean up his mess. [Pet. Ex. 32]

After this incident, MSD staff changed Student's educational placement from the hearing-impaired classroom with eight peers to a room by himself with just a teacher and an aide. There was no IEP meeting called to discuss this change in placement. [Tr. Vol. II (June 5), pg. 355]

This change in placement was not successful. Student's behavior continued to escalate.

On April 22, 2018, an updated Behavior Intervention Plan was completed. From the record, it is difficult to determine who had input into the BIP or if it was implemented with any fidelity. There is no evidence that this BIP had any effect on Student's behaviors. Again, this was created by Ms. Odette whose qualifications in this area are unclear. [Pet. Ex. 20]

Student was essentially isolated from his peers after the change in placement on April 19, 2018.

Student's behaviors continued to escalate. There were incidents of severe behavior on April 25, 26, 27, 30, May 1, 2, and 3. [Pet. Exs. 25-31]

On May 3, 2018, an updated BIP was allegedly implemented, although it is unclear as to how this particular BIP could have been implemented as Student was removed from the MSD on May 4, 2018.

On May 3, 2018 a Crisis Management Plan was created by Ms. Odette using references she received from Ms. Russell and internet links. Ms. Odette has no specific training or qualifications for developing this document. [Pet. Ex. 23]

On May 4, 2018, Student had a significant behavioral incident. Student threatened to kill specific students and/or staff. Ms. Odette, without any specific training or protocols, conducted a "threat assessment" of Student. Student left for the day with J.S. MSD called the police. [Pet. Ex. 24]

After this incident, Ms. Grupido determined that Student was a danger and unilaterally placed him in an alternative educational setting. The setting was that Student would remain in his home and receive education services from Mr. Vernon via skype. This was not a successful educational environment. [Tr. Vol. I, pg. 9]

Student refused to do any work. He would turn off the computer or run around. It was difficult for the remote staff to redirect the Student because they were in another location on a computer screen. [Tr. Vol. I, pg. 35]

Student completed the 2017/2018 school year in the interim alternative educational setting.

On June 13, 2018, Todd VandenAkker, Ed.S. completed a Psycho-Educational Evaluation of Student. [Resp. Ex. 81]

From Student's teachers reporting, Mr. VandenAkker found that Student was functioning at an early first grade level in reading while functioning slightly higher in math skills. [Resp. Ex. 81]

Mr. VandenAkker noted that Student's language skills seemed very simplistic and well below a boy his age. Mr. VandenAkker administered the WISC-V; Student had an overall nonverbal, visual-perceptual reasoning ability within the Average to Low Average range for his age. Student has Average nonverbal problem-solving ability for his age. [Resp. Ex. 81]

Mr. VandenAkker noted that when Student does not get what he wants or if pressed to do something he does not want to do, he can become outwardly very loud and aggressive though more directed at objects rather than people. Student has learned a very manipulative style of getting his way as evidenced by his behaviors with his grandparents. [Resp. Ex. 81]

Mr. VandenAkker determined that factors beyond Student's hearing loss alone are substantially impacting his ongoing development, educational progress, and ability to function successfully in an educational setting. [Resp. Ex. 81]

Mr. VandenAkker stated that, cognitively, Student is capable of making gains academically, but his behaviors continue to pose a significant barrier both to his learning and his social development. [Resp. Ex. 81]

Mr. VandenAkker states that Student will need a good deal of support and will need a program that provides structure, clear and consistent expectations, and sufficient flexibility to address the behavior challenges without undue immediate concern for his academic progress. [Resp. Ex. 81]

Mr. VandenAkker states that Student will need the assistance of a behavior specialist and an autism consultant to help design and implement a behavior support plan that is not overly complex. He will also need social skills group work that includes modeling and reinforcement of basic friendship strategies. [Resp. Ex. 81]

After Mr. VandenAkker's evaluation, a Multidisciplinary Evaluation Team (MET) Report – Emotional Impairment was completed. The MET consisted of Todd VandenAkker, Psychologist and Heike Woodard, School Social Worker. [Resp. Ex. 82]

As part of the MET evaluation, it was noted that Student has had a lack of consistency throughout his school career in approaches to teaching, his communication skills, the academic learning strategies applied as well as the behavior strategies applied. [Resp. Ex. 82]

The MET team also noted that Student had a Neurodevelopmental Trauma Assessment completed by Easter Seals, LUNA Assessment Center in 2017 that documented the impact that Student's trauma history has on his current functioning. [Resp. Ex. 82]

Student struggles with inappropriate feelings and behaviors under normal circumstances within the school setting. Student is applying maladaptive coping strategies to deal with school situations he finds challenging, difficult or upsetting. Student uses behavior as his primary way of communicating. [Resp. Ex. 82]

The MET team determined that Student meets the criteria for special education services under the category of Emotional Impairment. [Resp. Ex. 82]

On July 16, 2018, an IEP Team meeting was convened. Team members included J.S. and D.S.; Dr. Courtney Szucs, Fenton Director of Special Education/District Representative; Christine Russell, GISD Behavioral Specialist; Heike Woodard, School Social Worker; Melissa Healey, Wraparound Facilitator; Natalie Grupido, MSD Principal;

Cherie Wager, GISD; Jan Cox, GISD; Vickie Coe, School Attorney; Cassandra Conlkin, MSD Aide; Monica Munin, MSD Attorney; Todd VandenAkker, Psychologist; and Janis Weckstein, MDE Assistant Director of Special Education. The speech language Therapist's presence was waived by J.S. [Resp. Ex. 83]

The IEP Team identified that Student's most recent evaluations for M-Step were that Student was not tested in English Language Arts, tested partially proficient and not proficient in science. Student's most recent NWEA in the Fall of 2017 showed Math and reading in the 1<sup>st</sup> percentile; language usage was not assessed. [Resp. Ex. 83].

On the BASC-3, Student had clinically significant scores in Hyperactivity; Aggression; Conduct Problems; Depression; Learning Problems; Atypicality; Withdrawal; and Behavior Symptom Index. [Resp. Ex. 83]

The IEP team considered the communication needs of Student; the need for assistive technology devices and services; the use of positive behavioral interventions and supports and other strategies to address behavior because Student has behavior that impedes his learning or the learning of others; and the mode of language and communication because the Student is deaf or hard of hearing. [Resp. Ex. 83]

Student's math level is first grade eighth month and reading is therefore mid-first grade level. His ASL proficiency is behind that of other students his age whose primary language is ASL. [Resp. Ex. 83]

Student's ability to access and make progress in the general education curriculum is impacted by both his deafness and his social/emotional or behavior needs. Attendance is also a factor. Student missed over 70 days of school during the 2017/2018 school year and an additional 31 days where he arrived late or left early. [Resp. Ex. 83]

The IEP Team identified five goals for Student. The first goal is a Common Core Essential Elements reading goal. The standard is to Determine the main idea of a passage and details or facts related to it (EE.RI.6.2). The goal is that by June 2019, Student will be able to independently sequence five main events/details presented in a sentence form (sentence strips) from a second-grade text/passage (on a topic of interest, i.e. hot air balloons, Titanic, etc.) that he has read with 80% accuracy as measured by teacher documentation. This goal is supported by two short-term objectives. [Resp. Ex. 83]

The second goal is a Common Core Essential Elements English Language Arts goal. The standard is to ask and answer questions specific to the topic, text, or issue under discussion (EE.SL.6.1.c). The goal is that by January 2019, Student will provide an answer when asked literal "wh" questions and "wh" questions requiring inferences or understanding of abstract language, following information presented to him in ASL with

60% accuracy during structured speaking situations as measured by SLP observations documented in SLP therapy log. [Resp. Ex. 83]

The third goal is a social skills goal. The goal is that by June 2019, Student will be able to identify (visually and using sign language) a coping skill and match it to his feelings using a 5-point scale in 3 out of 5 trials as measured by documented observation. [Resp. Ex. 83]

The fourth goal is a Common Core Essential Elements English Language Arts Writing goal. The Standard is to produce writing that is appropriate for the task, purpose, or audience (EE.W.6.4). The goal is that by June 2019, Student will be able to write a five-sentence paragraph on a preferred topic that includes a topic sentence and 3-4 supporting details using correct capitalization and punctuation in 4/5 trials as measured by student work samples. [Resp. Ex. 83]

The final goal is a Common Core Essential Elements Mathematics goal. The Standard is to identify equivalent number sentences. (M.EE.6. Ee.1-2). The goal is that by June 2019, Student will be able to subtract up to four digits with regrouping with 80% accuracy in 3/4 trials as measured by student work samples. [Resp. Ex. 83]

The IEP team identified several supports and services including signing answers to assessments; extended time to complete assessments; provision for breaking large assignments into smaller steps; reduced assignments; use of visuals or manipulatives; provision of a teacher or student copy of overheads and notes. [Resp. Ex. 83]

The IEP provided for Occupational Therapy consult 1-2 sessions per month 15-30 minutes for deficits in self-care or sensory modulation; TC Deaf or Hard of Hearing - consult 1-2 sessions per month 10-30 minutes; a Behavior Intervention Plan in all school settings; ASL tutoring to be provided by a qualified person or through an online program and a paraprofessional for 4-6 hours five days a week to assist with breaks, redirection, and behavioral concerns. [Resp. Ex. 83]

The IEP also called for Social Work Services 20-30 minutes a session for 4-8 sessions per month and Speech and Language Services 20-30 minutes a session for 4-8 sessions per month in addition with consultation with family and staff. [Resp. Ex. 83]

The IEP team determined that Student should continue to attend the Michigan School for the Deaf. As part of the discussion, the IEP team focused on three possible placements: the Genesee County Day Treatment Program for Students with Emotional Impairments (Day Treatment); a Residential Treatment Placement suggested by MDE; and the Michigan School for the Deaf. [Resp. Ex. 83]

The team rejected the Residential Treatment Placement because of Student's emotional needs specifically concerning abandonment or separation anxiety. The team rejected the Day Treatment program because it could not fully address Student's language needs. [Resp. Ex. 83]

### **CONCLUSIONS OF LAW**

In the instant matter, like in most due process hearings, many witnesses testified and there were numerous exhibits offered and admitted into evidence. Post-hearing written closing arguments were permitted. The closing arguments filed in this matter were lengthy, detailed and thorough regarding the witnesses' testimony, documentation offered at hearing and the applicable law. I have reviewed and considered all that is contained in the post-hearing written closing arguments, the exhibits and the transcripts of the hearing in deciding this matter.

The parties in this matter have had a lengthy and adversarial relationship that appears to be adversely affecting the decisions made involving this Student and his family. There have been several due process hearing requests filed between the parties. It is clear that MSD did not want Student enrolled at MSD as early as the spring of 2017 and have fought his enrollment continually up through the present. MSD staff have taken several actions under the direction of MDE staff that are outside the normal IEP team process which have affected the enrollment of Student. Student was only ultimately enrolled at MSD as part of a Settlement Agreement to resolve litigation. It is unclear if MSD's administration's desire to not have Student enrolled tarnished MSD staff's interactions with Student and the family during Student's time at MSD.

Based on the evidence submitted, there is no doubt that Student is eligible for special education services as a student with a hearing impairment<sup>4</sup> and an emotional impairment. The parties dispute whether the primary disability is hearing impairment or emotional impairment. Any programming for Student would require that Student's needs for each disability be addressed. The IEP team determined that Student's primary disability is the hearing impairment with a secondary disability of emotional impairment. Petitioners have not produced any evidence to disagree with the IEP team's determination.

Because of Student's emotional impairment, Student engaged in violations of the code of conduct during his enrollment between January 2018 and May 2018. These violations ranged from failure to follow directions to extreme physical aggression including assault on staff and peers. Student's conduct while attending MSD was dangerous to Student, his peers and staff. Student's conduct resulted in numerous removals from school between January 2018 and May 4, 2018. Staff regularly called to

---

<sup>4</sup> IDEA's term hearing impaired will be used interchangeably with Michigan's deaf and hard of hearing classification.

have Student picked up early. Ultimately, Student was removed from MSD completely on May 4, 2018.

IDEA and the regulations provide that School personnel may remove a child with a disability from his current educational placement to an appropriate interim alternative educational setting, another setting or suspension. A manifestation review must be held within 10 days of any decision to change the placement of a child with a disability for more than 10 days.

Between January 3 and May 4, Student had 38 individual disciplinary incidents, 22 of which occurred prior to the implementation of the School Social Worker services as required under the IEP. As of March 27, 2018, Student had 8 suspensions. He was suspended for one day on January 11, February 1, February 28, March 1, March 6, March 15, March 19 and March 27. [Pet. Ex. 68] This does not appear to include all of the days he was sent home early for behavior issues. [Resp. Ex. 50] On April 16, 2018, Student was suspended for one day bringing his total suspensions to 9 days. However, again not including the days he was sent home early. [Pet. Ex. 68] On April 17, 2018, MSD contends that Student only had been suspended for 6.5 days giving no explanation for the change other than administrative calculation error. [Pet. Ex. 68] Student was then suspended again on April 19, 2018. From the record, it does not appear that MSD was properly calculating Student's disciplinary removals from the classroom.

Despite the IEP providing that Student required School Social Worker services, MSD did not implement any School Social Worker services until March 23, 2018. From January 3, 2018 until the Social Worker began providing services, Student had 22 behavioral incidents.

Between March 23 and April 19, 2018, Student had 8 additional behavioral incidents. During this same time, he only met with the School Social Worker three times. After the April 19 incident, MSD staff changed Student's educational placement. MSD staff changed Student's educational placement from the hearing-impaired classroom with eight peers to an isolated environment where student was in a classroom by himself with an aide and teacher. There was no manifestation determination held at this time. There was no IEP team meeting to determine the appropriateness of the change in placement.

This change in placement directly resulted in an escalation of Student's behavior. This same type of isolated placement had previously been attempted and was equally unsuccessful.

From April 19 through May 4, Student had 8 additional behavioral incidents. These incidents were the more severe and physically aggressive incidents. On May 4, MSD

personnel unilaterally changed Student's educational placement again. This time he was removed from the school completely. MSD staff determined that Student would be taught via skype while in his home. As an educational placement, this was a complete failure. Student would turn off the computer, would refuse to look at the computer and because the teacher was in another location, it was impossible to redirect Student.

IDEA and the regulations require that when a student is having behavioral issues, a school must conduct a Functional Behavioral Analysis and implement a Behavior Intervention Plan. If a Behavior Intervention Plan is already in place, the School must review the Plan and modify it.

In this case, MSD contends that a FBA had been completed and that a BIP was implemented. Based on the testimony from Mr. Vernon, it is clear that the BIP was written by individuals who had limited to no experience writing a BIP. While Ms. Russell who has significant experience attempted to give input, she was cut out of the process by Ms. Odette. Additionally, the BIPs that were implemented are difficult to follow and implement. They do not appear to be focused on changing Student's behaviors.

As MSD contended, Student has an emotional impairment that clearly affects his behavior. However, MSD did not take any significant steps to work with any individual experienced with Emotionally Impaired students in developing any of the classroom or behavior supports for Student. MSD used a licensed professional counselor, an individual that lacks the required certification to work as a school social worker, as the primary individual in developing the FBA and the BIP. There were no steps taken to provide any of the types of classroom supports that would be beneficial to working with a student with an emotional impairment. It appears that from MSD's prospective, they did not want Student to attend and did nothing affirmative to assist with his success.

To the extent any BIP was implemented, it was not implemented consistently or with any fidelity. There was no BIP implemented in the first 30 days Student attended. Student, clearly a student with behavioral issues, did not have a BIP or social work services for the first 30 days he attended MSD. It is unclear what if any behavior supports were in place during this time. From the record, it appears that positive behavior supports were not implemented. Additionally, it appears that staff's reactions to Student actually increased or escalated Student's behaviors rather than attempting to disarm the behaviors.

While there is no dispute that Student has significant behavioral challenges, MSD clearly did not implement his IEP or develop positive behavioral supports including a clear and effective BIP. Student has never brought a weapon or drugs to the school. Student has not committed serious bodily injury as defined in 18 USC 1365(h)(3) to another. Student has behavioral struggles. He is entitled to the proper supports to address his needs for his emotional impairments under IDEA. Because MSD failed to



implement the IEP and provide the proper supports, an Interim Alternative Setting is not appropriate now. An Interim Alternative Setting is only appropriate when the implemented IEP and supports have failed; because MSD has not yet fully implemented Student's IEP and provided all the required supports, it cannot be said that they have failed – they have not yet been fully tried.

Additionally, the interim alternative setting must be determined by a child's IEP team. In this case, the Student's IEP team did not decide on the placement, it was unilaterally determined by MSD school personnel. This is a violation of the protections afforded to Student under IDEA. In light of MSD's failure to implement School Social Worker Services, provide an appropriate BIP implemented with fidelity, and none of Student's behaviors meeting the special circumstances defined by IDEA, an Interim Alternative Setting is not appropriate.

MSD contends that the MSD is not the appropriate placement for Student because he has an emotional impairment that impacts his ability to access the curriculum. MSD contends that the MSD is merely a placement for students who (only) have a hearing impairment (but no additional disability). MSD is the only school for the deaf located in the State of Michigan. All the staff use ASL as the primary communication. All the staff are certified hearing-impaired teachers. It is a language rich environment for a student who uses ASL. While some Intermediate School Districts and/or school districts operated hearing impaired categorical classrooms, Fenton Area Schools does not operate a hearing-impaired classroom.

Student is a student with a hearing impairment. Because Student has a hearing impairment, each IEP Team would be required to consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode in determining the appropriate educational placement for Student.

Student is also a student with an emotional impairment. He requires behavioral supports to address his emotional needs.

In July 2018, an IEP team meeting was held. During that meeting, the team focused on the appropriate placement for Student considering the hearing impairment and the emotional impairment. The team focused on three programs. There has been no recommendation for a private placement from any psychologist or psychiatrist. There is no evidence that any teacher or administrator, either school or state, would have any of the expertise to make a proper recommendation for a private placement.

Student requires a placement more restrictive than a general education classroom. No one is contending that the general education classroom would be appropriate for him. Instead it appears that the best placement for Student would be a hearing-impaired classroom for emotionally impaired students. There does not appear to be such a placement in the State of Michigan.

Therefore, it appears that in this case a decision will have to be made as to whether Student is placed in a hearing-impaired classroom with behavior supports or an emotionally impaired classroom with language supports. For a deaf child, a hearing-impaired classroom, although a categorical classroom, is actually the less restrictive option because it provides a student with the opportunity to communicate in his language with his peers and teachers.

An emotionally impaired categorical classroom with language supports would be more restrictive for the Student because he would be unable to communicate directly with his teachers and his peers. Student would have to use an interpreter which can be inhibiting and difficult.

IDEA prefers the least restrictive environment. Regulations provide that each District must ensure that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

In this case, Student has not had the use of the appropriate supplementary aids and services for his emotional/behavioral needs. It is unclear whether, with the proper supports in place, Student's behavior could or could not be managed in a hearing-impaired classroom – it hasn't yet been tried. Student has been given all of the power as a result of his manipulative behavior. He decides when he is working and when he is going home. MSD, J.S. and D.S. as well as Fenton need to work together to ensure that a proper FBA is conducted and that a BIP is drafted that can be implemented in both the home and school. Student's behavioral needs require that everyone is working together and consistent in the manner in which Student's behaviors are addressed.

Based on Mr. VandenAkker's recommendations, Student needs a classroom that provides structure, clear and consistent expectations and sufficient flexibility to address his behavior challenges. There has been no evidence presented that a hearing-impaired classroom could not have the proper structure, expectations, and supports necessary for Student, particularly if an emotionally impaired teacher consultant provides assistance.

The record indicated that Student's language ability, including his sign language knowledge, is below grade/age level. Removing Student from a language-rich

environment such as MSD will only harm his sign language development. This is particularly problematic because Student's behavior is often the manner in which he communicates because he lacks the skills to communicate in any other way. He needs to continue to develop his sign language skills in order to address some of the behavioral causes. It is essential that Student has exposure ASL in order to be able to communicate. Placing Student in an emotionally impaired classroom where he cannot communicate with his peers will be isolating and more than likely continue to contribute to his behavior difficulties. It is clear that the Student does worse when isolated from his peers. Additionally, an emotionally impaired classroom placement would not provide the access to the ASL language that Student needs to continue to develop his language skills.

MSD contends that it is not required to create an emotional impaired classroom. I would agree that it is not required to create a classroom. However, that does not mean that MSD is not required to provide the behavioral supports necessary for a hearing-impaired student who requires those behavioral supports. MSD is a public school required to comply with the provisions of IDEA. Student is a hearing-impaired student with emotional needs that must be addressed for him to access the curriculum. MSD cannot abdicate this responsibility. Student shall remain enrolled in MSD until an IEP team determines a new educational placement.

### ORDER

#### IT IS ORDERED:

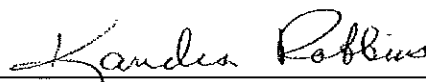
1. Petitioner's complaint is **DENIED**.
2. Student **SHALL** be enrolled at the Michigan School for the Deaf for the 2018/2019 school year.
3. To address Student's emotional impairment disability needs, within 30 days of this order, the School for the Deaf shall contract with a Board Certified Behavioral Analyst (BCBA) who has experience working with Autistic or Emotionally Impaired students to conduct an appropriate Functional Behavioral Assessment (FBA), develop an appropriate Behavioral Intervention Plan (BIP), and provide the necessary instruction to both school staff and parents to ensure that the BIP is implemented with fidelity in **all** environments to include the home.
4. For any disciplinary incident that occurs during the 2018/2019 school year, before any disciplinary action is taken, the Michigan School for the Deaf Administration shall consult with the contracted BCBA regarding appropriate action and review any need to update the FBA or the BIP. There shall be no

change to Student's educational placement without a full meeting of the IEP team to include the contracted BCBA.

5. Within 10 **DAYS** of this Order, the Michigan School for the Deaf shall contract with a Certified Emotionally Impaired Teacher Consultant to ensure that the proper supports are in place in Student's classroom. The Teacher Consultant shall meet with Student's assigned teacher for a minimum of 30 minutes a week for the first marking period to ensure that the classroom is set-up and all supports are in place for an emotionally impaired student. The teacher consultant shall be available to provide support and guidance to the assigned teacher as necessary for Student throughout the remainder of the school year.
6. The Michigan School for the Deaf shall hire or contract with a Certified School Social Worker. The School Social Worker services can be billed in the same manner as other services (such as occupational therapy or physical therapy) are billed.
7. The Michigan School for the Deaf and Fenton Area Schools shall ensure that Student receives social work services as called for in Student's July 2018 IEP. Until the Michigan School for the Deaf hires/contracts with a school social worker, Fenton Area Schools will ensure that Heike Woodard, if an employee of Fenton, continues to provide social work services to Student as she has a developed relationship with him. Michigan School for the Deaf shall ensure that an interpreter is present every time Ms. Woodard is at the Michigan School for the Deaf providing services. These services shall be in place within the first week of school. If Ms. Woodard is no longer an employee of Fenton, Fenton shall ensure that another social worker is assigned until MSD hires/contracts with one.
8. Because of the failure to provide School Social Worker services from January 3, 2018 **THROUGH** March 23, 2018, Student is entitled to compensatory School Social Worker Services. Student shall have 12 additional sessions at 30 minutes duration to compensate for the missing services. These services shall be implemented as one additional session on a weekly basis in addition to the School Social Worker Services implemented under the July 2018 IEP. These sessions shall also begin within the first week of school. If Ms. Woodard is providing the services, MSD shall ensure that an interpreter is present to assist Ms. Woodard.
9. Because of the failure of MSD to provide appropriate educational placement when **STUDENT** was removed from his educational placement, he is entitled to compensatory educational services of 50 hours to address his reading, writing and mathematics deficits. However, based on the assessment of

Mr. VandenAkker it is necessary to focus on Student's behavior at this time rather than his academics. Therefore, the compensatory educational services shall not be implemented until a consensus of the IEP team finds that Student's behaviors have improved, and he will benefit from the additional education services. MSD shall be responsible for any costs related to the 50 hours of compensatory educational services.

10. Mr. VandenAkker is a psychologist familiar with Student and working with students who are hearing impaired. Fenton Area Schools shall ensure that Mr. VandenAkker remains a member of Student's IEP Team until the beginning of the 2019/2020 school year. If Mr. VandenAkker is willing or able to be contracted to continue as a duly licensed psychologist providing expertise regarding Student, it is the responsibility of Fenton Area Schools to enter into any contracts necessary to ensure Mr. VandenAkker's continued presence until the beginning of the 2019/2020 school year. If Mr. VandenAkker is unable or unwilling to contract, Fenton Area Schools shall contract with another Psychologist who specializes in working with deaf or hard of hearing students to provide input to the IEP team concerning Student.
11. The Michigan School for the Deaf shall contract with independent consultants to provide training to the Michigan School for the Deaf staff on the Legal Obligations under IDEA; Disciplinary Protections for Students with Disabilities; Conducting IEP meetings; writing appropriate IEP goals; writing and implementing FBAs and BIPs; working with students who have suffered trauma; and Crisis Prevention Intervention. This shall be completed within 90 days.
12. Any claims or defenses not specifically addressed herein are dismissed with prejudice.
13. MSD and Fenton Area Schools shall provide proof of compliance with this decision and order to the Michigan Department of Education, in conformity with the form and content required by that agency, within 30 days of the date of this decision and order or upon completion of the required action, whichever is later.
14. A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.



---

**Kandra Robbins**  
**Administrative Law Judge**

**PROOF OF SERVICE**

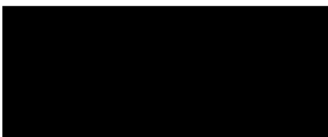
I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 31<sup>st</sup> day of August, 2018.



---

Pamela Moore  
Michigan Administrative Hearing System

Fenton Area Public Schools  
Courtney Szucs, Director of Special Services  
3100 Owen Road  
Fenton, MI 48430



Jeffrey J. Butler  
Clark Hill PLC  
212 E. Grand River Ave.  
Lansing, MI 48906

Jonathan S. Ludwig  
Department of Attorney General  
Health Education & Family Services Div.  
P.O. Box 30758  
Lansing, MI 48909

Julie Markham  
Department of Education  
PO Box 30008  
Lansing, MI 48933

Leigh M. Manasevit  
Brustein & Manasevit PLLC  
1023 15th Street NW  
Suite 500  
Washington, DC 20005

**18-012122**  
**Page 39**

Michigan Department of Education - Office of Special Education  
Teri Chapman, Director  
608 W. Allegan Street  
Lansing, MI 48909

Vickie L. Coe  
Clark Hill PLC  
212 E. Grand River Ave.  
Lansing, MI 48906