

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Nauset Regional School District and
Massachusetts Department of Developmental Services**

BSEA # 1300562

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 April 29 and 30 and May 1, 2013 in Orleans, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Student's Father	
Susan Brefach	Educational Consultant for Parents and Student
Roger Nelson	Special Education Assistant, Nauset Regional School District
Teal Tobler	Special Education Teacher, Nauset Regional School District
Kristina Mack	Special Education Teacher, Nauset Regional School District
Julie Edwards	Physical Therapist, Nauset Regional School District
Daria Rice	Occupational Therapist, Nauset Regional School District
Mae Timmons	Speech-Language Therapist, Nauset Regional School District
Ann Caretti	Director of Student Services, Nauset Regional School District
Arthur Campbell	Educational Consultant to Nauset Regional School District
Jennifer Jensen	Service Coordinator, Mass. Dept. of Developmental Services
Michael Turner	Attorney for Parents and Student
Joanne Robichaud	Advocate for Parents and Student
Mary Joann Reedy	Attorney for Nauset Regional School District
Elizabeth Duffy	Attorney for Mass. Dept. of Developmental Services
Jane Williamson	Court Reporter

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-33 (except P-24 which was intentionally left blank); documents submitted by the Nauset Regional School District (Nauset) and marked as exhibits S-1 through S-24 (except S-16 which is a duplicate exhibit); documents submitted by the Massachusetts Department of Developmental Services (DDS) and marked as exhibits DDS-1 through DDS-3; and approximately three days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on June 12, 2013, and the record closed on that date.

INTRODUCTION

Student is globally disabled as a result of a combination of relatively unique disabilities with the result that he has extremely limited cognitive and functional abilities. Parents seek an order from the BSEA requiring Nauset to place Student in a year-round residential educational placement “that would allow him access to peers, communication development, daily living skills in a natural environment, social opportunities on daily basis, and transitional skills to prepare him for adulthood.” Hearing Request, p. 5, par. 3. Nauset disagrees, taking the position that Student is appropriately served within his current, substantially-separate program within the Nauset Regional High School. For reasons explained below, I agree with Nauset that Student is appropriately placed although the IEP services need to be adjusted. I find it unnecessary to order DDS to provide any additional services.

ISSUES

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Nauset (exhibit S-1) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications (short of a residential educational placement) be made to the IEP in order to satisfy this standard?
3. If not, does Student require a residential educational placement to satisfy this standard?
4. Does Student require any additional services from DDS to access or benefit from his special education services from Nauset?¹

FACTUAL BACKGROUND

Student, who is 20 years old, lives with his father (Father) in Brewster, MA. Student’s parents (Parents) are divorced, and his mother (Mother) lives in California. Both Parents are actively involved in making educational decisions for Student, both Parents filed the Hearing Request in the instant dispute, and each Parent is Student’s legal guardian. Testimony of Father, Mother; exhibit S-1.

¹ These issues were recited by me at the beginning of the hearing, on the record, as the only issues that would be addressed through the hearing. No party made an objection to this recitation of the issues. These issues reflect my understanding of what the parties’ attorneys agreed would be the issues to be resolved at hearing, as discussed with the parties’ attorneys during conference calls dating back to August 29, 2012. Only these issues were addressed in the closing arguments of Nauset and DDS. However, Parents’ closing argument seeks to raise claims for compensatory services that were not identified within Parents’ Hearing Request and that are not included in the above recitation of issues. Accordingly, I decline to address compensatory claims in the instant Decision, other than to state that I do not believe that there was any probative evidence presented at the hearing that would support a compensatory education claim. In Parents’ closing arguments, their attorney also states that an issue to be resolved is whether there was “demonstrated bad faith, gross misjudgment, animus, and deliberate indifference towards [Student].” Since this does not fall within the above recitation of issues, I decline to address this issue within the Decision, other than to state that I do not believe that there was any probative evidence presented at the hearing that would support a finding of bad faith, gross misjudgment, animus or deliberate indifference towards Student.

Student is friendly and loves being with his peers (particularly, regular education students), listening to music and playing computer games. He identifies and responds to caregivers and expresses appropriate emotions. He appears most engaged when he is with other students who can interact with him, including at lunch, at the school store and at art therapy. He demonstrates strengths in the areas of positive social interactions, improved mobility and improved self-feeding. He is able to participate in most aspects of his special education but only with extensive assistance, including 1:1 support, and adaptations. Testimony of Mother, Father, Mack, Tobler; exhibits S-14, S-15.

Student has profound, multiple disabilities. They include significant global delays related to diagnoses of (1) partial unbalanced translocation syndrome of the 7th and 9th chromosomes and (2) dysplastic corpus callosum. He also carries a diagnosis of seizure disorder. As a result of his disabilities, he is profoundly compromised regarding cognition, communication, mobility, social skills and self-help skills. For example, he requires assistance with ambulating, toileting and eating. Student is non-verbal and has extremely limited understanding of language. He has an extremely limited ability to express his needs and wants. Testimony of Father, Mother, Brefach, Campbell; exhibits S-1, S-15, S-16, P-14.

Student has attended the Nauset Regional Schools as a special education student since the time he was a young boy. Currently and since entering high school in 2008, Student has attended Nauset's Life Skills Program, which is a substantially-separate special education program within the Nauset Regional High School. Testimony of Father.

In addition to the Life Skills Program, Nauset's currently-proposed IEP (from May 2, 2013 to May 2, 2014) for Student provides for the following school-based consultation services during the school year, as described within exhibit S-1:

- Communication consultation services from the speech-language pathologist for 45 minutes every two weeks.
- Vision consultation services from the vision teacher for an hour during the school year.
- Consultation from the special education teacher for 15 minutes per week.
- Behavior consultation for an hour every two weeks.
- Consultation from the occupational therapist for 15 minutes per week.
- Consultation from a physical therapist for a half hour each month.

This IEP provides for the following school-based, pull-out services during the school year:

- Communication services from the special education consultant for 45 minutes each day.
- Social skills instruction from a special education teacher for 45 minutes every other day.
- Life skills instruction from a special education teacher for 45 minutes every other day.
- Additional, 1:1 direct teaching from the special education teacher for 45 minutes each day.

- Adaptive physical education instruction from special education staff on a 1:1 basis for 40 minutes each day.
- Occupational therapy from an occupational therapist for 15 minutes per week.
- Physical therapy from a physical therapist for a half hour each day.

This IEP provides for Student's special educational assistant to be with him during his art therapy class within the general education environment.

This IEP provides for the following home-based instruction:

- Occupational therapy from an occupational therapist for a half hour, twice per month.
- Speech-language services from a speech-language pathologist for a half hour, twice per month.
- Assistance from an educational assistant for 90 minutes per day.

This IEP also provides for extended school year services to prevent regression, including occupational therapy services and Student's 1:1 instructional assistant. Summer services are scheduled for four days per week from July 8, 2013 to August 15, 2013.

Except for a vision assessment (discussed separately below), Student's most recent evaluations have all been part of his last three-year re-evaluation, which occurred in the fall of 2010. His three-year re-evaluation included a physical therapy evaluation, an occupational therapy evaluation, a speech-language evaluation and an "Educational Status" evaluation. Exhibits S-9, S-10, S-13, S-15, P-14.

The physical therapy evaluation was conducted by Julie Edwards, PT, DBT, a Nauset physical therapist, on September 29, 2010. The evaluation reported: "[Student] has made steady improvements in his ability to access the high school environment. He has demonstrated an increase in strength, increase in activity level, increased balance, and increased transfers as compared to the last IEP period." The report concluded that Student would continue to benefit from physical therapy "to maximize his functional mobility, strength, range of motion and balance." Exhibit S-13.

The occupational therapy evaluation was conducted by Daria Rice, OTR/L, a Nauset occupational therapist, on October 1, 2010. The evaluation reported that "[Student] ... currently demonstrates strengths in the areas of positive social interactions, switch use, improving functional communication, mobility and self-feeding." Identified areas of need were noted as improving independence with self-feeding and "improving purposeful upper extremity use and range of motion." Because of the way that Student holds his arms with his elbows bent to 90 degrees, the evaluation report recommended continuing with Student's upper body extremity range of motion program in order to prevent further loss of range of motion. The report continued to recommend direct occupational therapy services for 30 minutes, once per week. Exhibits S-15, P-14.

The speech-language evaluation was conducted by Mae Timmons, MS/CCC, a Nauset speech-language pathologist, in October 2010. The evaluation included the Huer Non-

Speech Test for Receptive Language, which is a test used to measure Student's ability to understand spoken language. Student was assessed through a series of observations during the month of October 2010. This included observing Student demonstrate his knowledge of functional vocabulary words by choosing between two photographs or symbols. The test results placed Student at a developmental receptive language level of 24 to 27 months. The report explained that these test results evidenced incremental progress compared with previous test results of receptive language level at the 19 to 22 month level during a September 2004 assessment, receptive language level at the 15 to 17 month level during a October 2001 assessment, receptive language level at the 12 to 16 month level during a February 1998 assessment, and receptive language level at the 12 to 16 month level during a February 1997 assessment.² Exhibit S-10.

The October 2010 speech-language evaluation referenced immediately above also included the Huer Non-Speech Test for Expressive Language, which is a test used to measure Student's ability to express himself and make his needs known to others. Student was assessed through a series of observations during the month of October 2010. This included observing Student demonstrate his ability to communicate through vocalizations, body language, pointing to a picture, photograph or drawing from a choice of four, and using his communication device. The test results placed Student at a developmental expressive language level of 19 to 22 months. The report explained that this test result compared positively with previous test results of expressive language level at the 18 to 21 month level during a September 2004 assessment, expressive language level at the 17 to 20 month level during a October 2001 assessment, expressive language level at the 13 to 17 month level during a February 1998 assessment, and expressive language level at the 11 to 15 month level during a February 1997 assessment.³ Exhibit S-10.

An "Educational Status" evaluation was conducted by Lisa Abbott, Ed.D., a Nauset school psychologist on November 1, 2010. Dr. Abbott assessed Student through a record review, observation and the Vineland Adaptive Behavior Scales (Parent and Teacher). Results from the Vineland assessment placed Student at the .1 percentile regarding receptive communication, expressive communication, socialization skills, daily living skills and motor skills. The evaluation also reported that Student's toilet "regime" has been successful and that increased physical activity and walking have resulted in increased strength. The evaluation noted that socialization (both within the Life Skills Program and in the general school setting) "continue to promote [Student's] engagement socially." Exhibit S-15, P-14.

The only assessment or evaluation of Student subsequent to this "Educational Status" evaluation was a vision consultation that was performed by Krissy Breda, M.Ed., a Nauset teacher of students with visual impairments, through an observation on June 8, 2012. Ms. Breda reported that "there are not any visual concerns noted at this time." Exhibit S-9.⁴

Parents' expert, Susan Brefach, Ed.D, did not evaluate Student and did not prepare a written report. However, she reviewed the above-described evaluations, she observed Student on

² An assessment was also done in September 2007 but was not scored.

³ An assessment was also done in September 2007 but was not scored.

⁴ There may have also been a DDS eligibility evaluation of Student but it is not in the record.

April 14, 2013 for two and a half hours in his Nauset educational program, and she testified at hearing. Her testimony included observations as well as expert opinion and recommendations, which I summarize briefly.

Dr. Brefach noted that approximately 90% of the time that she observed Student he was interacting with Mr. Nelson (his 1:1 educational assistant) and only occasionally with Ms. Tobler (his special education teacher). Dr. Brefach noted that Ms. Tobler interacted with Mr. Nelson and re-structured what he was doing with Student. Dr. Brefach found that for the most part, Student was not engaged in learning or involved in developing more effective communication strategies; rather, he was minimally engaged. She noted that Student made sounds several times, but no one responded; and that there were several communication devices but they were not consistently available to Student. She concluded that she observed extremely limited instructional time and that this would not allow Student to improve his language skills or advance his independent living skills. She opined that with appropriate instruction, Student would likely be able to make choices and express his needs and wants. She also testified that Student has no comparable peers in his current placement—that is, all of the other students have at least some ability to communicate through words, read and write. Testimony of Brefach.

Dr. Brefach testified that Student's current program lacks the following essential elements: an educational placement with comparable peers, sufficient instruction throughout the school day, sufficient supervision and support during the school day, daily practice of daily living skills, and a year-round, 12-month program. She also testified that daily living skills need to be developed through more than the school day instruction—that is, either through home-based services or residential placement. Testimony of Brefach.

Nauset hired its own outside expert, Arthur Campbell, Ph.D., who observed nearly all of Student's educational services over a period of time. He also reviewed all records within Nauset's exhibit book. He testified regarding his expert opinion and recommendations, which I summarize briefly.

Dr. Campbell testified that the overall program model, with the vast majority of instruction provided by Student's educational assistant, is appropriate. He specifically noted that during his observation, Student's instructional assistant was appropriately providing instruction, Student's special education teachers were appropriately working with Student within group contexts, and Student was having appropriate educational experiences in the mainstream (such as in the school store and cafeteria). He testified that although it is very difficult to determine Student's learning potential, his likely potential progress is very small and very incremental. Testimony of Campbell.

Dr. Campbell testified that Student's current educational program is generally appropriate for him, and is appropriately focusing on Student's daily living skills, communication skills and social skills, but that there are several areas where improvements could be made. He noted that the data collection may be interfering with instruction and should be corrected, and that Student's educational assistant could receive additional supervision by providing services to Student at a table with others so that Student's classroom special education teacher would be able to observe what is occurring. Testimony of Campbell.

Student has been found generally eligible for services from DDS. Currently, DDS provides Student with flexible family support services (mostly through the Kennedy Donovan Center) and stipends. DDS also applied for and obtained personal care attendant services for Student in the home. Last summer, Student's Father had serious medical challenges that threatened to compromise his ability to care for Student at home. At that time, DDS identified a home in the community (in Sandwich, MA) that it was prepared to fund as Student's residence if Father's medical challenges made it not possible for him to care for Student. Testimony of Jensen.

DISCUSSION

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 [FAPE]." ⁵ "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]." ⁶ An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability. ⁷ A student is not entitled to the maximum educational benefit possible or "even the best choice". ⁸ Rather, the IEP must be "reasonably calculated to confer a meaningful educational benefit." ⁹ The appropriate level of progress varies for each student, "with infinite variations" depending on the particular individual's constellation of disabilities and strengths. ¹⁰

The IDEA reflects a preference for mainstreaming disabled students. ¹¹ This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children. ¹² "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs." ¹³ Similarly under Massachusetts law, FAPE must be provided in the least restrictive environment. ¹⁴

⁵ 20 U.S.C. § 1400 (d)(1)(A).

⁶ *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

⁷ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)"); *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1st Cir. 2007) (FAPE includes "specially designed instruction ... [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. § 300.39(b)(3)).

⁸ See *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."); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) ("Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.").

⁹ *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, *1 (D.Mass. 2012).

¹⁰ *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).

¹¹ 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

¹² 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i).

¹³ *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1st Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1st Cir. 2002) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria."), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990).

¹⁴ See MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

Thus, the IEP must be tailored to the student's unique special education needs so as to confer a meaningful educational benefit (gauged in relation to the potential of the student at issue) within the least restrictive educational environment.

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations¹⁵ and which may exceed the federal floor¹⁶) seek “to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment.”¹⁷ In addition, Massachusetts regulatory standards require that Student's IEP Team “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.”¹⁸ For purpose of determining whether a student is making effective progress, consideration must be given to a student's “chronological age and developmental expectations” as well as his or her “individual educational potential”.¹⁹

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.

In the instant dispute, Parents are the moving party and have the burden of persuasion that Nauset's proposed IEP is not appropriate and that FAPE in the least restrictive environment can only be provided by a residential, educational placement.²⁰

¹⁵ See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the “education standards established by statute or established by regulation promulgated by the board of education”).

¹⁶ 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]”).

¹⁷ See 603 CMR 28.01(3) (“purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws”). See also 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”); 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”).

¹⁸ 603 CMR 28.05 (4) (b). Similarly, the Massachusetts Department of Elementary and Secondary Education-mandated IEP form requires a school district to include within each IEP the specially-designed instruction “necessary for the student to make effective progress” both in the general curriculum and in “other educational needs” including, communication, behavior, language, and social/emotional needs. See 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>. See also, e.g., exhibit S-1 (describing the specially-designed instruction proposed as “necessary for the student to make effective progress”).

¹⁹ 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, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.”)

²⁰ See *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”).

The initial issue presented is whether the programming and specialized services embodied in Nauset's most recently proposed IEP (exhibit S-1) are consistent with the above-described legal standards.

Although every special education student is unique, Student is particularly so. This is because his principal disability, which is partial unbalanced translocation syndrome of the 7th and 9th chromosomes, is extremely rare. There are so few persons with this disability that none of the witnesses could point to any literature relevant to it, and none of the witnesses (including the various expert witnesses) has had any experience observing, evaluating or working with even a single person with this disability, other than Student himself. Student's uniqueness is further heightened by his having a second, very unusual disability, which is dysplastic corpus callosum. This disability likely further complicates his presentation and development. Testimony of Campbell, Timmons.

It is essentially impossible to assess Student's cognitive levels or learning potential as one would with most students since he is not capable of responding to an evaluator in a meaningful manner through receptive or expressive language—rather, evaluations typically occur through observations of Student in certain situations. As a result, virtually everything that is known about Student and the educational implications of his particular combination of disabilities has been gleaned from observing him (and interacting with him) at school, in the community and at home over the course of his lifetime and his many years within the Nauset Public Schools.

What is clear from observing Student at home and at school is that as a result of his disabilities, Student is profoundly compromised regarding communication, mobility and self-help skills. He has only two adult living skills that he is able to utilize independently. First, he has the self-feeding skill of being able to grab food with his hand and put the food in his mouth. Second, he is able to choose (through a communication device) between two activities that are represented by icons that he can understand. In all other respects, he needs to be assisted by another person. For example, he requires assistance with ambulating and with all self-care functions. He is not toilet-trained. Testimony of Tobler, Mack.

Student is completely non-verbal. His very limited ability to communicate his needs and wants occurs in two ways. First, as noted above, he has been taught to make choices between two options that are presented to him visually. At school, he chooses by placing his hand on one of two buttons that are placed next to icons representing his choices. He is able to use this method to communicate that he wants to listen to music (apparently, when given the opportunity, Student always wants to listen to music). Student's second (and principal) form of communication is through body language. Those that have come to know Student (for example, his Parents, teachers, educational assistant and other service providers) have learned to read his body language so that they know whether he wants to do something or does not—for example, by his becoming upset (or pushing away from) an undesired activity that he is doing or about to do, or getting visibly excited about (or trying to move toward) a desired activity. Father testified that, at home, he has developed what he described as "direct methods" of communicating with his son within particular contexts—for example, when Student is using the toilet and Father reaches out with his hands toward Student, Student will

then either reach out towards Father (indicating that he wants to get off the toilet) or draw back (indicating he wants to remain on the toilet). Testimony of Father, Tobler, Mack, Nelson.

As will be discussed in detail below, it is unclear whether Student understands even a single spoken word. What Student can and does understand are context situations—for example, he can recognize what conduct is associated with going out for a walk (such as putting on a jacket) so that when he sees this occur, he knows that it is time to go out for a walk. Similarly, for example, when Father approaches Student with his pull-ups when Student is on the toilet, Student knows it is time to leave the toilet. In contrast, it is unclear what, if anything, Student understands when someone simply tells him that it is time to go out for a walk or that it is time to leave the toilet. Testimony of Father, Tobler, Mack, Timmons, Nelson; exhibits S-1, S-16.

There are a number of activities that Student clearly enjoys. As noted above, his preferred activity is music, which he loves. He also visibly demonstrates enjoyment from being with others—for example, when he attends art therapy class (the regular education students are learning to provide art therapy to special education students such as Student, and Student can participate in this class by making designs on the floor with his walker). It is anticipated that Student will similarly participate in a music therapy class with regular education students beginning in the fall of 2013. Similarly, Student enjoys his role at the school store where he can interact with others, including regular education students (Student sits behind the counter and pushes a button activating a recording of “thank you” when a person makes a purchase). There is no doubt that these interactions with his peers give Student significant pleasure. Testimony of Mack, Tobler.

During the time that Student has attended the Nauset Public Schools since 1998, all of his IEPs have been fully accepted by Parents until April 2012 when they declined either to accept or to refuse any further IEPs on advice of their advocate and attorney. The last accepted IEP (and therefore, the stay-put IEP) is for the period from 10/4/11 to 10/4/12, which was fully accepted by Father. This IEP reflects special education and related services that are similar to those in the most recently-proposed IEP, and the areas of instruction addressed by the earlier IEP are substantially the same as those reflected within the most recently-proposed IEP. Similarly, the fully accepted IEP for the period 10/4/10 to 10/4/11 indicates that Student was then working on many of the same areas as are reflected within the most recently-proposed IEP. Moreover, from the testimony of Parents and Nauset staff, it appears that most if not all of the areas of instruction have been substantially the same at least since Student first entered the High School in 2008. Testimony of Mother, Father, Tobler, Mack, Timmons; exhibits S-1, S-7, S-8.

Consequently, Student’s current services and the current areas of instruction that are being provided pursuant to his stay-put IEP, are generally reflected in his most recently-proposed IEP that is found at exhibit S-1.²¹ Therefore, in evaluating the appropriateness of this proposed IEP, it is relevant to consider whether the services Student has been receiving this

²¹ The principal difference between the IEPs is the home-based services, which will be addressed separately below.

school year have been appropriate in offering him an opportunity to make meaningful progress commensurate with his educational potential.²²

Student receives an array of special education and related services intended to address his wide range of profound mental and physical deficits. Student's academic instruction focuses on communication-related skills—specifically, learning to identify pictured family members, friends and teachers; learning to match a meaningful, functional object with a matching picture; learning to make choices using his communication device (for example, being taught to indicate “I’m finished” on a choice board when he wants or needs a break from an activity); learning to communicate through assistive technology (for example, being taught to activate a “thank you” switch when a purchase is made at the school store); and increasing his receptive communication skills by following directions with greater accuracy and by understanding meaningful vocabulary. Testimony of Tobler, Timmons; exhibit S-21.

With respect to development of social and daily living skills, Student is being taught not to grab objects without permission, he is being taught not to yell when he is sitting with others, and he is learning to take turns while playing a game. Student is learning these skills so that he can participate appropriately with peers or adults. During community outings, Student participates successfully simply by going along with the group. Testimony of Tobler.

Student receives passive oral motor exercises, and a goal is to tolerate these exercises with less frequent protesting. Staff continue to work with Student regarding toileting in order to reduce accidents. Student is not toilet-trained; rather, he is on a toileting schedule, so that at set times of the day, he sits on the toilet for approximately 15 to 20 minutes at a time, with the hope that he will use the toilet during those times. Staff are also working with Student regarding washing his hands and brushing his teeth, with physical prompts from staff. Testimony of Tobler, Mack.

With respect to physical and occupational therapy, staff use upper extremity and lower extremity exercises to promote flexibility and range of motion. Student is learning how to improve his walking with his four-wheel walker and to ascend and descend stairs with moderate assistance. Testimony of Rice, Edwards.

Within the classroom, the majority of Student's academic instruction is provided by a dedicated 1:1 educational assistant who is supervised by a classroom teacher. The educational assistant is also the principal staff person working with Student regarding walking, toileting, washing and tooth brushing skills, as well as implementing the physical and occupational therapy exercises. The teachers, speech-language therapist, physical therapist and occupational therapist all provide training to the educational assistant. In addition, 1:1 direct teaching is provided by the special education teachers for 45 minutes each day, principally to address communication and social skills; the special education teachers work with Student while he is within groups for social instruction and life skills

²² See *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012) (“an IEP ... could be reasonably calculated to confer a meaningful educational benefit if it is closely modeled on a previous IEP pursuant to which the child made appreciable progress. Of course, previous success does not guarantee future success. Nevertheless, if the two IEPs are substantially similar in design, that similarity provides a reasonable basis for assessing the likelihood of future progress.”) (internal citations omitted).

instruction for 45 minutes each day; and the occupational therapist provides direct services to Student for 15 minutes per week. This consultation model for many parts of Student's day is intended to allow the educational assistant to provide instruction and assistance that address a wide range of Student's needs over the course of a substantial part of the school day. Testimony of Timmons, Mack, Tobler.

I now turn to a review of what progress Student has made in these various areas that are being addressed by Nauset teachers and other service providers.

Because Student's progress has been so slow in many areas of instruction, typically there has been no demonstrable gain made over the course of a single school year. As a result, his educational gains may only be understood by considering what has occurred over a multi-year timeframe. Some of Student's current services providers have worked with him for several years, and the current speech-language pathologist has worked with him in elementary school and then again while in high school. They were able to provide a meaningful description of the arc of Student's progress while attending the Nauset Public Schools. For these purposes, I consider Student's progress over the course of his time in the Life Skills Program at the Nauset Regional High School, which he entered in 2008.

Student's progress has been most clearly-demonstrated and has been most consistent in several life skill areas. Importantly, while in the Life Skills Program, Student has developed the ability to walk for longer distances, to walk with greater independence (although still using a four-wheel walker and needing a staff "contact guard" with him at all times) and to walk over more varied terrain. He began being able to walk only about 20 feet in middle school, and only a few laps around the gymnasium in high school, but can now walk much farther. His balance has also improved. He also is much less resistant to walking—currently, he may resist some at the outset when it is time for a walk but then seems to settle in and no longer resists. This progress regarding walking allows Student to participate in more activities in the community. Testimony of Edwards, Tobler, Nelson, Caretti.

Student has a tendency to drool and to put his hands in his mouth. For the past several years, he has received a sensory oral-motor program to address these issues. As a result, Student is drooling less, and he has learned to obey a command that he put his hands down. These are important gains relevant to Student's appropriate comportment while with others. Testimony of Timmons, Nelson, Mother.

Student has a tendency to hold his arms in a way that, over time, may result in restricted range of motion. But, through exercises, staff have been able to maintain his range of motion in his upper extremities. Also, through exercises, Student's hamstrings have been stretched out to the point where he can almost stand up completely erect. Testimony of Father, Edwards, Rice.

Over the course of several years, Student has made progress in self-feeding. He has been able to progress from using a "gross grab" (i.e., grabbing with the hand as a whole) to a "pincher grasp" that now allows him to pick and eat small bites of food. Testimony of Rice.

Importantly, with respect to the above activities involving physical assistance by staff, Student has become less resistant to being handled by others and less resistant to others helping him with tasks and activities, thus allowing staff to work with him more easily and more effectively, allowing Student to participate in more activities, and allowing Student to be a more active participant in his care. Testimony of Father, Edwards, Rice.

Nauset witnesses testified that another area of demonstrated progress while attending the Nauset Regional High School is that Student has generally become less agitated and resistant, and more socially appropriate. Specifically, he has become more able to act appropriately within a group—for example, generally demonstrating less inappropriate grabbing of objects. But, Nauset witnesses clarified that progress in this area has been inconsistent—on some days, he continues to be unable to sit appropriately with a group. And, it is not known why he is able to participate appropriately with a group during some days but not others. Testimony of Tobler, Caretti.

An important past success involves toilet-training. A number of years ago, Nauset staff were able to teach Student to void while he was on the toilet and not to void at other times; and he has learned to be successful with respect to the vast majority of his bowel movements. While at school, Student is on a toilet schedule pursuant to which he sits on the toilet for about 15 minutes, three times per day. As a result, over time, he has substantially reduced the frequency of soiling himself. Currently, he soils himself approximately once each week at school and very rarely at home. However, Student continues to wet himself at least twice each day, and he continues to wear pull-ups. Testimony of Nelson, Father.

With respect to academic skills, what is principally being taught are language and communication skills. The lack of any substantial progress in these areas is illustrated by the testimony of Student's teachers and 1:1 aide. When asked during the hearing, none of them could identify any progress that he has made over the course of the current school year. Specifically, one of his teachers (Ms. Mack) testified that Student does not appear to retain what he is learning, and his presentation is so inconsistent that it is impossible for him to demonstrate educational progress. Testimony Tobler, Mack, Nelson. As discussed below, it was only Ms. Timmons (who provides speech-language consultation services and who observes Student in that capacity) who has been able to identify Student's improvements in the area of communication and language.

In the area of communication skills, Student is learning to make a choice (between two fields) to indicate a preferred activity. This is a noteworthy success. Testimony of Timmons. As discussed below, other areas of progress regarding communication have been only incremental and have not resulted in Student actually developing any new, effective communication skills.

In an effort to quantify his progress regarding communication abilities during the current school year, Student's speech-language pathologist looked at data collected by Student's educational assistant, and charted Student's progress on a monthly basis from December 5, 2012 through March 4, 2013. These charts showed progress in the area of receptive language skills where Student's success rate went from 40% to 58% in the area of identifying people he knows and went from 42% to 50% in the area of identifying pictured vocabulary.

However, in these areas, Student was being asked to choose from a field of two—in other words, if Student had chosen randomly, his scores would be expected to be around 50% correct. Testimony Timmons; exhibit S-21.

These charts also indicated that Student was able to respond appropriately to spoken direction in three different areas with generally an 85% success rate. Progress was charted with respect to Student's needing fewer prompts or assistance. However, with each spoken direction, Student was always given a prompt. Similarly, the charts indicated that with generally at least a 96% success rate, Student was able to activate his communication device (for example, to push a button so that the device says "thank you"). Progress was charted with respect to Student's needing fewer prompts over time. However, in each case, Student was always assisted by a teacher or assistant physically directing him to the communication device. Thus, these charts demonstrate progress—the progress is in the form of fewer prompts and assistance over time, but with Student's continuing to need at least some prompts and assistance from staff at all times. Exhibit S-21.

In the early stages of his academic learning, Student was being taught simply to extend his arm towards a single photograph, and eventually he has been able to work towards pointing in the direction of one of two photographs to make a choice, with a 60% accuracy. Ms. Timmons testified that there is demonstrated learning in these areas because Student's success rate on making choices between two fields (one of which was correct) has improved from 20% to the point where it is now as high as 60%; but this is only marginally above would have occurred if Student had answered randomly when he is choosing between two fields. Testimony of Timmons.

Another area of marginal progress in this area is that over the course of a number of years, staff has been able to move from using actual objects in instruction to using photographs of these objects, and then to reducing the size of the photographs. (For example, Student would be asked, during snack time, what he wanted next and he could reach for an actual juice box to indicate his choice; then staff taught him to respond to photographs of the juice box instead of the juice box itself.) Staff started with photographs that were eight inches by ten inches. Currently, staff use photographs that are three inches by three inches. Testimony of Timmons.

Staff has also been able to increase the choices offered Student during instruction, so that currently he is able to work with an array of four choices. Another point of improvement is that in the beginning, it would take Student perhaps 60 seconds to respond, but currently, staff expect Student to be able to respond within 15 seconds. As explained by Ms. Timmons, this kind of progress reflects learning basic foundation skills related to a goal of ultimately being able communicate his needs and wants. Testimony of Timmons.

Over the course of many school years, Student has been taught receptive language vocabulary. Yet, there is no probative evidence that he has retained any of what he has been taught in this area. It is even unknown whether he understands the positive feedback that he receives when he chooses a correct answer. Although there was somewhat inconsistent testimony on this point from the speech-language pathologist and Mother who believe that Student may know a number of words, those who spend the most time with Student at home

and school (i.e., Father, his special education teacher and his educational assistant at school) testified that they are not able to tell whether Student currently understands the meaning of even a single word. Testimony of Mother, Father, Timmons, Nelson, Mack.

Student is being taught to use a yes/no communication device to indicate to staff when he is done using the toilet. In addition, a communication device (using icons) is used by staff to tell Student that he will be using the bathroom soon. Yet, it is unclear whether any of this communication has any meaning to him. And, Student remains unable to communicate to staff when he needs to use the bathroom. Testimony of Nelson, Timmons.

In sum, Student entered the Nauset elementary school with the ability to communicate through gestures—that is, by reaching, pointing and vocalizing sounds (not words)—and his ability to communicate beyond this has developed only marginally, and it is unclear whether Student has learned any receptive language even after years of instruction.

Given Student's progress in the various areas being addressed by Nauset, as described above, the essential question becomes whether the anticipated continuation of this overall rate of progress is legally sufficient for purposes of Student's right to receive FAPE from Nauset.

This is not an easy question to answer. Notwithstanding the painfully slow (and in some areas, virtually non-existent) rate of progress that has occurred (and presumably would continue to occur pursuant to the proposed IEP), one cannot simply conclude that, as a matter of law, this rate of progress is insufficient. Rather, for purposes of a FAPE determination, the question of the appropriateness of Student's rate of progress can only be considered within the context of his educational potential. This was discussed above, briefly, but because of the importance of this point, I consider more specifically what the Supreme Court and First Circuit have written.

The Supreme Court has explained:

The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.²³

The First Circuit has further noted:

children of different abilities are capable of different achievements, and only by considering an individual child's capabilities and potentialities may a court determine

²³ *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).

whether an educational benefit provided to that child allows for meaningful advancement.²⁴

A critical point of disagreement between the parties is the extent to which Student has the potential to make educational progress substantially greater than what has occurred during the past several years. Parents' argument (that Student has the educational potential to make substantially greater progress) essentially rests on the credibility and persuasiveness of their expert, Dr. Brefach.

Dr. Brefach and Dr. Campbell (Nauset's expert witness) agreed that one can never (and should never) assume that Student has ever reached his maximum learning potential. That is, educational services must be planned and provided based upon the assumption that with appropriate services, Student can and will make further educational gains. Testimony of Brefach, Campbell. Yet beyond this agreement in principle, there was a clear difference of view as to Student's learning potential.

Dr. Brefach, as the sole expert witness for Parents who addressed this question, concluded that Student has potential to make educational progress substantially beyond his current skills and abilities. Specifically, she testified that Student should be able to learn how to understand simple sentences; he should be able to learn to communicate his needs and wants; and he should be able to learn "factual skills"—that is, the recognition and knowledge of common objects, names and signs.

Dr. Brefach is a highly experienced educational consultant, with considerable expertise regarding the educational needs of severely and multiply-disabled students. However, for the following reasons, I did not find her expert opinion regarding Student's learning potential to be reliable.

At the outset, I note that Dr. Brefach does not have a specific understanding of Student's disabilities. Dr. Brefach testified that she has never assessed or worked with someone with Student's chromosome abnormality, nor was she aware of any research or professional literature relevant to this disability. She testified that she only had general knowledge of the fact that this disability may result in substantial handicaps. Testimony of Brefach.²⁵

²⁴ *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 36 -37 (1st Cir. 2012) (internal quotations and citations omitted).

²⁵ Relevant parts of the transcript (vol. I, pp. 178-179) are as follows:

THE WITNESS (Dr. Brefach): [Student's particular chromosomal abnormalities] are very severe chromosomal abnormalities. A lot of information is lost, and it generally results in a significant handicap.

HEARING OFFICER CRANE: Tell me more about what you know about that particular disability.

THE WITNESS: This particular one, I have to say I had not encountered. My first master's was in human genetics, so I did, in fact, spend a fair amount of time studying chromosomal disabilities, trisomies or translocations. They are very rare, because most of them are not viable. And so the children who are born with those kinds of chromosomal abnormalities often have severe handicaps. They often have severe health issues and communication and motor disabilities.

HEARING OFFICER CRANE: Other than that kind of a general statement --

THE WITNESS: That's right. That's basically what I know --

HEARING OFFICER CRANE: Which doesn't tell me a lot. There isn't anything else that you know specific to this particular disability?

THE WITNESS: No, I do not.

(footnote cont. on next page)

This is not meant to be a criticism of Dr. Brefach, but only an observation. No one at the hearing (indeed, no one who could be identified by any witness) is an expert with respect to Student's particular disabilities. But, Dr. Brefach's limited knowledge of Student's particular disabilities does have consequences relevant to her expert testimony—that is, she could not rely on her own previous experience or general expertise with respect to Student's particular form of disabilities and would need to rely principally upon evaluations, observations and the experiences of those who have been interacting with Student.

For purposes of forming her opinion regarding Student's learning potential, Dr. Brefach did not rely on any discussions with Student's teachers, other service providers or Parents; and she did not evaluate Student. Rather, she formed her expert opinion on the basis of her review of previous evaluations (and relied upon one evaluation, in particular, as discussed below) and her two and one-half hour observation of Student at school.

Dr. Brefach testified that she concluded that Student was able to comprehend language at the 24-month level, observing that Student understood "three or four-word sentences and fairly simple language."²⁶ Dr. Brefach had no contact with Student, other than this observation. As discussed below, the overwhelming weight of evidence from the testimony of those who live with and teach Student on a daily basis was that one may not conclude that Student knows consistently the meaning of even one single word and that his receptive vocabulary is likely at the nine to 12 month level, rather than the 24-month level.

Dr. Brefach did not evaluate Student. Instead, she reviewed Student's previous evaluations. However, there were no *current* evaluations for her to review. Except for a vision evaluation that was unremarkable, Student has not been evaluated since the fall of 2010 when Nauset completed its most recent three-year evaluations. Testimony of Brefach.²⁷

Dr. Brefach testified that in addition to her observation, the principal basis for her opinion regarding Student's learning potential was an October 2010 Nauset speech-language evaluation conducted by Mae Timmons, a Nauset speech-language pathologist. This

HEARING OFFICER CRANE: Or its implications in terms of his learning and growth over time?

THE WITNESS: No. ...

BY MS. REEDY:

Q. Dr. Brefach, your education in genetics was in 1973 to 1975; is that correct?

A. That's correct.

Q. So it's not really quite up-to-date in terms of current developments in either the diagnosis or treatment of genetic disorders?

A. That's true. I was not attempting to say that it was.

²⁶ Relevant parts of the transcript (vol. I, pp. 193-194) are as follows:

HEARING OFFICER CRANE: From what your observation of [Student] was, do you think you observed somebody with receptive language skills at the 24-month level?

THE WITNESS: I believe that he was comprehending a number of the brief sentences that were said to him. And as I said, 24-month skills, three or four-word sentences and fairly simple language would be understood by children with that level of skill. And I do believe that he understood language at that level.

²⁷ Nauset sought to move up Student's three-year evaluations, which are scheduled for the fall of 2013, but Parents did not consent. Testimony of Father; exhibit S-3.

evaluation found Student's receptive language skills to be at the 24 to 27 month level. Testimony of Brefach; exhibit S-10.²⁸

Dr. Brefach testified, and it is not disputed, that the level of understanding of receptive language for someone such as Student is the most important indicator of his ability to learn. She explained that the receptive language scores from this speech-language evaluation essentially establish certain expectations regarding what should be anticipated in terms of Student's educational progress if he is provided an appropriate educational program.

As noted above and discussed further below, however, the evidence presented at hearing persuasively established that Student's current receptive language abilities are likely at the nine to 12-month level—that is, significantly below the 24-month level.

Mae Timmons, the Nauset speech-language pathologist who administered the evaluation relied upon by Dr. Brefach and who continues to provide consultation services for Student, opined that Student may understand “dozens” of words. However, when Ms. Timmons was asked what words Student understands, she could name only seven specific words; and she later clarified that even these words, Student does not know consistently—that is, on some days, he seems to understand certain words and then on other days, he does not. Ms. Timmons further explained that, as compared to other students, it is “very difficult” to state a definite number of vocabulary words that Student has learned. She concluded that Student's consistent receptive language level is currently at an infancy level (likely at nine to 12 months). Testimony of Timmons.

Ms. Timmons does not provide any direct services to Student. Rather, she provides consultation to Student's service providers for approximately 45 minutes per week, and at times, she has the opportunity to observe Student; she has not evaluated Student since the fall of 2010. She based her opinion regarding Student's current understanding of language on her observations of Student at school—for example, his looking towards an object as an indicator that he may know that this object was being referenced with language. Testimony of Timmons.

The testimony of those who currently spend the most amount of time directly working and interacting with Student every day (including Father who is Student's principal caretaker, Student's educational aide who is with Student most of the school day and one of his special education teachers) further elucidated Student's understanding of language. They testified that, as a practical matter, Student may have even less receptive language knowledge than opined by Ms. Timmons. These witnesses credibly testified that sometimes Student is able to associate a word with a particular situation—such as when the word “outside” is spoken while staff are in the process of getting ready to go outside—but according to these witnesses, there is no indication that Student understands any language when not combined with the context or situation (that Student can see) that is related to that language. Thus,

²⁸ Dr. Brefach relied upon that part of the evaluation that reported on the Huer Non-Speech Test for Receptive Language, which is a test used to measure Student's ability to understand spoken language. Student was assessed through a series of observations during the month of October 2010. This included observing Student demonstrate his knowledge of functional vocabulary words by choosing between two photographs or symbols. The test results placed Student at a developmental receptive language level of 24 to 27 months. Exhibit S-10.

these witnesses were unable to conclude that Student understands consistently the meaning of even a single word. Testimony of Father, Nelson, Mack.

I am persuaded by this evidence (and I so find) that Student may, in certain situations or at certain times, understand a small number of words, but there is no persuasive evidence that Student understands even a single word on a consistent basis when the word is used without being accompanied by a context or situation that Student can observe. I further find that Student's receptive language is at the infancy level (likely at nine to 12 months), rather than at the 24-month level.

Dr. Brefach testified that if it turns out that Student's receptive language is "significantly lower" than the 24-month level, "it's going to be very difficult for him to even, you know, make sense of what they're trying to teach." Testimony of Brefach.²⁹ Thus, because Dr. Brefach's analysis was premised upon the belief that Student's receptive language is at the 24-month level, I do not rely upon her expert opinion regarding what gains Student should have made and should be able to make (for example, that Student should be able to learn how to understand simple sentences) with appropriate educational services.

Two other witnesses provided expert testimony to describe Student's learning potential—Ms. Timmons and Dr. Campbell. I first consider Ms. Timmons' opinion. Because of the combination of her having worked directly or indirectly with Student for many years, her having evaluated Student in 2010, and her extensive experience and expertise as a speech-language pathologist, Ms. Timmons was able to provide reliable and persuasive expert testimony regarding what gains may be reasonably expected within the context of Student's educational profile.³⁰ In this regard, she testified as follows:

Given that [Student] is 20 and is functioning somewhere between one and two years in terms of language skills that we can observe and measure, it's highly unlikely that he would he would make significant progress beyond this point. It is unheard of for anyone at his profound impairment level to develop oral communication.³¹

On cross-examination, Ms. Timmons added the following:

[Student] is a 20-year old who is, at most, functioning at a two-year old level. So will it take 20 more years for two years of language growth? Will he be at a four-year old level when he's 40? I don't know. But it will be somewhere between here and there

²⁹ Relevant parts of the transcript (vol. I, pp. 193-194) are as follows:

HEARING OFFICER CRANE: And if he didn't understand language at [the 24-month] level, if, say, it was significantly lower, how would that affect your testimony?

THE WITNESS: I would have more reservations about his ability to make more growth; because below a certain level of receptive language understanding, it's going to be very difficult for him to even, you know, make sense of what they're trying to teach.

³⁰ Ms. Timmons has 32 years of experience as a speech-language pathologist, she meets the qualifications of an assistive technology specialist, she worked with Student from kindergarten to 5th grade and then again from 2008 to the present while Student has been at the High School

³¹ Transcript, vol. II, pp. 244-245.

in my opinion. In my experience, students with this profound constellation of communication impairments don't change the rate at which they make progress.³²

And, later during cross-examination, Ms. Timmons responded to a question of whether Student's language development would be enhanced by more intensive services—for example, during time when he is not at school. Ms. Timmons responded by noting that Student has been receiving “programming throughout his entire day on communication skills”, that this is a “very intensive communication program; and yet he has made very guarded and slow progress.”³³

Ms. Timmons declined to answer directly the question which she herself posed: “Is more better?”³⁴ But, the clear implication of her testimony is that it is impossible to predict whether substantially more intensive services would substantially change Student's rate of progress regarding language.

Dr. Campbell, Nauset's outside expert, has somewhat limited knowledge of Student and I do not rely heavily on his testimony. He testified briefly regarding Student's learning potential. Dr. Campbell stated that there were so few people who have Student's combination of disabilities and so little written regarding Student's disabilities that it would be difficult to identify Student's learning potential. But, Dr. Campbell testified that Student's likely potential progress is very small and very incremental. Testimony of Campbell.

As noted above, I have found Dr. Brefach's testimony regarding Student's learning potential to be not reliable. Ms. Timmons' testimony (and, to some extent, Dr. Campbell's testimony) are the only credible, expert testimony regarding what should be considered a reasonable rate of meaningful progress within the context of Student's learning potential. I therefore adopt their view that, even with substantially more intensive services, it is unreasonable to expect Student to make progress at a faster pace, particularly with respect to language and communication skills and daily living skills, which have been a major focus of his education.

Parents filed their hearing request for the purpose of seeking a residential educational placement for their son and I therefore briefly review the relevant legal standards and evidence. A residential placement is properly considered more restrictive than a day program, even when the day program places a student in a substantially separate special education program.³⁵ When considering whether a student is entitled to a residential educational placement, the appropriate standard, as reflected within several First Circuit decisions, is whether the educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.³⁶

³² Transcript, vol. II, p. 268.

³³ Transcript, vol. II, p. 283.

³⁴ *Id.*

³⁵ *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

³⁶ *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983).

Parents did not provide any credible, expert testimony or reports that would satisfy this standard for residential services. Parents' only expert who supported expanded services was Dr. Brefach. She was critical of Student's current program in two respects. First, she testified that what she saw during her two and a half hour observation did not include effective teaching because Student was engaged with a teacher or aide for only short periods of time and because when Student was engaged with a teacher or aide, the instruction did not appear to be meeting his needs. This criticism goes to the question of whether the existing services are appropriate in terms of quality and effectiveness, not whether Student requires a residential placement to meet his educational needs.

Second, Dr. Brefach testified that additional services were needed beyond the school day, but her view appeared to be that this could be satisfied either by home-based services or by residential services. The fact that home-based services would satisfy this need, in Dr. Brefach's view, means that appropriate services may be provided without the need for a residential placement; and the standard for residential placement is therefore not supported by her testimony.³⁷

In sum, Dr. Brefach's testimony does not support an order for residential placement. Both Parents testified in support of residential placement, but they too did not assert that Student could only receive the requisite special education and related services within a residential setting, nor does either Parent have sufficient expertise to testify as an expert regarding the educational needs of Student.³⁸

It is not disputed that Student requires home-based services in addition to the services that he is receiving during the school day. It is also not disputed that Student has not been receiving home-based services. However, the fault does not lie with Nauset.

As discussed above, Nauset's proposed IEP includes home-based services. There is no evidence to suggest (and Parents do not argue) that these proposed services are not appropriate. Parents have simply declined to allow the home-based services to be provided. Specifically, Father testified (as he had previously communicated to Nauset) that he has developed his own ways of working with his son at home and in the community, and that he does not see the need for Nauset's assistance in this regard. It is not disputed that Father is a responsible and capable caretaker for his son. Father's testimony made clear that he is fully engaged with his son, that he likely knows his son better than anyone else, that he is

³⁷ Her relevant testimony was as follows:

At this point I think we're really looking at a child who needs to develop as many semi-independent skills as he possibly can. So as many skills for daily living as he can. And I think that that requires more than just the six hours in a school day. I think that additional specialized services need to be available to him outside of the school day. And whether those are provided at home or as part of a residential setting, he simply needs a lot more intervention.

Transcript, vol. I, page 175.

³⁸ This is not to suggest that Parents do not have a great deal of expertise regarding Student and regarding education in general. Father, who was a regular education teacher before he retired to take care of Student, knows his son's needs intimately. Mother is the head of a regular education school in California and has taken a course on inclusion as part of her master's program at Harvard University. But, this expertise is not sufficient to allow either Parent to testify as a special education expert regarding the question of how Nauset must educate Student in order that he receive appropriate special education and related services.

dedicated to the wellbeing of his son, and that he appreciates what the Nauset educators have done for his son. Nauset has proposed home-based services and, at the same time, Nauset has appropriately respected Father's decision that Nauset not provide any home-based services.

Parents have alleged violation of transition services standards and I therefore briefly review the relevant legal standards and evidence. Transition services are part of, and not separate from, a school district's responsibility to provide FAPE under the IDEA, discussed above. And, transition services requirements do not change basic FAPE principles. Whether a student's transition planning and services are appropriate must therefore be considered within the context of FAPE and court decisions interpreting FAPE.³⁹

What is unique about transition services requirements is that they focus educational services on a particular purpose—that is, to facilitate a student's movement to whatever the student will be doing after high school—and impose certain specific mandates on a school district for that purpose.⁴⁰ Specifically, the IDEA and the regulations thereunder provide that transition services include “instruction [which also includes ‘specially designed instruction’⁴¹], related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”⁴² The IDEA further explains that transition services are provided to “improve[e] the academic and functional achievement of the [student] to facilitate [his or her] movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.”⁴³

³⁹ See *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1036 (9th Cir. 2009) (“no plausible way to read the definition of ‘transition services’ as changing the free appropriate public education standard”); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 28-30 (1st Cir. 2008) (applying FAPE standards to determine whether transition services were appropriate).

⁴⁰ See *Yankton School Dist. v. Schramm*, 93 F.3d 1369, n.6 (8th Cir. 1996) (“A very bright, disciplined, and determined student, Tracy appears to be headed for college. Preparing disabled students for postsecondary education is one of the reasons for transition services under the IDEA. Under the statute, her success in high school, due in part to the special education she receives, should not prevent her from receiving whatever transition services she may need to be equally successful in college.”); *Elizabeth M. v. William S. Hart Union High School Dist.*, 2003 WL 25514791, *4 (C.D. Cal. 2003) (“adequate high school education is inextricably linked to a successful transition to post-secondary education”); *Kevin T. v. Elmhurst Community School Dist. No. 205*, 2002 WL 433061, *12 (N.D.Ill. 2002) (transition services are “[t]o ensure that disabled students can adequately function in society after graduation”); *J.B. v. Killingly Board of Education*, 990 F.Supp. 57 (D.CT 1997) (student “could receive instruction in community living and social skills, including daily living skills, appropriate behavior, socialization, and working skills, as part of his transition services”); *Yankton School District v. Schramm*, 900 F.Supp. 1182 (D.S.D. 1995) (“Transition services are ‘aimed at preparing students (soon to leave school) for employment, *postsecondary education*, vocational training, continuing and adult education, adult services, *independent living*, or community participation.”) (emphasis in original), *aff’d* 93 F.3d 1369 (8th Cir. 1996).

⁴¹ See 34 CFR §300.43(b).

⁴² 20 U.S.C. § 1401(34)(C). See also 24 C.F.R. § 300.43.

⁴³ 20 U.S.C. § 1401(34)(A). See also 24 C.F.R. § 300.43. Similarly, the U.S. D.O.E. has stated: “The purpose of [the transition services requirement] is to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school.” 64 Fed. Reg. 12474-12475 (March 12, 1999), quoting H. Rep. No. 105-95, pp. 101-102 (1997); S. Rep. No. 105-17, p. 22 (1997).

IDEA transition services requirements further provide that essential to the development of appropriate transition planning and services is a school district's "age appropriate transitional assessments related to training, education, employment, and, where appropriate, independent living skills."⁴⁴ The assessments are necessary to ensure appropriate transition planning because the school district must develop "appropriate measurable postsecondary goals based upon age appropriate transition assessments."⁴⁵ Once the appropriate goals are identified, the school district must then provide "transition services (including courses of study) needed to assist the child in reaching those goals."⁴⁶

It is not disputed that Nauset has done no formal transition assessments of Student, and Parents argue that this makes it difficult if not impossible for Nauset to provide appropriate transition services. Parents also criticize the apparent minimal amount of time that has been spent during IEP Team meetings discussing and addressing Student's transition needs. Parents conclude that Student's transition services have been and currently are inappropriate.

Although Nauset has done no formal transition assessments, no evidence has been presented of particular transition assessments that should have been done and that would have provided Nauset relevant information regarding Student's transition needs and how they should be met. Instead of conducting formal transition assessments, Nauset relied upon informal assessments, including observations and data collection, to determine Student's transition needs and how they should be addressed. Testimony of Caretti. For the reasons explained below, there is no evidence that this has been insufficient.

Currently, Student is eligible for services from the Massachusetts Department of Developmental Services (DDS). When he reaches his 22nd birthday, Student will likely transition from special education eligibility and services to services funded by DDS and Mass. Health. Because of the severity of Student's multiple disabilities, it is very likely that he will be placed in a group home and a day program. These programs would be appropriate for Student and would be able to meet his needs even if Student makes no further educational progress. Testimony of Jensen.

Student is then likely to remain in these programs for the indefinite future. Therefore, Student's transition services must take into account and plan for his needs in these settings, including his taking recreational trips into the community. Testimony of Jensen.

It is not disputed that the skills that Student will need in these settings (after Student turns 22 years) are the skills that are the focus of his current educational placement at the Life Skills Program in the Nauset Regional High School. These skill areas are communication, social pragmatics, participating (and acting appropriately) with others, walking, and adult life skills such as eating, using the toilet and personal hygiene. There is no evidence to suggest that Student's current program should be adjusted to focus on any different or additional areas for purpose of making Student as ready as possible to transition to adult services from DDS and

⁴⁴ 20 USC § 1414 (d)(1)(A)(i)(VIII)(aa). See also 34 CFR §300.320(b) (providing similar requirements).

⁴⁵ 20 USC § 1414 (d)(1)(A)(i)(VIII)(aa). See also 34 CFR §300.320(b) (providing similar requirements).

⁴⁶ 20 USC § 1414 (d)(1)(A)(i)(VIII)(bb). See also 34 CFR §300.320(b) (providing similar requirements).

Mass. Health. Testimony of Rice, Jensen. Thus, I can find no substantive violation regarding Nauset's responsibility to provide transition planning and services.

Finally, I consider that Student is entitled to an educational program with services (including transition services) that are reasonably calculated to be effective, and this includes effectively providing the special education and related services described within the IEP so that Student will have the opportunity to receive FAPE.⁴⁷ It is not disputed that there are a number of areas where the implementation of IEP services needs to be improved.

Specifically, Ms. Timmons and Dr. Campbell testified, and it is not disputed, that Mr. Nelson needs to be supervised and taught to better understand the appropriate use of data collection so that it does not interfere with his instruction of Student. Based upon the testimony of Dr. Brefach and Father, I find that it is likely that Mr. Nelson also requires additional instruction and supervision in order to correctly implement some of the educational programs on a consistent basis.

I now turn to a summary of the above legal and factual analyses.

In reviewing the above discussion of Student's educational development, I find that Student is making extremely slow and incremental progress with respect to communication and other academic areas, and he is making somewhat greater (but still very slow) progress with respect to life skills such as walking and eating. There is every reason to believe that, with the currently-proposed IEP which would continue Student in his existing placement, Student's progress will remain essentially the same, even with several adjustments (referenced below) to improve the effectiveness of the services.

Parents bore the burden of presenting credible, persuasive evidence that this progress was not meaningful for Student, with the term "meaningful" being understood within the context of Student's learning potential. This they have not done. Rather, the weight of the evidence is that although Student definitely has the potential to learn and make progress in a number of areas, his learning potential is extremely limited in large part because of the simple fact that he may not consistently understand the meaning of even a single word. This is not to say that one should ever give up on teaching Student—no one is suggesting this. But, rather, it is simply not possible to fault the special education and related services provided by Nauset on the basis that they have not resulted in (and are not likely to result in) greater educational gains. Moreover, there is little, if any, dispute that the areas being addressed by Nauset are those areas important for Student's transition to adult services, which will occur within approximately one and one-half years when he turns 22 years.

Parents, who are devoted to their son, initiated this dispute before the BSEA in order to obtain a residential placement, believing that it would advance his education and social development and would provide greater opportunities for him to enjoy his life with similar

⁴⁷ Congress has noted that "providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities". Also, as discussed above, Massachusetts regulatory standards require that Student's IEP Team "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 603 CMR 28.05 (4) (b). See also 603 CMR 28.02(17).

peers. It seems reasonable that a residential placement may meet at least some of these objectives, but this is not the legal standard by which Nauset may be required to fund such a placement.

It would be difficult to find a more deserving person than Student to be given a real opportunity to make substantial educational gains. Had there been credible, persuasive evidence that only with residential services, Student would be able to make substantial gains in important educational areas such as communication and daily life skills, I have no doubt that I would have ordered a residential placement.

Parents bore the burden of presenting credible, persuasive evidence that the special education and related services to which Student is entitled could only be provided in a residential setting. Even if I were to fully credit the testimony of Parents' only expert, I find that there is no credible evidence in the record that supports this proposition.

Based upon the findings made earlier in this Decision, I draw several conclusions regarding the implementation of the special education and related services described within the IEP. Student's 1:1 educational assistant requires additional training and supervision. Dr. Campbell noted, for example, that the educational assistant's data collection needs to be improved and that it would likely be helpful for the educational assistant to provide some of his instruction at a table where the special education teacher would be able to observe what occurs. I further conclude that Mr. Nelson's need for additional training and supervision likely goes beyond Dr. Campbell's recommendation, but there was insufficient evidence for me to determine its precise nature and scope. With Dr. Campbell's assistance (if he is willing and able to assist), the IEP Team shall meet to consider these deficiencies and to make adjustments necessary to correct them.

Also, Ms. Timmons testified that she needs to (and typically does) spend 45 minutes per week providing consultation to staff, but the most recently proposed IEP calls for only 45 minutes of consultation over every two week period. Therefore, the IEP shall be amended to reflect 45 minutes of consultation per week from the speech-language pathologist, rather than the current 45 minutes per two-week period.⁴⁸

⁴⁸ Three other concerns of Parents will be addressed briefly. First, it is not disputed that Student receives the vast majority of his instruction from Mr. Nelson, who in turn is trained by Student's service providers and is supervised by a classroom special education teacher. Although this model of providing the vast majority of services through an educational assistant was criticized by Parents and their expert, the weight of the evidence was that it is often used in other educational programs and can be an efficient and appropriate model, provided that the educational assistant receives sufficient training and supervision. Testimony of Timmons, Campbell.

Second, Dr. Brefach criticized the communication devices that were being used with Student. She opined that there were more sophisticated devices that were available that would be helpful to Student. Ms. Timmons, who has substantial expertise in the area of assistive technology for purposes of communication and who is credentialed in this area, acknowledged the existence of more sophisticated communication devices. But, she testified persuasively that Student simply does not have the cognitive ability and physical skills to utilize these more communication devices. Testimony of Timmons, Brefach.

Third, Parents objected to Dr. Campbell's testimony on the grounds that Nauset did not obtain Parents' consent prior to his observing Student or reviewing records. However, the federal and special education regulations governing access to confidential student information indicate that because Dr. Campbell is under contract with Nauset to provide consultation services regarding Student's special education services, he is exempt from the general rule that

ORDER

As currently written, the IEP most recently proposed by Nauset (exhibit S-1) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

With the amendments required below, the IEP will be reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Nauset shall do the following:

1. Immediately amend the IEP to reflect 45 minutes per week of consultation from the speech-language pathologist.
2. Within 20 school days from the date of this Decision, re-convene the IEP Team in order to determine what adjustments should be made regarding the on-going training and supervision of Student's 1:1 educational assistant in order to address the concerns reflected within this Decision. The IEP shall then be amended accordingly.
3. Approximately two months after adjustments are initiated regarding the training and supervision of Student's 1:1 educational assistant as described immediately above, Nauset shall have an expert observe and review the effectiveness of Student's 1:1 educational assistant, and the expert shall provide a written report to Nauset and Parents, including any recommendations for further training or supervision.

Student is not entitled to a residential educational placement.

Student is not entitled to additional services from DDS to access or benefit from his special education services from Nauset.

By the Hearing Officer,

William Crane
Dated: June 27, 2013

**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.