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

In Re: Pembroke Public Schools **BSEA # 1310012**

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 15, 2013 in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Catherine Mason[1]	Education Specialist, Floating Hospital for Children at Tufts Medical Center
Joan LaCroix	Biology Teacher, Pembroke High School
Meaghan Fitzpatrick	English Language Arts Teacher, Pembroke High School
Michael Frates	History Teacher, Pembroke High School
Aron Blidner	Coordinator of Special Education PK-22, Pembroke PS
Laurie Casna	Director or Personnel and Student Services, Pembroke PS
Virginia Dodge	Court Reporter, Doris O. Wong Associates

Neither party was represented by an attorney or advocate. The official record of the hearing consists of documents submitted by Parent (Parent refers to Student's Mother; the terms Parent and Mother are used interchangeably in this Decision) and marked as exhibits P-1 through P-5; documents submitted by the Pembroke Public Schools (Pembroke) and marked as exhibits S-1 through S-14; and approximately one day of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on October 24, 2013, and the record closed on that date.

[1] Ms. Mason testified by telephone.

ISSUES

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

1. Is Pembroke's most recently-proposed IEP (exhibit S-5) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment? If not, what additions or other changes should be made to the IEP?

2. Has Pembroke complied with its responsibilities to Student under state and federal special education law (and under any agreements between the parties) since December 11, 2012? If not, are compensatory services due and if so, what compensatory services should be provided?

FACTS

Student is a fifteen-year-old young man who resides with his Mother in Pembroke, MA. He attends the 10th grade of a substantially-separate, language-based program at Pembroke High School. Student hopes to attend college after he graduates from Pembroke High School. Testimony of Mother, Student; exhibit S-5.

Student has a diagnosis of Specific Learning Disability (Dyslexia), Auditory Processing Disorder and Communication Disorder. He has a history of severe difficulties acquiring basic literacy skills. Student is highly motivated to remediate his learning deficits. Testimony of Student, Mother, Mason; exhibits P-1, P-5, S-5.

Beginning in the 2012-2013 school year and continuing in the current school year, Student has attended a language-based program at Pembroke High School. The program is only for students with specific reading, written language and language learning disabilities who, as a result of these deficits, are functioning significantly below grade level in reading and written language but who can access grade-level curriculum. Student has attended the Pembroke High School language-based program pursuant to an accepted IEP that covers the period 10/25/12 to 10/24/13. Testimony of Blidner; exhibit S-5.

The accepted IEP calls for Student to receive instruction within substantially-separate, language-based classrooms for social studies, science and English Language Arts. Speech language services are also imbedded in Student's English Language Arts class. Testimony of Fitzpatrick, Frates, exhibit S-5.

In addition to the substantially-separate language-based classes for all academic subjects (except math which is currently being taught in an inclusion class), Student's IEP calls for him to attend the Learning Center for 55 minutes, six times per seven-day cycle. The Learning Center is used to supplement classroom instruction—for example, by assisting Student to understand what is being taught in the classroom and what is expected to be done for homework. Testimony of Fitzpatrick, Frates, exhibit S-5.

The IEP also calls for Student to receive a pull-out reading class 55 minutes, five times per seven-day cycle. This reading class provides Student with 1:1 or 1:2 teaching that utilizes Orton-Gillingham instruction. Among other areas, the class targets Student's reading fluency. Testimony of Fitzpatrick, S-5.

The accepted IEP also provides Student with speech-language consultation for 15 minutes per month. Exhibit S-5.

It is not disputed that Student has done well in Pembroke High School's language-based program this year and last, achieving very high grades and making progress in academic content areas. For example, Student's 9th grade transcript reflects grades of A or A+ in each of his academic subjects. His written progress reports and the testimony of his teachers indicate that Student is excelling in the classroom, particularly math, science and history. His progress in math and history during 9th grade (the 2012-2013 school year) was sufficient to result in recommendations from his teachers that he transition into regular education, co-taught classes for these subjects for 10th grade.[2] In the spring of 2012, Student passed the English Language Arts portion of MCAS, with a scaled score of 240. Testimony of Fitzpatrick, Frates, LaCroix; exhibits S-1, S-2, S-3.

Student's written progress reports and the testimony of his teachers indicated that he is making gains in writing (from three-paragraph essays to five-paragraph essays) and that he has been making progress regarding his decoding skills and automaticity through Orton-Gillingham instruction during reading class. Student's English Language Arts teacher testified that at the beginning of his 9th grade year, he was reading at the 5th grade level, and that by the end of that school year, he was reading at the 6th grade level. As a 10th grader, he currently is reading at the 6th grade level. Testimony of Fitzpatrick, Frates, LaCroix.

Student's IEP was amended in December 2012 pursuant to an IEP Team meeting on December 4, 2012. The purpose of the Team meeting was to review recommendations from an evaluation and observation by Catherine Mason, MEd, in September and October 2012.

As reflected in her written report, Ms. Mason's observation and evaluation generally found that the Pembroke High School language-based program was an appropriate placement for Student but nevertheless cautioned that Student has severe literacy delays and language learning disabilities that were not being adequately addressed by his IEP services. In particular, she noted Student's lack of facility in decoding and recognizing words, and she cautioned that these deficits can become major barriers to acquiring increasingly complex information in high school. She recommended increased instruction to address Student deficits regarding phonological awareness, decoding, encoding, reading fluency, reading comprehension, and writing. Exhibit P-5.

[2] Student and Mother declined this recommendation for history with the result that he has continued in a substantially-separate classroom for this subject, but they accepted this recommendation for math with the result that Student transitioned into an inclusion math class for the current school year.

As a result of the IEP Team's review of Ms. Mason's evaluation, the IEP was amended to increase direct reading instruction from three times 55 minutes per seven-day cycle to five times 55 minutes per seven-day cycle. It was also agreed that Ms. Mason would return during the summer of 2013 for a follow-up evaluation. Testimony of Blidner; exhibits P-4, S-6.

Mother accepted the IEP amendment on December 12, 2012. But, Mother takes the position that her acceptance was obtained under false pretenses. As alleged in her hearing request and as will be discussed further below, Mother takes the position that she signed the IEP amendment without the benefit of her reading glasses and on the basis of assurances from Pembroke that all of Ms. Mason's recommendations were to be included in her son's IEP as a result of the IEP amendment. Mother argues that Pembroke has never fully included (or implemented) Ms. Mason's recommendations. Testimony of Mother; exhibits P-4, S-6.

On June 19, 2013, Ms. Mason conducted her educational re-evaluation of Student pursuant to the parties' agreement referenced above, and she produced a written evaluation report. Ms. Mason also testified at the hearing, providing further clarification to her findings and recommendations. She explained that she continues to believe that the Pembroke High School language-based program is an appropriate placement for Student, but expressed significant concern regarding Student's decoding skills. Ms. Mason explained that these skills appeared to be weaker than during her previous testing on September 11, 2012, and in her view, reflect substantial, underlying phonological weaknesses that need to be addressed through direct instruction as quickly as possible. She also noted Student's continuing reading fluency deficit and the need to address this through additional, direct instruction. Testimony of Mason; exhibit P-1.

On August 7, 2013, Student's IEP Team met to review Ms. Mason's June 2013 evaluation and recommendations. As a result of this meeting, the Team determined that Student no longer needs to be placed within a substantially-separate classroom for math, that Ms. Mason would provide a follow-up evaluation in the summer of 2014, and that current IEP benchmarks should be amended to include additional metrics for phonological awareness, reading fluency, sentence construction, comprehending and writing specific text from structures. Due to a clerical error by Pembroke, the amendments to the IEP benchmarks were not provided to Mother until the day of the hearing (October 15, 2013). Testimony of Mother, Blidner; exhibits P-2, S-14.

In her Hearing Request, Mother has also expressed concerns regarding Student's services for the summer of 2013. Pursuant to Student's current IEP, he is entitled to receive summer services in order to prevent regression. For the summer of 2013, Pembroke offered Student a five-week, three-hours-per day program that included explicit, language-based instruction to reinforce what Student learned during the school year as well as hands-on learning experiences that emphasized use and development of language. Speech-language services were offered twice per week as part of English Language Arts. In a letter dated June 11, 2013 to Mother, Dr. Blidner explained the details of this proposed summer program. Apparently because of scheduling conflicts with his other summer activities (for example,

football practice), Student attended only a field trip and several other days of instruction during the five-week summer program. Testimony of Mother, Fitzpatrick, Blidner; exhibits S-5, S-12.

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]."[3] "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."[4] An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability.[5] A student is not entitled to the maximum educational benefit possible or "even the best choice".[6] Rather, the IEP must be "reasonably calculated to confer a meaningful educational benefit."[7]

The IDEA includes Massachusetts statutory and regulatory educational standards.[8] Massachusetts statutes require that special education services be "designed to develop the [student's] educational potential".[9] Massachusetts regulatory standards further 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."[10]

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[3] 20 U.S.C. § 1400 (d)(1)(A).

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

[5] 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)).

[6] 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."); *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".).

[7] *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*, 869 F.Supp.2d 174, 177 (D.Mass. 2012).

[8] 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]").

[9] 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."). 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"); 603 CMR 28.01(3) (purpose of Massachusetts special education regulations is "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential."

[10] 603 CMR 28.05 (4) (b).

In the application of these standards, "levels of progress must be judged with respect to the potential of the particular child"[11] unless the potential is "unknowable"[12] 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".[13]

The IDEA also 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]

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

Parent has the burden of persuading me that Pembroke's IEPs have not and do not meet these standards.[17]

DISCUSSION

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 and regulations.

As discussed above in the Facts section, Student has been making progress in the Pembroke High School language based program, as reflected in his grades, progress reports and teacher testimony. It is not disputed that Student is appropriately placed in this program, which has been provided pursuant to an accepted IEP.

Notwithstanding this progress, Ms. Mason's written evaluations and testimony were persuasive that Student has certain underlying language weaknesses that Pembroke has not adequately addressed. Importantly, Ms. Mason was persuasive that addressing these weaknesses is essential in order for Student to develop adequate reading skills and to allow

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[11] *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.").

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

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

[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 *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

him to make meaningful educational progress in high school. Testimony of Mason; exhibit P-1.

More specifically, Ms. Mason's evaluation and testimony were persuasive that comparing her test results over time indicated that Student was making insufficient progress in phonological awareness and phonological processing (as reflected in the Comprehensive Test of Phonological Processing, 2nd ed.), with his phonological memory standardized and percentage scores actually decreasing from 2011 to June 2013, with his June 2013 phonological memory score at the 1st % level. Similarly, testing over the time period from September 2012 to June 2013 indicated that Student's standardized and percentage scores on the Kaufman Test of Educational Achievement – II (as well as grade equivalency scores) in decoding were decreasing. Over this same time period, Student's reading rate, accuracy and fluency scores (on the Gray Oral Reading Test – 4) made modest progress from September 2012 to June 2013 but nevertheless as of June 2013 were at the 9th % for reading rate, 2nd % for reading accuracy and <1st % for reading fluency. Testimony of Mason; exhibits P-1, P-5.

Ms. Mason was persuasive that Student has at least average academic potential but that without addressing the above-referenced underlying language weaknesses through more intensive and specifically-directed instruction, Student's progress in literacy skills will be minimal, particularly as is he is faced with higher level material that includes more challenging language tasks in the higher grades of high school and beyond. She explained that at this stage of Student's educational career, it is clear that he has not and cannot gain the necessary literacy skills simply through practice. In particular, phonological awareness and phonological processing skills as well as fluency must be taught explicitly. Testimony of Mason; exhibit P-1.

In response, Pembroke has relied on Student's high grades and his gaining content information in academic classes. It is not disputed that Student has been able to access the curriculum and learn content material through appropriate language-based instruction and attain very high grades. But, as Ms. Mason explained, Student is intelligent and works hard, he is able to compensate to some degree for his language deficits, and the language-based instruction has allowed Student to access the curriculum and achieve high grades without remediating certain literacy skill deficits. Testimony of Mason.

Pembroke has also noted that when not timed, Student's reading is accurate and he can score reasonably well in reading comprehension, which is reflected in Student's teachers' testimony regarding his reading progress. However, Ms. Mason testified persuasively that the Gray Oral Reading Test scores (noted above) are a better indicator of Student's reading progress, which is minimal. She further testified persuasively that Student's untimed reading abilities (relied upon by Pembroke) do not reflect anything close to mastery of essential phonological and fluency skills that Student requires in order to make meaningful progress in reading. Testimony of Mason.

In order to make Student's language-based educational program appropriate, Ms. Mason recommended that Student receive explicit instruction to address his phonological

weaknesses. She specifically recommended that Student be evaluated through a Lindamood Phoneme Sequencing (LiPS) program and that Pembroke provide intensive tutorial instruction in the amount that is recommended by that evaluation. Ms. Mason also recommended that Pembroke provide Student with a reading fluency program (such as the Read Naturally program) at least twice each week.[18]

With respect to reading fluency, Pembroke does not seek to refute Ms. Mason's recommendation to add a reading fluency program (such as the Read Naturally program) at least twice each week. In its closing argument, Pembroke has indicated that it is willing to propose that Student access Read Naturally three times per seven-day cycle, for 15 minutes each, to practice his fluency skills in addition to interventions currently in place.

With respect to Student's phonological awareness weaknesses, Pembroke does not refute the need to provide explicit instruction to address this deficit. But, in its closing argument, Pembroke questions the appropriateness of the LiPS program for this purpose. Pembroke bases this argument, in part, on its reported discussions with a representative of the LiPS program that apparently occurred after the completion of testimony in this dispute. However, as discussed below, if the LiPS program's evaluation of Student confirms Pembroke's argument, then instruction in this program need not be provided.

Ms. Mason has had the benefit of observing Student in Pembroke's program and testing Student over a period of time, allowing her to track Student's progress. She has extensive experience and expertise relevant to her evaluation of Student. I find her testimony and reports to be credible and persuasive. Testimony of Mason; exhibits P-1, P-5.

Ms. Mason was particularly persuasive that Student's unremediated learning deficits will increasingly hamper his educational development and learning potential. Testimony of Mason. As noted above, a central purpose of Massachusetts special education regulations is "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential."[19]

I am persuaded that Ms. Mason's recommendations are necessary (and that the IEP must be amended accordingly) in order that Student's IEP be reasonably calculated to provide him with an opportunity to receive FAPE. Per Ms. Mason's recommendation, Student shall be provided with a reading fluency program (such as the Read Naturally program) at least twice each week.

Also per Ms. Mason's recommendation, Pembroke shall arrange for Student to be evaluated through a LiPS program and shall provide instruction in the type and amount that is recommended by that evaluation. If the LiPS evaluation does not recommend instruction,

[18] Although Ms. Mason's most recent evaluation includes additional recommendations (for example, a minimum of three hours per day of small group or 1:1 instruction to address Student's literacy weaknesses, and daily instruction regarding decoding and encoding), she testified that with the above-described services added to Student's existing placement and services, Student's IEP would likely be appropriate. Testimony of Mason.

[19] 603 CMR 28.01(3).

then the IEP Team shall re-convene with Parent and Ms. Mason to determine what other additional, explicit instruction shall be utilized to address Student's phonological weaknesses.[20]

With respect to extended year services for the summer of 2013, Mother has argued that Pembroke has not provided appropriate services. However, this argument appears to be based more on what Student actually participated in, rather what he was offered by Pembroke. As explained in greater detail in the Facts section above, Pembroke offered a five-week, three-hours-per-day summer program that included special education and related services designed to avoid regression. Dr. Blidner and Ms. Fitzpatrick provided credible and persuasive evidence in support of the appropriateness of this program. Parent's only expert, Ms. Mason, did not address this issue in her testimony or her report, leaving Parent with no credible or persuasive evidence in support of her position. I therefore conclude that Parent has not met her burden of persuasion on this issue.

With respect to Parent's compensatory claims, she argues that not only is Student's IEP currently deficient, but it has been deficient (with the result that it has failed to provide Student with FAPE) at least since December 2012 when the IEP Team met to consider Ms. Mason's 2012 evaluation and when Mother accepted the IEP amendments. However, Mother fully accepted the IEP for the period 10/25/12 to 10/24/13, as well as the IEP amendments in December 2012. The Team proposed amendments in August 2013, but it is unclear whether Mother has ever accepted or rejected these amendments. In sum, there is nothing in the record that indicates that Mother has rejected the IEP or any of the amendments since December 2012. Exhibits P-4, S-5, S-6.

The general and well-settled rule is that acceptance of an IEP precludes a Hearing Officer from considering its appropriateness.[21] Thus, Parent cannot, on the one hand, accept the IEP and its amendment, thereby indicating that she agrees with the goals and objectives and the types and amounts of services reflected within that IEP, and then, at a later time after the IEP has been implemented, complain that the goals and objectives and the types and amounts of

[20] A school district is generally given discretion to determine the appropriate methodology so long as the selected methodology is likely to allow the student the opportunity to receive FAPE. See, e.g., *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). However, in the instant dispute, there is a history of Pembroke having failed to address Student's phonological weaknesses appropriately through the methodologies chosen by the school district. Testimony of Mason; exhibits P-1, P-5. This provides sufficient justification to require Pembroke to implement the particular methodology recommended by Parent's expert.

[21] *See Independent School District No. 432, Mahnomen School v. J.H.*, 8 F.Supp.2d 1166, 28 IDELR 427 (D.Minn. 1998) (acceptance of IEP precluded Hearing Officer from considering its appropriateness); *In Re: Yale and Upper Cape Cod Regional Technical School and Sandwich Public Schools*, BSEA#06-0501 & #06-0808, 11 MSER 200 (2005) (without a showing of lack of notice of parental options and due process rights, lack of meaningful parental participation in the development of the IEP, or any other procedural impropriety, the BSEA does not revisit accepted expired IEPs); *In Re: Quabbin*, 11 MSER 146 (MA SEA 2005); *In Re: Sharon Public Schools*, 8 MSER 51, 67 (MA SEA 2002); *In Re: Carver Public Schools*, 7 MSER 167, 179 (MA SEA 2001).

services reflected within the IEP were not reasonably calculated to provide Student with FAPE in the least restrictive environment.[22]

Mother seeks to avoid this rule through two arguments. First, she takes the position that when she signed the IEP amendment on December 11, 2012, she relied upon the advice of a Pembroke staff person that the amended IEP would include all of Ms. Mason's recommendations. Mother argues that this turned out to be untrue. Second, Mother takes the position that she should not be held accountable for signing the IEP because she did so without the benefit of her reading glasses. I do not find these arguments to be persuasive for the following reasons.

It was perhaps understandable that when Mother signed the amended IEP, she relied on the verbal opinion of a Pembroke staff since Mother did not have her reading glasses and therefore could not review the IEP herself. However, at any time after returning home, Mother could have read the amended IEP herself with the benefit of her reading glasses and then would have been able to reach her own determinations as to whether the IEP was acceptable. At that time or any subsequent time, she could have rejected the IEP, in whole or in part, thereby putting Pembroke on notice and preserving her right to compensatory claims. However, there is no evidence that Mother ever rejected the IEP in whole or in part.

Mother also raises a claim of failure to implement the signed IEP. The only evidence that supports Mother in this regard is the fact that, through a clerical oversight, the additions to the benchmarks, which were agreed upon during the August 7, 2013 Team meeting, were not provided to Mother until the day of the hearing (October 15, 2013). However, there is no basis for me to conclude that any educational harm occurred as a result of this oversight.

For these reasons, I find that Parent has not met her burden of persuasion regarding her compensatory claims.

[22] See *Doe ex rel. Doe v. Hampden-Wilbraham Regional School Dist*., 715 F.Supp.2d 185, 194-195 (D.Mass. 2010) (the court first noted the rule "that hearing officers are precluded from revisiting or re-opening accepted IEPs that have expired where parents participated in the development of the IEP" and then explained its rationale as follows: "The purpose of this rule is plain; deciding upon which goals and methods to include in any student's IEP is not an exact science, and allowing parents to second guess IEP decisions after it has expired would only undermine the process of providing students with the educational services they need.").

ORDER

As currently written, the IEP most recently proposed by Pembroke (exhibit S-5) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

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

1. As soon as possible and no later than 30 days from the date of this Decision, Pembroke shall arrange for Student to be evaluated through a Lindamood Phoneme Sequencing (LiPS) program and shall provide instruction in the type and amount that is recommended by that evaluation. However, if the LiPS evaluation does not recommend instruction, then the IEP Team shall re-convene with Parent and Ms. Mason as soon as possible thereafter and no later than 30 days later to determine what other additional, explicit instruction shall be utilized to address Student's phonological weaknesses. The IEP shall be amended to reflect the instruction that is to be provided to Student. This instruction shall be in addition to the special education and related services currently provided under Student's IEP.

2. As soon as possible and no later than 30 days from the date of this Decision, Pembroke shall include in Student's educational program a reading fluency program (such as the Read Naturally program) at least twice each week. The IEP shall be amended to reflect this instruction.

Pembroke has otherwise complied with its responsibilities to Student under state and federal special education law (and under any agreements between the parties) since December 11, 2012.

By the Hearing Officer,

William Crane
Dated: October 31, 2013

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

THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

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

Rights of Appeal

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

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

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

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