COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

# **In Re: Duxbury Public Schools BSEA #11-7847**

**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 March 29 and 30, 2012 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student

Student’s Mother

Student’s Father

Elizabeth Barrett Speech-Language Pathologist, Duxbury Public Schools

Wayne Frieden School Psychologist, Duxbury Public Schools

Bruce Hamilton Guidance Counselor, Duxbury Public Schools

Amy Muldoon IEP Team Chairperson, Duxbury Public Schools

Kathleen Davis-McDonough Assistant Principal, Duxbury Public Schools

Bruce Cole Duxbury Administrator of Special Education

Sheldon Ananian Attorney for Parents and Student

Paige Tobin Attorney for Duxbury Public Schools

Laurie Jordan Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-27; documents submitted by the Duxbury Public Schools (Duxbury) and marked as exhibits S-1 through S- U; and approximately two days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on May 4, 2012, and the record closed on that date.

## ISSUE

The issue to be decided in this case is whether Parents are entitled to be reimbursed by Duxbury for expenses related to Parents’ private placement of Student at the New Hampton School during the 2009-2010 school year.

FACTS

Student is intelligent, personable and articulate. She is an excellent athlete, and athletics have been an important part of her education at least from the beginning of high school through the present. Testimony of Mother, Student.

Student has been diagnosed as having global deficits in oral and written language and a language-based learning disability. Student’s deficits are in the areas of auditory processing, word retrieval, and working memory. She also has deficits in the area of executive control such as the efficient selection and processing of information and organizing her behavior to produce an appropriate response. She “has difficulty with tasks involving working memory, processing speed, and academics across all domains” and, more specifically, she continues to be “challenged by a variety of tasks, within the domains of reading, writing, and math.” Testimony of Frieden, Mother; exhibit P-3 (pages 4-7).

Currently, Student is a sophomore at Bridgewater State College, having graduated from New Hampton School (a private, residential school in New Hampton, New Hampshire) in the spring of 2010. Duxbury paid for three years of Student’s placement at New Hampton (her 9th, 10th and 11th grade years). Parents paid for the 12th grade year (the 2009-2010 school year), for which they now seek reimbursement through the instant appeal. Testimony of Student, Mother.

With respect to the disputed school year (2009-2010), Duxbury proposed IEPs that would have placed Student back at the Duxbury High School for her senior year. Student’s English Language Arts (ELA) and math classes would have been co-taught by a regular education teacher and a special education teacher. The IEP also called for related services of academic support (4.5 times, 68 minutes per seven-day cycle), speech-language services (a half hour each seven-day cycle), academic/prevocational guidance (a half hour, three times each semester), and summer services from a special education teacher (two hours, four days per week, for five weeks). Exhibits P-1, S-H.

I now turn to Student’s educational history. Student attended the Duxbury Public Schools for elementary school through the 4th grade. During these early years, Student received a number of evaluations during the spring of 1999, the fall of 2000 and the winter of 2001, including language and auditory processing evaluations at Children’s Hospital in Lexington, MA, and a neuropsychological evaluation by Rafael Castro, PhD.[[1]](#footnote-1) Dr. Castro also observed Student’s educational program at Duxbury on March 1, 2001. His evaluation report concluded that Student had global deficits in oral and written language and that her profile reflected a language-based learning disability as well as attentional concerns. Dr. Castro recommended that Student be placed in an educational program specifically oriented to children with language-based learning disabilities. Testimony of Mother; exhibits P-6, P-7, P-8.

Following these evaluations, Duxbury and Parents agreed that Student should be placed at the Learning Prep School for 5th grade. Duxbury funded this placement for 5th grade, as well as Student’s continued placement at Learning Prep School for her 6th, 7th and 8th grade years. Testimony of Mother.

In May 2005 (near the end of Student’s 8th grade year) at Parents’ request, Dr. Castro conducted a second neuropsychological evaluation of Student, finding that Student “continues to struggle with limitations imposed by her pronounced language based learning disorder.” The evaluation recommended that Student be placed in a “substantially-separate, language-based classroom employing a coherent academic program in which information is broken down for her and presented repetitively, in multiple modalities and at a pace that she can manage.” The neuropsychological evaluation further recommended that all subjects be taught to Student “in a specialized fashion and implemented through a coordinated and consistent set of strategies that assist children with learning disabilities to circumvent their challenges.” The evaluation also noted that “it is important to understand that a student with [Student’s] current levels of reading and writing skills would be unable to manage the demands of even an inclusionary classroom and would therefore fail to access the curriculum in that type of setting.” Exhibits P-2 (pages 12-14), P-10.

Parents then decided to return Student to the Duxbury Public Schools. Pursuant to a fully accepted IEP, Student began attending the Duxbury High School for 9th grade, which was the 2005-2006 school year. Testimony of Mother; exhibit P-4.

Over the course of the 2005-2006 school year, Parents became concerned regarding the appropriateness of Student’s educational services and placement. Student also did not believe that her school year was productive, and she skipped a substantial number of classes. At Parents’ request, Dr. Castro observed Student’s ELA period at the High School. Testimony of Student, Mother; exhibit P-2.

In a December 27, 2005 letter to Parents, Dr. Castro concluded, on the basis of his observation and neuropsychological evaluation of May 2005, that the IEP and educational services being delivered to Student at the Duxbury High School were not meeting her educational needs. For purposes of recommendations regarding her needed special education services, he referred to his May 2005 evaluation, discussed above. Exhibit P-10.

On May 3, 2006, Parents rejected the IEP and placement. By letter of May 16, 2006 to Duxbury, Parents shared with Duxbury Dr. Castro’s December 27, 2005 letter and advised Duxbury that they were exploring alternative placements for their daughter. Testimony of Mother; exhibit P-9.

On June 20, 2006, at Parents’ request, Duxbury administered the WIAT-II test to Student. The report included test scores and interpretation of results, but did not include any summary analysis or recommendations. Exhibit P-22.

By the end of June 2006, Parents had explored a number of private schools, and Student had been accepted at the New Hampton School for the next school year. Although it served regular education students, New Hampton also had a program specifically for special needs students. New Hampton strongly recommended to Parents that if Student were to attend New Hampton, she should repeat 9th grade and attend the special needs program, so that she would have the benefit of this special needs program from the 9th grade going forward. New Hampton advised Parents that this would likely be necessary for Student to be successful in their school. When Parents decided to have their daughter attend New Hampton, they believed that they had little choice but to accept this recommendation and have their daughter repeat 9th grade. Testimony of Mother.

At this same time, Parents and Duxbury were negotiating an agreement for purposes of Student’s attending New Hampton at Duxbury’s expense. On July 17, 2006, the parties entered into an agreement by which Duxbury agreed to fund Student’s placement at New Hampton for the 2006-2007, 2007-2008 and 2008-2009 school years. The agreement provided that “[i]t is expected that the STUDENT will graduate from high school in June 2009, thus ending her entitlement to special education.” The agreement further provided that in the event this did not occur, Duxbury would develop an IEP and, if there were a disagreement regarding the proposed IEP and placement for the 2009-2010 school year, the “stay put” placement would be the placement proposed by Duxbury. Testimony of Mother; exhibits P-11, S-N.

Mother testified that by the time the agreement was signed on July 17, 2006, Parents knew that New Hampton was strongly recommending that Student repeat 9th grade and that Parents would follow this recommendation, making it likely that Student would graduate in the spring of 2010, instead of June 2009 as contemplated by the agreement (quoted above). Mother testified that she had brought this to the attention of Duxbury’s then Special Education Director (Ms. O’Callaghan) prior to signing the agreement, but Ms. O’Callaghan took the position her that it was too late to change the agreement, and that the issue of Student’s 12th grade could be taken up at a later time. Testimony of Mother.

Student attended New Hampton, repeating her 9th grade year during the 2006-2007 school year. She continued to attend New Hampton for her 10th and 11th grades (2007-2008 and 2008-2009 school years). Duxbury funded Student’s private placement for these three school years.

On February 6, 2009, Duxbury’s School Psychologist (Mr. Frieden) conducted a psychological evaluation of Student, and on March 17, 2009, Duxbury’s Speech-Language Pathologist (Ms. Barrett) conducted a speech-language evaluation of Student. The psychological evaluation recommended that Student “may benefit from instructional support in all academic areas”, suggested various accommodations, and noted that other recommendations would be formulated by the IEP Team. The speech-language evaluation did not make any recommendations (indicating, instead, that they would be discussed at a Team meeting). Exhibits P-26, S-I, S-J.

Pursuant to the agreement discussed above, Duxbury convened an IEP Team meeting in May 2009 and proposed a new IEP for Student for the 2009-2010 school year after it became clear that Student would not graduate in June 2009. The details of the IEP, which proposed to bring Student back to the Duxbury High School, are discussed above.

By letter of June 30, 2009 to Duxbury, Cynthia M. Rooney, MD, wrote that in support of Student’s continuing to be placed at the New Hampton School for 12th grade because Student has found academic success there and because a change at this time “would be detrimental in her pursuit of a high school diploma.” Dr. Rooney has been Student’s neurologist since 4th grade. Testimony of Mother; exhibit P-19.

At Parents’ request, Dr. Castro completed a third neuropsychological evaluation of Student in July and August 2009. The evaluation included formal testing of Student, a review of Student’s records, interviews with and reports completed by Parents, the Achenbach Teacher’s Report Form (completed by Student’s academic support teacher at New Hampton) and clinical observation of Student. In his report, Dr. Castro also referenced his previous neuropsychological evaluations of Student (discussed above). There were no program observations as part of this evaluation. Testimony of Mother; exhibit P-3.

Dr. Castro’s neuropsychological report found that since his previous neuropsychological evaluation in May 2005, Student demonstrated “continued difficulties with language-based tasks, consistent with her diagnosis of a language-based learning disability.” The report further explained: “[Student] continues to be challenged by a variety of tasks, within the domains of reading, writing and math” including deficits in the formulation of expressive language, and difficulties understanding more complex, orally-presented directions.” She also “presents with difficulties with executive control” including the efficient selection and processing of information and organizing her behavior to produce an appropriate response. Exhibit P-3 (pages 5-7).

Dr. Castro’s neuropsychological report stated that Student had made gains since the previous evaluation in 2005, but nevertheless “is experiencing increased difficulty in math and reading” with only one year of progress in reading decoding skills since May 2005. “[H]er independent reading comprehension skills have not developed as expected for age.” Exhibit P-3 (page 5).

The recommendations section of Dr. Castro’s report began by stating that Student would continue to benefit from “placement in a structured high school setting that provides one-to-one or small group academic support, as well as frequent check-ins with an appropriate individual to monitor her overall progress and experience in the high school setting.” The report then noted that “[t]hese elements are present in her current educational setting” which was the New Hampton School. Exhibit P-3 (page 8).

Dr. Castro’s neuropsychological report further recommended that Student be offered a “smaller class size, as well as preferential seating”; unlimited time, whenever possible, to complete class assignments and tests; and a “decreased workload when appropriate to allow he to accomplish tasks without excessive effort.” She should also be provided information in “smaller steps or in written form” given her “challenges processing language and working within information in memory”. It was also suggested that Student be provided audiobooks to study from and that reading assignments be kept to a minimum. Exhibit P-3 (pages 8-9).

Dr. Castro’s neuropsychological report further recommended “regular academic support with an appropriate professional” in order to assist Student in such areas as strategies for academic assignments, analyzing word problems in math, monitoring her progress in all academic subjects with help offered as needed during tutorial times. The report then recommended the following additional services:

She will benefit from being directly taught problem solving strategies (i.e., “learning to learn” strategies) to use when tackling novel demands, of effective ways to break down information into manageable loads and steps, and of efficient approaches to integrating material. Verbal and visual supports, as well as modeling and cuing, will assist her in understanding the material. These supports would serve to promote her ability to more successfully approach and more independently accomplish tasks and assignments across domains. [Exhibit P-3 (page 9).]

With respect to reading, Dr. Castro’s neuropsychological report noted that “given her increased challenges in this area”, it is suggested that

[Student] be offered a structured reading comprehension program in a small group or individualized format designed for individuals with language based learning disabilities. The goal of this program should be to help [Student] read more strategically and extract information more easily from text. [Exhibit P-3 (page 9).]

Parents rejected Duxbury’s IEP for 12th grade, and continued to place their daughter at the New Hampton School. Mother testified that Student succeeded academically (by achieving average grades), as well as socially and athletically at New Hampton. Student’s written progress reports at New Hampton are generally favorable. Testimony Mother; exhibits P-23, P-25, S-L.

Duxbury did not receive Dr. Castro’s evaluation from Parents until February 2010. Duxbury re-convened an IEP Team meeting on March 9, 2010. The evaluation was reviewed by the Team at that time, and an amended IEP (for the period 3/9/10 to 6/5/10) was proposed by Duxbury. The principal change in the IEP was the addition of a reading comprehension program, as recommended by Dr. Castro. Exhibit S-A.

Dr. Castro wrote a letter, dated January 1, 2012, “To whom it may concern”. In his letter, Dr. Castro stated that Student “exhibited a remarkable trajectory of improvement” at the New Hampton School and that Duxbury’s “proposed 2010 IEP constituted an effort similar to that of 2005 and therefore remained insufficient in addressing her needs”. Exhibit P-20.

Student attended New Hampton for 12th grade and graduated in the spring of 2010. She then attended Plymouth State University in Plymouth, New Hampshire for one semester and transferred to Bridgewater State College (in Massachusetts) where she is presently a sophomore. Testimony of Student, Mother.

**LEGAL STANDARDS**

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)[[2]](#footnote-2) and the Massachusetts special education statute.[[3]](#footnote-3)

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] …"[[4]](#footnote-4) The IDEA defines FAPE to mean “special education and related services” that are provided at public expense, that meet state standards and that are provided in accordance with the student’s individualized education program (IEP).[[5]](#footnote-5)

Student’s right to FAPE is assured through the development and implementation of an individualized education program or IEP.[[6]](#footnote-6) An IEP must be custom-tailored to address Student’s “unique” educational needs.[[7]](#footnote-7)

The IDEA and Massachusetts law reflect a preference for mainstreaming disabled students.[[8]](#footnote-8) This entails ensuring, “[t]o the maximum extent appropriate,” that disabled students are taught with nondisabled students.[[9]](#footnote-9) “The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs.”[[10]](#footnote-10)

As a general rule, FAPE mandates proposed special education and related services that are “reasonably calculated to enable [Student] to receive educational benefits.”[[11]](#footnote-11) This “does not imply that a disabled child is entitled to the maximum educational benefit possible.”[[12]](#footnote-12) Rather, within the context of FAPE, “[a]ppropriateness and adequacy are terms of moderation.”[[13]](#footnote-13)

“At the same time, the IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a federal basic floor of meaningful, beneficial educational opportunity. Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit.”[[14]](#footnote-14) Similarly, on multiple occasions the Supreme Court has referenced a FAPE standard that a student is entitled to “meaningful access” to his or her education.[[15]](#footnote-15) In the application of these standards, federal case law clarifies that “levels of progress must be judged with respect to the potential of the particular child”[[16]](#footnote-16) unless the potential is “unknowable”.[[17]](#footnote-17)

FAPE is defined by the IDEA to include state educational standards,[[18]](#footnote-18) which may exceed the federal floor.[[19]](#footnote-19) Massachusetts standards require that a proposed IEP include specialized instruction and related services designed to enable Student to make effective progress and develop his or her individual educational potential.[[20]](#footnote-20)

In the instant dispute, Parents enrolled their daughter at a private school for the 2009-2010 school year without the consent of or referral by Duxbury. Under these circumstances, a BSEA Hearing Officer may require Duxbury to reimburse Parents for the cost of that enrollment but only if the Hearing Officer finds both that (1) the school district had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and (2) the private school placement was appropriate. In such circumstances, the school system may be found responsible for the reasonable costs incident to that private placement, including tuition and transportation.[[21]](#footnote-21)

In the instant dispute, Parents have the burden of persuasion that Duxbury did not offer FAPE through an appropriate IEP and that Parents’ private placement was appropriate for purposes of reimbursement.[[22]](#footnote-22)

**DISCUSSION**

In the instant dispute, I will first consider whether Parents’ privately-obtained educational services were appropriate for purposes of their reimbursement claim.[[23]](#footnote-23)

When Student first entered New Hampton in the fall of 2006 repeating her 9th grade year, it had a specialized program (for special education students) that New Hampton recommended for Student. Student enrolled in this special education program for the 2006-2007 school year. At all times relevant to this dispute, New Hampton also served regular education students. Testimony of Mother.

However, by Student’s 12th grade year (2009-2010 school year), she was no longer participating in a special education program at New Hampton. Instead, she was fully mainstreamed in regular education for the entire school year. As will be discussed in detail below, although New Hampton provided a number of accommodations and supportive educational structures, it did not offer any specialized instruction that might be considered “special education”,[[24]](#footnote-24) and Student was taught entirely by regular educators. Testimony of Student, Mother.

As a general rule, the fact that a special education student is privately placed in a regular education private school that provides no specialized instruction does not necessarily foreclose the possibility of determining that the school is appropriate for the student for purposes of reimbursement. It may be that the private school is structured in a way and includes needed accommodations so that a student’s special education needs may be appropriately met.[[25]](#footnote-25) I therefore consider more specifically Student’s actual special education needs and whether those needs were addressed appropriately at New Hampton.

For purposes of determining Student’s special education needs and how they should be met in order for her to receive appropriate services and placement, I find (and it is not disputed) that Parents’ private evaluations through their expert, Dr. Castro, provide the most complete analysis and recommendations. Of particular relevance are Dr. Castro’s two most recent neuropsychological evaluations and reports. Exhibits P-2, P-3, P-10.

I also note that Dr. Castro is a highly experienced neuropsychologist and had the advantage of evaluating Student on three different occasions over a seven year period. He also observed Student’s program at Duxbury on two occasions and his most recent evaluation included obtaining information from Student’s academic support teacher at New Hampton. Exhibits P-2, P-3, P-10, P-26.

There were other evaluations (for example, Duxbury’s speech-language evaluation and psychological evaluation), but they are not nearly as comprehensive, nor do they provide meaningful recommendations to guide Parents as to what special education and related services (and placement) should be provided to Student. Exhibits S-I, S-J.

Parents have relied upon Dr. Castro’s opinions in determining their daughter’s educational placements. Parents have not provided or relied upon any other evaluations for the purpose of my determining the appropriateness of their private placement. I will therefore consider the appropriateness of New Hampton in light of Dr. Castro’s evaluation reports and recommendations.

Of the neuropsychological evaluations, Dr. Castro’s evaluation in July and August 2009 is most relevant because it was completed shortly before Student attended New Hampton for the 2009-2010 school year. However, I also note that although Parents may have been orally advised regarding the evaluation conclusions soon after the evaluation, they apparently did not receive the written evaluation report until well after the beginning of the 2009-2010 school year, [[26]](#footnote-26) and therefore Parents may have reasonably relied upon Dr. Castro’s earlier neuropsychological evaluation report from May 2005 when making their decision to continue Student at New Hampton for her 12th grade year in the 2009-2010 school year. Testimony of Mother. I therefore consider both evaluations.

Dr. Castro’s 2005 and 2009 evaluations consistently identified Student as having a language-based learning disorder that required an array of specialized services and accommodations in order for her to access the curriculum and make meaningful progress, particularly in the areas impacted by her disability. In his 2009 report, Dr. Castro summarized as follows: “[Student’s] profile continues to be consistent with that of a language-based learning disability and she requires continued specialized supports to assist her in managing a number of demands across environments.” Exhibits P-2, P-3 (page 6).

Dr. Castro’s 2009 evaluation made a number of recommendations that appear to have been met by Student’s placement at New Hampton during the 2009-2010 school year. These included relatively small classes, one-to-one or small group academic support, and a number of accommodations, including preferential seating, unlimited time for tests, a “tailored” workload, directions in relatively small steps or written form and audiobooks. Dr. Castro’s 2009 evaluation report also concluded that the following recommendation from his report was being met at the New Hampton School: “frequent check-ins with an appropriate individual to monitor her overall progress and experience in the high school setting.” Testimony of Mother; exhibit P-3.

However, in both the 2005 and 2009 reports, Dr. Castro made clear that while these kinds of accommodations and supportive structure found within New Hampton’s regular education program were needed, they were not, by themselves, sufficient.

Through his reports, Dr. Castro made clear the importance of Student’s receiving specialized instruction. He noted, for example, in his 2005 report that a student with “[Student’s] current levels of reading and writing skills would be unable to manage the demands of even an inclusionary classroom and would therefore fail to access the curriculum in that type of setting.” The evaluation recommended that Student be placed in a “substantially-separate, language-based classroom employing a coherent academic program in which information is broken down for her and presented repetitively, in multiple modalities and at a pace that she can manage.” It was further recommended that all subjects be taught to Student “in a specialized fashion and implemented through a coordinated and consistent set of strategies that assist children with learning disabilities to circumvent their challenges.” Exhibit P-2 (pages 12-14). In other words, Dr. Castro recommended that Student attend substantially-separate classrooms that would be taught only to students with similar special education needs, in contrast to the mainstreamed classes that Student actually attended for her 2009-2010 school year.

When Dr. Castro re-evaluated Student in July and August of 2009, he found not only that Student continued to have a language-based learning disability, but he also noted “executive control” difficulties that impact negatively on her efficient selection and processing of information and organizing her behavior to produce an appropriate response. Exhibits P-2, P-3.

Perhaps of most concern in the 2009 report was Dr. Castro’s finding regarding Student’s reading abilities. In this regard it is helpful to first refer back to Dr. Castro’s 2005 report, where he emphasized that Student had “pronounced challenges in almost every aspect of language-based academic skills”. He noted in his 2005 report that, as compared to his testing six years earlier, Student had made “particularly noticeable” gains in reading and reading comprehension; the gains “approximat[ed] elapsed time” and included “improved decoding capacity”. In Dr. Castro’s opinion, these gains attested to the appropriateness of her placement at Learning Prep School during middle school. The 2005 report cautioned that, notwithstanding these gains, “reading remains a slow and laborious process for [Student]”. Exhibit P-2 (pages 10-11).

In his 2009 report, issued after Student had been at Duxbury for her 9th grade and then at New Hampton for three years, Dr. Castro found that as compared to his findings in 2005, Student “is experiencing increased difficulty in math and reading” with only one year of progress in reading decoding skills since May 2005. Dr. Castro concluded that Student’s “independent reading comprehension skills have not developed as expected for age.” Exhibit P-3 (page 5).

Dr. Castro’s evaluation in 2009 further revealed that Student’s “ability to read multiple passages and answer questions about them, even with extended time, was well below average, at a fourth grade level” when, at that time, Student had completed her 11th grade at New Hampton The report then noted: “Obviously, this level of reading comprehension is not sufficient to sustain independent work at either the high school or college levels, and [Student] will absolutely require continued academic supports and tutoring to make progress in these settings.” Exhibit P-3 (pages 5-6). In other words, it appeared that since the previous testing in 2005, Student was falling further behind her typical peers with respect to her special education deficit areas (particularly reading and math) and now had a relatively severe need for special education remediation services in reading comprehension.

In order to address Student’s “increased challenges” in reading, Dr. Castro recommended that Student “be offered a structured reading comprehension program in a small group or individualized format designed for individuals with language based learning disabilities.” Dr. Castro explained that the “goal of this program should be to help [Student] read more strategically and extract information more easily from text.” Exhibit P-3 (page 9).

Duxbury’s School Psychologist (Mr. Frieden) who evaluated Student in February 2009 and later reviewed Dr. Castro’s 2009 evaluation similarly testified as to the importance of Student’s receiving a structured reading comprehension program because of her deficits in this area. Testimony of Frieden.

As noted above, Dr. Castro found in 2009 that Student also had “increased difficulty” with math. Dr. Castro did not specifically recommend that Student take a special education math course, and Student and Parents opted for Student not to take any math course during 12th grade because she had already satisfied the school’s math requirement and they knew she struggled in this area. Testimony of Mother, Student; exhibit P-3.

Nevertheless, Dr. Castro recommended that Student receive specialized instruction in the area of problem solving. More specifically, he recommended that Student be “directly taught problem solving strategies (i.e., ‘learning to learn’ strategies) to use when tackling novel demands, of effective ways to break down information into manageable loads and steps, and of efficient approaches to integrating material.” Dr. Castro also recommended that Student be taught using a “multimodal, hands-on approach that will engage her more fully, without excessive language demands.” “Verbal and visual supports, as well as modeling and cuing” were also recommended. He noted that these supports “would serve to promote her ability to more successfully approach and more independently accomplish tasks and assignments across domains.” Exhibit P-3 (page 9).

Finally, Dr. Castro’s 2009 report recommended a variety of academic supports and frequent “check-ins” with Student. The report explains that these supports and check-ins were to be provided by “appropriate professionals” who would be able to assist Student in such areas as strategies for academic assignments, who would monitor her progress in all academic subjects, and who would offer help as needed during tutorial times. It is unclear from the report whether “appropriate professionals” may include regular education teachers and staff. What was clear, however, was that Dr. Castro further recommended that a “special educator or counselor at her school knowledgeable in working with individuals with learning challenges supervise her programming and suggest additional techniques to further [Student’s] learning.” Exhibit P-3 (pages 8, 9).

In sum, Dr. Castro’s reports demonstrate, and it is not disputed by Parents, [[27]](#footnote-27) that Student continued to have wide-ranging and substantial special education needs that required a multitude of specialized services, including specialized instruction, and supervision and support from persons with expertise in Student’s special education deficit areas. Exhibits P-2, P-3. Duxbury also determined that Student needed speech-language services to address her special education needs. Exhibits S-A, S-H, P-1.

As a general rule, providing probative evidence regarding the appropriateness of a special education program is the province of educational experts. The expert would need to know Student and her special education needs, know the particular educational program within which she has been placed, and testify regarding the ability of the educational program to address Student’s unique special education needs. No expert testified on behalf of Parents.

There is no doubt that Parents are dedicated to Student’s well-being, and they likely know their daughter better than anyone else. Parents are more than capable of providing important and relevant information regarding what they have observed as layperson. Yet, it is not disputed that neither by training nor experience is either Parent an educational expert with respect to how their daughter’s educational needs may be appropriately met or with respect to whether a particular service or program was educationally appropriate for their daughter. For the same reasons, Student’s testimony was illuminating, but she did not testify as an expert.

Instead of expert testimony, Parents sought to rely on the reports of educational experts. They point to Dr. Castro’s 2009 neuropsychological report (exhibit P-3, page 8) which takes the position that New Hampton provides “placement in a structured high school setting that provides one-to-one or small group academic support, as well as frequent check-ins with an appropriate individual to monitor her overall progress and experience in the high school setting.” But, these are regular education supports and services,[[28]](#footnote-28) and Dr. Castro’s report never addresses the question of whether New Hampton was providing his recommended special education services to meet Student’s special education needs which, as described above, were extensive.

Parents also relied upon two documents that considered Student’s progress—the New Hampton 2009-2010 progress reports and Dr. Castro’s letter “to whom it may concern” of January 1, 2012. However, the progress reports made no reference to Student’s special education needs and how they were being addressed. Dr. Castro’s letter only generally references Student’s “remarkable trajectory of improvement” and “positive progression” without explaining what time period is being referenced and without taking into account Dr. Castro’s own report from 2009 which cites Student’s increasing difficulties in reading and math after attending New Hampton for three years. Dr. Castro provided no additional explanation of whether or how Student’s special education needs were being addressed at New Hampton. Exhibits P-20, S-L.

I find that none of these documents supports Parents’ view that New Hampton appropriately addressed Student’s special education needs.

Parents also relied on the testimony of Mother, Father and Student. Through this testimony, Parents were able to describe what they observed and were told regarding Student’s needs and the services she received to address those needs.

The only testimony that might support the appropriateness of New Hampton was from Mother. She stated the following regarding the monitoring and support that were provided to Student:

there was structured homework time. There were always people available to her. All of her teachers, if she didn't show up for an after-school study session they would call her on her cell phone and have her come. If there was any change in her academic progress, we heard about it right away. From the house parents to her old tutors to the teachers she had a tremendous amount of support. They wanted her to try to access it herself so when she went to college she would have that skill. [Transcript, March 29, 2012, page150, lines 6 to 18.]

[Student] was expected to identify her needs and seek appropriate assistance as an adult learner in preparation for college.” [Transcript, March 29, 2012, page171, lines 11 to 14.]

In other words, Mother testified that there was structure, accountability, monitoring and tutorial support built into Student’s educational program. I fully credit this testimony. However, as discussed above, this testimony does not support the proposition that Student received any of the extensive specialized instruction or specialized supervision recommended by Dr. Castro.

When asked specifically about any specialized instruction being available to Student, Mother first answered that there was none. When asked again, she added the following: “I think that the English teacher did some specialized reading with her, but it wasn't like a Wilson plan or something like that. Understanding comprehension type things she worked with her on.” Transcript, March 29, 2012, page151, lines 1 to 6. Later in the hearing when the Hearing Officer inquired why Mother appeared to believe that Student was provided a structured reading comprehension program, she had difficulty remembering the nature of the program used, responding as follows: “I know they had it available and I don't remember exactly what it was or what it wasn't. This is like three years ago. And she was doing well so I wasn't barking up their tree to find out why it was going well. I was if I had concerns about it. I don't remember.” Transcript, March 29, 2012, page178, lines 2 to 11.

This testimony reflects the possibility that Student’s English teacher may have provided additional, specialized assistance. However, the testimony is so vague as to the nature of what was provided and how frequently it was provided, that it cannot establish that Student received any part of what Dr. Castro recommended. Moreover, there was no testimony that Student’s English teacher, who was a regular education teacher, had the skills or experience to provide effective special education services to Student.

Student, who likely had the best understanding of the nature and extent of the services that she was provided, testified that what was made available to her was no more and no less than what was available to all other students in the 12th grade. For example, Student explained that, as with all students at New Hampton, she could access tutorial assistance from her teachers whenever she needed to do so. She also testified that she took a reading comprehension course during her first year at New Hampton but did not do so during the 2009-2010 school year. Student’s testimony indicates that she received no special education services for the 2009-2010 school year.

Parents’ closing argument also does not point to any special education services received by Student.[[29]](#footnote-29)

Based upon the testimony of Mother and Student, I have no doubt that Student attained educational benefit from her final year at New Hampton. However, the First Circuit has cautioned that it is not enough for Parents simply to choose a private educational program in which Student can make academic progress.[[30]](#footnote-30)

In order to be considered appropriate for purposes of reimbursement, a private placement need not provide every recommended special education service, “[n]or must the placement meet every last one of the child's special education needs.”[[31]](#footnote-31) “But the reasonableness of the private placement [for purposes of reimbursement] necessarily depends on the nexus between the special education required and the special education provided.”[[32]](#footnote-32) A “unilateral private placement is only appropriate if it provides education instruction *specifically* designed to meet the *unique* needs of a handicapped child.”[[33]](#footnote-33)

Because Parents have not provided sufficient evidence that would allow me to conclude that Student’s extensive special education needs were appropriately addressed and because there is no evidence that Student attained any demonstrable improvement or benefit in the various educational and personal skills identified as her special education needs, I find that Parents have failed to meet their burden of persuasion that the private educational services they obtained for their daughter for the 2009-2010 school year were appropriate. Parents’ reimbursement claim must be denied on this basis alone.

Having determined that Parents’ private placement was not appropriate for purposes of reimbursement, I need not consider whether Duxbury offered FAPE.[[34]](#footnote-34) However, in order to provide further guidance to the parties, I review this second issue. As noted above, Parents had the burden of persuasion on this part of the dispute as well.

Duxbury proposed two IEPs for the 2009-2010 school year. The first IEP for the 2009-2010 school year was proposed during an IEP Team meeting on May 27, 2009; and then, after receipt of Dr. Castro’s 2009 evaluation report in February 2010, the Team met again in March 2010 to amend the IEP for this school year, essentially for the purpose of adding a specialized reading comprehension program. Testimony of Mother, Muldoon; exhibits P-1, S-A, S-H.

Duxbury provided the expert testimony of several of its educators in support of the appropriateness of its proposed IEPs. Duxbury’s School Psychologist (Mr. Frieden) had completed a psychological evaluation of Student in February 2009. In his testimony, he reviewed the results of his evaluation, together with the results of Dr. Castro’s 2009 evaluation. He demonstrated a good understanding of Student’s special education needs, emphasizing the importance of Student’s receiving specialized services in her critical areas of weakness—reading comprehension, writing and math—because these skills would be particularly important for Student in college. Mr. Frieden provided credible testimony that Duxbury’s proposed IEPs were reasonably calculated to provide the needed special education services through co-taught classes in English and math, and additional specialized instruction in the Resource Room for 68 minutes 4.5 times per seven-day cycle. Testimony of Frieden.

Duxbury’s Speech-Language Pathologist (Ms. Barrett) testified that she evaluated Student in March 2009. She also reviewed Parents’ prior speech-language evaluation done at Children’s Hospital. She demonstrated a good understanding of Student’s special education needs in the language area, particularly with respect to Student’s weakness in auditory memory, and her deficits in receiving, processing and retaining auditory information. She provided credible testimony regarding the appropriateness of the speech-language services proposed in Duxbury’s IEPs, as well as the appropriateness of the accommodations listed in the IEPs. Testimony of Barrett.

Duxbury’s IEP Team Chairperson (Ms. Muldoon) and Assistant Principal (Ms. Davis-McDonough) provided credible testimony regarding the services that Student would have received in the Resource Room pursuant to the proposed IEPs for the 2009-2019 school year. She explained that during this school year, the Resource Room was very structured, work was done on each student’s IEP goals, and the number of students was no more than ten (and, if the number exceeded eight, an aide would be added). Work would have been done in each student’s class content areas through “mini lessons”, and there would have been homework support.

Through this testimony, Duxbury did not establish that their IEPs provided all of the services recommended by Dr. Castro, and certainly the IEPs did not meet the wishes of Parents.[[35]](#footnote-35) However, Duxbury provided credible, expert testimony in support of their position that the IEPs were appropriate because they were “reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs”.[[36]](#footnote-36)

In contrast, Parents provided no expert testimony that Duxbury’s proposed IEPs were inappropriate. Instead, Parents relied upon two documents to establish the inappropriateness of the IEPs. First, Parents point to Dr. Castro’s letter dated January 1, 2012, addressed “To whom it may concern”. In his letter, Dr. Castro stated that the IEP proposed by Duxbury for the 2009-2010 school year was inadequate. More specifically, Dr. Castro wrote:

It is also my professional opinion that the programming offered to [Student] by her school system in the form of the 2010 IEP constituted an effort similar to that of 2005 and therefore remained insufficient in addressing her needs. Moreover, while I believe the proposed 2010 IEP to be insufficient in addressing [Student’s] needs, the added burden of MCAS preparation and testing, would make the plan not only insufficient, but also unworkable. [Exhibit P-20.]

In his letter, Dr. Castro did not provide any explanation as to what information he relied upon (or from whom he obtained any information that he relied upon) in reaching these conclusions—for example, we do not even know if he reviewed a proposed IEP for the 2009-2010 school year (as compared to simply being advised by someone as to the content of the IEP) or whether he was aware of changes at the Duxbury High School from 2005-2006 to 2009-2010. We only know from Mother’s testimony that Dr. Castro did not observe the proposed program for the 2009-2010 school year. Thus, there is no way to discern what Dr. Castro knew about Duxbury’s proposed IEP for the 2009-2010 or the placement within which the IEP would have been implemented. It is therefore not possible to understand the bases for his conclusion that the “2010 IEP constituted an effort similar to that of 2005” and therefore one cannot evaluate the reliability or persuasiveness of his opinions. Similarly, we know nothing about Dr. Castro’s understanding of MCAS preparation, making it impossible to know why he determined that the “added burden of MCAS preparation” would make the “plan … unworkable”. It also may be noted that the letter appears to be written solely for purposes of assisting Parents in their dispute with Duxbury. Since Dr. Castro did not testify, he could not be cross-examined, thereby reducing further the probative value of his letter. For all of these reasons, it is not possible to give his letter any probative weight regarding the appropriateness of Duxbury’s proposed IEPs for the 2009-2010 school year.[[37]](#footnote-37)

Nevertheless, Dr. Castro’s letter serves the purpose of helping to identify the two arguments that Parents make as to the inappropriateness of Duxbury’s proposed IEP: first, the IEPs for the 2009-2010 school year at Duxbury High School were inappropriate because they are substantially the same as a previous, inappropriate IEP (for the 2005-2006 school year); and second, Student would not be able to pass MCAS in 12th grade, and therefore she would not have been able to graduate from Duxbury High School in June 2010. I will briefly consider each argument.

Even if one were to assume for purposes of discussion that Student’s IEP for her 9th grade year at Duxbury High School (the 2005-2006 school year) was inappropriate because it did not allow Student to make meaningful or effective educational progress, Parents’ arguments fail regarding the IEP for the 2009-2010 school year. As will be discussed below, the unrebutted evidence was that Student’s special education needs had changed over the course of the four intervening years, and the educational program offered by Duxbury for the 2009-2010 school year was substantially different than the program offered for the 2005-2006 school year.

Between the 9th grade at Duxbury High School (the 2005-2006 school year) and Student’s 12th grade year (the 2009-2010 school year), her special education needs and how they should be met had changed. This is easily seen in comparing Dr. Castro’s 2005 and 2009 neuropsychological reports, and the fact that the two reports recommend different educational programs for Student—the first report proposes placement in a substantially-separate, language-based classroom, while the second report continues to propose extensive special education instruction but through inclusion and specialized instruction, and no longer calls for placement in a substantially-separate classroom throughout the school day. Also, in the 2009 report, Dr. Castro discussed how Student had changed, making progress in some areas but not in others, as discussed above in greater detail. Exhibits P-2, P-3. In light of Student’s changing special education needs over these four years and in light of Dr. Castro’s recommending less restrictive special education services in 2009, it simply is not possible to prove that the later IEP is inappropriate by arguing that the two IEPs call for similar services and placement.

Also, the IEPs and educational programs for these two school years may have appeared to Parents to be substantially the same, but they were in fact different. By the 2009-2010 school year, Duxbury had moved to a co-teaching model that paired a regular education teacher and a special education teacher, with 18 to 20 students in each classroom. Pursuant to her IEP, Student’s math and English classes would have been taught in this manner, as compared to Student’s 2005-2005 school year where Student would have received all of her math and English special education services outside of the general education classroom. In addition, the manner in which services were provided in the resource room substantially changed from the 2005-2006 school year to the 2009-2010 school year (Mother and Student were particularly critical of the services that Student received in the resource room during the 2005-2006 school year), with the Resource Room providing substantially greater structure and more effective support to students by the 2009-2010 school year—for example, the resource room had begun using a curriculum mapping system that included mini-lessons. Testimony of Muldoon, Davis-McDonough; exhibits P-1, P-4, P-5, S-A, S-H. In sum, there was persuasive, unrebutted testimony that what Duxbury was proposing for Student’s 12th grade was a substantially-different educational program than what was provided Student for 9th grade at Duxbury High School.

For these reasons, it is not persuasive for Parents to argue that because Student’s IEP for the 2005-2006 school year was inappropriate, her IEP for the 2009-2010 school year must have been as well.

Parents further argue that in addition to Student’s IEP being inappropriate during the 2005-2006 school year, the IEP was not properly or fully implemented. Parents infer from this, without any support in the evidentiary record, that Student’s IEP for the 2009-2010 school year would also not have been properly or fully implemented. Yet, the undisputed testimony was that Duxbury was prepared to and had the capacity to fully and properly implement its proposed IEP for the 2009-2010 school year. Testimony of Frieden, Muldoon, Cole.

Parents also made the argument that Student could not reasonably be expected to pass MCAS, which would be a prerequisite for graduation if Student were to return to Duxbury High School and that Duxbury’s proposed IEP was inappropriate for this reason.[[38]](#footnote-38)

Duxbury witnesses testified that Student would have had ample opportunity to prepare for MCAS through dedicated, after-school tutorials. Also, Student’s math and biology classes and her Resource Room support would have all provided her help to prepare for the MCAS exams. These witnesses have had experience with students returning to Duxbury High School (sometimes in their senior year) and needing to pass the MCAS without having done any prior MCAS preparation. These witnesses also reviewed Student’s schedule. They testified that Student would likely have had sufficient opportunity to pass the MCAS exams during her 12th grade year if she had returned to Duxbury. Testimony of Muldoon, Davis-McDonough. I credit this testimony.

Concerns regarding Student’s having to pass MCAS were referenced, as noted above, in Dr. Castro’s letter. Student’s neurologist, Dr. Rooney, stated similar concerns in her June 30, 2009 letter to Duxbury. She wrote in support of Student’s continuing the New Hampton School for 12th grade because “[i]f she returned to Duxbury she would be required to pass MCAS as she has been exempt for the past three years. This would only add to her academic burden.” Testimony of Mother, Father; exhibit P-19.

However, Dr. Rooney’s letter suffers from the same limitations that were discussed above regarding Dr. Castro’s letter of January 1, 2012. There was no evidence regarding Dr. Rooney’s knowledge, experience or expertise regarding these issues. Dr. Rooney did not testify. We only know from Mother’s testimony that she has been Student’s neurologist. For these reasons, her letter (and Dr. Castro’s letter, for reasons discussed above) have no probative value.

In their testimony, Mother and Father echoed these concerns regarding MCAS. I respect their concerns as Student’s Parents and I agree that passing MCAS would undoubtedly have been a challenge for Student; but Parents demonstrated no particular expertise or experience regarding this issue and could not provide probative evidence regarding the likelihood of their daughter not being able to pass MCAS during her 12th grade year at Duxbury High School.

For these reasons, I find that Parents have not met their burden of persuasion that Duxbury’s proposed IEPs for the 2009-2010 school year were inappropriate. Thus, Parents’ reimbursement claim fails on this basis.

**ORDER**

Parents are not entitled to reimbursement for expenses relevant to their private placement of Student at the New Hampton School for the 2009-2010 school year.

By the Hearing Officer,

William Crane

Dated: May 22, 2012

# **COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

# **Bureau of Special Education Appeals**

# **THE BUREAU’S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

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. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial 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. Rather, a party seeking to stay the decision of the Bureau must 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," during the pendency of any judicial appeal of the Bureau decision, 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 during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *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 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 Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

**Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 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. Dr. Castro has been a neuropsychologist since 1993. In addition to his private practice as a neuropsychologist, he has an academic appointment as an instructor at Harvard University Medical School, Department of Psychiatry. Exhibit P-27. [↑](#footnote-ref-1)
2. 20 USC § 1400 *et seq*. [↑](#footnote-ref-2)
3. MGL c. 71B. [↑](#footnote-ref-3)
4. 20 USC § 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12 (1st Cir. 2007) (referencing “broad purpose behind the IDEA: ‘to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living’” citing to 20 USC § 1400(d)(1)(A)). [↑](#footnote-ref-4)
5. 20 USC § 1401 (9). [↑](#footnote-ref-5)
6. See 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe,* 484 U.S. 305, 311-12 (1988); *Board of Education v.*

   *Rowley*, 458 U.S. 176, 182 (1982). See also *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“The ‘primary vehicle’ for delivery of a FAPE is an IEP.”). [↑](#footnote-ref-6)
7. See 20 USC 1400(d)(1)(A) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); 20 USC 1401(9), (29) (“free appropriate public education” encompasses “special education and related services,” including “specially designed instruction, at no cost to Parents, to meet the unique needs of a child with a disability”); *Honig*, 484 U.S. at 311 (FAPE must be tailored “to each child's unique needs”); *Rowley,* 458 U.S. at 181 (FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)"); *Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18, 23 (1st Cir. 2008) (referencing the school district’s “obligation to devise a custom-tailored IEP”); 603 CMR 28.02 (20) (“Special education shall mean specially designed instruction to meet the unique needs of the eligible student or related services necessary to access the general curriculum and shall include the programs and services set forth in state and federal special education law.”). [↑](#footnote-ref-7)
8. *See, e.g., Rowley,* 458 U.S. at 202, 102 S.Ct. 3034; *Roland v. Concord School Committee*, 910 F.2d 983, 987 (1st Cir. 1990); MGL c. 71B, s.1. [↑](#footnote-ref-8)
9. 20 U.S.C. § 1412(a)(5)(A); MGL c. 71B, s. 1. See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2(i); 603 CMR 28.06(2)(c). [↑](#footnote-ref-9)
10. *C.G. ex rel. A.S. v. Five Town Community School Dist*., 513 F.3d 279, 285 (1st Cir. 2008). See also *Honig v. Doe,* 484 U.S. 305, 321, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). [↑](#footnote-ref-10)
11. *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 207 (1982). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18, 23 (1st Cir. 2008) (“IEP must be individually designed to provide educational benefit to [a particular] handicapped child.”) (internal quotations and citations omitted). [↑](#footnote-ref-11)
12. *Lessard*, 518 F.3d at 23 (citations omitted). See also *Rowley,* 458 U.S. at 197, n.21 (“Whatever Congress meant by an “appropriate” education, it is clear that it did not mean a potential-maximizing education.”). [↑](#footnote-ref-12)
13. [*Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1086 (1st Cir. 1993)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1993141335&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=1086&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122). [↑](#footnote-ref-13)
14. *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (internal quotations and citations omitted) (emphasis supplied). [↑](#footnote-ref-14)
15. See *Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F*., 526 U.S. 66, 79 (1999) (IDEA dispute “is about whether meaningful access to the public schools will be assured”); *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984) (“Congress sought primarily to make public education available to handicapped children and to make such access meaningful”) (internal quotations omitted); *Rowley,* 458 U.S. at 192 ("in seeking to provide ... access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"). [↑](#footnote-ref-15)
16. *Lessard,* 518 F.3d at 29. See also *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.”). [↑](#footnote-ref-16)
17. See *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012). [↑](#footnote-ref-17)
18. 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524(2007) (“education must … meet the standards of the State educational agency”). [↑](#footnote-ref-18)
19. See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524(2007) (“education must … meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55,* 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 416-423 (1st Cir. 1985) (incorporating into the IDEA a higher state educational standard), cert. den., 475 U.S. 1140 (1986); *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984) (states are “free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children”). [↑](#footnote-ref-19)
20. See MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities.”); MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); 603 CMR 28.01(3) (IEP Team must “include specially designed instruction or related services in the IEP designed to enable the student to progress effectively in the content areas of the general curriculum”). See also IEP form mandated for all Massachusetts school districts by the Massachusetts Department of Elementary and Secondary Education, at pages 2 of 8 and 3 of 8, which may be found at <http://www.doe.mass.edu/sped/iep/forms/word/IEP1-8.doc> [↑](#footnote-ref-20)
21. See *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 366 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.,* 471 U.S. 369 (1985); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006). [↑](#footnote-ref-21)
22. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion “loses if the evidence is closely balanced”); *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“burden of persuasion … lies with the party challenging the IEP”).   [↑](#footnote-ref-22)
23. This issue is typically addressed only after consideration of whether the school district has proposed FAPE. But, as the First Circuit made clear in *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002), the analysis in a reimbursement case may begin (and possibly end) with a finding regarding the appropriateness of the parent’s privately obtained services. In *Rafferty*, the Court found it “unnecessary to consider whether the District was providing [student] with a FAPE” for purposes of resolving parents’ reimbursement claim because it first determined that the parents’ private school was an inappropriate placement. *Id*. [↑](#footnote-ref-23)
24. The IDEA defines the term "special education" to mean “specially designed instruction … to meet the unique needs of a child with a disability”. 20 USC § 1401 (29). [↑](#footnote-ref-24)
25. See, e.g., ***Frank G. v. Board of Educ. of Hyde Park***, 2006 WL 2077009 (2nd Cir. 2006). [↑](#footnote-ref-25)
26. Parents did not provide Duxbury with a copy of Dr. Castro’s 2009 evaluation until February 2010. [↑](#footnote-ref-26)
27. Parents have not disputed Student’s special education deficits and her need for special education services to address those deficits. Their closing argument (at pages 2-3) explained as follows:

    [Student] has been determined to have a language-based learning disability, dyslexia, and auditory processing problems, with marked impairment with word retrieval, verbal memory and organization. These conditions required special education services. [↑](#footnote-ref-27)
28. See *C.M. ex rel. Jodi M. v. Department of Educ., State of Hawai'I*, 2012 WL 662197, \*2 (9th Cir. 2012) (“reading and math classes were not ‘special education’ classes, but rather were regular education classes with small enrollments designed to provide additional support and were open to many types of students who needed additional help”). [↑](#footnote-ref-28)
29. In their closing argument (page 8), Parents provided only the following description of the services and supports provided to address Student’s special education needs at New Hampton during the 2009-2010 school year:

    While her curriculum in her senior year at New Hampton was not labeled as “Special Education,” the services and structure were unique. All classes were small in size; homework time was structured; teachers were always available as they were also dorm monitor and all lived on campus; there was a structured reading list of books; and, homework was monitored each night. [↑](#footnote-ref-29)
30. See *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002) (“Even if the child makes academic progress at the private school, that fact does not establish that such a placement comprises the requisite adequate and appropriate education. Therefore, we reject Rafferty's argument-that a parent can seek any alternative school she wishes if the public school education is inadequate.”) (internal quotations and citation omitted). [↑](#footnote-ref-30)
31. *Mr. I. ex rel. L.I. v. Maine School Admin*., Dist. No. 55, 480 F.3d 1, 25 (1st Cir. 2007). [↑](#footnote-ref-31)
32. *Id*. [↑](#footnote-ref-32)
33. *Gagliardo v. Arlington Cent. Sch. Dist.,* 489 F.3d 105, 115 (2d Cir. 2007) (emphasis in original) (internal quotation marks omitted) (quoting *Rowley,* 458 U.S. at 188-89, 102 S.Ct. 3034). See also *R.B. ex rel. W.B. v. St. Joseph School Dist*,. 2012 WL 1448501, \*3 (8th Cir. 2012) (parents must demonstrate that private placement provides “educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction”); *Matrejek v. Brewster Central School Dist*., 293 Fed.Appx. 20, 22, 2008 WL 3852180, \*2 (2nd Cir. 2008) (where parents’ private “school did not provide the type of instruction and services recommended by the evaluators hired by the parents” and did not provide other recommended services such as speech-language services, reimbursement should be denied). [↑](#footnote-ref-33)
34. See *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26-27 (1st Cir. 2002) (“unnecessary to consider whether the District was providing [student] with a FAPE” for purposes of resolving parents’ reimbursement claim because Court first determined that the parents’ private school was an inappropriate placement). [↑](#footnote-ref-34)
35. See *GD v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991) (“FAPE may 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”). [↑](#footnote-ref-35)
36. *North Reading School Committee v. Bureau of Special Education Appeals,* 480 F.Supp.2d 479, 489 (D.Mass. 2007), quoting[*Lenn v. Portland Sch. Comm.,* 998 F.2d 1083, 1090 (1st Cir. 1993)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1993141335&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=1086&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122) and [*Town of Burlington v. Dep't of Educ.,* 736 F.2d 773, 788 (1st Cir. 1984)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1984126363&rs=WLW9.05&referencepositiontype=S&ifm=NotSet&fn=_top&sv=Full&referenceposition=788&pbc=B1A74D31&tc=-1&ordoc=2011844076&findtype=Y&db=350&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122), *aff'd* [471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)](http://web2.westlaw.com/find/default.wl?tf=-1&serialnum=1985121789&rs=WLW9.05&ifm=NotSet&fn=_top&sv=Full&tc=-1&pbc=B1A74D31&ordoc=2011844076&findtype=Y&db=708&vr=2.0&rp=%2ffind%2fdefault.wl&mt=122). [↑](#footnote-ref-36)
37. Dr. Castor’s letter is in contrast to his three neuropsychological evaluations which utilized standardized, formal testing and then reached educational conclusions and made educational recommendations based on that testing, all of which was carefully explained and well within Dr. Castro’s capabilities as a highly-experienced neuropsychologist. Thus, even though Dr. Castro did not testify (thereby reducing the probative value of his written reports), the neuropsychological evaluation reports were not rebutted by either party and may be relied upon by me. [↑](#footnote-ref-37)
38. I note that passing the MCAS is a regular education issue, but Duxbury did not object to my consideration of the substance of this argument and I will therefore do so. [↑](#footnote-ref-38)