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

In Re: Quincy Public Schools **BSEA # 1302133**

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 October 22, 24 and 25, 2012 in Quincy, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Student's Father	
Terrell Clark	Pediatric Psychologist, Children's Hospital Boston
Erin Perkins	Team Administrator, Quincy Public Schools
Judith Wyks	Teacher of the Deaf, Quincy Public Schools
Donna Cunningham	School Psychologist, Quincy Public Schools
Sylvia Pattavina	Student's Case Manager, Quincy Public Schools
Evelyn Rankin	Program Director, READS Deaf and Hard-of-Hearing Program
Lila West[1]	Teacher of the Deaf, Clarke School
Owen Logue	Director of K through 8th Grade Program, Clarke School
Judith Todd	Director of Special Education, Quincy Public Schools
Michael Turner	Attorney for Parents and Student
Doris MacKenzie Ehrens	Attorney for Quincy Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-A through P-O; documents submitted by the Quincy Public Schools (Quincy) and marked as exhibits S-1 through S-22 (except that S-20 was not admitted) and exhibits S-1 (supplemental) through S-3 (supplemental); and approximately three days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on November 13, 2012, and the record closed on that date.

[1] Ms. West testified by telephone and did appear in person at the hearing.

ISSUES

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

1. Is the IEP most recently proposed by the Quincy School District (i.e., exhibit S-2A) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would placement at the Clarke School for Hearing and Speech in Northampton, MA (Clarke School or Clarke) satisfy this standard?
4. Should Quincy be required to pay for Mother's residential living expenses in the Northampton, MA, area so that Student can attend Clarke as a day student?
5. If not, what educational program must Quincy locate or create for Student in order to satisfy this standard.[2]

[2] The first four of these five issues were identified for the parties by me on the record at the beginning of the hearing. This occurred after I conferred with the attorneys off the record to determine their understanding of the relevant issues. Neither party objected to my on-the-record recitation of these four issues being the issues that would be addressed through the hearing. The fifth issue was identified by me during the hearing after evidence was presented that would arguably support a determination that each of the proposed educational programs was inappropriate and could not be modified to be appropriate, with the resulting possibility that Quincy would need to locate or create an appropriate educational program with guidance from me. Neither party objected to the addition of this fifth issue.

During the second day of hearing, Quincy objected to my consideration of Parents' requested relief that Quincy prospectively pay for Parents' living expenses in the Northampton area, noting correctly that this relief is not expressly identified in either Quincy's hearing request or Parents' response to Quincy's hearing request. I overruled this objection because Quincy had failed to object to the inclusion of this requested relief when, at the beginning of the hearing, I identified it as one of the issues in dispute. I also noted that during my conference calls with the parties, Parents had been clear with me and with Quincy's counsel for a period of time of more than two weeks prior to the hearing that Parents were seeking this form of prospective relief. I find that this relief was implicitly included within Parents' request that the BSEA order Quincy to place Student at the Clarke School since the parties understood that the only way that this could occur would be for Quincy to pay prospectively for Parents' living expenses in the Northampton area. I find that Quincy is not prejudiced by the inclusion of this requested relief in the issues to be addressed at hearing, nor has it claimed that it is prejudiced.

Immediately prior to the beginning of the hearing, Parents' attorney stated that Parents were also seeking reimbursement of Mother's previously-incurred living expenses in the Northampton, MA, area while Student has been attending Clarke pursuant to my stay-put order. Because reimbursement of previously-incurred living expenses had not been raised as an issue in either Quincy's hearing request or Parents' response and because Quincy had not been otherwise put on notice that this would be an issue at hearing, I advised the parties that I would not consider it. This is an issue separate and distinct from the issues that had been identified by the parties, and therefore may not be included without consent of Quincy. See 20 USC § 1415 (f)(3)(B) ("party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise").

In their closing argument, Parents alleged a number of procedural violations relevant to Quincy's development of its most recently proposed IEP. Because procedural claims had not been raised either in Quincy's hearing request or in Parents' response, because Quincy had not otherwise been put on notice of these issues and because procedural issues are separate and distinct from the issues that had been identified by the parties, I do not consider them. *Id*.

STUDENT'S PROFILE, RECENT PLACEMENTS AND PROPOSED IEP

Educational profile. Student is a thirteen-year old, 6th grader, who attends the Clarke School at the campus in Northampton, MA. She attends Clarke as a day student pursuant to a stay-put order of the BSEA.

Although not entirely deaf, Student has a bilateral, sensorineural hearing loss that is communicatively and educationally significant. Relying on her residual hearing, and the use of binaural hearing aids and an FM system for amplification at school, she is and always has been an aural/oral learner/communicator (i.e., she is a listener and talker). She also relies upon visual cues to support her understanding of spoken language. She has never learned (or wanted to learn) sign language. She sees herself as an aural/oral student who has a significant hearing loss. Testimony of Mother, Clark; exhibit S-2 (supplemental) (page 1).

Student's testimony at the hearing demonstrated her ability to accurately understand and respond to questions from the attorneys and me so long as she was facing the person with whom she was communicating and was in relatively close proximity to that person (for example, sitting across a conference room table from that person). As reflected in a recent evaluation by Dr. Clark and as demonstrated through her testimony, the "intelligibility of her speech is quite good." Student did not use an FM system while testifying. Testimony of Student, Clark; exhibit S-2 (supplemental) (pages 1, 5).

For a number of years, Student has also been diagnosed with deficits in expressive and receptive language, and language-based learning disabilities. It is undisputed that, as explained in a recent evaluation by Dr. Clark, Student "continues to require a small, language-based class where her language and learning needs are addressed by professionals who employ special educational techniques to circumvent and compensate for learning disabilities and for the effects of her significant hearing loss." Testimony of Clark; exhibit S-2 (supplemental) (page 4).

Student's cognitive profile has remained relatively stable over time. Her 2011 test scores on the WISC-IV reflect functioning in the Low Average range in the Verbal Comprehension area (index score of 85) and functioning in the Average range in the Perceptual Reasoning or non-verbal area (index score of 96). This profile is consistent with her diagnosis of learning disabilities. Testimony of Clark; exhibit S-2 (supplemental) (page 3).

Student's recent educational placements. During the 2011-2012 school year, Student attended Clarke School as a residential student pursuant to an accepted IEP and settlement agreement between the parties. However, at the end of the 2011-2012 school year, Clarke discontinued the residential component of its school, and Student currently attends Clarke's day program. Parents reside in Quincy. Because Quincy and Northampton are too far apart for Student to commute to school on a daily basis, Mother has obtained, at private expense, a hotel room in the Northampton area in order to provide Student with the residential support needed for her to continue to attend Clarke. Testimony of Mother, Todd.

Quincy's proposed IEP. Quincy filed the hearing request, seeking an order from the BSEA finding its most recently-proposed IEP to be appropriate. This IEP, which was developed only a few days before the beginning of the hearing, proposes that Student be placed at the READS Collaborative Deaf and Hard-of-Hearing Program. In order to address Student's language-based learning disabilities, the IEP calls for all of Student's English language arts, math, reading and other academic classes to be taught by a special education teacher. Hearing services are to be provided by a teacher of the deaf for a half hour per week, and communication services are to be provided by a speech-language pathologist (or assistant) for 40 minutes, three times per week. No consultation services or special education services within the general education classroom are proposed. The IEP indicates that extended year services will be recommended to address Student's "significant learning disabilities" but does not specify the nature or extent of these services because the IEP is for the period 10/19/12 to 7/9/13. Testimony of Todd; exhibit S-2A.

Parents' proposed educational placement. Parents seek an order from the BSEA continuing Student's placement at Clarke School. Parents also seek an order requiring Quincy to pay for Parents' living expenses in the Northampton area, which Parents' attorney has stated would likely be in the range of $30,000 to $38,000 depending upon whether Mother obtains an apartment or continues residing in a hotel. Quincy has declined to pay for any of Parents' living expenses. Testimony of Mother.

EDUCATIONAL AND PROCEDURAL BACKGROUND

2006-2007 school year. In a previous dispute between the parties, a BSEA Hearing Officer issued a decision, dated January 8, 2007, which addressed whether Quincy had developed and implemented a program to provide Student with a free appropriate public education in the least restrictive environment for the 2006-2007 school year.[3] At the time of the BSEA decision, Student was seven years old. The decision explained that there was an agreed-upon IEP for the 2006-2007 school year, calling for placement of Student in a substantially-separate classroom within the Quincy Public Schools with a licensed full-time special education teacher and a teacher of the deaf for all academic instruction, and with a full-time communication facilitator.[4] The dispute centered around Quincy's acknowledged inability to fill the position of teacher of the deaf, resulting in Quincy's acknowledged inability to implement the educational program described within the agreed-upon IEP for the 2006-2007 school year and the BSEA's therefore needing to consider what Quincy should do as a result.[5]

As in the current dispute, the 2007 BSEA decision reflected extensive involvement of Dr. Clark who had been evaluating Student since she was two years old, who was involved in reviewing the appropriateness of Student's proposed educational program for the 2006-2007 school year, and who testified at the BSEA hearing.[6]

[3] *Student v. Quincy Public Schools*, BSEA #05-4960, 13 MSER 4 (2007).
[4] *Id*. at 13 MSER 6 (par. 7).
[5] *Id*. at 13 MSER 9.
[6] *Id*. at 13 MSER 5.

2007-2008 school year through the 2010-2011 school year. For the 2007-2008 school year, Student was unilaterally placed by Parents at the Learning Prep School, a private school for learning disabled children in Newton, MA. For the subsequent three school years (i.e., through the 2010-2011 school year), Student continued to be placed at Learning Prep; but instead of this occurring through a unilateral placement by parents, the placement ocurred through a settlement agreement between the parties. The settlement agreement provided for Quincy to pay for tuition and transportation, but specifically relieved Quincy of any responsibility to provide accommodations or services relevant to Student's hearing loss. Parents believed that the Learning Prep School would appropriately address this area of need without any assistance from Quincy. Testimony of Mother, Todd.

2011-2012 school year. For this school year, Quincy proposed an IEP that would continue Student's placement at Learning Prep because they were not satisfied with Learning Prep. Parents rejected the IEP and filed a hearing request with the BSEA. The parties resolved their dispute through a settlement agreement that provided for Quincy to place Student residentially at Clarke School. The residential component of the program was needed only because the distance between Quincy and Northampton was too long for Student to commute daily. She typically spent Monday through Thursday nights at Clarke, returning home for the weekends. During this school year, she repeated 5th grade by agreement of Parents and the Clarke School. By this time, Student was twelve years old. Testimony of Mother, Todd; exhibits S-9, S-21, P-B. P-C, P-N.

Student's grades, as reported by her Clarke teachers in January 2012, were in the B- to A range. Her grades, as reported by her Clarke teachers in June 2012, were all B+ except for science for which she received a grade of A-. IEP progress reports from teachers and service providers generally indicated that Student was making progress on most of her IEP goals although the extent of the progress was often unclear from the face of the reports. Testimony of Todd; exhibits P-F, P-G, S-5, S-6.

2012-2013 school year. On May 3, 2012, Parents filed a hearing request seeking to order Quincy to continue funding Student's placement at Clarke for the 2012-2013 school year. As the parties recognized, Student had previously attended Clarke as a residential student, and Clarke terminated its residential program effective the end of the 2011-2012 school year. Clarke continued to offer only a day program for the 2012-2013 school year. In light of these changed circumstances, Parents, through their hearing request, sought an order from the BSEA requiring payment not only of the Clarke tuition but also of Parents' living expenses in the Northampton area so that Student would have sufficient residential support from her Parents so that she could continue to attend Clarke, this time as a day student. Testimony Mother, Todd; exhibit S-8

Prior to the scheduled hearing dates in the previous dispute and prior to the beginning of the 2012-2013 school year, the parties settled their differences, and Parents withdrew their hearing request. Their settlement agreement required Quincy to fund Student's tuition as a "publicly-funded residential student" at Clarke. Quincy's obligation to do so, however, was

contingent upon Quincy's "obtain[ing] sole source approval for [Student's] residential placement at Clarke." Exhibits S-21, P-N.

Quincy included this "sole source" language in the agreement because Clarke no longer had a residential program and, to the extent Clarke had created an as yet unapproved residential program, Quincy could not place Student there without prior approval and it could not expend public funds for the program without price authorization. Testimony of Todd.[7]

After the settlement agreement was signed, Quincy completed its portion of the sole source application and forwarded the application to Clarke for it to complete its portion. Clarke did not do so. Clarke took the position that it could not complete the application because it did not have a residential program and could not develop a budget for a program it did not have. Testimony of Todd.

Because Quincy's payment of the Clarke tuition was made expressly contingent upon sole source approval and because sole source approval was never obtained, Quincy did not make any tuition payments to Clarke for the 2012-2013 school year. Nevertheless, apparently because the parties (and Clarke School) assumed that there was an agreement pursuant to which she would attend Clarke School, Student began attending Clarke as a day student at the beginning of the school year and continued to attend until September 24, 2012 when Clarke informed Parents that because it had received no tuition payment, Student must terminate immediately. Testimony of Todd.

On September 14, 2012, Quincy filed a hearing request with the BSEA in the instant dispute, seeking a determination that its proposed IEP for the current school year is appropriate. On October 2, 2012, Parents' attorney filed a motion seeking that I determine Student's stay-put placement to be the Clarke School, and that Quincy be ordered not only to pay for this day placement but also to pay for Parents' living expenses in the Northampton area, where Clarke is located.

During the motion hearing, Parents' attorney represented that although Parents were seeking payment of their residential support services, they would be willing, at private expense, to support their daughter's attendance at Clarke as a day student if I did not order Quincy to pay for Parents' residential services. In a ruling dated October 10, 2012, I found that it was only the Clarke School day program that could offer Student an educational program that would be comparable to her previous residential placement at Clarke. My ruling determined the Clarke day program to be Student's stay-put placement but declined to order, under stay-put principles, that Quincy pay for any part of Parents' living expenses. Quincy was ordered to immediately place Student in Clarke's day program.

[7] See 808 CMR 1.06(7)(b)("DPS [Division of Purchased Services] will develop, issue and amend, as necessary, instructions for the development and authorization of prices for individual students who are placed, after approval by DOE pursuant to 603 CMR 28.500 or successor provisions thereto, by a Department in a private school which has not been approved under M.G.L. c. 71B. These placements are also referred to as "sole source" placements.")

Student then began attending Clarke again. At her own expense, Mother has obtained a hotel room in the area, essentially providing Student with the residential support needed for her to attend Clarke. Testimony of Mother.

During the morning of the hearing on Parents' motion for stay-put (October 4, 2012), Parents' attorney for the first time shared with Quincy's attorney an April 18, 2012evaluation of Student by Dr. Clark. For a period of time, Quincy had recognized the need for additional testing for Student and had made a request to Parents that further evaluation, at Quincy's expense, occur as soon as possible, but Quincy had been unaware of the evaluation. Parents had received the evaluation report from Dr. Clark in the spring of 2012, and Mother testified that she sent a copy of the evaluation to a Quincy staff person soon thereafter. However, there is no indication that Quincy actually received the evaluation until October 4, 2012. Testimony of Mother, Todd.

Dr. Clark's April 18, 2012 evaluation found that Student was reading at the early 3rd grade level, that her spelling skills were at the mid-2nd grade level, and that her math computation abilities were at the early 2nd grade level. Of significant concern was that these scores were essentially identical to Student's scores in these same areas in Dr. Clark's testing approximately 15 months earlier. Also noteworthy was Dr. Clark's finding in her April 18, 2012 evaluation that Student appeared to be "increasingly hampered by anxiety defensiveness", and that she "'shuts down' when confronted with even the potential for not completing tasks successfully". Testimony of Clarke; exhibits S-14, S-2 (supplemental), P-I.

After receipt of Dr. Clark's evaluation, Quincy became increasingly concerned as to the appropriateness of Student's placement at Clarke. Quincy sought to schedule an IEP Team meeting for the purpose of considering the evaluation and making any needed changes to the IEP. Because of scheduling difficulties, the IEP Team meeting did not occur until October 19, 2012, which was only a few days before the beginning of the evidentiary hearing. Testimony of Todd, Mother.

During a conference call with me on October 16, 2012, Quincy's attorney suggested that the evidentiary hearing be postponed until mid-November to allow more time for scheduling the Team meeting and preparing any amended IEP prior to the hearing, but Parents' attorney sought to maintain the hearing dates of October 22, 24 and 25, 2012 in part because he represented that Parents had only a limited ability to continue privately paying for living expenses in the Northampton area while Student attended Clarke pursuant to the stay-put order. I determined that proceeding on the October hearing dates would not prejudice either party, and I agreed with Parents' attorney that this dispute could be resolved as quickly as possible.

As a result of the October 19, 2012 IEP Team meeting, Quincy prepared its most recent IEP, which was provided to Parents immediately prior to the first day of hearing on October 22, 2012. The IEP (which is discussed above in greater detail) proposed changing Student's placement from Clarke to the READS Collaborative Deaf and Hard-of-Hearing Program. The appropriateness of this IEP is the subject of the instant dispute.

During the second day of the evidentiary hearing (October 24, 2012), Parents' attorney moved to have the BSEA hearing dismissed, which if allowed, would have avoided a BSEA determination as to Student's special education needs and how they should be met, and would have maintained Student indefinitely in her stay-put placement at Clarke. In support of this motion, Parents' attorney relied upon earlier testimony of the Program Director of the READS Collaborative Deaf and Hard-of-Hearing Program (Ms. Rankin) that READS had not yet determined whether Student would be appropriate for the deaf and hard-of-hearing program at READS. I denied Parents' motion because the fact that Student had not been accepted at READS did not preclude my determining Student's special education needs and how they should be addressed.

LEGAL STANDARDS

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."[8] "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."[9] An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability.[10] A student is not entitled to the maximum educational benefit possible or "even the best choice".[11] Rather, the IEP must be "reasonably calculated to confer a meaningful educational benefit."[12]

In the application of the meaningful benefit standard, "levels of progress must be judged with respect to the potential of the particular child"[13] unless the potential is "unknowable"[14] because "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".[15]

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[8] 20 U.S.C. § 1400 (d)(1)(A).

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

[10] 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 Dir. 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)).

[11] 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.").

[12] *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).

[13] *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008). See also *D.B. v. Esposito*, 675 F.3d at 36 ("In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.").

[14] See *D.B. v. Esposito*, 675 F.3d at 36.

[15] *Rowley*, 458 U.S. at 202.

The IDEA also reflects a preference for mainstreaming disabled students.[16] This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children.[17] "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs."[18]

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 regulations[19] and which may exceed the federal floor[20]) 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."[21]

As a general rule, an IEP must be judged as of the time when the IEP is proposed—that is, the issue is whether the IEP was "objectively reasonable … at the time the IEP was promulgated" by the school district.[22] However, notwithstanding Quincy's arguments to the contrary, this legal standard has little, if any, relevance to the instant dispute. The focus here is not on determining whether Quincy has acted correctly or incorrectly in the past but rather on ensuring that Student's special education needs will be appropriately met going forward. In other words, the instant dispute is entirely prospective in orientation as compared, for example, to a dispute where there are claims (such as compensatory services or for reimbursement of Parents' privately-obtained educational services for Student) that depend on my determining whether Quincy's proposed IEP was appropriate when it was proposed.

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[16] 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).
[17] 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).
[18] *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).
[19] See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the "education standards established by statue or established by regulation promulgated by the board of education").
[20] 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]").
[21] 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").
[22] *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (internal quotations omitted).

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.[23]

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

As the moving party in the instant dispute, Quincy seeks a determination by the BSEA that its proposed IEP is appropriate. Under these circumstances, Parents have the burden of persuading me that Quincy's IEP is not appropriate and that their proposed educational program is appropriate because it is Parents, rather than Quincy, who are challenging Quincy's proposed IEP.[24]

DISCUSSION

Introduction. The nature of Student's twin disabilities—that is, significant hearing loss combined with long-standing, language-based learning disabilities—presents a uniquely-challenging educational profile. As Parents' expert (Dr. Clark) repeatedly explained in her testimony and has noted in her evaluation reports, as Mother agreed in her testimony, and as the Quincy witnesses concurred in their testimony, Student cannot make effective or meaningful educational progress unless *both* her hearing deficits and her learning deficits are appropriately and simultaneously addressed in an integrated manner within her educational program. Testimony of Clark, Mother, Rankin, Todd.

Although the present dispute addresses prospective issues only, it may be helpful to understand Student's educational profile within the context of her educational history. It does not appear to be disputed by the parties that this history is one of continuing difficulties and frustrations, sometimes resulting in Student's making little if any measurable academic progress. This may have occurred because it appears that none of her educational placements over the past six school years addressed successfully *both* aspects of her educational disabilities at the same time, notwithstanding that nearly all of Student's educational services during these school years have been provided pursuant to settlement agreements between the parties and that during this time, Dr. Clark has been involved by evaluating Student and consistently emphasizing the necessity of simultaneously addressing Student's twin educational deficits.

Student's most recent educational difficulties and frustrations are revealed through Dr. Clark's 2011 and 2012 evaluations. These two evaluations, taken together, indicate that

[23] MGL c. 71B.

[24] See *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35 -36 (1st Cir. 2012) ("In 2005, … the Supreme Court decided *Schaffer,* which clarified that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62, 126 S.Ct. 528. We understand this to mean that a school system does not incur the burden of proof merely by preemptively seeking an administrative determination that a proposed IEP would comply with the IDEA, as in this case. In that instance, the school system is defending the adequacy of the IEP, not challenging it.").

Student made no measurable progress in reading, spelling and math computation skills during a 15 month period between January 14, 2011 and April 18, 2012, leaving Student's reading skills at the early 3rd grade level, spelling at the mid-2nd grade level and math computation skills at the early 2nd grade level. Student is currently in the 6th grade, having repeated 5th grade during the last school year. Dr. Clark testified that Student's lack of progress over this 15 month time period was "alarming". Testimony of Clarke, Rankin; exhibits S-14, S-2 (supplemental), P-I.

Of perhaps equal concern is Dr. Clark's finding in her April 2012 evaluation report that Student appeared to be "increasingly hampered by anxiety defensiveness", and that she "'shuts down' when confronted with even the potential for not completing tasks successfully". Dr. Clark testified that this reflects a cumulative effect from years of frustration and failure in school. Dr. Clark's concern is that this may likely interfere with her future educational progress because she may not be willing to invest in learning that is difficult for her. Similarly, Ms. Rankin testified that Student's anxiety and her tendency to withdraw from challenging academic situations, as reported by Dr. Clark, is a "huge concern". Testimony of Clarke, Rankin; exhibit S-2 (supplemental).

Student's history of educational difficulties, including her failure to make measurable academic progress in reading and math over a recent 15 month period, together with her growing anxiety and frustration that may limit her enthusiasm and energy for future educational challenges, heightens the importance of identifying as soon as possible an educational placement in which Student can effectively and successfully access her education with a minimum of frustration and failure and make meaningful progress. Testimony of Clark, Rankin.

In order to determine the appropriateness of Quincy's currently-proposed placement as well as Parents' proposed placement, I first identify three criteria for an appropriate educational placement for Student, and then apply these criteria to the parties' proposed placements. It should be emphasized that for a program to be appropriate for Student, it is essential that each of these three criteria be met.

In developing these criteria, I have relied heavily (although not exclusively) on Dr. Clark's testimony and her two most recent evaluations because I found her to be credible, objective and persuasive, and because no other witness offered her degree of knowledge of Student and expertise in her twin disabilities.[25]

[25] As a pediatric psychologist, Dr. Clark has evaluated Student nearly every year since 2001, observed Student in her program at Learning Prep School and has substantial expertise both in the area of deafness and hard-of-hearing as an educational disability and in the area of learning disabilities. She has worked in the area of special education, is fluent in American Sign Language, is an assistant professor at Harvard Medical School Department of Psychiatry and for more than three decades has been the director of the Deaf and Hard-of-Hearing Program at Children's Hospital Boston. Because of her stature and long-standing tenure evaluating students who have a hearing disability, she has a near encyclopedic knowledge of deaf and hard-of-hearing programs for students throughout New England. In addition and equally important, she testified in a careful, objective, candid and authoritative manner, fully supporting neither Parents' positions nor Quincy's positions. No other witness had substantial knowledge of both learning disabilities and deafness, and no other witness had conducted a comprehensive evaluation of Student.

Criterion # 1: Student's educational program must be aural/oral. This criterion is relevant to consideration of an educational program for deaf and hard-of-hearing students. An aural/oral program for deaf and hard-of-hearing students uses oral instruction rather than sign language instruction. Dr. Clark testified persuasively that Student will not be able to learn effectively if placed in an educational program for deaf and hard-of-hearing students where instruction is provided through American Sign Language. Testimony of Clark.

Student does not understand American Sign Language; rather, she learns and communicates through spoken English. Because American Sign Language's vocabulary and grammar are different than the vocabulary and grammar in the English language, it is not be possible for a teacher or other student to simultaneously communicate through American Sign Language and spoken English. Therefore, any American Sign Language instruction for Student would need to be translated simultaneously by a third person (i.e., an interpreter) into spoken English with the result that Student would not be receiving the instruction directly from the teacher. Testimony of Clark.

Dr. Clark testified persuasively that placing Student in an educational program where some or all instruction is provided through American Sign Language (resulting in instruction through a triangulation of the teacher communicating to a third person interpreter who communicates to Student) would likely result in Student being confused and overwhelmed, leading to educational frustration and failure. Dr. Clark testified persuasively that for instruction to be effective for Student, it needs to be through direct Student-teacher communication, thereby necessitating an aural/oral educational program. Testimony of Clark.

In addition, Dr. Clark noted that even where students are able to both speak orally and use sign language, they are likely to use sign language if any other students present communicate only through sign language. She thus testified persuasively that Student would be excluded from communication between students, particularly social communication outside of the classroom, if she were placed in an educational program where some students only use American Sign Language. This would negatively impact her education. Testimony of Clark.

Finally, Dr. Clark testified persuasively that it would be unrealistic to expect that Student could learn American Sign Language. She explained that American Sign Language is a visual, spatial language that involves sequencing, but Student has substantial deficits in spatial orientation, temporal concepts and sequencing. Dr. Clark testified persuasively that Student's trying to learn American Sign Language would likely be another lesson in frustration. Testimony of Clark.[26]

Parents called Dr. Clark as their principal witness, but both Quincy and Parents have relied upon Dr. Clark's opinions for purpose of making educational decisions regarding Student. For these reasons, I found Dr. Clark's analysis and recommendations regarding Student's special education needs and how they should be met to be credible, persuasive and, for all practical purposes, unrebutted.

[26] Student has never learned sign language (either signed English or American Sign Language), she has never wanted to learn sign language, and Dr. Clark has never recommended that she learn it. From her earliest years in

For these reasons, I am persuaded that in order to receive FAPE, Student must be placed in a school where the communication (both from and to teachers and to and from students) is oral. In other words, if Student is placed in an educational program for deaf and hard-of-hearing students, the program must be aural/oral, rather than a program using American Sign Language for instruction. (This criterion would likely be met by any language-based educational program for hearing students that would be adapted to accommodate Student's hearing deficits, as discussed below in the *Locate or create* section.)

Criterion # 2: Student's educational program must effectively accommodate her hearing loss. Each of the two programs proposed by the parties (READS Collaborative proposed by Quincy and Clarke by Parents) is a program specifically designed for deaf and hard-of-hearing students, and it is not disputed that each is a high quality educational program that "gets it" in terms of understanding and accommodating the needs of deaf and hard-of-hearing children. Testimony of Clarke, Rankin, Logue. As a result, the evidence did not focus on this criterion as much as it focused on criterion # 1 and criterion # 3. Nevertheless, Dr. Clark's testimony illuminated the outlines of what may be needed in order for a program to effectively accommodate Student's hearing loss.[27]

Although Student learns from oral instruction much as any hearing student, there are a variety of circumstances unique to students with a hearing loss that can interfere with this instruction for Student. For example, Student and the teacher (or other person talking to Student) should be situated so that they are relatively close to each other and so that Student can see the other person's face, and lighting in the room should be sufficient so that Student can clearly see the person's face. Only one person should be talking at a time if Student is to be able to understand what is said. Ambient noise in the room should be sufficiently reduced so that it does not interfere with Student's understanding of what is said. An FM amplification system should be available for use by Student. Because of her hearing disability, Student may not be able to hear or understand each word that is spoken, with the result that the teacher should be monitoring Student's understanding and should be repeating or providing additional explanation or support as needed. Finally, there may be times when the speaker will need to get Student's attention before speaking (so that Student can face the speaker) so that she is not left out of the instruction or discussion. Testimony of Clark.

Dr. Clark emphasized the necessity for these deaf accommodations to be fully integrated into all of the teaching that Student receives. In other words, deaf accommodations must be part of Student's entire curriculum so that all of her teachers understand her unique needs related to her hearing loss and continually teach in a manner that allows Student to access the instruction. For this to occur, Dr. Clark recommended that one or more persons with

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school, she has seen herself as an aural/oral learner who understands and communicates through the spoken word rather than through sign language. Testimony of Mother, Clark.

[27] Criterion # 2 becomes more of an issue were Student to be placed within a language-based educational program that may not already have integrated into it the capacity and knowledge to teach students with a hearing disability. Neither party proposed such a placement, but, for reasons explained below, such a program will likely need to be considered by Quincy.

appropriate expertise (for example, a teacher of the deaf) be integrated into Student's education team, and that there be sufficient consultation and other resources provided to the school—for example, training of all of Student's teachers, provision of an FM amplification system and physical adjustments to rooms to address any difficulty with ambient noise. Testimony of Clark.

Dr. Clark testified persuasively that unless Student's hearing loss is accommodated effectively, she will be simply unable to access her education and make meaningful progress, regardless of how otherwise appropriate that education might be. For example, Dr. Clark explained that all of the benefits to Student of language-based instruction would be lost if the educational program did not accommodate successfully Student's hearing deficit. Testimony of Clark.

For these reasons, I am persuaded that in order to receive FAPE, Student's educational program must effectively accommodate her hearing loss.

Criterion # 3: all academic instruction must be taught within a language-based classroom. In her evaluation reports and testimony, Dr. Clark made clear that for a substantial period of time, Student has needed to be taught in a language-based classroom. For example, in her most recent evaluation report, Dr. Clark wrote: "[Student] continues to require a small, language-based class where her language and learning needs are addressed by professionals who employ special educational techniques to circumvent and compensate for learning disabilities and for the effects of her significant hearing loss." Testimony of Clark; exhibit S-2 (supplemental) (page 4).

Dr. Clark testified persuasively that just as the deaf accommodation component (discussed above in criterion # 2) cannot be accomplished by simply introducing a discrete class taught by a teacher of the deaf, Student's language-based learning deficits cannot be remediated simply by adding to her curriculum one or more classes taught by a special education teacher. Instruction can only be effective through integration of specialized teaching methods throughout Student's academic curriculum. Learning strategies needed to remediate her learning deficits (for example, as taught as part of a structured reading program) must also be used and reinforced consistently throughout her academic curriculum, and a common instructional language that can be accessed by Student must also be used throughout the curriculum. The result is a language-based educational program that is both consistent and integrated throughout all academic classes. Dr. Clark testified persuasively that nothing less will likely be effective in remediating Student's learning deficits so that she can make meaningful progress, particularly in reading and math—two areas of pronounced weakness. Testimony of Clark.

Quincy supported Dr. Clark in this regard. Its most recently-proposed IEP calls for all academic instruction to be taught by special education teachers so that a consistent and integrated language-based model can be implemented. Similarly, Ms. Perkins (Quincy's Team Administrator who has substantial experience and expertise regarding language-based instruction) testified persuasively that she concurred with Dr. Clark's understanding of the

need for and ingredients of language-based instruction for Student. Testimony of Perkins; exhibits S-2A, S-3A (supplemental) (resume).

Although it is not possible to conclude that addressing her learning disabilities is more important than addressing her hearing disability (since both must be addressed simultaneously for her to have the opportunity to make meaningful progress), for reasons explained in the *Introduction* section above, there is a sense of urgency in addressing those areas that have been impacted by her language-based learning disability—particularly reading and math. Testimony of Clark, Rankin.

For these reasons, I am persuaded that in order to receive FAPE, all of Student's academic instruction must be taught within a language-based classroom.

READS Collaborative. Quincy has proposed an IEP calling for Student's placement at the READS Collaborative Deaf and Hard-of-Hearing Program. In the classroom in which Student would be placed at READS, approximately half of the academic instruction would be provided through American Sign Language and a significant number of students in the program communicate only through sign language. Ms. Rankin testified that READS would provide Student with an interpreter to translate any instruction in American Sign Language into spoken English until such time as Student learned American Sign Language. These are essential features of the program that cannot be changed. For these reasons alone, I find that Quincy's proposed placement of Student at READS does not (and cannot) meet criterion # 1, above.

Also, the evidence was not specific as to how READS would be able to meet criterion # 2 since there are no special education teachers assigned to 6th grade. Ms. Rankin testified only that, in general, she hires additional staff and re-assigns existing staff as needed to serve her students appropriately. Testimony of Rankin.

In addition, READS has not determined that Student is appropriate for its program. Thus, even if I were to determine READS to be appropriate, it may be that she will not be accepted into this program. Testimony of Rankin.

Quincy indicated that if the READS Program were not appropriate, it would consider placing Student at the Horace Mann School in Boston, MA. However, it is not disputed that the Horace Mann School similarly provides instruction through American Sign Language.

As noted above, Dr. Clark is extremely knowledgeable about virtually all of the programs in Massachusetts for deaf and hard-of-hearing children, specifically including the READS Collaborative and the Horace Mann School (she has followed and evaluated students at both programs). She testified persuasively that these are, essentially, signing programs and that Student would likely fail educationally if placed in either program. From Dr. Clark's perspective, she would not even consider placing Student in either program. Testimony of Clark.

Relying principally on the testimony of Ms. Rankin, Quincy sought to rebut Dr. Clark's testimony regarding the inappropriateness of READS.

In many respects, Ms. Rankin was an impressive and credible witness who has a substantial amount of experience educating deaf and hard-of-hearing students, who knows her own program extremely well, and who made clear her concern that Student be appropriately educated. Ms. Rankin explained how her program could accommodate the fact that Student does not know sign language (by using an interpreter for Student who would translate sign language into spoken English), that her program could make staffing adjustments (including possibly hiring new staff) to address Student's learning deficits, and how her program may benefit Student. Testimony of Rankin; exhibit S-3D (supplemental) (resume).

However, Ms. Rankin did not (and could not) testify regarding the question of whether her program would be appropriate for Student since, as Ms. Rankin explained, she does not know Student well enough to make that determination. Although Ms. Rankin has knowledge of Student through reading evaluations and an IEP, she testified that a determination regarding the appropriateness of her program for Student could only occur through the admission process, which would include observing Student at Clarke School, talking to Student's service providers at Clarke, and interviewing Student and her Parents at Ms. Rankin's program. In short, she was in no position to rebut the testimony of Dr. Clark who has known, evaluated and observed Student since she was two years old.[28]

In addition, notwithstanding the impressive credentials of Ms. Rankin as an educator of deaf children, I find that Dr. Clark's expertise regarding the educational implications of a hearing loss is more sophisticated. Also, Ms. Rankin testified in a manner that revealed her interest in convincing the listener of the merits of her program, as compared to Dr. Clark's testimony that was more objective regarding the merits of programs, including READS, that might educate Student. Finally, Ms. Rankin's understanding of a language-based classroom for Student was that language be explicitly taught, as compared to the language-based classroom recommended by Dr. Clark (discussed above in criterion # 3), thereby undermining the probative value of Ms. Rankin's testimony that her program could address appropriately Student's language-based learning deficits.

For these reasons, I find that Quincy's proposed IEP placing Student at the READS Collaborative Deaf and Hard-of-Hearing Program is not reasonably calculated to provide Student with FAPE, nor can it be altered in order to meet this standard.

Clarke School. Clarke School is Parents' proposed placement for Student and, having determined Quincy's proposed educational program to be inappropriate, I therefore consider it. In order for Clarke to be an appropriate placement, not only must the educational program itself be appropriate (or be able to be made appropriate) but Quincy must be determined to be

[28] Similarly, Quincy's part-time teacher of the deaf (Ms. Wyks) testified that Student would be able to understand American Sign Language if interpreted for Student. She is a highly experienced teacher of the deaf but she, too, does not have Dr. Clark's breadth and depth of understanding regarding Student's educational needs and what is likely to be effective for her.

responsible for paying Parents' residential living costs so that they can support Student's living in the Northampton during the school week. I therefore consider both aspects of Parents' proposed placement at Clarke.

At the outset, I note that through her testimony, Student communicated a strong desire to stay at Clarke. Mother further testified that Clarke is a place where her daughter feels comfortable because she is with others like her; the teachers, staff and other students understand Student's hearing deficits and how to accommodate them—after first arriving at Clarke, she told Mother that these were "her people". Parents have demonstrated their sincere and strong belief that Clarke is the appropriate placement for their daughter by establishing a temporary home in the Northampton area to support Student's current placement at Clarke pursuant to the BSEA's stay-put order.[29]

Clarke School provides an aural/oral educational program for deaf and hard-of-hearing students and therefore satisfies criterion # 1, above. It is also noteworthy that it is the only aural/oral educational program in Massachusetts for deaf and hard-of-hearing students. It is also undisputed that there is no residential aural/oral educational program for deaf and hard-of-hearing students in the United States. Accordingly, if Student is to be placed within a deaf and hard-of-hearing educational program that would meet criterion # 1, above, it would have to be Clarke School.

It is not disputed that Clarke can (and has) appropriately met Student's needs relevant to her hearing disability, and therefore satisfies criterion # 2.

The issue is whether Clarke School has (or can) meet criterion # 3, above, by appropriately addressing Student's language-based learning deficits.

Dr. Clark did not address this issue directly. Rather, she spelled out (as discussed above in criterion # 3) the necessary ingredients to remediate Student's learning deficits through language-based instruction throughout the academic curriculum, and deferred to others (specifically, those from Clarke School) to testify as to whether Clarke could actually provide these necessary ingredients.

As a preliminary matter, I note (as discussed above) that Parents bear the burden of persuasion and therefore must provide probative evidence that Clarke School would (or could with adjustments) satisfactorily address Student's learning disabilities.

[29] Student's and Parents' desires that Student continue to attend Clarke are not strictly relevant to a determination of whether Clarke is educationally appropriate for Student, and Parents are not educational experts. Ultimately, what is determinative is whether a Clarke placement is reasonably calculated to provide Student with FAPE. Nevertheless, their opinions are important to understand and take into account since they provide an important context within which to understand the instant dispute. See *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991) ("FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice").

Not one witness and not one document indicated that Clarke would or could provide language-based instruction that would be consistent and integrated throughout Student's academic curriculum. As a result, Parents have not met their burden of providing credible and probative evidence that would support a finding that Clarke School would or could meet criterion # 3.

Instead, what Parents' witnesses and documents support is a finding that Clarke has little, if any, ability to provide special education services but, with resource assistance from Quincy, would propose to provide discrete special education instruction to Student. The special education instruction proposed by Clarke School is reflected within the service delivery grid (drafted by Clarke School) of a proposed IEP developed at a Team meeting on July 10, 2012. Exhibits S-2, P-K. Pursuant to the service delivery grid, the only instruction from a special education teacher is for reading during one session of 225 minutes per week; and English language arts, math and social sciences are to be taught by a teacher of the deaf. Testimony of Logue, West, Pattavina.

The two Clarke witnesses (Dr. Logue who is the Director of Clarke Schools' program for kindergarten through 8th grade students, and Ms. West who is a Clarke School Teacher of the Deaf and Speech-Language Assistant and who has provided Student with speech-language services) further testified that Clarke would not consider anything further than what is described in the service delivery grid of the July 10, 2012 IEP, other than the possibility of having a current Clarke special education teacher (who normally does not teach special education to any student but who has the qualifications to do so) teach math to Student, but this has never been initiated by Clarke.

Language-based instruction throughout Student's academic courses is reflected within Quincy's most recently proposed IEP. Exhibit S-2A. In his testimony, Dr. Logue specifically rejected the possibility of Clarke School implementing Quincy's most recently proposed IEP since, from Dr. Logue's perspective, it proposes too little teaching by teachers of the deaf. Similarly, the other witness from Clarke (Ms. West) rejected this model in her testimony. Both witnesses made clear that the premise of Clarke's educational program is instruction across the curriculum by teachers of the deaf, and that this would necessarily continue with Student regardless of her special education needs. In other words, Clarke School has no interest in implementing across the curriculum the language-based instruction from special education teachers that Dr. Clark believes to be essential for Student to make meaningful progress. Testimony of Logue, West.[30]

It is beyond dispute that the proposed special education services in the service delivery grid of the July 10, 2012 IEP would not satisfy Dr. Clark's recommendations for language-based

[30] Even if Clarke School wanted to train its current teachers of the deaf to implement a language-based instruction for Student across the curriculum, this would likely be a long and challenging process. Ms. Perkins' unrebutted testimony was that it would likely take between one and two years to train Clarke's teachers. One reason that Clarke may have no interest in making a major financial or time commitment to establishing a language-based classroom for Student is that she is the only 6th grader at Clarke who has learning deficits that need to be addressed through specialized instruction. Testimony of Logue, West.

instruction and would not satisfy criterion # 3. And, the testimony of Dr. Logue and Ms. West leaves no doubt that Clarke School is not willing to provide special education services beyond what is described in this service delivery grid. Testimony of Clark, Perkins, Logue, West.

There are other indicators that Clarke is not well-suited to address Student's learning deficits. When Student arrived at Clarke for the 2011-2012 school year, she was not an unknown commodity. She had, for the previous four years, been a student at a language-based learning disability school (i.e., Learning Prep School), and for many years she had been evaluated by Dr. Clark, who consistently highlighted her learning deficits and recommended language-based instruction. In addition, she had attended Clarke's summer program in 2012, and Dr. Logue's August 2, 2012 letter to Parents reflected his knowledge that Student had "needs for … special education services." Testimony of Logue; exhibit S-10.

Nevertheless, when Student arrived at Clarke School for the school year, Clarke took the position that it would monitor Student and determine how she was doing academically without providing any special education instruction, and then would make adjustment as needed. Student received no special education instruction during the entire 2011-2012 school year and has been receiving no special education instruction at Clarke during the current school year. Testimony of Pattavina, Clark; exhibits S-1, S-10.[31]

The evidence indicates that as a result of Clarke School's not addressing Student's learning deficits through appropriate specialized instruction, she has been making no measurable progress in reading, spelling and math. This is the only possible inference that can be drawn from Dr. Clark's two most recent evaluations, discussed above, which include approximately the first eight months of Student's 2011-2012 school year at Clarke.

Parents seek to rebut the implications of the testimony and reports of their own expert (Dr. Clark) by pointing to a December 2009 evaluation at Children's Hospital, indicating that math skills were at grade 1, spelling skills were at grade 2.3, and word recognition skills were at grade 3, and then comparing a Clarke School evaluation of February 2012, indicating Student's math skills at grade 2.4 and reading skills at grade 3.3. Parents, in their closing argument, relied upon these test scores as demonstrating "a substantial improvement". See Parents' closing argument, page 12. Yet, it is difficult to understand how one can know from this comparison of test scores that Student made gains at Clarke School since Student did not begin attending Clarke until September 2011. Moreover, the 2009 evaluation at Children's Hospital is not in evidence, nor did any witness testify regarding it. Rather, Parents are relying on a reference to the evaluation in one of Quincy's proposed IEPs. In addition, there was no testimony regarding Clarke Schools' February 2012 evaluation, the evidentiary record does not include an evaluation report from Clarke but only test results, and therefore I have little ability to determine their probative value. In short, the evidence relied upon by

[31] At Clarke, there are no special education teachers who serve in the role of providing direct instruction to students; rather there are two special education teachers who serve as consultants to classroom teachers. Dr. Logue testified that he was prepared to make an exception and assign a special education teacher to instruct Student in math, but this has not occurred. Testimony of Logue.

Parents does not establish that Student has made academic progress at Clarke in the areas of reading, spelling and math.[32]

For these reasons, I find that at Clarke School, Student cannot receive the special education services recommended by Parents' own expert and reflected within criterion # 3.

As discussed above, a secondary issue regarding placement at Clarke is whether Quincy may be required to pay for Parents' living expenses in the Northampton area so that Student would be able to attend Clarke's day program.

The parties strongly disagree as to whether the BSEA has the authority to order Quincy to pay for Parents' residential support expenses. I need not answer this question generally because this part of the dispute may be resolved more easily on the basis of the particular factual context in which Parents seek residential support.

It is a basic tenant of the case law addressing a student's right to residential services that such right exists only when the student's special education needs cannot be met appropriately through a day placement alone.[33] Although this premise has typically been applied in residential cases where parents were seeking around-the-clock special education and related services as compared to parental living expenses,[34] I find that it is equally applicable to the instant dispute.[35]

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[32] I briefly review below other evidence (none of which was relied upon by Parents in their closing argument) relevant to Student's progress at Clarke.

The only testimony supporting progress by Student at Clarke was from Ms. West, who has worked with Student as a teacher of the deaf and speech-language assistant. Ms. West testified that her testing indicated that Student had made progress in vocabulary, with test scores increasing by more than ten standardized points from the last school year to this school year. However, her testing only evaluated Student's ability to point to a picture that reflects a single vocabulary word, does not test any in-depth understanding of the meaning of words, and provides little, if any, insight into Student's progress in reading. Testimony of West, Perkins.

Student's grades, as reported by her Clarke teachers in January 2012, were in the B- to A range. Her grades, as reported by her Clarke teachers in June 2012, were all B+ except for science for which she received a grade of A-. IEP progress reports from teachers and service providers generally indicated that Student was making progress on most of her IEP goals. However, no one from Clarke School testified for the purpose of explaining or elaborating upon Student's grades at Clarke or the IEP progress reports. Thus, it is not possible to determine on what basis Student earned her grades, and the extent of the progress was often unclear from the face of the IEP progress reports. Testimony of Todd; exhibits P-F, P-G, S-5, S-6. I find that these documents, by themselves, have little, if any, probative value.

A July 30, 2012 letter to Ms. Todd from Kathleen Fitzgerald, MD (Student's physician) stated that Student "did very well" at Clarke during the 2011-2012 school year, but Dr. Fitzgerald did not testify and there is no way of know the foundation of her opinion or to what it was referring. Exhibit S-M. As a result, the letter has no probative value. Exhibit S-M.

[33] See *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350, 352 (1st Cir. 2001) (issue was "whether [student] could be appropriately educated outside a residential program"); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983) (affirming district court finding "that the minimal educational benefits to which Daniel was entitled could not be obtained in a day program alone").

[34] See, e.g., cases cited in previous footnote.

[35] See *In Re: Provincetown Public Schools and Mass. Dept. of Education and Anne*, BSEA # 04-3100 & 05-0340, 10 MSER 493 (November 2, 2004) (BSEA Hearing Officer ordered prospective payment of certain of parents' living expenses where the parties agreed that the identified day program, which was located too far from parents'

Parents take the position that the Clarke School is the only placement where Student can be appropriately educated because it is the only school for deaf and hard-of-hearing students that is aural/oral. However, the unrebutted testimony of Parents' own expert (Dr. Clark) was that Student does not necessarily have to be educated within an aural/oral program designed for deaf and hard-of-hearing students. Rather, as discussed in greater detail below, Dr. Clark testified persuasively that there was no reason to believe that an existing language-based, learning disabilities program for hearing students could not be adapted to meet Student's hearing deficits. And, there was no evidence from which I might conclude that all such programs are so far from Quincy as to require residential services. In other words, it is likely that Student's special education needs can be addressed through a day placement without the need for residential services. See the *Locate or create* section, below.

For these reasons, I find that the Clarke School is not an appropriate placement for Student and cannot be made to be appropriate, and that Parents have not established the right to publicly-funded residential support services.

Locate or create. Because I have determined that Quincy's proposed placement is not (and cannot be made) appropriate and that Parents' proposed placement is not (and cannot be made) appropriate, Quincy shall locate or create an appropriate educational program for Student. The educational program shall satisfy each of the three criteria set forth above.

I provide the following additional guidance regarding an appropriate educational program for Student and the process of Quincy's locating or creating it.

First, as noted above, Clarke School is the only school for deaf and hard-of-hearing children in Massachusetts that is aural/oral; no such residential school exists within the United States; and I have determined Clarke to be inappropriate. As a result, Quincy will not be able to identify for Student an appropriate school for deaf and hard-of-hearing children.

Rather, Quincy will likely need to identify an educational program that is already well-suited to address Student's learning deficits through language-based instruction, and then take such steps as are necessary to ensure that the program will also have the needed expertise and resources to accommodate appropriately Student's hearing disability. Dr. Clark's undisputed testimony was that there is no reason to believe that a language-based, learning disabilities program cannot appropriately educate Student if additional resources and expertise are provided to accommodate appropriately her hearing loss.

Parents disagree. With understandable concern, they point to Student's experience at Learning Prep School where she likely received language-based instruction and Learning Prep sought to accommodate her hearing deficits. As discussed above in the *Educational and Procedural Background* section, Student attended this school for four school years, first

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home to permit daily commuting to school, was the only educational program that could provide Student with FAPE).

on a unilateral placement by Parents and then for the next three years pursuant to a settlement agreement pursuant to which Parents (and not Quincy) bore responsibility for ensuring that Student's hearing deficits were appropriately accommodated. Parents believed that Learning Prep would appropriately address this issue, and a consulting contract was entered into between Learning Prep and Dr. Clark's program at Children's Hospital Boston for this purpose. However, the consulting contract lasted only for approximately one-half of a school year, and Parents and Student were appropriately frustrated by this experience.

In contrast to Student's placement at Learning Prep pursuant to the settlement agreement requiring Parents to be responsible for accommodating Student's hearing deficits, Quincy now bears full responsibility for ensuring that Student's next educational program meets both her learning deficits and her hearing disability. Quincy must take whatever steps are needed to ensure that Student's next program has the resources and expertise to accommodate Student's loss of hearing so that she will have the opportunity to make meaningful educational progress.

Second, it seems possible that Quincy will identify or create a program that it believes is appropriate and that Parents believe is inappropriate. It may be that any such disagreement will center around the question of whether Quincy's proposed program can or likely will appropriately accommodate Student's hearing disability. If this disagreement should occur (or if Quincy believes that it may likely occur), I encourage (but do not require) Quincy to consider engaging Dr. Clark (with Parents' permission) to evaluate the proposed program and to advise the parties regarding what, if any, additional changes should be made to accommodate Student's hearing loss in order to allow her to make meaningful educational progress. It may also be advisable under these circumstances for Quincy to consider proposing a process for monitoring the effectiveness of the accommodations of Student's hearing disability.

Third, I have determined that Student's current program at Clarke School is not now addressing Student's learning disabilities appropriately and has not been since the beginning of the 2011-2012 school year. There is no basis for believing that Clarke can or will substantially improve the effectiveness of its educational program in remediating Student's substantial learning deficits and allow her to make meaningful educational progress, particularly in reading. I have further determined that Student is becoming increasingly anxious and frustrated by her lack of educational development. For these reasons, I find that it is imperative that an appropriate placement be identified by Quincy as soon as possible.

Fourth, Parents do not have the legal responsibility to locate or create an appropriate educational program for Student since this is Quincy's obligation. However, Parents' conduct may impact the process. For example, a program identified by Quincy may require an interview with Parents and Student as part of the process of reviewing its appropriateness; a program may need to speak with Student's current service providers to evaluate her appropriateness, thus requiring Parental consent; or a program may be reluctant to seriously consider Student if Parents communicate to the program that they will aggressively oppose

Student's placement there. I note that Parents' conduct in this regard may be relevant to any future reimbursement claim.[36]

Fifth, pursuant to the stay-put order in my ruling of October 10, 2012, Quincy remains responsible for continuing Student's placement at the Clarke School until Quincy has located or created an appropriate program and the program is able to begin providing appropriate educational services to Student.

ORDER

The IEP most recently proposed by the Quincy Public Schools (i.e., exhibit S-2A) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Additions or other modifications cannot be made to the IEP in order to satisfy this standard. Therefore, placement at the READS Collaborative Deaf and Hard-of-Hearing Program is not appropriate.

Clarke School for Hearing and Speech also does not (and cannot) satisfy this standard. Parents have not established a right to prospective payment of residential living expenses in the Northampton area to support Student's attending Clarke. Therefore, placement at Clarke is not appropriate.

Because no appropriate educational program has been proposed by either party, Quincy shall, as soon as possible, locate or create an appropriate educational program that meets each of the three criteria specified above and that is otherwise consistent with the instant decision.

By the Hearing Officer,

William Crane
Dated: November 21, 2012

[36] During the hearing, Parents' attorney stated that Parents may seek reimbursement from Quincy for Parents' out-of-pocket expenses regarding Mother's residing in the Northampton area during the stay-put placement. I do not express an opinion as to whether Parents ultimately may be entitled to such reimbursement, but I note that notwithstanding the inappropriateness of the Clarke placement for Student, Parents may possibly be entitled to reimbursement of part or all of their living expenses in the Northampton area until such time as Quincy locates or creates an appropriate program that can begin providing services to Student. However, any determination of the appropriateness or amount of such reimbursement by either Quincy, a BSEA Hearing Officer or a court may appropriately consider Parents' conduct, including any conduct that delays or hinders Quincy's efforts to find an appropriate program for Student as soon as possible. See, e.g., *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (parent's unreasonable actions may justify a denial of reimbursement under the IDEA). By making these comments, I do not intend to suggest that there is any indication in the record that Parents will actually conduct themselves in this way.

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.