

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

In Re: Newton Public Schools

BSEA # 1307903

DECISION

This decision is issued by the Bureau of Special Education Appeals (BSEA) 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 June 17, 19 and 20, 2013 at the BSEA offices in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

Student's Father

Brian Doyle

Kara Corely

Laura Weissman¹

Nancy Sullivan

Jessica Minahan

Shannon Robichaud

Maura McLaughlin Tynes

William Holcomb

Kerri Shanahan

Elizabeth Tinglof

Brooke Perry

Jocelyn Bossart

Barbara Goodman

Katherine Martin

Angela Buchanan Smagula

Matthew MacAvoy

Carol Kusinitz

Behavior Analyst, Northeast Applied Behavior Associates

Speech-Language Pathologist, Boston Children's Hospital

Developmental Pediatrician, Boston Children's Hospital

Neuropsychologist, Boston Children's Hospital

Behavior Analyst, Newton Public Schools (Newton)

Director of Out of District Placements, Newton

Director of Elementary Special Education Services, Newton

Senior Consultant, New England Center for Children (NECC)

Clinical Supervisor, NECC

Lead Teacher, NECC Partnership Program

1st Grade Teacher, Southborough Public Schools

Speech-Language Pathologists, Southborough Public Schools

Director of Student Services, Southborough Public Schools

Attorney for Parents and Student

Attorney for Newton

Attorney for Southborough Public Schools

Court Reporter, Doris Wong Associates

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-18; documents submitted by the Newton Public Schools (Newton) and marked as exhibits S-1 through S-25 (including exhibit S-1A); and approximately three days of recorded oral testimony and argument. As agreed by the parties, oral closing

¹ Dr. Weissman testified by telephone.

arguments on extended school year services were made on June 26, 2013. With respect to all remaining issues, written closing arguments were filed on July 25, 2013, supplemental oral closing arguments were made at the BSEA offices on July 30, 2013, and the record closed on July 30, 2013.

In order to apprise the parties in a timely manner of my findings and conclusions regarding the extended school year issue in this dispute, an Order was issued on June 27, 2013, in advance of the full text of this Decision. The Order determined that the specific program offered by Newton (as identified as the Focused Academics Program and Camp Brunen Brook) is appropriate and may be implemented by Newton for the summer of 2013 in satisfaction of its obligations to provide Student with a free appropriate public education.

However, the June 27, 2013 Order further concluded that the portion of the IEP regarding extended school year services was neither sufficiently clear nor sufficiently specific regarding the nature and scope of the extended school year services that are proposed for Student. Newton was directed to propose alternative language that is sufficiently clear and specific. Newton filed proposed alternative language on July 17, 2013. In their final closing arguments, the parties addressed the appropriateness of Newton's proposed alternative language for extended year services, and within the instant Decision, I have further addressed this issue.

ISSUES

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

1. Is Newton's currently-proposed IEP reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, what additions or other modifications must be made to the IEP in order to meet this standard?²

EDUCATIONAL BACKGROUND

Student resides in Newton with his Parents. He is eight years old and has recently completed the 1st grade. Testimony of Mother, Father.

Student is intelligent, hard-working and engaging. He is highly motivated to learn and has a good sense of humor. With respect to most academic skills, he is at grade level, and in some academic areas, he may be above grade level. However, Student is diagnosed as being on the autism spectrum, with delays in social pragmatics, problem-solving and language processing. His disability negatively impacts his reading comprehension and math. He also

² Counterclaims raised by Parents in their response to Newton's Hearing Request (including an alleged procedural violation relative to Parents not attending the IEP Team meeting that developed the currently-proposed IEP) were bifurcated pursuant to my Order of June 6, 2013, and the merits of those claims are not addressed at this time.

has some stereotypical behaviors. Student learns best in an inclusion classroom with 1:1 support. Testimony of Mother, Father, Tinglof, Doyle.

Student attended pre-school in Newton. However, in November 2011, Student was placed at Southborough Public Schools' Partnership Program with New England Center for Children (NECC Partnership Program) pursuant to an agreement between Newton and Southborough Public Schools. By this agreement, Student was placed there for most of his kindergarten year (from November 2011 to June 2012) and all of 1st grade (2012-2013 school year). Testimony of Tinglof.

When Student began at the NECC Partnership Program in kindergarten, he was integrated into the mainstream classroom for one and one-half hours each day. Then, in December 2011, he was further integrated into a music class. While integrated, he was accompanied by his 1:1 aide. At that time, Student had certain behavioral difficulties, including flopping on the ground and crying occasionally. Testimony of Tinglof; exhibit S-8.

As the kindergarten year progressed, Student made demonstrable progress regarding all IEP goals and objectives, and during the school year, he began spending two and a half hours each day in the mainstream classroom. By the end of the school year, Student was spending three hours (approximately half of the school day) in the general education classroom with his 1:1 aide. Within the special education classroom, Student was working with his 1:1 aide on specific skills. Year-end progress reports indicated that Student made significant gains on his IEP goals and objectives. Testimony of Tinglof; exhibit S-8.

During the summer of 2012, Student attended five of the seven weeks of a NECC substantially-separate, extended year program (Student was away with his family on vacation for two of the seven weeks) and also attended a recreational program with typical peers while accompanied by his 1:1 aide. He continued to make progress. Testimony of Tinglof; exhibit S-9.

At the beginning of 1st grade, Student indicated that he would like to spend the entire school day in the regular education classroom, accompanied by his 1:1 aide, and the NECC Partnership Program agreed. Student continued to need 1:1 instruction from his aide to develop specific skills (such as self-help skills). This instruction was done off to the side within the regular education classroom so that Student would not need to be pulled out of the classroom. The teachers and aide found this approach to be successful and continued it through the remainder of the 1st grade year. The result was that for the entire 1st grade school year, Student spent all of the school day in the regular education classroom except for 30 to 40 minutes during the middle of the day when he would return to the NECC Partnership Program special education classroom to "trade-in" his earned points for rewards such as shooting baskets. It is not disputed that, as during the prior school year, Student made substantial educational and behavioral progress in 1st grade. Testimony of Tinglof, Perry, Doyle, Sullivan, Weissman; exhibits S-10, S-13.

As in kindergarten, Ms. Tinglof was the NECC Partnership Program's Lead Teacher and, in that role, determined what Student's 1:1 aide should be doing with Student. Ms. Tinglof also consulted and coordinated with Student's 1st grade teacher (Ms. Perry) to ensure that the level of 1st grade instruction for Student was appropriate. Student's 1:1 aide continued to collect data throughout the year, as instructed by Ms. Tinglof, and Ms. Tinglof used this data to make adjustments in what Student was taught. Testimony of Tinglof, Perry.

In September 2012 of the 1st grade year, Student switched speech-language pathologists to Ms. Bossart. Ms. Bossart recommended that Student participate in small groups to address his deficits regarding social pragmatics and language comprehension. Testimony of Tinglof, Perry, Doyle, Sullivan, Father, Mother; exhibits S-10, S-13.

In the fall of 2012, Student began attending a small, social pragmatics group with Ms. Bossart for a half hour, once per week, and a small, language group with Ms. Bossart for a half hour, twice per week. Student did not receive any 1:1 speech-language services. It is not disputed that Student made substantial progress with respect to social pragmatics and language comprehension during 1st grade. Testimony of Tinglof, Bossart.

As discussed above, Parents had agreed to placement at the NECC Partnership Program, and IEPs reflecting this placement were developed. However, Parents never accepted part or all of any of these IEPs. As a result, the NECC Partnership Program was working off of Newton's IEP developed for Student in pre-school—that is, prior to his attending the NECC Partnership Program. Testimony of Tinglof.

The IEP Team met most recently on April 12, 2013 to prepare an IEP for the remainder of the 2012-2013 school year (1st grade) and most of the 2013-2014 school year (2nd grade). As a result of this Team meeting, a proposed IEP (which is the subject of the instant dispute) was developed. Parents did not attend the Team meeting and did not otherwise offer input.³ Testimony of Mother, Tinglof.

The proposed IEP called for Student to finish 1st grade at the NECC Partnership Program and then to return to the Newton Public Schools for the summer of 2013 and to be fully integrated into a regular education 2nd grade classroom in the fall at Newton's Zervas Elementary School. After the Team meeting, Newton proposed several upgrades of staff qualifications, and these upgrades were agreed upon by Parents. Therefore, the IEP being proposed by Newton and considered throughout the instant Decision is this proposed IEP together with Newton's proposed staff upgrades. Testimony of Tinglof; exhibits S-1, S-1A (this exhibit includes revised service delivery grid with staff upgrades, together with e-mail correspondence between the attorneys as to the parties' agreement to the upgrades).

³ In their response to Newton's Hearing Request, Parents take the position that they were unlawfully precluded from having the opportunity to attend the Team meeting because Newton's notice advising them of the date of the Team meeting arrived at Parents' home on the same day as the IEP Team meeting occurred, with the result that Parents were notified of the Team meeting after it had occurred. This issue will be discussed in detail later in this Decision.

The originally proposed IEP together with the staff upgrades (hereinafter, “proposed IEP” or “IEP”) includes the following consultation services:

- Speech and language by a speech-language pathologist for 10 minutes per week.
- Education supervision by a special education teacher for a half hour each day.
- Clinical supervision by a BCBA for one hour per week.
- Occupational therapy by an occupational therapist for 15 minutes per month.
- Parent consultation by a BCBA/special education teacher for an hour per month.

The proposed IEP includes the following services in the general education classroom:

- Academic support by a behavior therapist for 360 minutes on one day each week, 330 minutes on three days each week and 240 minutes on one day each week.

The proposed IEP includes the following services outside of the general education classroom:

- Social skills/language by a speech-language pathologist for 30 minutes, once per week.
- Speech language by a speech-language pathologist for 30 minutes, twice per week.
- Home training by a BCBA for two hours per week.

The proposed IEP includes extended school year services as follows:

[Student] requires extended year services to prevent substantial regression in the areas of reading comprehension, mathematical reasoning, and social skills. His program should include time with typically developing peers with the support of a 1:1 aide. He is also recommended for 1X30 minutes per week of speech services for 5 weeks to prevent substantial regression in his social language skills.

Pursuant to my June 27, 2013 Order (discussed at the beginning of the instant Decision) noting the lack of sufficient clarity and detail in the proposed IEP’s description of Student’s extended school year services, Newton submitted the following proposed revised extended school year services to be included in the proposed IEP:

It is recommended that [Student’s] extended school year (“ESY”) program include the support of a 1:1 behavior therapist, trained in Applied Behavior Analysis (ABA), each day, throughout the day. [Student’s] program shall be designed by a certified special education teacher to prevent substantial regression in reading comprehension, mathematical reasoning and social skills. Specifically, approximately 4 hours of the day, is to be spent with the special education teacher and trained behavior therapist, and will address all 3 content areas identified above. Additionally, it is recommended that [Student] participate in a social pragmatics group (2 to 4 students) for 30 minutes each week to be led by a SLP to prevent substantial regression on social language

skills. This group is designed to further foster relationships among peers and increase [Student's] ability to interact and work cooperatively with peers. Specifically, it is recommended, that for the other approximate 3 hours of the day, [Student's] ESY programming include time with typical peers to practice his social skills and interaction. This is a structured inclusive time. The behavior therapist shall collect data, help foster social relationships, and prompt/encourage [Student] throughout the day.

The additional information section of the proposed IEP included the following statement regarding Parents' not participating in the April 12, 2013 Team meeting that developed the proposed IEP:

The Newton Public Schools made multiple efforts to secure the Parents' participation in [Student's] annual review meeting. Despite these efforts, the Parents refused to provide dates on which they would be available to participate in a Team meeting. During a Bureau of Special Education Appeals conference call conducted on April 8, 2013, the Parents' attorney informed the BSEA, the Newton Public Schools and the Southborough Public Schools that the Parents were unwilling to participate in a meeting of [Student's] IEP Team.

The additional information section of the proposed IEP included the following statements regarding Student's 1:1 aide:

[Student] requires a special education aide trained in the principles of Applied Behavior Analysis.

The Team agreed that in the upcoming year, efforts should be made to systematically fade [Student's] support across situations that he has shown consistent success (e.g., lunch, recess, specials, etc.).

PROCEDURAL BACKGROUND

Prior, related dispute:

Before addressing the procedural history of the current dispute, I summarize the procedural history in a prior, related dispute between Parents, Newton, Southborough Public Schools (Southborough) and NECC, which was resolved through my *Ruling on Parents' Motions*, dated May 15, 2013, in BSEA # 1306409 and # 1306414.

In the spring of the 2012-2013 school year, Southborough Public Schools (Southborough) notified Newton that Student would not be allowed to continue at the NECC Partnership Program past the end of the school year—that is, June 25, 2013. This notification occurred by letter dated March 13, 2013, from Southborough's attorney's to Newton's attorney, and stated that "Southborough has exercised its authority under the contract to terminate

[Student's] enrollment and will not authorize or contract for his enrollment for summer 2013 or the 2013-2014 school year." See *Ruling on Parents' Motions*, page 3.

On March 18, 2013, Parents filed with the BSEA a hearing request seeking a stay-put order that would allow Student to continue in the NECC Partnership Program through the pendency of the dispute.

In Newton's response to the hearing request, it asked that I order Parents to participate in a facilitated IEP Team meeting. During a conference call with the parties on March 27, 2013, Newton's attorney noted the need for Newton to propose a new IEP and expressed frustration in not being able to engage Parents to obtain dates when they would be able to participate in such a Team meeting for purposes of developing a new IEP.

During the March 27, 2013 conference call, I advised the parties that I had no authority to order Parents to participate in a Team meeting, much less a facilitated IEP Team meeting. Nevertheless, I strongly encouraged Parents' attorney to advise Parents regarding the importance of proposing dates and participating in a Team meeting, even as they continued to press their stay-put rights. This was emphasized through my Order of March 27, 2013, in which I stated in relevant part as follows:

As discussed with the parties' attorneys earlier today, I expect that Parents will fully cooperate with Newton's efforts to schedule an IEP Team meeting so that an IEP Team meeting can occur promptly. My expectation is that by our next conference call ..., the parties will have agreed upon a date for this Team meeting. [Bold in original.]

By letter to me dated April 8, 2013, Newton's attorney wrote that Parents' attorney had not provided any proposed dates or times for purposes of Newton's scheduling a Team meeting. The letter then stated: "I reiterate my request for an order for a Facilitated Team meeting, as one last effort to encourage some measure of Parent cooperation."

It is not disputed that during the next conference call with the parties, which occurred on April 8, 2013, Parents' attorney reported to me and to Newton's attorney that Parents had not and would not provide available dates to Newton for a Team meeting and that Parents had no intention of attending a Team meeting that would be used to propose a new IEP.⁴ I again declined Newton's request to order a facilitated IEP Team meeting, and I reminded Newton of its responsibility to convene an IEP Team meeting regardless of Parents' willingness either to provide available dates or to participate in the meeting.

Newton then scheduled an IEP Team meeting to occur on April 12, 2013. It is not disputed that two days prior to the Team meeting, Newton's attorney sent an e-mail to Parents'

⁴ During oral closing argument regarding summer services on June 26, 2013 and during the final oral closing argument on July 30, 2013, I asked the parties' attorneys about the accuracy of what is stated in the sentence in the text above, and Parents' attorney stated that she did not disagree with it.

attorney asking whether Parents would attend an April 12, 2013 Team meeting, the e-mail attached a notice of the Team meeting date, and Parents' attorney then advised Father of the meeting date.⁵ The IEP Team meeting did occur on April 12, 2013 as scheduled, without either Parent in attendance.

On May 15, 2013, I issued my *Ruling on Parents' Motions*. In it, I noted that "it is not disputed that the NECC Partnership Program in which Student is now enrolled continues only through the 1st grade, and Student currently is a 1st grader. NECC and Southborough have alleged (and it has not been disputed by Parents) that there are no other NECC Partnership Programs (either within Southborough Public Schools or elsewhere) that are currently available for Student as a 2nd grader." See *Ruling on Parents' Motions*, page 7.

My *Ruling on Parents' Motions* concluded that Parents do not have a stay-put right to continue their son's education in this placement past June 25, 2013 and that after that date, Newton has responsibility to provide Student with a stay-put placement comparable to the NECC Partnership Program. See *Ruling on Parents' Motions*, pages 7-8.

Because the *Ruling on Parents' Motions* addressed and resolved all outstanding issues in BSEA # 1306409 and # 1306414, that case was closed upon issuance of the Ruling.

Current dispute:

On May 6, 2013, Newton filed its own hearing request against Parents. The BSEA processed Newton's hearing request as a separate case (BSEA #1307903) which is the subject of the current dispute. Through its hearing request, Newton sought an order from the BSEA that its recently-proposed IEP (for the period April 2013 to April 2014) is reasonably calculated to provide Student with a free appropriate public education. As discussed above, this IEP would bring Student back to Newton Public Schools' educational programs.

On June 5, 2013, Parents filed their amended response to Newton's hearing request. Parents' amended response included their objections to Newton's currently-proposed IEP, as well as the following counterclaims: (1) procedural claims, including that Parents did not receive sufficient advance notice of the April 12, 2013 Team meeting and were therefore unable to attend, (2) compensatory services claims for missed home-based services and (3) reimbursement claims for transportation costs. After discussions with the parties, I issued an Order of June 6, 2013 that bifurcated the dispute, with the result that all of Parents' counterclaims would be heard at a separate hearing.

On June 7, 2013, Parents filed a request to postpone the hearing scheduled to begin on June 17, 2013. Parents asserted that they had not had sufficient time to observe the Newton and NECC programs. Parents conceded that their expert had completed his observations of both

⁵ During the final oral closing argument on July 30, 2013, Newton's attorney raised this e-mail correspondence in response to Parents' attorney's arguments regarding a procedural violation. Parents' attorney confirmed what is stated in the sentence in the text above.

programs but were seeking additional time for the Parents themselves to observe. By Order of June 11, 2013, I denied the request, noting that the hearing dates had been scheduled on April 8, 2013.⁶

On the last hearing day (June 20, 2013) in the instant dispute, Parents' attorney advised me that she anticipated that the parties would be able to resolve informally Parents' compensatory and reimbursement claims, and that Parents would not be taking their procedural claims to hearing. It was expected that this would resolve all of Parents' counterclaims. Immediately prior to oral closing arguments on July 30, 2013, Parents' attorney advised me that she continued to expect that the parties would be able to resolve Parents' reimbursement claims but that the parties were having difficulty resolving the compensatory claim and may need hearing dates. Parents' attorney declined my invitation to scheduled hearing dates at that time and suggested that a conference call occur in early September 2013 to discuss this matter further. Parents' attorney stated that she did not anticipate that Parents would be taking their procedural claims to hearing.

MOTION TO STRIKE

On July 30, 2013, Newton filed a *Motion to Strike*, seeking to strike from the record (1) the portions of Parents' closing argument raising procedural claims, (2) footnote 9 of the closing argument which makes a statement regarding Parents' concern of bias, and (3) two affidavits (one from each Parent) that were included with Parents' closing arguments. On July 30, 2013, a motion hearing occurred on this matter.

Relevant regulatory standards provide: "A Party may move to strike from any pleading, or the Agency or Presiding Officer may on its own motion strike, any insufficient allegation or defense, or any redundant, immaterial, impertinent or scandalous matter."⁷

I agree with Newton that Parents' alleged procedural claims are outside the scope of what is to be considered at this juncture in the dispute. I agree with Newton that footnote 9 seeks to introduce evidence after the evidentiary record has been closed and includes a potentially inflammatory statement regarding alleged "legitimate concern regarding bias" for which there is no factual support in the record. I also agree with Newton that Parents' affidavits would introduce evidence after the close of the evidentiary record.

I will disregard the affidavits for purposes of the instant Decision, I will not consider them to be part of the evidentiary record, but I will not strike them from the administrative record. I will strike footnote 9 from the record for reasons explained above. I will not strike Parents' closing arguments regarding their procedural claim pertaining to Parents' not attending the

⁶ Father testified that subsequent to my ruling, he was able to visit and observe the NECC program. Father had previously visited and observed the proposed Newton program and made no attempt to schedule an additional visit. Testimony of Father.

⁷ 801 CMR 1.01(7)(c).

April 12, 2013 IEP Team meeting; later in the instant Decision, I will address this topic.

For these reasons, Newton's *Motion to Strike* is ALLOWED with respect to footnote 9 of Parents' closing argument and is otherwise DENIED.

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]." 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 The appropriate level of progress varies for each student, "with infinite variations" depending on the particular individual's constellation of disabilities and strengths. ¹³

The IDEA reflects a preference for mainstreaming disabled students. ¹⁴ This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children. ¹⁵ "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs." ¹⁶ Similarly under Massachusetts law, FAPE must be provided in the least restrictive environment. ¹⁷

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 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)).

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

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

¹⁵ 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).

¹⁶ *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).

¹⁷ 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 regulations¹⁸ and which may exceed the federal floor¹⁹) 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.”²⁰ 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.”²¹ 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.”²²

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 (M.G.L. c. 71B).

As the moving party in the instant dispute, Newton seeks a determination by the BSEA that its proposed IEP is appropriate. Even though Newton is considered to be the moving party in this dispute because it filed the hearing request, the First Circuit has expressly determined that under these circumstances Parents have the burden of persuading me that Newton's IEP

¹⁸ 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”).

¹⁹ See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

²⁰ 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”).

²¹ 603 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”).

²² 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.”)

is not appropriate and that their proposed educational program is appropriate because it is Parents, rather than Newton, who are challenging Newton's proposed IEP.²³

The initial issue presented is whether the programming and specialized services embodied in Newton's most-recently proposed IEP, found in exhibits S-1 and S-1A, are consistent with the above-described legal standards.

As explained in the Procedural and Educational Background sections above, Student had been attending 1st grade in the NECC Partnership Program at Southborough. The NECC Partnership Program at Southborough does not continue past 1st grade and, as decided in my stay-put ruling in a related case, Student has no stay-put rights to remain there past June 25, 2013. Moreover, NECC Partnership Program staff testified that even if the NECC Partnership Program at Southborough continued into the 2nd grade, Student is able to be fully integrated into a mainstream classroom and is appropriately returned to the Newton Public Schools for placement. Testimony of Holcomb, Shanahan, Tinglof.

For the purpose of developing an IEP for the remainder of 1st grade and for most of Student's 2nd, Student's IEP Team met on April 12, 2013. Newton invited to this meeting the NECC Partnership Program staff and the Southborough staff who had been working directly with Student during 1st grade, including Ms. Tinglof (the NECC Partnership Lead Teacher and Student's kindergarten and 1st grade special education teacher), Ms. Shanahan (Ms. Tinglof's NECC supervisor), Ms. Perry (Student's 1st grade teacher) and Ms. Bossart (Student's speech-language therapist during 1st grade). Importantly, Newton requested that these NECC and Southborough staff (rather than the Newton staff) be the persons who would actually draft Newton's proposed IEP based on their understanding of Student's special education needs and how they should be met. Once the IEP was developed in this manner, Newton then simply adopted the IEP without modification and proposed the IEP to Parents. Later, Newton suggested upgrades of the qualifications of several staff on the service delivery grid (without otherwise changing the proposed IEP), and Parents agreed to these staff upgrades. Testimony of Tinglof, Shanahan, Perry, Bossart; exhibits S-1, S-1A.

The principal drafts person of the IEP was Ms. Tinglof. As Ms. Tinglof's NECC supervisor, Ms. Shanahan reviewed and edited the IEP. Portions of the proposed IEP were written by other service providers—for example, Ms. Bossart (Southborough's speech-language pathologist who served Student for most of 1st grade) wrote the portions of the IEP relevant to speech-language services. Ms. Tinglof, Ms. Shanahan and Ms. Bossart testified that they sought to draft an IEP that would essentially replicate at the Newton Public Schools for 2nd grade the program model that had been successful for Student in 1st grade. Testimony of Tinglof, Shanahan, Bossart.

²³ 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.").

It is not disputed by the parties (including Parents' experts) that the NECC and Southborough staff who have been working with Student during 1st grade were highly successful in providing an educational program in which Student thrived, with the result that Student made substantial and meaningful educational progress in all areas, including academics and behavior. For example, Ms. Perry (the regular education classroom teacher) and Ms. Tinglof testified that Student fit into the 1st grade classroom as a "model" student, as he was engaged and contributed to the class, asked questions appropriately and fit in socially. Ms. Perry further testified that Student's math performance is average to above average as compared to his classmates, his reading fluency is above average, but that he needs assistance from his 1:1 aide with abstract problem-solving including word problems. She explained that Student required no additional attention from her, and his very few behavioral issues were typical of 1st graders. Testimony of Tinglof, Perry; exhibits S-10, S-13.

Similarly, Parents' experts agreed that Student had made substantial and meaningful gains during 1st grade. Testimony of Doyle, Sullivan, Weissman. There was no evidence presented by either party that criticized any part of the 1st grade program as not allowing Student to make effective or meaningful progress. In their final closing arguments, Parents explained (at p. 5) their understanding of Student's success in the NECC Partnership Program: "[Student] has made significant gains across all domains as a direct result of an intensive individualized program which provides seamless intervention between home and school provided by a highly qualified special education teacher and a BC/BA." Parents testified that if a similar NECC program had been available for 2nd grade, they would want their son to attend it. Testimony of Father, Mother.

Ms. Tinglof, Ms. Shanahan, Ms. Bossart and Dr. Holcomb testified that the proposed IEP would essentially replicate Student's NECC Partnership Program at the Newton Public Schools for 2nd grade, and would allow Student to continue to make meaningful educational progress and be successful. Therefore they opined, the IEP was appropriate. Testimony of Tinglof, Shanahan, Bossart.

Ms. Tynes (Newton's Director of Elementary Secondary Education), who recently observed Student at the NECC Partnership Program, testified that Newton would be able to implement each part of the proposed IEP including the service delivery grid and goals and objectives, thereby continuing the program model that allowed Student to make substantial progress in 1st grade.

Replication of Student's 1st grade program model at Newton for 2nd grade would occur in the following ways pursuant to Newton's proposed IEP.

As explained in the Educational Background section above, during 1st grade Student had been completely integrated into a general education classroom, with the exception of 30 to 40 minutes each day during which he would return to the special education classroom where he would trade-in his points earned for his rewards (such as time for shooting baskets). It is not disputed that this trade-in time need not occur within a special education classroom, but

rather could occur at any number of different places within a school building. Therefore, the proposed IEP called for Student to be integrated into a 2nd grade regular education classroom for the entire school day in the Newton Public Schools. Parents testified that they have no objection to this inclusion model for 2nd grade. Testimony of Tinglof, Mother, Father.

During 1st grade, Student had a dedicated 1:1 aide throughout the day. The aide often provided assistance (such as cuing) and instruction, utilizing applied behavior analysis (ABA) principles. During 1st grade, this assistance and instruction was provided within the general education classroom, with Student sometimes being taken aside so that he could more easily be instructed by his aide while still remaining in the classroom. The 1st grade aide was supervised by a NECC Partnership Program special education teacher (Ms. Tinglof). As part of the instruction, the aide collected data which was reviewed by Ms. Tinglof, who on the basis of this data, would make adjustments in the aide's instruction. In addition to being a special education teacher, Ms. Tinglof is a Board Certified Behavior Analyst (BCBA). Ms. Tinglof was supervised by Ms. Shanahan who was also a BCBA.

In order to replicate this model, the proposed IEP intended to call for the assignment of a dedicated 1:1 aide for Student throughout the day.²⁴ The originally-proposed IEP described this person as a special education aide, but in the proposed IEP, Newton has upgraded the qualifications of this person to a behavior therapist in recognition of the need for this person to be trained in and be able to instruct Student using ABA principles. Ms. Minahan (a Newton BCBA) testified that a behavior therapist must have a bachelor's degree and unless already sufficiently experienced, is provided a week-long training (during August prior to the beginning of the school year) that includes data collection and analysis, reinforcement and discrete trials. Ms. Tinglof testified that this would likely be sufficient qualifications and training for Student's aide.²⁵ Testimony of Tinglof, Minahan.

For purposes of supervision of the 1:1 aide, the proposed IEP included a half hour per day of consultation services from a special education teacher for day-to-day supervision. In addition, for purposes of providing behavior consultation, the originally-proposed IEP included one hour per week of consultation services from a behavior specialist. Newton upgraded the qualifications of this person to a BCBA in the proposed IEP. Ms. Tinglof, Ms. Shanahan and Ms. Minahan testified that this would be sufficient for purposes of supporting the aide and special education teacher, and is comparable to the BCBA consultation provided in the NECC Partnership Program. Ms. Shanahan also testified that the proposal within the IEP of an hour per week for behavior consultation from a BCBA would be appropriate to support the special education teacher and aide. Ms. Tinglof testified that there needed to be close coordination between the special education teacher, regular education teacher and BCBA. Testimony of Tinglof, Shanahan.

²⁴ The proposed IEP actually only includes the aide in part B of the service delivery grid. As will be discussed later in the text, part C of the grid needs to be amended to correct this oversight.

²⁵ "Behavior therapist" is the correct term for purposes of what is proposed in the IEP, but throughout this Decision I have often used the term "aide" interchangeably with the term "behavior therapist" simply because witnesses often used the term "aide".

Parents have concerns about Newton's model, believing that because the Newton special education teacher would not be a BCBA (as compared to Ms. Tinglof who was Student's special education teacher and also is a BCBA), there would likely be potential difficulties with supervision and support of the 1:1 aide. However, Ms. Tinglof testified that although she is a BCBA, it is not necessary that the special education teacher used by Newton also be a BCBA so long as the special education teacher has an understanding of ABA principles. It is not disputed that Newton's 2nd grade teacher (Ms. Lindley) has an understanding of ABA principles, and Parents provided no expert testimony recommending additional or different BCBA consultation services. Testimony of Tinglof; exhibit S-25.

I find, on the basis of credible, persuasive and largely unrebutted²⁶ testimony of Ms. Tinglof, Ms. Shanahan, Dr. Holcomb and Ms. Minahan, that this program model at Newton's Zervas Elementary School is appropriate for Student.

As discussed above in the Educational Background section, in October of 1st grade, Student began attending a small, social pragmatics group with Ms. Bossart for a half hour, once per week, and in November began a small, language group with Ms. Bossart for a half hour, twice per week. Student did not receive any 1:1 speech-language services. It is not disputed that Student made substantial progress with respect to social pragmatics and language comprehension during 1st grade.

Parents' expert, Ms. Corley, conducted a speech-language evaluation of Student on November 2, 2012 in which she recommended an individualized and structured teaching approach. She testified that in addition to small group speech-language services, she recommended that Student receive 1:1 speech-language services. Testimony of Corley; exhibit S-5.

However, Ms. Bossart testified that 1:1 speech-language instruction had not been needed for Student to benefit from the instruction and make meaningful progress. She found that Student could successfully learn within this small group structure, and, from her perspective, the small group had the advantage over 1:1 instruction of allowing Student to learn from his peers, to practice with his peers, and to thereby learn to generalize his skills. Ms. Bossart further explained that Student's 1:1 aide observed all of the group sessions and was able to continue to work with Student on the skills that he was learning in the groups. Testimony of Tinglof, Bossart.

Ms. Bossart testified that she participated in the development of the speech-language portions of Newton's proposed IEP for 2nd grade, which calls for services of social

²⁶ Dr. Doyle, who is a private BCBA, has reviewed Student's records, observed Student and consulted Parents but has not evaluated Student. In his testimony, he expressed concern that the proposed IEP may be allocating too little time for Newton's BCBA, but the bases of his concerns were vague and appeared to be premised on a misunderstanding. He seemed to believe, erroneously, that Student would be moving from a behaviorally-oriented program at the NECC Partnership Program to an educationally-oriented program at Newton, and therefore Newton's IEP required additional consultation time from a BCBA. Testimony of Doyle; exhibits P-8, P-9. In fact, the two programs are essentially the same in design. I did not find Dr. Doyle's testimony to be persuasive on this point.

pragmatics group with a speech-language pathologist for a half hour, twice per week, and a small, language group with a speech-language pathologist for a half hour, once per week. Ms. Bossart testified that this would replicate what was successfully provided to Student in 1st grade and would therefore be appropriate for 2nd grade. Ms. Tynes testified that at Zervas, there would be appropriate social pragmatic and language groups for Student, so that he would be able to continue to receive the speech-language services provided in 1st grade and recommended in Newton's proposed IEP.

In this area (speech-language) and other areas (for example, specialized reading instruction, summer services and full-year programming that are discussed below), Parents and their experts recommended what they considered to be best practices for Student. They apparently did so without speaking with Student's service providers or considering what services Student has been receiving that have been successful at the NECC Partnership Program. Newton is only required to provide Student with an IEP that is reasonably calculated to provide him with FAPE. Where it is not disputed that Student received FAPE in 1st grade, it is not unreasonable for Newton to seek to replicate the 1st grade program, without adding additional services even though additional services may be beneficial to Student's educational development. As discussed above in the Legal Standards section and as explained by the First Circuit: "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".²⁷

For these reasons, I find that Student does not require 1:1 speech-language services to receive FAPE and that the proposed IEP is appropriate with respect to (and can be implemented at Zervas with respect to) speech-language services.

With respect to home-based services, Newton's proposed IEP calls for a continuation of the two hours per week of consultation services that had been provided until they were terminated by Southborough and the NECC Partnership Program in January 2013. During 1st grade, the home-based services had been provided by Student's aide, with assistance from the special education teacher as needed. Newton upgraded the staff qualifications (of the person providing the home-based services) to a BCBA in its proposed IEP. Dr. Holcomb (Senior Consultant in NECC's public services component) testified that this amount of home-based services is appropriate. Testimony of Tinglof, Holcomb.

Although the actual services to be provided under the proposed IEP are equivalent in amount of staff time (and higher in terms of staff qualifications) as compared to those provided during last school year (1st grade), Newton has proposed a substantive change in program model for home-based services for the 2013-2014 school year. Instead of having the home-based services provided by staff who are working with Student at school, Newton proposes to contract with a private provider to deliver the home-based services, thus requiring additional communication and coordination between service providers that was not needed within the NECC Partnership Program model. It is not disputed by Newton that it has

²⁷ *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991).

proposed a less-than-ideal structure but, for reasons not relevant here, Newton has concluded that it should do so.

In their closing arguments, Parents have argued against this program model. However, as a general rule, a school district is given discretion to determine the appropriate methodology so long as the selected methodology is likely to allow the student the opportunity to receive FAPE.²⁸ Parents' own experts testified that it was possible to provide appropriate services with Newton's service delivery model for home-based services, and there was no probative evidence to the contrary. Testimony of Doyle, Sullivan, Weissman.

It is not disputed that consistency of instruction is vital for the success of the proposed IEP. There must be sufficient communication between home and school staff, and perhaps with Parents as well, in order to ensure this consistency. This should be monitored (through data collection) and adjustments made as required to ensure that sufficient consistency occurs for purposes of allowing Student to make meaningful educational progress. Testimony of Doyle, Weissman.

For these reasons, is not disputed that as compared to the program model used by the NECC Partnership Program for home-based services, Newton's program model requires that additional time and resources be devoted to communication and monitoring to ensure this consistency of instruction. Yet, Newton has proposed no greater staff time than was provided through the NECC Partnership Program, taking the position that the additional coordination and monitoring can be accomplished within the time allocated for service delivery, together with the monthly hour-long clinic meetings. It seems self-evident that in order for Newton to accomplish its intended goal of replicating the success of the NECC Partnership Program, it needs to allocate additional resources to communication between home-based and school-based program staff.

Ms. Minahan testified that under Newton's proposed IEP, there would be sufficient communication and overlap between the home-based BCBA and the Newton BCBA to ensure consistency, and as noted above the proposed IEP already calls for one hour, monthly meeting that would appropriately include the home-based and school-based BCBAs as well as Parents. But I do not find it persuasive that it would be sufficient to rely upon a monthly, one hour meeting (that would cover a broad variety of topics) to ensure consistency of instruction, nor is it persuasive that weekly communication to ensure consistency could be provided within the time already allocated on the proposed IEP without reducing the available time for home-based instruction.

²⁸ Compare *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) ("there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to denial of a FAPE") with *E.S. v. Independent School District, No. 196*, 135 F.3d 566 (8th Cir. 1998) ("As long as a student is benefiting from her education, it is up to the educators to determine the appropriate methodology."). See also *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 208 (1982) (so long as school district has met its obligations to provide FAPE, any decisions regarding methodology are left to its discretion).

Parents' experts (Doyle, Weissman and Sullivan) specifically addressed the question of what additional resources would be needed to ensure consistency of instruction. Dr. Doyle and Dr. Weissman recommended that the proposed IEP include an additional one hour per week for the home-based BCBA. However, Dr. Sullivan testified that 15 minutes per week should be sufficient for purposes of communication between the home-based BCBA and the school-based BCBA, with additional time allocated as needed to address any difficulties or challenges that may arise in this area. I found Dr. Sullivan to be a careful, candid and measured witness with significant experience and expertise regarding these kinds of issues. She is currently the Associate Director of Psychology in the Developmental Medical Center at Boston Children's Hospital and has been an instructor at Harvard Medical School since 2004. She conducted a comprehensive neurodevelopmental evaluation of Student in December 2012. Among Dr. Doyle, Dr. Weissman and Dr. Sullivan, I found Dr. Sullivan's testimony on this point to be more persuasive. Testimony of Doyle, Weissman, Sullivan; exhibits P-7, P-18 (Dr. Sullivan's resume).

For these reasons, I find that the time of the Newton BCBA and the time of the home-based services BCBA must each be increased by 15 minutes per week on the proposed IEP in order for the IEP to be appropriate.

With respect to summer services, Ms. Tinglof testified that the IEP Team determined that Student does not need the intensity of the NECC substantially-separate extended year services that were provided during the summer of 2012 pursuant to Student's stay-put IEP. She (and the Team) recommended that instead, Student receive services targeted to address Student's continuing weaknesses in reading comprehension, math reasoning and social skills. She noted that Student only attended five weeks of the seven week program last summer, and she opined that five weeks turned out to be sufficiently long last year for Student's extended year services to prevent regression. Ms. Shanahan and Dr. Holcomb testified that they agreed with these recommendations. Ms. Bossart testified that a half hour per week of speech-language services during the five-week summer program would be sufficient to prevent regression. Testimony of Tinglof, Shanahan, Holcomb, Bossart.

The IEP proposed extended school year services as follows:

[Student] requires extended year services to prevent substantial regression in the areas of reading comprehension, mathematical reasoning, and social skills. His program should include time with typically developing peers with the support of a 1:1 aide. He is also recommended for 1X30 minutes per week of speech services for 5 weeks to prevent substantial regression in his social language skills.

In a letter dated May 23, 2013, Newton's attorney wrote to Parents and their attorney describing the specific program that Newton was offering to satisfy this part of the IEP for the summer of 2013:

Focused Academics and Camp Brunen Brook

This summer program is held at Pierce Elementary School in Newton. The Focused Academics Program runs from 8:30 am to 12:30 pm and includes academic and social pragmatic programs. Then from 12:30 pm to 3:30 pm, the Focused Academic students attend Camp Brunen Brook (located across the hall), which is an inclusive recreational camp with typical peers. [Student] would have his 1:1 behavior therapist with him throughout the day. This option runs from July 1 – August 9, 2013. [Exhibit S-21.]²⁹

Ms. Tynes testified that, as described in the above letter, Newton's Focused Academics summer program would address Student's deficits in reading comprehension, math reasoning and social pragmatics.

Pursuant to my June 27, 2013 Order (discussed at the beginning of the instant Decision) noting the lack of sufficient clarity and detail in the proposed IEP's description of Student's extended school year services, Newton submitted the following proposed revised extended school year services to be included in the proposed IEP:

It is recommended that [Student's] extended school year ("ESY") program include the support of a 1:1 behavior therapist, trained in Applied Behavior Analysis (ABA), each day, throughout the day. [Student's] program shall be designed by a certified special education teacher to prevent substantial regression in reading comprehension, mathematical reasoning and social skills. Specifically, approximately 4 hours of the day, is to be spent with the special education teacher and trained behavior therapist, and will address all 3 content areas identified above. Additionally, it is recommended that [Student] participate in a social pragmatics group (2 to 4 students) for 30 minutes each week to be led by a SLP to prevent substantial regression on social language skills. This group is designed to further foster relationships among peers and increase [Student's] ability to interact and work cooperatively with peers. Specifically, it is recommended, that for the other approximate 3 hours of the day, [Student's] ESY programming include time with typical peers to practice his social skills and interaction. This is a structured inclusive time. The behavior therapist shall collect data, help foster social relationships, and prompt/encourage [Student] throughout the day.

Parents have objected to Newton's proposed summer services, taking the position that they are not sufficient nor are they articulated in sufficient detail. However, as explained above, there is credible and persuasive testimony from Ms. Tinglof, Dr. Holcomb and Ms. Bossart

²⁹ The letter also offered a summer program that Newton believes satisfies Parents' stay-put rights. Mother testified that between the two options offered in Newton's letter, she and her husband would prefer the summer services described in the text above rather than the stay-put option.

that the services, as proposed by Newton in the above-quoted language, are appropriate.³⁰ In order to carry their burden of persuasion so that I may require different or additional IEP language regarding summer services, Parents must present credible, persuasive evidence that Newton's proposed summer services are not appropriate. The only probative evidence that contradicted the testimony of the Newton witnesses on this point was Dr. Weissman's testimony, which I now consider.

Dr. Weissman is a Developmental and Behavioral Pediatrician at Boston Children's Hospital. She has been evaluating and following Student since 2008. Her expertise and credentials are not in dispute. She testified that Student requires a year-round program with breaks of no more than six weeks over the course of the entire calendar year including holidays, school breaks and vacations. It was clear from her testimony that she recommended this for purposes of providing the best education to Student as a child on the autism spectrum, and not from the perspective of replicating what program Student has been actually receiving that has been successful for him or for purposes of meeting standards under state and federal special education law.

Dr. Weissman testified that Student should receive a minimum of seven weeks in a full-time summer program. However, she did not seem to be aware (and therefore did not rebut) the evidence that Student only attended extended school year services for five weeks during the summer of 2012, and that this was sufficient for purposes of avoiding any regression.

Ms. Tinglof credibly and persuasively testified that the NECC Partnership Program (within which Student has thrived) functioned on Southborough Public Schools' school calendar. I have no reason to believe that Student requires anything longer than the school year provided in the NECC Partnership Program in order for Student to receive FAPE.

For these reasons, I find that Newton's proposed revised language regarding extended school year services is appropriate and should be included within Student's proposed IEP in place of the existing language regarding these services.

Parents seek additional services to address Student's reading deficits. In her report and testimony, Dr. Sullivan recommended that Student receive specialized instruction from a reading specialist, as well as curriculum to help with reading comprehension and a reading goal on the IEP. The IEP Team met and considered Dr. Sullivan's recommendation. Ms. Tinglof testified that she consulted with a reading specialist who determined that specialized instruction in this area was not warranted because Student met 1st grade reading objectives with supports normally provided in a regular education classroom for 1st grade. It is not disputed, as discussed above, that Student made meaningful progress in all areas during 1st grade, including reading, and he did so without specialized reading instruction or reading curriculum. For these reasons, I find that although specialized instruction, additional

³⁰ These witnesses testified prior to Newton's proposing the above-quoted language and therefore they were not able to address the specific language. Nonetheless, their testimony supports the appropriateness of the services that are reflected within this language.

curriculum material and an IEP reading goal might benefit Student, there is no persuasive evidence that it is needed in order for Student to receive FAPE. Testimony of Sullivan, Tinglof; exhibits P-7, S-4

Parents seek other changes to the proposed IEP. Mother testified credibly that there are parts of the proposed IEP that do not accurately reflect Student's current level of performance. Father testified regarding the extensive home-based services that Parents have been privately providing, and he credibly pointed out that the IEP does not appear to recognize what has been done in the home. There was also undisputed testimony from Ms. Tinglof and Dr. Doyle that it may be useful to add to the IEP one or more objectives for the purpose of teaching Student how to be safe in the home and community. Testimony of Mother, Father, Doyle, Tinglof. However, there was no evidence that would support a finding that because of these imperfections, the IEP is not reasonably calculated to provide FAPE. Nevertheless, for reasons explained below, there will be an opportunity for these concerns to be addressed by the IEP Team in October 2013.

However, there was one oversight in the drafting of the IEP. Ms. Tinglof, the principal drafts person of the IEP, testified that Student's 1:1 aide is intended to be with him six hours per day (in other words, the entire school day) each day of the week. Part B of the service delivery grid within the proposed IEP reflects that the 1:1 aide will be with Student for the entire time that he is in the general education classroom. But part C of the service delivery grid does not include the 1:1 aide at times when Student is participating in pull-out services for his social skills group and his speech and language group, and this would appear to be an inadvertent oversight. Ms. Corley testified that the aide attended Student's speech and language group and social skills group in 1st grade and that it was important that he do so in order to help teach Student these same skills in other settings. The intention was for the proposed IEP to continue this in 2nd grade. To correct this inadvertent oversight, part C of the service delivery grid within the IEP needs to be amended to include the 1:1 aide at times when Student is receiving these pull-out services. Testimony of Tinglof, Corley.

Finally, I consider one of Parents' principal objections to the proposed IEP, which is that they did not participate in its development. It is not disputed that they did not attend the April 12, 2013 Team meeting that developed the IEP, nor did they otherwise participate in the development of the IEP. They claim that they did not have the opportunity to do so. Parents reason that therefore the proposed IEP is inappropriate.

The fundamental difficulty with this procedural claim is that it is not included within the issues to be addressed in the instant Decision. As stated near the beginning of this Decision, the only issues to be addressed at this time are whether Newton's proposed IEP is appropriate and if not, what changes should be made to it. My Order of June 6, 2013 bifurcated Parents' counterclaims and stated that **"only the merits of the currently-proposed IEP will be addressed at the hearing beginning June 17th. The hearing will**

not consider any alleged procedural violations that pertain to the development of this IEP. [Bold in original.]”³¹

For these reasons, I cannot, at this time, rule on the merits of Parents’ procedural claim that the IEP is inappropriate because they did not attend the IEP Team meeting.³²

³¹ Also, during a conference call with me on June 6, 2013 (prior to issuing the June 6th Order), this was discussed with the parties’ attorneys and I advised them that the case would be bifurcated with the result that Parents’ procedural claims would be considered only at a later-scheduled hearing. During that conference call, Parents’ attorney was invited to request scheduling of hearing dates to address Parents’ procedural claims, but no hearing dates have been requested.

³² Even though Parents’ attorney likely recognizes the futility of asking that I rule on the merits of Parents’ procedural claim at this time, Parents (through their attorney) have continued to press this claim as a principal, substantive argument as to why I should find the proposed IEP to be inappropriate, devoting nearly all of the first half of their ten-page closing argument to this position. In order to elucidate this issue for Parents, I will explain below why their arguments are procedural in nature and why their arguments are, ultimately, misplaced.

Parents strongly believe that the proposed IEP is inherently and fundamentally flawed because it was developed without their participation. Parents are correct that their participation in the development of their son’s IEP is extremely important. See *Doug C. v. Hawaii Dept. of Educ.*, L 2631518, *3 (9th Cir. 2013) (“Parental participation in the IEP and educational placement process is critical to ... providing quality education to disabled students”). I also agree with Parents that “[they] not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.” *Id.* at *4 (internal quotations omitted). Throughout the hearing, Parents amply demonstrated an in-depth and unique understanding of their son and his current performance level, as well as an admirable commitment to providing him with significant educational opportunities to help ensure his educational development, and Parents have expended substantial amounts of their own time, energy and money towards that end. Testimony of Mother, Father.

Parents did not participate in the April 12, 2013 Team meeting that developed the proposed IEP and did not otherwise have input into the IEP. But this fact alone does not result in the proposed IEP being inappropriate. Even those courts (such as the 9th Circuit) which have stated most strongly the importance of parental participation make clear that “if the parent refuses to attend or is entirely unresponsive to the agency’s requests to meet, the agency has a duty to move forward with the IEP process” without parents in attendance. *Id.* at n. 6 at *5. Similarly, federal special education regulations provide that an IEP Team meeting “may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend.” 34 CFR § 300.322(d).

Perhaps aware of this case law and regulation, Parents argue that they were impermissibly denied a meaningful opportunity to participate in the April 12, 2013 Team meeting “because [they] were not provided sufficient notice of the date and time of the meeting.” Parents’ closing argument at p. 2. This position rests on the allegation that Parents did not receive (through the US postal service) Newton’s notice of the date and time of the IEP Team meeting until the same day as the meeting and that this notice was read by Parents only after they arrived home from work that day.

Both Parents testified but neither addressed the question of when they received Newton’s notice of Team meeting nor did any other witness, and there is no document in the evidentiary record that addresses this issue. In their closing argument (and in their response to Newton’s Hearing Request), Parents have simply alleged that the above facts are true. Thus, although I have no reason to doubt that Parents received the Team meeting notice by first class mail on the same day as the Team meeting actually occurred, I find that there is no evidentiary support for Parents’ position, and the entire basis for their procedural claim therefore fails.

In their closing argument at p. 1, Parents also allege a past pattern and practice of Newton’s failure to convene IEP Team meetings requested by Parents for the purpose of their sharing information from their own observations as well as their experts’ observations and evaluations. I have no doubt that Parents strongly believe that this pattern and practice exists and that they believe that it may have substantially compromised the integrity of Newton’s planning and delivery of educational services for Student. However, there are no facts in the evidentiary record that support this allegation and, even if there were, these facts would not be relevant to the question of whether Parents were provided the requisite opportunity to participate in the April 12, 2013 Team meeting.

(Footnote continued on next page.)

Although I decline to rule on the merits of Parents' alleged procedural violation, I will order the relief that Parents seek regarding a reconvening of the IEP Team, and through this meeting, Parents will have an opportunity to participate in the decision-making regarding the substance of their son's IEP. Newton has agreed that such an IEP Team meeting is appropriate.³³

Newton understands that the situation is similar to a student who is being transferred from another school district. Newton teachers, aide and other service providers who will begin working with Student in September 2013 have not taught or worked with Student (other than during the summer of 2013) and Newton will be implementing a program model replicated upon but nevertheless somewhat different than Student's program at the NECC Partnership Program. Newton recognizes the need to get to know Student, see how he does in its program and then, with input from his new service providers and Parents, adjust the IEP as needed.

For these reasons, I find that Newton shall schedule an IEP Team meeting to occur in October 2013 (with the result that the meeting will occur four to eight weeks after the beginning of the school year). Parents, anyone invited by Parents to the meeting and those attending the meeting at Newton's invitation shall have an opportunity (1) to report on the special education and related services that Student is receiving at school and at home, his level of performance and his progress to date, (2) to discuss Student's special education needs and how they should be met, and (3) to make any recommendations regarding amendments to the IEP. In addition, the home-based and school-based BCBAs shall report to the Team regarding their ability to coordinate services and whether additional time should be included within the IEP to ensure consistency of instruction. Similarly, at the meeting, the school-based BCBA, special education teacher, regular education teacher and behavioral aide

Moreover, even if I were to accept as true Parents' allegation that their receipt (through the US postal service) of Newton's notice of Team meeting arrived on the day of the meeting, there are two undisputed facts (which are discussed in greater detail above in the "prior, related dispute" part of the Procedural Background section) that would likely cast substantial doubt on the merits of Parents' procedural claim.

First, it is not disputed that during a conference call with me on April 8, 2013, Parents' attorney reported that Parents had not and would not provide available dates to Newton for a Team meeting notwithstanding my explicit requests (and Newton's repeated urging) to do so. And Parents' attorney further unequivocally stated that Parents had no intention of attending a Team meeting that would be used to develop a new IEP. From this, one might reasonably conclude that Newton has met the 9th Circuit's standard (discussed above) that "if the parent refuses to attend or is entirely unresponsive to the agency's requests to meet, the agency has a duty to move forward with the IEP process" without parents in attendance or that Newton has met the federal regulatory standard (also discussed above) that Newton was "unable to convince the parents that they should attend."

Second and even more to the point, it is not disputed that two days prior to the April 12, 2013 Team meeting, Newton's attorney sent (and Parents' attorney received) an e-mail advising Parents' attorney of the time and date of the Team meeting (and that the e-mail included, by attachment, a copy of the meeting notice), and that Parents' attorney then advised Father of the meeting date. Parents' written closing argument completely ignores this actual notice and apparently believes I should do the same because Parents had advised Newton that all communication should be sent by first class mail. Parents' position is wholly unpersuasive.

³³ During the hearing, Newton's attorney agreed that it would be appropriate to reconvene the Team for a meeting within four to ten weeks after the beginning of the school year. See Newton's closing argument at p. 10, n. 15, and references to the transcript cited therein.

shall report to the Team regarding their collaboration and the supervision of the aide, and whether any additional time should be included within the IEP to ensure appropriate services by the aide. In sum, the meeting shall be sufficient to review with Parents the IEP and its implementation, and whether any amendments should be made to the IEP.³⁴

ORDER

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

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

1. Immediately amend the IEP by adding 15 minutes per week to the Clinical Supervision by a BCBA in part A of the Service Delivery Grid.
2. Immediately amend the IEP by adding 15 minutes per week to the Home Training by a BCBA in part C of the Service Delivery Grid.
3. Immediately amend the IEP by adding Academic Support by the Behavior Therapist in part C of the Service Delivery Grid so that the Behavior Therapist is with Student while he attends his social skills group (1 X 30 minutes per week) and his speech and language group (2 X 30 minutes per week).
4. Immediately amend the IEP by substituting Newton's proposed revised extended school year services for the existing language regarding these services.

Newton shall convene an IEP Team meeting to occur in October 2013, as explained more fully in the body of the Decision.

By agreement of the parties, this matter is scheduled for a conference call with the parties' attorneys at 9:00 AM on September 4, 2013 to discuss Parents' counterclaims.

By the Hearing Officer,

William Crane

Dated: August 6, 2013

³⁴ If there are any points of substantial disagreement regarding the IEP and its implementation, Newton may want to (but is not required to) consider engaging one or more of Student's 1st grade NECC service providers to observe Student's 2nd grade program and consult to Newton and Parents to assist in resolving the dispute.

**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.