**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In re: Student v. Blackacre Regional School District** **BSEA # 2300441**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

A hearing was held on February 14, 15, and 16, 2023 before Hearing Officer Alina Kantor Nir. Those present for all or part of the proceeding agreed to participate via a remote videoconferencing platform. The following were in attendance and participated for some or all of the proceeding:

Father

Mother

Student

Matthew Engel Attorney for Parents

Dr. Sanjay Gulati Psychiatrist

Dr. Courtney Dunne Director, CAPS Program for the Deaf and Hard of Hearing at Newton North High School (CAPS)

Terri Pancare Case Manager, Massachusetts Commission for the Deaf and Hard

of Hearing

Craig Kowalski Attorney for Blackacre Regional School District (Blackacre or the District)

Brad Brooks Director of Special Education, Blackacre

Camilla Thompson Certified Teacher of the Deaf, Blackacre

Robert Canty School Psychologist, Blackacre

Brooke Chamberland School Adjustment Counselor, Blackacre

Wendy Orazio Special Education Teacher, Blackacre

Kelly Bettencourt General Education Teacher, Blackacre

Timothy McMahon Principal, Blackacre High School

Kathleen Dwyer Interpreter for the Deaf and Hard of Hearing

Alex Loos Court Stenographer

Jane Werner Court Stenographer

The official record of the hearing consists of documents submitted by the Parents and marked as Exhibits P-1 to P-13; documents submitted by Blackacre and marked as Exhibits S-1 to S-19; and a four-volume stenographic transcript. Parent and the District made their oral closing arguments on February 21, 2023, and the record closed on that date.

**ISSUES IN DISPUTE:**

The issues in this matter are as follows:

1. Whether the Individualized Education Program (IEP) dated November 16, 2022 until November 15, 2023 with a full inclusion placement at Blackacre (the “2022 IEP”) denies Student a free, appropriate public education (FAPE) in the least restrictive environment (LRE)?
2. If the answer to (1) is affirmative, then whether Student requires placement at CAPS in order to receive a FAPE in the LRE?

**FINDINGS OF FACT:**

1. Student is a fifteen-year-old, 9th grade student, who lives with his parents in Townsend, Massachusetts. Student is sensitive, kind, hardworking, and funny. (S-6, S-9, P-12, Mother, Thompson, Orazio, Chamberland, Bettencourt, Gulati, Student) He is well liked by all and is conscientious about his schoolwork. (S-6, S-9, Thompson, Orazio, Chamberland, Bettencourt, Mother, Gulati, Student) Student plans to go to college and pursue a career in teaching. (S-9, S-16, Student)
2. Student was born profoundly deaf. At 12 months old, he underwent surgery for the placement of a cochlear implant in his right ear and, approximately seven months later, a cochlear implant in his left ear. Cochlear implants do not fix hearing but rather provide access to sound. (S-6, S-13, Gulati, Mother) “Hearing” with cochlear implants is not the same as “normal hearing.” (Gulati)
3. Student currently attends Blackacre High School pursuant to the 2022 IEP under the primary disability category of Sensory/Hard of Hearing or Deaf and a secondary disability category of Emotional Impairment. (S-13, S-16)
4. At school, Student’s academic performance is exceptional in all classes, However, he is anxious about his grades, puts great pressure on himself to get A+s and feels overwhelmed by the workload. At the same time, Student loves school and learning. (P-1, P-12, S-2, S-3, S-4, S-5, S-7, S-11, S-12, S-13, Gulati, Student, Mother, Chamberland, Orazio)
5. Student finds it very “tiring” to be a deaf student in a “hearing school.” He believes that “[n]obody gets it” and that “[n]o one is going to accept [him] except for other deaf people.” Student wants to belong and to “be with his people.” According to Student, he does not have close friends. Peers often “give up on him" when he cannot hear them. Lunch time is especially isolating. The cafeteria is very loud, and he is unable to communicate with peers due to the noise. Although he has been offered a quiet place to eat, his peers choose not to join him, and, hence, he chooses to remain in the loud cafeteria. Student feels excluded from social activities at school due to his disability. Dances, for instance, are too loud and “overwhelming.” After school activities are difficult because, by the end of the day, he feels “fried.” In general, Student feels lonely and sad. He also believes that he misses a “bunch” of information in class due to his disability. Student reports it is getting harder to “put on a happy face.” (P-1, P-3, P-8, P-12, S-13, Student, Mother, Gulati)
6. Student’s mode of communication is oral English. (S-13, Thompson, Gulati) Currently, Student uses a Cochlear Nucleus 7 processor in each ear. (S-13, Thompson) At school, he utilizes a Hearing Assistance Technology (HAT) system whereby the general education teachers (and the special education teacher in Student’s biology class) wear the Phonack Roger Touchscreen microphone (“mic”). The microphone transmits sound to Student’s cochlear implants. (S-6, S-13, Student, Thompson, Bettencourt, Orazio) Student carries the system with him from class to class, handing it to the classroom teacher. The HAT system can be used in group mode during small group work. Student chooses to utilize it in that mode only during biology class, but it is an option in every class. (Thompson)
7. All staff working with Student participate in an in-service training relative to Student, the HAT system, and his IEP, prior to the first day of school. (P-9, P-16, Thompson, Bettencourt, Chamberland, Orazio)
8. There are 752 students at Blackacre High School. (McMahon) Other than Student, there are two students with hearing impairments. (Thompson, Student, Orazio) Despite a facilitated meeting amongst them, no meaningful relationships have formed. (Student, Orazio, Thompson) Student testified that because these students do not have cochlear implants, they would not “get his part.” (Student)
9. Student is comfortable speaking to others about his cochlear implants. (Student, Thompson, Bettencourt)
10. During the 2020-2021 school year, Student began “to change”, struggling with anxiety and becoming sad and withdrawn. (Mother)
11. Student underwent a three-year re-evaluation in the spring of 2021. It continued into the fall of 2021.[[1]](#footnote-2) (S-5, S-6, S-7) As part of the re-evaluation, Student participated in a speech and language evaluation. Student’s scores on all formal testing fell in the average to high average range, demonstrating significant progress in language skills from previous testing. Student’s intelligibility was within normal limits. The evaluator recommended discontinuing speech and language services but also recommended accommodations, such as securing attention prior to verbal directions, check-ins when providing lengthy directions, providing visuals to reduce the load of processing auditory information, and encouraging Student to self-advocate when needing clarification and to increase his confidence through independence. (S-5)
12. In June 2021, the Clarke Schools for Hearing and Speech (Clarke Schools) conducted an audiological evaluation (the 2021 Audiological Evaluation). Word recognition was assessed for each of Student’s implants in a quiet environment using recorded Northwestern University Auditory Test Number Six (NU-6). Student’s scores were “excellent” with 92 to 96% accuracy. In a quiet environment, Student understood 92% of familiar words. In the presence of background noise and without access to the HAT system, his score decreased to 44% correct. In the same noisy condition, using the HAT system, Student understood 92% correctly. Hence, the 2021 Audiological Evaluation concluded that the HAT system significantly improved Student’s understanding of heard words, and its use was “imperative.” HAT use in all academic courses was strongly indicated.[[2]](#footnote-3) Listening breaks in his school schedule, strategic seating and visual supports were recommended. Summer camp with other teenagers with hearing loss was also recommended. (S-6, Thompson)
13. According to the 2021 Audiological Evaluation, although Student made excellent use of both his implants, “he [would] never perform the way other students with typical hearing do in a classroom. Student needs to work harder than his peers who have typical hearing to understand spoken communication.” Student is “at particular risk for missing incidental information and the things students with typical hearing overhear and depend on for learning.” The 2021 Audiological Evaluation recommended that Student take “proactive and direct steps to advocate for his needs as an individual with hearing loss” because “equipment use alone [would] not [be] enough to guarantee that he will have access to what he needs in the classroom.” (S-6, Thompson)
14. In September and October 2021, the District also conducted a psychoeducational assessment as part of its three-year re-evaluation. Although the majority of Student’s cognitive and academic scores were in the average range, Student presented with significant anxiety during testing, and therefore these scores were deemed to not be a valid representation of his skills and abilities. Student also displayed concerning challenges with self-esteem, depression, anxiety, and social stress. He reported “significant stressors with his disability, the amount of energy he puts into learning, the stress associated with making friends and feeling like the kids are judging him, and not being able to handle making mistakes well.” Student “wavered at the top of a proverbial full bucket of water” in terms of emotional functioning and the report noted he needed to learn how to handle anxiety in the moment without being given permission to avoid a stressor. Outside therapy to learn age-appropriate coping skills was recommended. Parents were encouraged to identify a support group for Student of near-aged deaf/hard of hearing peers. Several accommodations were also recommended, such as pairing auditory information with visual information, encouraging quality of work over quantity, frequent checks ins, and additional time to complete assignments when effort is shown. (S-7)
15. As Student’s anxiety intensified, he began meeting with Dr. Sanjay Gulati three to four times per month. (Mother, Gulati) Dr. Gulati first met Student in December 2021 and has been Student’s psychiatrist since then. (P-2, Gulati) Dr. Gulati is board-certified in psychiatry and neurology. His psychiatric practice focuses on people with hearing impairments. Dr. Gulati currently has approximately 400 active clients, two-thirds of whom are children and adolescents. Dr. Gulati suffered from progressive hearing loss in his late teens and is now completely deaf. (P-1, P-9, Gulati)
16. Also, during the 2021-2022 school year, Mother reached out to Ms. Terri Pancare. (Mother, Pancare) Ms. Pancare is Student’s case manager at the Massachusetts Commission for the Deaf and Hard of Hearing (the “Commission”). Ms. Pancare first met Student when he was 4 years old. She has a bachelor’s degree in communication disorders and a master’s degree in deafness rehabilitation. Ms. Pancare has worked for the Commission since 1993. (P-11, Pancare) In her current role as a child specialist, Ms. Pancare meets with families, discusses options regarding communication modalities, makes referrals, works with sister agencies, and attends IEP meetings for students on her caseload. She is also on the Department Elementary and Secondary Education (DESE) Steering Committee for the Deaf and Hard of Hearing. In part, her work with DESE resulted in the issuance of the *Guidance on the Application of Least Restrictive Environment (LRE) for Students Who Are Deaf or Hard of Hearing (DHH)(FCSN)*. Ms. Pancare testified that there are several factors the IEP Team should consider when determining the LRE for a child who is deaf. These include whether the deaf student has peers with a shared experience and whether the staff working with the student are deaf or hard of hearing or have expertise in working with said populations. She also testified that it is important for students to have deaf adult role models. (P-6, Pancare)
17. In November 2021, Ms. Pancare met with Student and his family. She testified that, at that time, Student was overwhelmed and feeling isolated. He felt that his school caseload was “too heavy,” and he wanted additional support for math and social science classes. He needed breaks and additional time to complete school assignments. (Pancare)
18. On November 30, 2021, the Team met to review the three-year re-evaluations. Ms. Pancare attended with Parents. Student advocated for himself at the meeting. All of Student’s teachers agreed that Student was making good progress in all subject areas, but he frequently appeared anxious in class and demonstrated lack of confidence in his abilities. The Team agreed that pre-teaching would be added to the IEP to target missing vocabulary, the Teacher of the Deaf (TOD) would push into social studies and math, and an emotional goal, with supporting services, would be added to the IEP. An additional microphone was also obtained so that it could be passed around during class. (S-8, S-9, Thompson, Pancare)
19. Following the Team meeting, the District proposed, and Parent accepted on February 2, 2022, an IEP dated 11/20/2021 to 11/29/2022, providing for a full inclusion placement pursuant to the primary disability category of Sensory/Deaf and a secondary disability category of Emotional Impairment (anxiety) (the 2021 IEP). Accommodations included, in part, daily monitoring of cochlear implants and the HAT system, listening breaks, HAT and pass around mic, positive reinforcement to promote risk-taking, access to class notes, extra time on assignments, an acoustically controlled learning environment, wait time to respond, modification of language and control of linguistic load as well as breaks for reducing auditory fatigue, check-ins for understanding and to assess emotional state, and access to a school counselor, as needed, to manage anxiety. Goals were proposed in the areas of Mathematics, Self-Advocacy, Audition, and Counseling. Services were proposed as follows: Grid A: Consultation to Staff: Teacher of the Deaf (1x30minutes per month), Special Education Teacher/General Education Teacher (1x15 minutes per week), Special Education Teacher/General Education Teacher (1x15 minutes per 7 day cycle beginning 8/29/2022); Grid B (12/1/2021 to 11/30/2022): Academic Services with Teacher of the Deaf (4x60 minutes per week); Grid B (12/1/2021 to 6/30/2022): Mathematics (4x50 minutes per week), Academic Assistance (4x30 minutes per week), Content Support (4x50 minutes per week); Grid B (08/29/2022 to 11/30/2022): Mathematics (5x60 minutes per 7 day cycle), Academic Assistance (5x60 minutes per 7 day cycle), Science (5x60 minutes per 7 day cycle); Grid C: Counseling (1x30 minutes per week until 6/30/2022), Counseling (1x30 minutes per 7 day cycle beginning 8/29/2022), ESY (2x60 minutes per week). The guidance counselor was made available to Student to focus on teaching strategies to reduce anxiety. A TOD conducted in-service training to staff, and an Education Audiologist conducted a classroom acoustic training yearly. (S-8, S-9, Thompson)
20. According to Dr. Gulati, Student’s depression worsened at the end of his 8th grade school year, because Student felt overwhelmed by auditory fatigue and social isolation. (P-1, P-3, Gulati) Dr. Gulati recommended that Student take “some time to recover his mental health,” which Student did at the end of the school year. (P-4, Gulati) Via email, during the summer of 2022, Dr. Gulati advocated that Student’s “workload be pre-emptively reduced for 9th grade.” (P-4, Gulati)
21. During the 2021-2022 school year, Student made excellent progress on most of his IEP goals and objectives; only his progress on the Self-Advocacy Goal was inconsistent. In March 2022, for instance, it was noted that Student’s self-advocacy skills had declined that year. Student was not utilizing the HAT system in some of his classes “which would help prevent auditory fatigue and allow better access to the teacher’s voice.” Student “never used the pass around mic that [was] available to him” to help with hearing his peers. Nevertheless, he still did “well both academically and socially” and “made significant progress in … his outward displays of confidence” and in advocating when he misheard or needed information repeated. Student also took notes in class and his notes contained accurate information. (S-10, S-11, S-12) By June 2022, Student demonstrated “an emerging ability to utilize anxiety management and self-esteem strategies” although he also demonstrated “visible signs of anxiousness and requests for reassurance about his work.” (S-12) Student’s grades were in the A to A+ range. (S-2).
22. In June 2022, Student and Parents, together with Ms. Pancare, visited CAPS. (Dunne, Student, Mother, Pancare) Ms. Pancare has several students on her caseload who attend the program. (Pancare)
23. Dr. Courtney Dunne is the current Director of CAPS in Newton, Massachusetts. She has worked in that role for 8 years. Dr. Dunne has a bachelor’s degree and a master’s degree in deaf studies and a doctorate in educational leadership. She also holds several licenses from the DESE. Her responsibilities include, in part, program oversight, staff supervision and evaluation, consultation to member districts, and facilitation of professional development for CAPS staff and the general education staff at Newton North High School (Newton North). (P-10, Dunne)
24. CAPS is a public, school-based program for middle and high school students who are hard of hearing or deaf.[[3]](#footnote-4) The high school program is located at Newton North High School. CAPS provides services for students using a variety of communication modalities, including American Sign Language (ASL), audiation, and spoken English. It provides services designed to meet individual learning needs with a specific regard for language, communication modality and choice of amplification (i.e., hearing aids, cochlear implants). CAPS staff includes one TOD, two ASL/English Interpreters, one counselor, one paraprofessional, and one speech and language pathologist. All staff are bilingual and bimodal. None are deaf or hearing impaired. (P-7, Dunne)
25. There are 2200 students at Newton North High School. There are ten CAPS students, five of whom have cochlear implants. Four students are fully included, and the remaining are included for some part of their day. (Dunne)
26. In collaboration with Newton Public Schools, CAPS students are offered an opportunity to learn in both integrated and self-contained settings. Students integrated in courses receive instruction from a general education teacher with supplemental aids and services as determined by their IEPs. Paraprofessional support in general education classrooms includes supporting language expansion, breakdown of tasks, alerting students regarding auditory fatigue, and ASL interpretation. Note taker services provide access to auditory information. (P-7, Dunne)
27. All CAPS students have access to the full range of academic and extracurricular offerings at Newton North High School. The CAPS team consults frequently with the general education staff. In addition, there is an in-service training at the beginning of the school year as well as “drop in dates” throughout the year to build staff capacity. (P-7, Dunne)
28. Many classes at Newton North High School have a sound amplification system (Lightspeed Redcat) which supports all students, including those who are hard of hearing and those with attention or processing issues. Two CAPS students also use an individual HAT system, which provides more auditory input than the Redcat. However, many teenagers are resistant to using the individual systems, and staff work through that resistance with individual students. (Dunne)
29. More than 50% of the current CAPS student body is bilingual; 30% use spoken English and have minimal knowledge of ASL; and for 20%, their primary mode of communication is ASL and written English. Staff are trained to facilitate communication amongst all CAPS students. (Dunne)
30. According to Dr. Dunne, oral students usually come to CAPS because of social isolation. CAPS helps accommodate students with auditory fatigue by teaching them to identify the signs thereof and by training the general education staff to recognize auditory fatigue and to understand it. CAPS also consults with Newton North staff to reduce classroom noise. The CAPS classroom is always a safe place for a break or a meeting with the TOD or the counselor. In addition, CAPS staff pre-teach content and vocabulary and transcripts of videos are available in advance, as needed, to reduce auditory fatigue in the general education classroom. For group work at CAPS, students utilize HAT systems which can be put on group mode and placed in the middle of the table. (Dunne)
31. Most CAPS students eat lunch in the Newton North cafeteria which is a very noisy environment. However, sophomores and upperclassmen can go off campus for lunch. CAPS students often either sit together in the cafeteria or leave campus. (Dunne)
32. CAPS offers both informal and formal social/emotional support. According to Dr. Dunne, being around deaf and hard of hearing students promotes a feeling of “safety and likeness” for students with a low incidence disability. The CAPS Counselor also holds a weekly class on various topics regarding identity and how to navigate daily barriers. There are structured social events both for CAPS students and for CAPS students and other regional deaf and hard of hearing schools/programs. (Dunne)
33. Dr. Dunne testified that there are students at CAPS who are oral learners who participate in Honors or Advanced Placement classes. For the purpose of scheduling, she tries to group CAPS students together, but does not group students together if that would mean that a student cannot access a high-level class. All CAPS students access a 40-minute class on deaf studies. ASL is not offered for credit, but CAPS offers an informal ASL class. In addition, many students pick up functional sign language informally owing to the exposure. (Dunne)
34. According to Dr. Dunne, research[[4]](#footnote-5) shows that having deaf students attend school with other deaf students makes “a difference in their educational outcomes”, because being around other deaf people and around staff knowledgeable in deaf studies helps build individual resiliency. Although current CAPS instructional staff are not hard of hearing or deaf, they have “expertise” in working with deaf and hard of hearing students. (Dunne)
35. CAPS is more than an hour drive from Student’s home. (S-18, Brooks, Thompson) According to Dr. Dunne, there are 4 other students who reside northwest of Newton North and whose travel times exceeds one hour. In addition, there are, or have been, students from Worcester, Ipswich, Salem, Marshfield, Norfolk, and Gardner who attend, or have attended, CAPS and have, or had, long commutes. Because deafness is a low incidence disability, long travel is often necessary to get a critical mass. (P-13, Dunne)
36. Ms. Pancare testified that during the family’s visit to CAPS, with tears in his eyes, Student said to Ms. Pancare, “I need to come here.” (Pancare)
37. CAPS only accepts referrals from public schools. Because the District has not sent a referral packet for Student, Dr. Dunne is not familiar with Student’s particular needs and does not know what his services would look like at CAPS. She also has not observed Student in his current program and has no opinion as to whether his current program is appropriate. (Dunne)
38. Student testified that he wants to attend CAPS, because the program will “allow” him “to have an equal opportunity to have the best education as [his] hearing siblings and friends.” In addition, the placement has electives that “meet his needs” (such as ASL, which he can take as a “foreign language”). CAPS students are “his people.” (P-8, P-12, Student) Student is not concerned about the long commute. (Student) Student was animated when he spoke of the program.
39. Mother testified that Student’s affect changed dramatically for the better during the visit to CAPS. Otherwise, in the last three years, Student had changed, becoming withdrawn and sad. The only other time he was as animated and excited as during the visit to CAPS was when he attended a camp for deaf and hard of hearing youth. Unfortunately, due to COVID, the opportunity to participate in the camp has not resurfaced. (Mother)
40. In the fall of 2022, Student transitioned to Blackacre High School. (Student, Mother, Gulati) Prior to Student’s first day, Ms. Camilla Thompson provided an in-service training for Student’s teachers. Ms. Thompson is Student’s TOD; she has worked in that role with Student for 8 years but had tutored him privately even prior to her involvement with him through the District. Ms. Thompson currently works for three school districts, including Blackacre. She has a bachelor’s degree in communication science and disorders and a master’s degree in speech and hearing science. For 30 years, in her capacity as a TOD, Ms. Thompson has worked with students with a wide range of hearing loss, including but not exclusively, at the Clarke Schools, the Grafton Public Schools, and CAPS, where she developed the preschool program. Ms. Thompson has extensive experience working with students with cochlear implants. She is licensed through DESE. (S-19, Thompson)
41. When Ms. Thompson first began working with Student in the 2nd grade, she provided him with a significant number of direct service hours. Student made excellent progress, especially with his language and audition[[5]](#footnote-6) skills, and Ms. Thompson is very “proud” of his success. Currently, Ms. Thompson only provides consultation and push in services to Student. When she pushes in, Ms. Thompson monitors whether Student is taking notes, raising his hand, or using the HAT system. She also observes the teachers to makes sure that Student is being provided with all of his accommodations. Up until recently, Student and Ms. Thompson had a “strong relationship,” but the relationship “shifted” as she encouraged Student to depend more heavily on his general education teachers. (Thompson)
42. During the 2022-2023 in-service training, which took place before the first day of the school year,[[6]](#footnote-7) Ms. Thompson presented a “very thorough” PowerPoint to Student’s instructional staff, in which she described cochlear implants and the HAT system’s operation, the goals and accommodations on Student’s IEP, and issues impacting Student’s social and emotional functioning.[[7]](#footnote-8) (Thompson, Bettencourt, Chamberland, Orazio) According to Ms. Thompson, many of Student’s teachers have heard a portion of her training previously, as another student with cochlear implants utilizing the same HAT system had recently attended the school and graduated. (Thompson, Orazio)
43. In October 2022, Dr. Britt Coffey from the Clarke Schools’ Mainstream Services conducted an observation of Student at Blackacre High School at the District’s request (Dr. Coffey’s 2022 Observation). Dr. Coffey’s evaluation utilized the Deaf and Hard of Hearing Program and Service Review Checklist. The following additional accommodations were recommended: modification of workload, offering an ASL class, support in helping with auditory fatigue, listening breaks built in during non-academic time, and a quiet place to eat lunch. The evaluator also recommended facilitating social opportunities between Student and other students who are deaf or hard of hearing. Specifically, Dr. Coffey wrote:

“People compare themselves to those around them. When a student with hearing loss is in a fully hearing environment, they will compare themselves to students with typical hearing. However, when a student with hearing loss is surrounded by other students with hearing loss, this characteristic no longer becomes the defining one, and students can explore other features of their personality. Among others, the team may consider opportunities such as the “Explore Your Future” program at the Rochester Institute of Technology.”

An acoustical evaluation of Student’s educational learning environment was also recommended. (S-13, Brooks, Thompson) Mr. Brooks testified that Dr. Coffey had not been retained for the purpose of providing input on placement. (Brooks)

1. In November 2022, at the District’s request, Boston Children’s Hospital conducted an acoustical evaluation of several classrooms at Blackacre High School (the 2022 Acoustical Evaluation). All of the classrooms evaluated were appropriate for a student with hearing loss. Recommendations included eliminating noise sources as much as possible in classrooms by installing a door seal to one classroom and eliminating the rattling noise of the HVAC system in another. (S-14, Brooks) The District coordinated with maintenance staff to comply with these recommendations. (S-17, Brooks)
2. Although while in middle school Student was frequently frustrated due to teachers’ failure to provide him with his accommodations, the high school teachers have been, for the most part, providing Student with his accommodations consistently. (Gulati)
3. Mr. Brad Brooks is the District’s Director of Student Support Services. He has served in this role for 8 years. He has a bachelor’s degree in psychology and elementary education and a master’s degree in special education. Mr. Brooks also has an advanced graduate certificate in leadership. (P-19, Brooks) He has worked with students with cochlear implants while employed by the Perkins School for the Blind and the Chelmsford Public Schools. Having first met Student in 2015, Mr. Brooks testified that he has observed Student in his previous and current placements on multiple occasions and across several settings.[[8]](#footnote-9) According to Mr. Brooks, Student “blends” with his peers and has always been “well integrated.”(Brooks)
4. In November 2022, Mr. Brooks and Ms. Thompson toured CAPS. (Dunne, Brooks, Thompson) The purpose of the visit was to make an informed decision at the upcoming Team meeting, especially as Parents had expressed their desire that Student attend CAPS. (Thompson, Brooks) Dr. Dunne testified that the “sheer size of the building” necessitates more than an hour to tour the program. Ms. Thompson and Mr. Brooks observed a general education shop class and the substantially separate CAPS classroom where they spoke to several of the CAPS students. (Thompson, Brooks) They did not have time to observe a general education classroom with CAPS oral learners, because Mr. Brooks had to leave for another meeting. (Dunne)
5. Mr. Brooks testified that Student’s programming at CAPS would be “largely similar” to his current programming at Blackacre High School. Student would have “all of the same” accommodations and services and would work on the same skill deficits such as “self-advocacy” and feelings of being “different.” (Brooks)
6. The Team convened on November 9 and 15, 2022 to review Dr. Coffey’s 2022 Observation and the 2022 Acoustical Evaluation. (S-15, S-16) Mr. Brooks testified that he went to the IEP meeting with an open mind. (Brooks) At the meeting, Student’s teachers reported that Student self-advocates and is able to access the curriculum with the accommodations and modifications set forth in his IEP. (P-2, P-12, S-15, S-16, S-17, Chamberland, Thompson)
7. All District witnesses testified that, across all school settings, Student looks “like a typical” student. (Thompson, Brooks, Chamberland, Bettencourt, Orazio) Student does not appear to have any trouble understanding his teachers, nor do his teachers have trouble understanding him. (S-17, Orazio, Bettencourt, Chamberland, Thompson) Student reaches out to his teachers for clarification and support both during Flex Time and via email. He raises his hand in class, answers and asks questions, and participates in group work. (S-17, Orazio, Bettencourt, Chamberland, Thompson) Student eats lunch with peers in the cafeteria and has been observed to engage in conversations with them. (Orazio, Bettencourt, Chamberland, Brooks)
8. Ms. Thompson testified that she rotates through Student’s schedule so she can observe Student in each of his classes. She is also available to staff, and they contact her via email with any questions or concerns. If there is an issue with Student’s “access to communication,” she troubleshoots with the teacher or with Student. During observations, Student often raises his hand demonstrating that he has heard the question “the first time.” He also asks for clarification or “reassurance that he is on the right path.” He gets along with peers and is successful in small groups; he is able to “track conversations” and respond to peers “without delay.” According to Ms. Thompson, Student understands his teachers as evidenced by his ability to take notes[[9]](#footnote-10) and answer questions. Student’s excellent grades further demonstrate that he is not missing information presented. Socially, Student is very well liked. Ms. Thompson has observed him “chatting” with friends during class and lunch in the cafeteria. (S-17, Thompson)
9. Wendy Orazio is Student’s liaison at Blackacre High School and the special education teacher in his biology class. Ms. Orazio has a bachelor’s degree in moderate special education and a Master of Arts degree in teaching mathematics. She holds multiple DESE licenses. Ms. Orazio has previous experience teaching a deaf student at Blackacre High School. Said student, who has since graduated, used a HAT system similar to that used by Student. Although she was previously trained on the HAT system, she participated in Ms. Thompson’s in-service training prior to the start of the 2022-2023 school year. Ms. Orazio found Ms. Thompson’s training to be useful, comprehensive, and “personalized” to Student. (P-19, Orazio)
10. As Student’s liaison, Ms. Orazio frequently speaks to Student’s teachers regarding their concerns. None has shared any concerns regarding Student’s understanding of the material or his communication needs. Ms. Orazio also maintains the charging ports for Student’s HAT system. As such, Student sees Ms. Orazio every morning for 5 to 10 minutes when he comes to pick up the HAT system. At times, he shares his anxiety about an upcoming assessment, and they “plan” together how to address his concerns. Student has access to Ms. Orazio throughout the day. (Orazio)
11. Ms. Orazio co-teaches with Student’s general education biology teacher. Biology meets 5 times in a 7-day cycle. In class, Student is engaged; he raises his hand, asks questions, and participates in group work and/or labs with other students. Ms. Orazio wears the mic for Student’s HAT system when she is instructing, but she passes it to students working with Student, or, during small group work, places it on the table in group mode. Although using the HAT system in group mode is an option in Student’s other classes, Student has opted to use it in that way only in biology class. Although Student has the ability to take breaks whenever he needs to, he chooses not to take breaks even when prompted, because he is afraid that he would miss something. (Orazio)
12. Kelly Bettencourt is Student’s math teacher. She has worked as a math teacher at Blackacre High School since 2018. She is also a club advisor for New York Service Learning, Relay for Life and Class of 2024. She has a bachelor’s degree in math education and a master’s degree in education. Ms. Bettencourt holds a DESE license to teach math. She currently teachers 5 math classes. (P-19, Bettencourt)
13. Ms. Bettencourt attended Ms. Thompson’s training prior to the first day of the 2022-2023 school year. She testified that Ms. Thompson explained the HAT system, demonstrated how to use it, and reviewed Student’s goals and accommodations. Ms. Bettencourt uses the HAT system in her class. Student hands it to her upon arrival and she puts it on and unmutes it. When she circulates in the classroom, she mutes herself. Ms. Bettencourt provides Student with a copy of her notes, but Student likes to take his own notes during class. Ms. Bettencourt also repeats what other students say, allows Student extra time for assessments (although he has not needed it), provides Student (and other students) with reference sheets and graphic organizers, checks with Student when changing his seat, provides closed captioning on his videos, and projects all material onto the blackboard for visual presentation. Student often works with partners in her class and converses with peers during “down time.” (Bettencourt)
14. There are 20 students in the New York Service Club, with whom Student engages during meetings. Ms. Bettencourt uses the mic for the HAT system and has offered to pass it around to Club students, but Student indicated that it was unnecessary. During meetings, Student openly shares his thoughts and acknowledges what others are saying. In April, Student will participate with peers in a trip to New York City. It is a bonding experience with the intention that students get to know each other. (Bettencourt)
15. Ms. Brooke Chamberland is Student’s school adjustment counselor at Blackacre High School. She has worked in the District since October 2021 and previously served as a social worker at the Department of Youth Corrections. She has also worked as a community-based mental health provider and in private practice. Ms. Chamberland has a bachelor’s degree and a master’s degree in social work and is licensed through DESE. She has worked with deaf and hard of hearing clients, four of whom had cochlear implants. Ms. Chamberland has been providing Student with 1x30 minutes per 7-day cycle of counseling since September 2022. In addition, Student has access to her at any time during the school day. (P-19, Chamberland) At the November 2022 Team meeting, Ms. Chamberland reported that, at times, Student has shared feeling overwhelmed, but he has also indicated to her that he has friends at school. (S-15, S-16, Chamberland)
16. Also at the November 2022 Team meeting, Parents reported that Student had been diagnosed with depression and obsessive-compulsive disorder. Dr. Gulati attended the meeting and shared what it is like to be a deaf person with cochlear implants in a hearing environment, and Student described how tiring and isolating it is to be a deaf student in the school. At the meeting, Dr. Gulati advocated that Student be placed in an environment with similar peers. (P-2, P-12, S-15, S-16, Gulati)
17. At the meeting, in response to Dr. Coffey’s 2022 Observation, Timothy McMahon, principal, Blackacre High School, offered to meet with Student to identify a quiet spot for him for lunch, which he subsequently did.[[10]](#footnote-11) (P-2, P-12, S-15, S-16, McMahon)
18. School is a significant “external stressor” for Student. (Gulati, Mother, Student, Chamberland, Orazio, Thompson) “Three fourths” of Dr. Gulati’s work with Student centers around school. The first thing Student said to Dr. Gulati when he met him was that school “requires a lot, and he’s exhausted.” (Gulati)
19. Dr. Gulati testified that even in a perfect setting, Student can only hear approximately 90% of words[[11]](#footnote-12) which “sounds great but what it means is that there is a 90% chance that he will guess correctly what word he is hearing.” A normally hearing person, understands 99% of everything (s)he hears. This means that Student misses one out of every 10 words, and for the other 9 words, he must work very hard in order to understand the word he hears. When Student has context, this is easier to do, but with novel information being presented, there is no context, creating an anxiety-provoking situation for Student. Student spends his entire school day solving word riddles which results in exhaustion. Because he is naturally bright and hardworking, he is able to do well. (Gulati)
20. Dr. Gulati testified that normal auditory perception is effortless because it automatic. For a person with cochlear implants, it is neither effortless nor automatic and hence results in auditory fatigue. Student must constantly “work” to make sense of what he hears. Deaf and hard of hearing students “stretch themselves and burn all their emotional resources trying to hear and trying to fit in, reducing the energy and attention available for academics.” As Dr. Gulati meets with Student after school, he has observed Student arriving home exhausted, “like someone who ran a marathon.” (P-1, P-12, S-13, Gulati, Student)
21. Ms. Chamberland testified that Student wants to be “the perfect student” and “gets so worked up” by his need to be ahead of his class and to get A+s that when this does not happen, he becomes dysregulated. Schoolwork is his primary source of anxiety because the academic standards he sets for himself are extremely high. (Chamberland) This witness testified that currently, Student is not making progress on his Counseling Goal because he is in the midst of a major depressive episode. This does not mean that he will not make effective progress on the goal once his depression subsides. Ms. Chamberland testified that she did not agree that Student’s current failure to make progress on this goal is due to Ms. Chamberland not being deaf. She also testified that in the past when students required a different school counselor than the one available in their building, virtual sessions were arranged with other in-district counselors. According to Ms. Chamberland, the November 2022 IEP meeting and the due process hearing could have increased Student’s dysregulation as well. In addition, the move from middle school to high school is overwhelming and even students who do not have any disabilities struggle with the change. Furthermore, most students are “several years behind emotionally” due to the COVID-19 school shutdown. Student is likely to struggle with depression and anxiety symptoms for years before learning how to manage them; the key is to practice strategies when not in a crisis situation. Ms. Chamberland testified that when students feel isolated and “not understood,” it may benefit them to engage in small group counseling with peers. (Chamberland)
22. Ms. Chamberland does not believe that she needs to “share” Student’s disability or to have the same experiences as Student in order to provide him with effective services.[[12]](#footnote-13) (Chamberland) She testified that up until recently, Student was “actively engaged” in his counseling sessions and was comfortable coming to speak to her. (Chamberland, S-17)
23. Ms. Chamberland observed two instances in school in which Student was visibly anxious and dysregulated; one was relative to assessments and workload and the other was with regard to the lunch space. (Chamberland, Orazio) Typically, she observes Student to be participating and engaged. (Chamberland) When Student is in a dysregulated state, Ms. Chamberland employs cognitive behavior therapy (CBT). Her goal with students is not to dive into issues “deeply” but rather to ground them and return them to class. She focuses on short-term solutions rather than providing long term mental health services. Ms. Chamberland testified that if Dr. Gulati has any suggestions or recommendations on what works with Student, she would be happy to follow his lead. However, the nature of her counseling service is not the same as the services offered by Dr. Gulati. (Chamberland)
24. Student does not find his counseling services with Ms. Chamberland to be helpful because she “doesn’t get how tired and isolated he [is]” or how much he is struggling. He wants to talk to someone who understands him and his disability. (Student)
25. Dr. Gulati testified that people identify around shared language. Student struggles with his identity which results in anxiety. In order to relieve some of his anxiety, Student needs to be exposed to a range of hard of hearing peers. (Gulati)
26. According to Dr. Gulati, some of Student’s strengths are also his vulnerabilities. Student wants “to be really good” and “to look good to everyone,” but this, in turn, exhausts him. Student himself is an obstacle to modifying his program because he wants to be normal and to appear normal. Hence, he does not want to make use of the accommodations needed to reduce auditory fatigue (i.e., taking breaks). (Gulati)
27. Ms. Pancare also attended the IEP meetings on November 9 and 15, 2022. During the latter, Ms. Pancare expressed concern that Student was not making progress in the social/emotional realm. She encouraged the Team to look at Student as a “whole person.” (Pancare) It is unclear whether Ms. Pancare made any placement recommendations verbally to the Team, but it does not appear that any were made in writing.
28. Following the meeting, the District proposed, and Parents rejected, the 2022 IEP. Accommodations proposed in the 2022 IEP included providing listening breaks, use of the HAT system, preferential seating to reduce auditory and visual distractions, providing class notes, pre-teaching, providing extra time on assignments and assessments, providing an acoustically controlled environment, encouraging self-advocacy, providing a quiet place for lunch with friends when requested, supporting Student to identify the best time in class for a break, encouraging and modeling use of self-talk when anxious, allowing access to a school counselor when needed, and providing subtle check-ins to assess Student’s emotional state. Goals were proposed in the areas of Academics (involving identifying auditory fatigue, implementing strategies for self-care, accessing extra support to aid learning, and using learned strategies when missing information in class), Counseling (involving making positive self-statements, identifying next steps based on emotional state, and utilizing self-talk and coping strategies to handle stressful situations), and Self-Advocacy (involving utilizing the HAT system in class, identifying leadership/community service roles, applying, in case of bullying, self-advocacy skills, assisting in staff training, identifying and seeking out 3 trusted adults, and identifying goals and steps to achieve).[[13]](#footnote-14) The following services were proposed to support said goals: Grid A: Consultation to Staff - TOD (1x30 minutes per month), Special Education Teacher/General Education Teacher (1x15 minutes per 7 day cycle), School Adjustment Counselor/Social Worker (1x15 minutes per 7 day cycle); Grid B: Academic Assistance (5x60 minutes per 7 day cycle), Academic Services with TOD (2x60 minutes per 7 day cycle); Grid C: Counseling (1x30 minutes per 7 day cycle). Instead of extended school year (ESY), it was recommended that Student attend summer school to maintain his math skills. In-service training and a classroom acoustic check by an education audiologist were also proposed in this IEP. [[14]](#footnote-15) (S-16)
29. In the opinion of the school-based Team, Student’s current placement is appropriate. (S-15, P-12, Thompson, Brooks, Bettencourt, Chamberland, Orazio) Ms. Thompson and Mr. Brooks testified that each of Dr. Coffey’s recommendations and the recommendations in the November 2022 Acoustical evaluation were incorporated into the 2022 IEP and implemented. (Brooks, Thompson)
30. Mr. Brooks testified that CAPS would be a more restrictive placement for Student, because a collaborative setting is more restrictive than Student’s public-school setting. Even considering the recommendations of the National Association of State Directors of Special Education’s *Optimizing Outcomes for Students who are Deaf or Hard of Hearing: Educational Service Guidelines*, Mr. Brooks opined that because Student is able to communicate with his peers and instructional staff at Blackacre High School, CAPS would be overly restrictive for him. (P-6, Brooks)
31. In Ms. Thompson’s opinion, placement at CAPS is not appropriate for Student as his needs are being met in his current placement. He has opportunities to discuss his disability related needs, and his instructional staff is appropriately trained to respond to his needs. If Student does not have a large peer group at school, he should join clubs and engage socially with others based on interest, not only on disability. This is one of his IEP goals (i.e., Goal 3: Self Advocacy). (S-16, Thompson) Student should also interact with other deaf or hard of hearing peers, and Ms. Thompson has provided Parents and Student with many resources for “countless opportunities to meet deaf and hard of hearing kids.” She does not believe that Student has availed himself of such opportunities. (Thompson)
32. Ms. Thompson testified that although Student experiences auditory fatigue towards the end of the day, that is to be expected. Nevertheless, she observes him at the end of the day, and he still participates fully. In addition, she has been working with Student for years to identify auditory fatigue and to take breaks when needed. Currently, during his daily academic assistance class, the academic support teacher offers him a break, but all of Student’s teachers have been trained on Student’s accommodations, which allow him to take breaks at any time. Student knows he needs breaks but does not want to take them. (Thompson)
33. According to Ms. Pancare, although Student will also have to deal with auditory and concentration fatigue at CAPS, the placement would provide him with the right supports, such as notetakers and the ability to take a break in the CAPS classroom. He would also have daily access to a counselor and a TOD. Although Student currently has access to academic accommodations, none is provided by staff with expertise with students who are deaf or hard of hearing. Ms. Pancare testified that having experience is “very different” from “having expertise.” In her opinion, Student’s current and proposed program is not appropriate. (P-6, Pancare)
34. Ms. Pancare has not observed Student in his current program. (Pancare)
35. According to Dr. Gulati, Student experiences “significant” auditory fatigue which means that change is necessary. While Dr. Gulati recognized that the District has made a “huge effort” to accommodate Student, he testified that it is not enough. The only way to combat auditory fatigue is to have “higher quality of information.” For instance, Dr. Gulati compared the use of Zoom closed captioning to the use of CART interpretative services. The latter is a “higher quality,” which reduces the fatigue of the recipient. (Gulati)
36. Student testified that he believes that self-advocacy is a “very important skill” but that “it comes with a price.” Self-advocacy further alienates him from the teacher and from his peers. It is embarrassing. It also annoys everyone and, as a result, he often does not speak up. He “needs to be with his people in a place that won’t make him tired.” (Student)
37. Dr. Gulati is “disturbed” by Ms. Thompson’s recommendation that Student advocate for himself. According to Dr. Gulati, the

“most empowered deaf adults … struggle daily with how much to stand out, how much to ask for…. In most situations a child cannot advocate and needs adults to anticipate needs through their own knowledge and empathy. This is something a public school simply cannot provide, unless sufficient deaf and hard of hearing students have passed through it to illuminate its teachers and staff to their special needs…. [O]nly the most optimistic, extroverted, and confident teens with cochlear implants manage mainstreaming solo in a large school.”

For Student, the “stress of solo mainstreamed schooling appear[s] to be the main factor in increased depressive symptoms which developed even as his OCD responded to medication and therapy.” Because Student’s education plan “vastly increase[s] [Student’s] depression risk,” it is not appropriate “educationally, socially, or in regard to his mental health.” Dr. Gulati explained that while “local education has benefits when possible, [] in this case they seem far outweighed by the risks of increased isolation, stress, academic struggles, and depression.” (P-1, P-3, P-8, P-12, S-16, Gulati)

1. According to Dr. Gulati, Student requires “a collaborative educational program where he can have deaf and hard of hearing peers, and teachers who are experienced with such students, as well as reduced communication stress.” A collaborative program

“offers teachers and staff [with] a deep, intuitive understanding of deafness and hearing loss, gained through specialized education and personal experience, as well as personal predilection. It offers a sense of belonging and community. When it works, inclusion/mainstreaming permits a child to feel he belongs in his local community with his peers from whom he has a difference. When this difference gap is not bridged, however, [it] leaves a child feeling deeply isolated.... A collaborative program shows [Student] visible examples in his peers of how to handle the difference of hearing loss. It creates opportunities to belong to the wider hearing school as well as to have a safe home in the smaller deaf program. The range of hearing loss he would observe in such a program would educate him to how people fit in and different ways of being deaf.”

(P-1, Gulati)

1. Dr. Gulati testified that he “is not sure he could have designed a better program for Student” than CAPS. Dr. Gulati has only visited the program twice, ten years ago. However, he sees many students who attend the program in his practice. While Student would still have to deal with the same issues at CAPS, the expectations would be different where Student’s expectation is to be normal and to appear normal. At CAPS, because there are other students like him, Student would not stand out. Also, at CAPS teachers are trained regarding issues such as auditory fatigue, so Student will be able to relax. The peers and staff would create a “buffer” around Student. (P-1, Gulati) Student testified that he believes that he will be less tired at CAPS because the staff is more experienced with working with students like him, and there will be “more flexibility.” Although he will likely participate in an inclusion program, there will be other deaf peers in classes. (Student)
2. Parents do not believe that Student’s current placement is appropriate. (S-15, P-12, Mother)
3. Mother is concerned that Student’s isolation and auditory fatigue further increase his feelings of depression and anxiety. (Mother)
4. According to Parents and Dr. Gulati, Student’s current mental state is “precarious.” (P-1, P-2, P-3, P-12, Gulati) Student’s “anxiety and depression related to hearing loss and school have remained significant” during the 2022-2023 school year. (P-4, P-12, Gulati, Student, Mother)
5. Dr. Gulati believes that student’s depression is exacerbated by his school placement. He testified that generally OCD is treated using a heavier medication dose than is used to treat depression. For Student, the medication dosage increase Dr. Gulati prescribed improved his OCD symptoms, but Student’s depression has worsened. To Dr. Gulati, this suggests that external forces are promoting Student’s depression. (P-1, Gulati)
6. Dr. Gulati opined that “there is nothing to criticize in Student’s current program except for the things that they cannot provide.” Community opportunities are not the same as being in an educational environment with peers and adults who are deaf or hard of hearing. Moreover, these community groups are rare and would not meet weekly. (Gulati, Mother)
7. Dr. Gulati has not observed Student’s current program. (Gulati, Brooks) He explained that the District has not reached out to him “to help them” with Student, and this concerns him. (P-1, Gulati)
8. Ms. Chamberland testified that she is aware when Student’s anxiety and depression are “ramping up” because she uses a tracking system with Student when she meets with him. In December 2022, Student reported to her that his anxiety had decreased, but his depression had increased. (Chamberland) According to school-based staff, Student’s anxiety revolves around grades, assessments, and workload and is largely based on the enormous pressure he puts on himself to perform a certain way in school. (Thompson, Bettencourt, Orazio, Chamberland)
9. Due to Student’s exacerbating depressive symptoms this school year, the death of Student’s dog, and Dr. Gulati’s concern that Student was on the brink of a major depressive episode, on January 31, 2023, Dr. Gulati completed a *Physician’s Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons* for Student. During Student’s time at home, Dr. Gulati again changed Student’s medication. (P-5, Gulati, Mother) Now that Student is home on medical leave, he feels less stressed because he need not “focus on hearing everyone properly or on trying to fit in.” (Student, Mother, Gulati) During his absence, Student has been keeping up with his work. (Bettencourt, Brooks). He has access to a tutor and to Ms. Chamberland. (Brooks, Chamberland)
10. During therapy sessions, Dr. Gulati works with Student on “strategies to cope and manage.” He also hopes that Student will learn to advocate for himself when he needs to stay home for a mental health break. At the same time, Dr. Gulati testified that it is the adults who should anticipate Student’s needs. (Gulati)
11. During the 2022-2023 school year, Student has continued to make progress on many of his goals and objectives; however, on his Counseling Goal, progress has been inconsistent. (S-17) His grades continue to be in the A to A+ range. (S-1, Bettencourt, Chamberland, Orazio)
12. During Student’s sophomore year, the District has proposed to provide Student with an online ASL course. (Student)
13. Mother testified that although Student has superficial connections with peers at school, he does not have any meaningful relationships that transcend the school environment. At home, he is tired and lonely. Mother is concerned that Student is “not living a full life” like her other three children had in high school. She feels that over the years the District continuously discounted her perspective when programming for Student. Mother acknowledged that the District has accommodated Student but believes that at this point in his life, he needs social connections. Any connections Student makes at out of school events for deaf students are “different” from “having lunchmates or classmates” that are deaf. (Mother)

**LEGAL STANDARDS:**

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education.”[[15]](#footnote-16) To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an IEP that is: custom tailored to the student’s unique learning needs; “reasonably calculated to confer a meaningful educational benefit”; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as “to enable the student to progress effectively in the content areas of the general curriculum.”[[16]](#footnote-17)

The IEP must be individually tailored for the student for whom it is created.[[17]](#footnote-18) When developing the IEP, the Team must consider parental concerns; the student’s strengths, disabilities, recent evaluations, and present level of achievement; the academic, developmental and functional needs of the student; and the child’s potential for growth.[[18]](#footnote-19) The IEP team for a student who is deaf or has a hearing impairment must consider several “special factors”[[19]](#footnote-20) such as the student’s “language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode."[[20]](#footnote-21) Evaluating an IEP requires viewing it as a “a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was … objectively reasonable … at the time the IEP was promulgated.”[[21]](#footnote-22)

The Massachusetts special education regulationsdefine “progress effectively”to mean “…mak[ing] documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.”[[22]](#footnote-23)

Similarly, in *Endrew F.,* the SupremeCourt explained that “appropriate progress will look different” depending on the student.[[23]](#footnote-24) For instance, for a child fully integrated in the general education classroom, an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[[24]](#footnote-25) Nevertheless, a student may be advancing from grade to grade and not receiving FAPE.[[25]](#footnote-26) The Court's use of terms such as "ambitious" and "challenging" simply underscored its main holding that IEPs must allow for progress that is appropriate in light of the student's circumstances.[[26]](#footnote-27) As the Fifth Circuit eloquently stated, “A disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by his nondisabled peers."[[27]](#footnote-28) Rate of progress on IEP goals must be assessed given the child's circumstances.[[28]](#footnote-29) An individual analysis of a student’s progress in his/her areas of need is key.[[29]](#footnote-30)

Under state and federal special education law, a school district has an obligation to provide the services that comprise a FAPE in the “least restrictive environment.”[[30]](#footnote-31) This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that “removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily.”[[31]](#footnote-32) As stated by the Eighth Circuit, the “IDEA's integrated-classroom preference makes no exception for deaf students.”[[32]](#footnote-33) The “process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child’s educational placement must be determined on an individual case-by-case basis depending on each child’s unique educational needs and circumstances, rather than by the child’s category of disability.”[[33]](#footnote-34) The U.S. Department of Education instructed that

“[a]ny 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 the LRE for that child. Just as the IDEA requires placement in the regular education setting when it is appropriate for the unique needs of a child who is deaf, it also requires placement outside the regular education setting when the child’s needs cannot be met in that setting.”[[34]](#footnote-35)

In 2022, the Department of Elementary and Secondary Education (DESE) posted *Guidance on the Application of Least Restrictive Environment (LRE) for Students Who Are Deaf or Hard of Hearing (DHH)(FCSN).*[[35]](#footnote-36) According to the DESE’s website, “[t]his guidance recommends practices to follow when considering the appropriate learning environment” for students who are deaf or hard of hearing.”[[36]](#footnote-37) This *Guidance* states that when “considering LRE for most students, the general education classroom is typically the standard. However, this setting may not be the LRE for some DHH students who need to access language rich environments requiring specialized deaf education instruction. Placement is an individualized decision made by the Team, based on the goals and services necessary to meet the student’s academic and functional needs.”[[37]](#footnote-38) An appropriate educational placement in the LRE for a deaf or hard of hearing child is one that, in part, enhances the child’s cognitive, social, and emotional development; is staffed by certified and qualified personnel trained to work with children who are deaf or hard of hearing; and has an adequate number of role models who are deaf or hard of hearing, including adults.[[38]](#footnote-39) “For some students, a specialized school for the deaf is the LRE, for others the regular class is the LRE, and for others, some combination of settings may constitute the LRE.”[[39]](#footnote-40) In selecting the LRE, school districts must also give consideration to any potential harmful effect on the child or on the quality of services that he will receive.[[40]](#footnote-41)

At the same time, FAPE does not require a school district to provide special education and related services that will maximize a student’s educational potential.[[41]](#footnote-42) The educational services need not be, “the only appropriate choice, or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice.”[[42]](#footnote-43) Although parental participation in the planning, developing, delivery, and monitoring of special education services is central in IDEA, the Massachusetts special education laws, and corresponding regulations,[[43]](#footnote-44) school districts are obligated to propose what they believe to be FAPE in the LRE, “whether or not the parents are in agreement.”[[44]](#footnote-45) As stated by the Supreme Court in *Endrew F.,*

“deference is based on the application of expertise and the exercise of judgment by school authorities. [IDEA] vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”[[45]](#footnote-46)

1. Burden of Proof

In a due process proceeding, the burden of proof is on the party seeking to change the status quo.[[46]](#footnote-47)

In this matter, Parents are seeking a change in the status quoto a more restrictive placement for Student. Therefore, they bear the burden of proving by a preponderance of the evidence that the 2022 IEP is not reasonably calculated to provide a free appropriate public education in the least restrictive environment to Student.[[47]](#footnote-48) Here, Parents are seeking a publicly funded placement at CAPS, a public special education day program. That type of prospective relief may be available to Parents who demonstrate at hearing both that the IEP and/or placement offered by the public school cannot meet Student's identified special learning needs and provide a meaningful educational benefit to him, and that their proposed alternative can.[[48]](#footnote-49)

With this legal authority in mind, I turn to the issues before me.

**DISCUSSION:**

In making my determinations, I rely on the facts I have found as set forth in the Findings of Fact, above, and incorporate them by reference to avoid restating them except where necessary.

Student’s eligibility for special education services is not in dispute in this matter, nor is his profile as a student with Sensory/Deaf and Emotional Impairment (Major Depressive Disorder and OCD) disabilities. Parents also do not dispute the appropriateness of the accommodations, goals or services in Student’s 2022 IEP. The dispute concerns whether Student’s special education needs can be addressed appropriately through a full inclusion model of services as proposed by the District’s IEP, or whether, as Parents assert, nothing less than CAPS was and currently is needed for Student to receive a FAPE in the LRE.

There is no disagreement as to the fact that Student is successful academically. Parents rather argue, in essence, that the 2022 IEP is inappropriate because it fails to address Student’s auditory fatigue, social isolation and identity issues, all of which increase his anxiety and depression and compromise his ability to access the general education curriculum and make progress commensurate with his potential. According to Parents, these programmatic inadequacies can only be addressed through a change in placement. The District stands behind the 2022 IEP and contends that it is appropriate. After considering the totality of the evidence, as well as the legal arguments presented by the parties, I conclude that Parents have met their burden of proving by a preponderance of the evidence that the 2022 IEP with full inclusion placement is not reasonably calculated to provide Student a free appropriate public education in the least restrictive environment to Student and that CAPS is. [[49]](#footnote-50) My reasoning follows.

I note at the outset that I commend the District for developing an IEP that meets a majority of Student’s needs. The 2022 IEP is based on the recommendations of both in-District and outside evaluators and reflects the District’s consideration of Student’s communication needs as a deaf student.[[50]](#footnote-51) Specifically, the recommendations of the following evaluations were incorporated into the 2022 IEP: the 2021 Psychoeducational Evaluation, the 2021 Audiological Evaluation, Dr. Coffey’s 2022 Observation, and the 2022 Acoustical Evaluation. Student’s IEP has been fully implemented, and, as Dr. Gulati testified, Student’s high school Team has been consistent in providing Student with his accommodations. Moreover, Parents presented no arguments or evidence that the goals contained in the 2022 IEP are not sufficiently ambitious or challenging for Student. [[51]](#footnote-52)

It is also indisputable that the 2022 IEP addressed Student’s communication needs as a deaf Student.[[52]](#footnote-53) Student is an oral communicator and learner, and the overwhelming evidence suggests that Student has endless opportunities for direct communications with peers and professional personnel in oral and written English. He is similarly instructed in his oral communication mode. The overwhelming evidence suggests that Student does not struggle to communicate with or to understand his teachers. Student’s ability to effectively access instructional information is further supported by Student’s excellent grades.[[53]](#footnote-54) Moreover, based on the testimony of District staff and Student himself, Student has demonstrated his ability to reach out to staff to fill in any gaps in information that is presented.

The assistive technology provided for in the 2022 IEP further allows Student access to the social and instructional communications around him. Student’s use of the HAT system in class is instrumental to his success. The 2021 Audiological Evaluation, Dr. Coffey’s 2022 Observation, and Dr. Dunne’s testimony emphatically stress the importance of the HAT system to maximize access to language and information. Moreover, to improve Student’s access to sound during group work, the District had provided him with a pass-around mic. Student can also use the HAT system in group mode during labs and class group work. Student has not used the pass around mic and is reluctant to make consistent use of these assistive technology options throughout the school day. Yet the 2022 IEP targets Student’s reluctance (and resistance) through the Academic and Self-Advocacy Goals and corresponding services.

Although Student’s communication with hearing peers in the classroom is impacted and causes him to miss some interactions or need to ask for repetition, this alone does not render the IEP inappropriate.[[54]](#footnote-55) While it is indisputable that, as Dr. Gulati testified, Student cannot hear in the same manner as his peers and must expend extraordinary effort to decipher communication, both Dr. Dunne and the 2021 Audiological Evaluation recognize use of the HAT system significantly improves Student’s understanding of heard words. The 2022 IEP provides Student with the HAT system as an accommodation in all his classrooms. These accommodations and services provide Student with appropriate access to information and communication to support his disability in these areas.[[55]](#footnote-56)

Despite the District’s best efforts, the 2022 IEP does not meet Student’s unique need relative to auditory fatigue. Mother’s, Dr. Gulati’s, and Student’s testimony regarding the strain of listening and understanding spoken language during school hours, and the isolation experienced by Student cannot be trivialized. Student experiences significant auditory fatigue, and this impacts Student even as he leaves the school building and arrives home. Both Dr. Gulati and Dr. Dunne testified that auditory fatigue is a pervasive issue for deaf students, and Student would need to continue to work on using strategies to mitigate its impact regardless of his placement. Although the 2022 IEP addresses Student’s auditory fatigue by incorporating the accommodations recommended by the 2021 Audiological Evaluation (i.e., use of the HAT system, frequent breaks, modified workload, preferential seating, availability of class notes, and visual representation), such accommodations alone are insufficient. Dr. Gulati, Mother, and Student testified credibly as to the high level of exhaustion experienced by Student; Student is “fried” when he arrives home, often needing a nap to recharge for the afternoon. While it is true that Student’s failure to avail himself of the accommodations in his IEP contributes to his auditory fatigue, his reluctance cannot be ignored as a unique emotional need in and of itself. Although Ms. Thompson testified that she has been working with Student “for years” to identify auditory fatigue and to take breaks when needed, and the 2022 IEP targets such reluctance, District staff consistently testified that Student continues not to take breaks as needed and even refuses them when prompted to do so.

The evidence is overwhelming that without a change in placement, Student’s auditory fatigue cannot be meaningfully mitigated. Dr. Gulati testified that the only way to reduce auditory fatigue is to offer a “higher quality of information.” As an example, Dr. Gulati explained that the use of CART over close captioning via Zoom mitigates auditory fatigue because it is a “higher quality of information”. According to Dr. Gulati, if Student were surrounded by deaf peers and staff with expertise in working with deaf students such “quality” would improve. Dr. Dunne and Ms. Pancare similarly testified that the presence of deaf peers and highly qualified staff would reduce auditory fatigue, because Student would be more likely to utilize the HAT system and to take breaks when surrounded by peer models who do the same and when encouraged to do so by highly trained general education staff. Although Dr. Dunne is unfamiliar with Student, I credit her testimony relative to the impact of peer models on an individual’s use of the HAT system and other accommodations, due to her extensive experience working with students who are deaf or hard of hearing in a school setting that offers a “critical mass” of peers.

The presence of peer “models” is necessary for Student to make progress in his ability to access his accommodations.[[56]](#footnote-57) While it is not the case that there are no hard-of-hearing students at MNRHS, nor was there any evidence presented to indicate that said peers are inappropriate for Student, said students’ use of hearing aids as opposed to cochlear implants makes them inappropriate as “models” for Student for the purpose of utilizing his accommodations.

In addition, Student’s current placement does not meet Student’s emotional, social and mental health needs.[[57]](#footnote-58) Based on his experience working with Student and his extensive expertise in treating teenagers and especially deaf youth, Dr. Gulati convincingly testified that Student’s education plan “vastly” increases Student’s depression risk” and is hence not appropriate “educationally, socially, or in regard to his mental health.” In Student’s case, any benefits of mainstreaming “seem far outweighed by the risks of increased isolation, stress, academic struggles, and depression.” Although Dr. Gulati did not observe Student within the District’s program, his substantial expertise in supporting deaf and hard of hearing students, together with his extensive work with Student himself, renders his testimony persuasive as to Student’s mental health and emotional needs.[[58]](#footnote-59) While all witnesses, including school staff, agreed that Student’s anxiety is primarily the result of self-imposed high academic standards, Dr. Gulati convincingly drew a nexus between Student’s emotional state and his school placement; such nexus was further corroborated by Student’s testimony as to his social isolation and lack of meaningful connections at Blackacre High School. Dr. Gulati described in detail how, for Student, the “stress of solo mainstreamed schooling” is the main factor in increased depressive symptoms; as evidence of the “external stressor” posed by his placement, Dr. Gulati testified that Student’s depression worsened even as his OCD responded to medication and therapy, suggesting that Student’s depression resulted from Student’s sense of isolation and extreme fatigue in his current placement.

The correlation between Student’s depressive exacerbation and the school setting were supported by Student, the District’s 2021 psychological evaluation, and Ms. Chamberland. Specifically, although Ms. Orazio, Ms. Bettencourt, Ms. Thompson, and Ms. Chamberland have not observed persistent symptoms of anxiety during the 2022-2023 school year, Student testified that he “puts on a happy face” in the school environment. I found Student’s testimony genuine as all witnesses familiar with him observed his need to appear typical. Moreover, the District’s own psychological evaluation in the spring of 2021 indicated that Student “wavered at the top of a proverbial full bucket of water” in terms of emotional functioning; he displayed concerning challenges with self-esteem, depression, anxiety, and social stress relating to “his disability, the amount of energy he puts into learning, the stress associated with making friends and feeling like the kids are judging him, and not being able to handle making mistakes well.” In the fall of 2022, Student reported the same stressors to Dr. Coffey. In addition, Ms. Chamberland described an incident of such intense dysregulation by Student that it necessitated that he be sent home. She also testified that, in December, Student’s depression was “ramping up”.

While Student’s current school staff testified that Student’s anxiety is related to self-imposed academic pressure, Dr. Coffey offered a different perspective which echoes that of Dr. Gulati:

“People compare themselves to those around them. When a student with hearing loss is in a fully hearing environment, they will compare themselves to students with typical hearing. However, when a student with hearing loss is surrounded by other students with hearing loss, this characteristic no longer becomes the defining one, and students can explore other features of their personality.”

She recommended facilitating social opportunities between Student and other students who are deaf or hard of hearing. Dr. Gulati too testified that Student required “visible examples in his peers of how to handle the difference of hearing loss” and how to “belong to the wider hearing school” in order to begin to form his own sense of identity as a deaf person in a hearing world. According to Dr. Gulati, Student required such “buffers,” both in terms of deaf peers and staff who could work with Student on “his own sense of identity” which was essential to his ability to make progress in his emotional functioning.

Although District staff insisted that Student was making progress not only academically but also emotionally, the evidence of Student’s repeated need to “take a mental health break” at home undermines their testimony. As of the Hearing date, Student was at home pursuant to a Physician’s Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons; in only one year’s time, this was the second depressive episode necessitating that Student remain at home. During such episodes, while Student may be able to complete his schoolwork and make academic progress, he cannot make effective progress on his Counseling Goal, as testified by Ms. Chamberland. Furthermore, Dr. Gulati testified that Student is likely to suffer from more of these episodes if Student were to return to his current placement. Although Ms. Chamberland disagreed that Student’s depressive episodes stemmed from the school environment, I defer to Dr. Gulati’s expertise as a seasoned, board-certified psychiatrist and to his professional judgment relating to the recurrence of these depressive episodes.

I further note that Ms. Thompson did not disagree with Dr. Coffey’s recommendation for the facilitation of social opportunities between Student and other students who are deaf or hard of hearing. Rather she agreed that this was important for Student, and she provided resources to Parents and Student relative thereto. Yet her testimony that Student should join clubs and engage socially with others based on interest, not only on disability, ignored Student’s need to connect with deaf peers during the school day in order to create a sense of identity that relates specifically to his disability. Moreover, she delegated the responsibility of “facilitating” such experiences to Parents without explaining why this is not the responsibility of the District as part of an offer of a FAPE.

I find that, in this case, based on the persuasive testimony of Dr. Gulati and Student, the absence of a larger “critical mass” of peers prevents Student from “benefit[ting] educationally” in the program and school in which he is currently enrolled. [[59]](#footnote-60) As such, the District has failed to offer Student a FAPE in the LRE. In reaching this conclusion, I do not take a position with respect to current research suggesting the benefits of educating deaf students with like peers.[[60]](#footnote-61) Nor do I place any weight on the preferences of Student[[61]](#footnote-62) or on Mother’s testimony that she wants Student to live “his best life” at the high school.[[62]](#footnote-63) Rather, I base this conclusion solely on the overwhelming evidence that Student’s emotional needs cannot be met in the full inclusion setting at Blackacre High School,[[63]](#footnote-64) as Parents have demonstrated that although Student is able to make effective academic progress, he is unable to make emotional progress in that setting.[[64]](#footnote-65)

Having concluded that Student’s current program is inappropriate, I now review whether placement at CAPS would offer Student a FAPE in the LRE. Dr. Dunne’s testimony offered a thorough review of the CAPS program and the individualized way that the needs of hard of hearing or deaf students are met. Based on her testimony, I find that CAPS can meet Student’s disability related needs. Student’s IEP could be implemented at CAPS; because of CAPS’s location within Newton North and its collaboration therewith, Student would have the opportunity to participate in highly challenging and rigorous general education classes with the support of a TOD and the pull-out counseling services delineated in his IEP. Dr. Dunne’s description of the CAPS student body suggests that Student would have appropriate peers and peer models. He would also have access to staff with expertise in facilitating communication amongst all students.

Furthermore, CAPS would offer Student both informal and formal social/emotional support and help promote a feeling of “safety and likeness” for Student. Student would benefit from the weekly class run by the counselor on various topics regarding identity and navigation of daily barriers. While Student would still have to negotiate auditory fatigue, I found Dr. Gulati’s testimony persuasive, that because of Student’s need to appear “normal” and to be his “best,” in a mainstream setting, the “expectations” at CAPS would enable him to make use of the accommodations he is reluctant to utilize in his current placement; specifically, where “Student’s expectation is to be normal and to appear normal,” at CAPS, because there would be other students like him, Student would not feel that he stands out. Dr. Gulati’s assessment is supported by Dr. Dunne, who has extensive school-based experience in the needs of deaf students within the school setting; she too affirmed the correlation between having a “critical mass” and the social-emotional development of teenagers who are deaf or hard of hearing.

Nor am I concerned about the length of Student’s commute to CAPS. The commute is minimally longer than the one hour allowed by Massachusetts regulations.[[65]](#footnote-66) I further found Ms. Dunne’s testimony convincing that because deafness is a low incidence disability, long travel is often necessary “to get a critical mass” of students.

**CONCLUSION AND ORDER:**

After reviewing the record, including the testimony of witnesses, the admitted documents, and the thoughtful arguments of Counsel, I conclude that the full inclusion program at Blackacre High School, while commendable in many respects, does not offer Student a FAPE in the LRE as it fails to address the totality of his needs. I also find that CAPS could provide Student with a FAPE in the LRE, and, as such, I order the District to send a referral packet to CAPS; if Student is granted admission, the District is ordered to fund the placement, including transportation.

So Ordered by the Hearing Officer,

*/s/ Alina Kantor Nir*

Alina Kantor Nir, Hearing Officer

Dated: March 16, 2023

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF FINAL BSEA ACTIONS AND RIGHTS OF APPEAL

# Effect of BSEA Decision, Dismissal with Prejudice and Allowance of Motion for Summary Judgment

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Similarly, a Ruling Dismissing a Matter with Prejudice and a Ruling Allowing a Motion for Summary Judgment are final agency actions. If a ruling orders Dismissal with Prejudice of some, but not all claims in the hearing request, or if a ruling orders Summary Judgment with respect to some but not all claims, the ruling of Dismissal with Prejudice or Summary Judgment is final with respect to those claims only.

Accordingly~~,~~ the Bureau cannot permit motions to reconsider or to re-open either a Bureau decision or the Rulings set forth above once they have issued. They are final subject only to judicial (court) review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. This means that the decision must be implemented immediately even if the other party files an appeal in court, and implementation cannot be delayed while the appeal is being decided. Rather, a party seeking to stay—that is, delay implementation of-- the decision of the Bureau must request and obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” while a judicial appeal of the Bureau decision is pending, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.”

Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement while judicial proceedings are pending must ask the court having jurisdiction over the appeal to grant a preliminary injunction ordering such a change in placement. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

# Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

# Rights of Appeal

Any party aggrieved by a final agency action by the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing*

*Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. Student’s three-year re-evaluation was delayed at Parents’ request. (S-8) [↑](#footnote-ref-2)
2. According to Ms. Thompson, this evaluation does not accurately reflect what Student can do now, due to a recent upgrade in Student’s speech processor, which “upgrade is significant.” (Thompson) [↑](#footnote-ref-3)
3. The Deaf and Hard of Hearing Program at Newton North High School was formerly part of the EDCO Collaborative, which has served deaf and hard of hearing students in Massachusetts for 50 years. The program was created to ensure that students with low incidence disabilities, such as deafness, have a “critical mass.” (Dunne) The term "critical mass" is defined as the number of students in a classroom, program or school that share common communication modes and characteristics and that is sufficient to support direct interaction opportunities among peers and adults. See Cheryl DeConde Johnson and Janet DesGeorges, “How Many are Enough? Defining ‘Critical Mass,’” *Hands and Voices*, 2014. [↑](#footnote-ref-4)
4. In response to Dr Dunne’s testimony, both parties were offered the opportunity to provide the Hearing Officer with empirical research, which Parents did. [↑](#footnote-ref-5)
5. **Audition is** the power or sense of hearing. [↑](#footnote-ref-6)
6. Ms. Thompson provided the same training to two new teachers prior to the second semester of the 2022-2023 school year. (Thompson) [↑](#footnote-ref-7)
7. During the in-service training, it became clear to Ms. Thompson that Student would not be able to participate in Spanish class due to the way in which it is taught, and, as a result, Student was excused from that class. (Thompson) [↑](#footnote-ref-8)
8. Mr. Brooks testified that whenever a parent contacts him, he “makes it a point to go and observe the student.” (Brooks) [↑](#footnote-ref-9)
9. In the past, Student was offered the opportunity to have a notetaker in class but opted to take his own notes. (Thompson) [↑](#footnote-ref-10)
10. Mr. McMahon has been the principal of Blackacre High School for the past 4 years. He previously worked as a teacher and an assistant principal. Mr. McMahon has a bachelor’s degree in history and education, a master’s degree in education with a concentration in history, and a master’s degree in education leadership and principalship. He holds several licenses from DESE. Mr. McMahon offered Student several quiet locations where Student and his peers could meet for lunch. Student chose a location, but Mr. McMahon does not think that Student has ever utilized it. The room continues to be available to Student. (P-19, McMahon, Student) [↑](#footnote-ref-11)
11. In referencing these percentages, Dr. Gulati relied on the scored derived from the 2021 Audiological Evaluation. (Gulati) [↑](#footnote-ref-12)
12. Ms. Chamberland testified by way of example that she need not be the victim of sexual assault or have an eating disorder in order to treat clients who have such experiences. (Chamberland) [↑](#footnote-ref-13)
13. Ms. Thompson testified that she utilizes “a lot of” research and resources when writing Student’s IEPs. She believes Student’s main skill deficit is his academic and social/emotional self-advocacy. Because Student’s HAT system is “really important to use in the presence of noise,” Ms. Thompson added a goal to Student’s IEP that he utilizes it. She testified that after COVID, Student’s use of the HAT system decreased. Ms. Thompson also testified that the Redcat system alone would not be effective for Student to access oral communication. (Thompson) [↑](#footnote-ref-14)
14. Ms. Pancare testified that the placement discussion at the Team meeting was brief. She did not believe that District staff provided any input to that part of the discussion. (Pancare) Mr. Brooks testified that he asked Team members whether the current program provided Student with a FAPE, and they nodded in the affirmative. He then asked whether they believed that Student required a more restrictive setting, and they shook their heads in the negative. (Brooks) [↑](#footnote-ref-15)
15. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 (d)(1)(A). [↑](#footnote-ref-16)
16. See 20 USC §1401(9), (26), (29); 603 CMR 28.05(4)(b); *C.D.*, 924 F.3d 621, 624–25 (1st Cir. 2019); *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist*., 518 F.3d 18, 29 (1st Cir. 2008); *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.,* 513 F. 3d 279, 284 (1st Cir. 2008); *In Re: Chicopee Public Schools*, BSEA # 1307346 (Byrne, 2013). [↑](#footnote-ref-17)
17. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist*. RE-1, 137 S. Ct. 988, 1001 (2017). [↑](#footnote-ref-18)
18. 34 CFR §300.324(a)(i-v); *Endrew F.,* 137 S. Ct. at 999; *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). [↑](#footnote-ref-19)
19. 34 C.F.R. § 300.324(a)(2). [↑](#footnote-ref-20)
20. 34 CFR 300.324 (a)(2)(iv). In 1992, the U.S. Education Department provided detailed guidance concerning the factors that should be taken into account when formulating the IEP and determining the placement of a deaf child. *Notice of Policy Guidance* (EDU 1992). Districts were directed to consider the following factors when developing an IEP for a deaf student and to determine placement on the basis of which setting would meet the communication and other individual needs of the student, as set out in the IEP: communication needs and the child's and family's preferred mode of communication; linguistic needs; severity of hearing loss and potential for residual hearing; academic level; social, emotional, and cultural needs, including opportunities for peer interactions and communication. Subsequently, OSEP clarified that the 1992 notice concerning deaf students was not intended to alter a school district's obligation to educate a deaf student in a regular classroom if the student could receive FAPE in that setting. See *OSEP Memorandum 94-15*, 20 IDELR 1181 (OSEP 1994); see also *Guidance on Application of Least Restrictive Environment (LRE) for Students Who Are Deaf or Hard of Hearing* (Meyer, et all, 2022) which may be found at https://fcsn.org/guidance-on-application-of-least-restrictive-environment-lre-for-students-who-are-deaf-or-hard-of-hearing/. [↑](#footnote-ref-21)
21. *Roland M. v. Concord Sch. Comm*., 910 F.2d 983, 992 (1st Cir. 1990). [↑](#footnote-ref-22)
22. 603 CMR 28.02(17). [↑](#footnote-ref-23)
23. 137 S. Ct. at 992. [↑](#footnote-ref-24)
24. *Id.* [↑](#footnote-ref-25)
25. See 34 CFR 300.101(c)(1) ("Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade and is advancing from grade to grade"). [↑](#footnote-ref-26)
26. *Endrew F.,* 137 S. Ct. at 1000 (“his 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”). [↑](#footnote-ref-27)
27. *Houston Indep. Sch. Dist. v. Bobby R*., 200 F.3d 341, 349 (5th Cir. 2000); see *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.,* 528 F. App'x 64, 67 (2d Cir. 2013) ("To the extent [the parents] argue that the gap between [the child] and her peers was growing in terms of reading ability, ... a child's academic progress must be viewed in light of the limitations imposed by the child's disability"). [↑](#footnote-ref-28)
28. See *G.D. v. Swampscott Pub. Sch.,* No. 19-CV-10431-DJC, 2020 WL 3453172, at \*5 (D. Mass. June 23, 2020). [↑](#footnote-ref-29)
29. *Endrew F.,* 137 S. Ct. at 1001 (“The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue”); see *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 809 (8th Cir. 2011) (explaining that the court would not compare the student to her nondisabled peers since the key question was whether the student made gains in her areas of need). [↑](#footnote-ref-30)
30. 20 U.S.C § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c). [↑](#footnote-ref-31)
31. 20 U.S.C. 1412(a)(5)(A); C*.D. v. Natick Pub. Sch. Dist.,* 924 F.3d 621, 631 (1st Cir. 2019) (internal citations omitted); see *Poway Unified Sch. Dist.*, 37 IDELR 174 (SEA CA 2002) ("The concept of LRE was coined to address the continuum of placement required by the IDEA. Under the continuum of placement, the farther removed from the typical classroom environment, the more restrictive a placement becomes. For example, it is generally understood that on the continuum of placements, the least restrictive of all environments is the regular classroom, all day, with support services. The continuum of placement options then continues to more restrictive settings, from resource services with some mainstreaming, to self-contained classes with limited integration, to residential facilities") [↑](#footnote-ref-32)
32. *Barron v. S. Dakota Bd. of Regents*, 655 F.3d 787, 794 (8th Cir. 2011). [↑](#footnote-ref-33)
33. 71 Fed. Reg. 46,586 (2006). [↑](#footnote-ref-34)
34. *Deaf Students Education Services Policy Guidance,* 57 Fed. Reg. 49274; see *Letter to Bosso*, 56 IDELR 236 (OSERS 2010); see *D.F. v. Red Lion Area Sch. Dist.*, No. 1:10-CV-1558, 2012 WL 175020, at \*3 (M.D. Pa. Jan. 20, 2012) (“While appropriateness is more commonly associated with the requirement that schools provide a free appropriate public education than the LRE requirement, appropriateness remains central to an analysis of whether the LRE requirement was violated. The primary consideration a court must make in reviewing a placement is not the restrictiveness of the placement, but rather whether the placement is appropriate, that is whether the student is able to receive a meaningful educational benefit in that placement. If an integrated placement would not provide the student with a meaningful educational benefit, the placement cannot be the LRE for that student”). [↑](#footnote-ref-35)
35. See https://www.doe.mass.edu/sped/links/deaf.html and National Association of State Directors of Special Education (NASDSE), (2018). *Optimizing Outcomes for Students who are Deaf or Hard of Hearing: Educational Service Guidelines, 3rd ed*. Alexandria, Virginia: Author. (pgs. 34-35) Available from: www.nasdse.org (“A common interpretation of LRE for a deaf or hard of hearing student is a “language rich environment”). [↑](#footnote-ref-36)
36. See https://www.doe.mass.edu/sped/links/deaf.html. [↑](#footnote-ref-37)
37. See *Guidance on Application of Least Restrictive Environment (LRE) for Students Who Are Deaf or Hard of Hearing* (Meyer, et all, 2022) which may be found at https://fcsn.org/guidance-on-application-of-least-restrictive-environment-lre-for-students-who-are-deaf-or-hard-of-hearing/. [↑](#footnote-ref-38)
38. See https://www.doe.mass.edu/sped/links/deaf.html; see also National Association of State Directors of Special Education (NASDSE), (2018). [↑](#footnote-ref-39)
39. See https://www.doe.mass.edu/sped/links/deaf.html; see also National Association of State Directors of Special Education (NASDSE), (2018); *Barwacz v. Michigan Dep't of Educ.,* 681 F. Supp. 427, 436 (W.D. Mich. 1988) (a “least restrictive environment” for a profoundly deaf student can be a “segregated community”). [↑](#footnote-ref-40)
40. See *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.,* 995 F.2d 1204, 1218 (3d Cir. 1993) (“possible negative effects of the inclusion of the child on the education of the other students in the class”). [↑](#footnote-ref-41)
41. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n.21 (1982) (“Whatever Congress meant by an “appropriate” education, it is clear that it did not mean a potential-maximizing education”). [↑](#footnote-ref-42)
42. *G.D. v. Westmoreland Sch. Dist*., 930 F.2d 942, 948- 49 (1st Cir. 1991). [↑](#footnote-ref-43)
43. *Rowley*, 458 U.S. at 208 (“Congress sought to protect individual children by providing for parental involvement … in the formulation of the child’s individual educational program”). [↑](#footnote-ref-44)
44. *In Re: Natick Public Schools*, BSEA #11-3131 (Crane, 2011); see, e.g., *Blackmon v. Springfield R-XII Sch. Dist*., 198 F.3d 648, 658 (8th Cir. 1999) (“Although the IDEA mandates individualized ‘appropriate’ education for disabled children, it does not require a school district to provide a child with the specific educational placement that her parents prefer. Nor does the IDEA require a school district to ‘either maximize a student's potential or provide the best possible education at public expense.’ The purpose of the IDEA is ‘more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside”) (internal citations omitted); *Barron*, 655 F.3d at 793-4 (the parents of deaf students and students with hearing impairments might have preferred that their children attend a state school for the deaf, but the 8th Circuit found no evidence that the board's decision to outsource services to local school districts would deny the affected students FAPE in the LRE); *Poway Unified Sch. Dist. v. Cheng,* 821 F. Supp. 2d 1197, 1202–03 (S.D. Cal. 2011) (finding that “CART may be appropriate to meet K.C.'s needs, but it does not follow from that conclusion that TypeWell is inappropriate, and would deny her a FAPE. Even if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits”) (internal quotations and citations omitted); *D.T. v. Seattle Sch. Dist*., No. C10-0759JLR, 2011 WL 5282715, at \*12 (W.D. Wash. Nov. 2, 2011) (finding that Parents did not establish by a preponderance of the evidence that the sign code used in the DHH Program was not reasonably calculated to provide a deaf Student with a meaningful educational benefit, the Court noted, “Were we to conclude that parents could demand that their children be taught with a specific signing system, we would be creating the potential that a school district could be required to provide more than one method of signing for different students whose parents had differing preferences ….[The] relevant inquiry is whether the sign code used by the school district is reasonably calculated to confer educational benefits, rather than whether the sign code is used in the student's home. This approach complies with the Supreme Court's mandate that ‘courts must be careful to avoid imposing their view of preferable educational methods upon the States’”) (internal citations omitted); *In re: Student v. Whitman-Hanson Regional School District*, BSEA # 20-07520 (Berman, 2020) (Although the District’s IEP and proposed placement were not found appropriate, the hearing officer concluded that it could be made appropriate with the addition of a TOD qualified in spoken/written language who would be responsible for providing the majority of Student’s direct instruction and be available throughout the day, and, as such, Parent’s request for placement at the Clarke Schools was denied); *Boston Public Schools v. Student*, BSEA # 15-03083 & 14-01653 (Figueroa, 2015) (concluding that the IEP and placement proposed by the District for the student calling for placement at the Horace Mann School for the Deaf was appropriate – parents’ requested placement at READ Collaborative’s deaf and hard of hearing program was denied – although both placements were found to be substantially similar, parents had the burden, so they did not prevail). [↑](#footnote-ref-45)
45. *Endrew F.,* 137 S. Ct. at 1001-2 (internal citations omitted). [↑](#footnote-ref-46)
46. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). [↑](#footnote-ref-47)
47. *Id*. [↑](#footnote-ref-48)
48. See *id.* [↑](#footnote-ref-49)
49. *Id*. [↑](#footnote-ref-50)
50. 34 C.F.R. § 300.324 (a)(2)(iv)(v). [↑](#footnote-ref-51)
51. See *C.D.*, 924 F.3d at 631; see also *Endrew F.,* 137 S. Ct. at 992. [↑](#footnote-ref-52)
52. See 34 CFR 300.324 (a)(2)(iv). [↑](#footnote-ref-53)
53. See *In re: Student with a Disability*, 2006-SE-0056, 47 IDELR 29 (SEA WA 2006) (where “it was hard for student to work in small groups because of the student's unwillingness to work through an interpreter, and that [where she] sometimes misse[d] assignments or the ability to communicate with teachers after class because the interpreter [] left to go to the next class,” there was no evidence that the difficulties asserted by the Student prevented her from benefitting from instruction as she received ‘As’ and ‘Bs’ in the general education classes”). [↑](#footnote-ref-54)
54. See *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 399 (5th Cir. 2012) (“disability remediation” is not a factor in assessing the appropriateness of an IEP); *L.F. v. Houston Indep. Sch. Dist*., No. CIV. A. H-08-2415, 2009 WL 3073926, at \*20 (S.D. Tex. Sept. 21, 2009), *aff'd sub nom.* *Ruffin v. Houston Indep. Sch. Dist.,* 459 F. App'x 358 (5th Cir. 2012) (“Nor is a school district required to ‘cure’ a student's disability”) (internal citations omitted); *Indep. Sch. Dist. No. 283, St. Louis Park, Minn. v. S.D.*, 948 F. Supp. 860, 885 (D. Minn. 1995), *aff'd sub nom. Indep. Sch. Dist. No. 283 v. S.D.,* 88 F.3d 556 (8th Cir. 1996) (“The IDEA does not demand that the State cure the disabilities which impair a child's ability to learn but requires a program of remediation which would allow the child to learn notwithstanding her disability”); *El Paso Indep. Sch. Dist. v. Robert W.,* 898 F. Supp. 442, 450 (W.D. Tex. 1995) (“whether or not there is a ‘widening gap’ is not the proper standard to be applied and curing Robert's disability is not a legally required educational goal”). [↑](#footnote-ref-55)
55. See *Poway Unified Sch. Dist. v. K.C.*, No. 10CV897-GPC DHB, 2013 WL 990837, at \*8 (S.D. Cal. Mar. 13, 2013) (where student was “very good [at] auditory learning and supplemented her understanding of classroom instruction with a variety of strategies and was very successful,” the court concluded that student did not need CART services as the transcription service offered by the school was “fine” especially as the IEP offered the student a “comprehensive scheme to address [her] needs” including “DHH Language and Speech; Resource Specialist Program Learning Strategies class; preferential seating; a second set of text books for the home; copies of teacher's notes when necessary; closed captioning for media; peer note taker in Health class; personal auditory FM system; laptop for streaming closed captioned videos; closed caption decoder; visual presentation of new materials and vocabulary; and directions to teachers to face [the student] when speaking,” and the student “was performing at an A or B in all of her classes and progressing on her IEP goals and advancing from grade to grade”). [↑](#footnote-ref-56)
56. In contrast, see *K.M. v. Tustin Unified Sch. Dist.*, No. SACV 10-1011 DOC, 2011 WL 2633673, at \*12 (C.D. Cal. July 5, 2011), *rev'd in part,* 725 F.3d 1088 (9th Cir. 2013) (“The Court also finds no substantive deprivation of a FAPE by the District's refusal to provide her with CART services. Under the Rowley ‘educational benefit”’ standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her”).  [↑](#footnote-ref-57)
57. See 603 CMR 28.02 (17) (“Progress effectively in the general education program shall mean to make documented growth in the acquisition of knowledge and skills, including *social/emotional development*, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student…”) (emphasis added); *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007 (“We have likewise held that the IDEA entitles qualifying children to services that “target ‘all of [their] special needs,’ whether they be academic, physical, emotional, or social”); see also https://www.doe.mass.edu/sped/links/deaf.html; National Association of State Directors of Special Education (NASDSE), (2018) [↑](#footnote-ref-58)
58. In contrast, I place little emphasis on Ms. Pancare’s testimony as she has only become re-involved with Student since 2021 and has not worked with him directly in any capacity. [↑](#footnote-ref-59)
59. *Cf. J.G. v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1288 (C.D. Cal. 2015) (a referral to a private program “may be J.G.'s best hope for some educational benefit, as J.G.'s 2012 IEP states that he ‘needs continued exposure to ASL to foster his language development’ [and a ] placement at CSDR would enable J.G. to interact with large group of peers using ASL as their primary mode of communication, and he would receive his instruction in ASL”). [↑](#footnote-ref-60)
60. See, e.g., Madeleine Chapman and Jesper Dammeyer, “The Significance of Deaf Identity for Psychological Well-Being,” *Journal of Deaf Studies and Deaf Education*, 2017, 187–194. [↑](#footnote-ref-61)
61. Brougham v. Town of Yarmouth, 823 F. Supp. 9, 16 (D. Me. 1993) (“It is clear that under the IDEA, parental preference alone cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child”); *Gregory K. v. Longview School District*, 811 F.2d 1307, 1314 (9th Cir.1987) (appropriate placement proposed by school district must be upheld even if family prefers another alternative, which may be better for the child). [↑](#footnote-ref-62)
62. *Endrew F.,* 137 S. Ct. at 999(“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal”). [↑](#footnote-ref-63)
63. See *Letter to Anonymous*, 21 IDELR 67 (OSEP 1994) (“Of course regular classroom placements are appropriate for many students who are deaf, but for others they are not. If the child's needs cannot be met in the regular education setting with the use of supplementary aids and services, then removal is required. As noted in the guidance, ‘[t]he provision of FAPE is paramount, and the individual placement determination about LRE is to be considered within the context of FAPE’”). [↑](#footnote-ref-64)
64. See *Endrew F.,* 137 S. Ct. at 1001; see also *Mr. I.,* 480 F.3d at 12 (“there is nothing in IDEA or its legislative history that supports the conclusion that ... ‘educational performance’ is limited only to performance that is graded”). [↑](#footnote-ref-65)
65. See 603 CMR 28.08(6)(a) (“The district shall not permit any eligible student to be transported in a manner that requires the student to remain in the vehicle for more than one hour each way except with the approval of the Team. The Team shall document such determination on the IEP”). [↑](#footnote-ref-66)