

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

In Re: Triton Public Schools

BSEA # 1400006

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 16, 21 and 23, 2013 in Boston, MA, at the Bureau of Special Education Appeals offices before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother

Friend of Mother

Melissa Ghiringhelli¹

Ann Marie Lasoski

Alison Schonwald

Kyle Campbell

Nicole Osborne LaPerriere

Michelle Lojko²

Maryellen Moreland

Andrea Cutter

Kristin Flaherty

Jodi Gundrum

Barbara Cyr

Christine Kneeland

Beverly Clark

David Magee

Mary Ellen Sowyrda

Virginia Dodge

Jane Williamson

Carol Kusnitz

Speech-Language Pathologist, Mass. General Hospital
Neuropsychologist, LifeDimensions Neuropsychological
Services, Inc.

Developmental Pediatrician, Boston Children's Hospital
Guidance Counselor, Triton Regional School District (RSD)

Regular Education Teacher, Triton RSD

Regular Education Teacher, Triton RSD

Special Education Teacher, Triton RSD

Special Education Teacher, Triton RSD

Special Education Liaison, Triton RSD

Speech-Language Pathologist, Triton RSD

Team Chairperson, Triton RSD

Principal of Pine Grove Elem. Sch., Triton RSD

Consultant to Triton RSD

Director of Special Education, Triton RSD

Attorney for Triton RSD

Court Reporter, Doris O. Wong Associates

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¹ Ms. Ghiringhelli testified by telephone.

² Ms. Lojko testified by telephone.

The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-18 through P-47 (Parent did not submit any exhibits identified as P-1 through P-17); documents submitted by the Triton Regional School District (Triton) and marked as exhibits S-1 through S-18; and approximately two and one half days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on November 25, 2013 and the record closed on that date.

INTRODUCTION

Triton filed a Hearing Request seeking a determination by the BSEA that Student no longer is eligible for special education or related services. This dispute requires that I determine whether Triton is correct.

As the First Circuit has noted on several occasions, the issue of eligibility for special education can require a “difficult and sensitive” analysis,³ and this case is no exception. The eligibility question itself is complicated in the instant dispute and was intensively litigated by the parties, with each party presenting substantial, credible evidence in favor of its position. Witnesses for each party left no doubt that they strongly (even passionately) believe in the correctness of their position. Triton was very capably represented by a highly experienced attorney; and although Parent was *pro se*, she was able to access the BSEA hearing process and presented three authoritative expert witnesses on her son’s behalf. Each party presented evidence portraying Student in very different ways.

In the final analysis and for the reasons explained below, I found Parent’s position to be more persuasive and therefore have ruled that Student remains eligible for special education and related services.

ISSUE

The issue to be decided in this case is whether Student should remain eligible for special education or related services under state or federal special education law.

FACTS

Student, who is 12-years-old, lives with his Parents in Rowley, MA, which is within the Triton Regional School District. He attends the 6th grade at the Pine Grove Elementary School in Rowley, MA. Exhibit S-5.

Student has substantial intellectual ability, as reflected in his score on the Verbal Comprehension Index (75th %tile) of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). He also is highly motivated to do well in school, and according to his

³ *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 162 (1st Cir. 2004).

teacher, is a delightful student in class. Testimony of LaPerriere, Ghiringhelli; exhibits P-44 (pages 1, 6).

It is also not disputed that Student has a specific learning disability in the areas of reading and written expression. More specifically, he has been diagnosed with Apraxia of Speech, Reading Disorder (specifically, Developmental Dyslexia), Disorder of Written Expression, and an Auditory Processing Disorder. He also has medical diagnoses of tethered spinal cord and asthma. Testimony of Ghiringhelli; exhibits P-44 (pages 1, 6), S-5 (2nd page), S-9.

For 3rd and 4th grades (the 2010-2011 and 2011-2012 school years, respectively), Student was placed at Landmark School. Exhibit P-44.

For 5th and 6th grades (the 2012-2013 and 2013-2014 school years, respectively), Student returned to the Triton Public Schools and has been an inclusion student at the Pine Grove Elementary School where Student has received daily pull-out services of 45 minutes to address his language-based learning disability as well as inclusion support within the general education classroom. Exhibits S-5, S-7, S-8.

On December 21, 2012, the IEP Team met to consider amendments to Student's IEP. The Team (including Parent) agreed to end inclusion support from the special education teacher (2x40 minutes per week) and instructional aide (3x40 minutes per week) for math, to end speech-language services, and to change consultation to Parents from a half hour per week to a half hour per month. This IEP represents Student's stay-put IEP. The IEP services (which were agreed to by Parent and which have continued through the present) are as follows:

- Inclusion support from the special education teacher (2x40 minutes per week) and instructional aide (3x40 minutes per week) for English Language Arts.
- Inclusion support from the instructional aide (4x30 minutes per week) for other subjects.
- Pull-out instruction from the special education teacher (5x45 minutes per week) for English Language Arts.
- Pull-out counseling for a half hour per week.
- Consultation to Parents for a half hour per month and to the IEP Team for 15 minutes per month.

Exhibits S-5, S-6.

Over the next several months, Triton conducted its required three-year evaluation of Student and on the basis of its evaluations, the IEP Team concluded that Student no longer meets eligibility requirements for special education services. Parent then had two private

independent evaluations of Student, with these evaluators concluding that Student remained in need of special education services. The relevant evaluations and the Team determination of ineligibility are summarized below.

On February 27, 2013, Beverly Clark, MEd (a Triton consultant) performed a psychoeducational evaluation of Student as part of his three-year re-evaluation. The evaluation found that Student possesses strong reasoning abilities and age-appropriate skills regarding understanding and formulating language. Ms. Clark testified that Student's reading was solidly average. She further testified that her testing revealed phonological weaknesses, but opined that Student has progressed in his reading skills to the point that he does not require specialized instruction in this area. She concluded that her evaluation revealed no substantial cognitive or educational weaknesses that would justify continued eligibility for special education or related services, and that, in sum, he appeared to be a very typical child of his age. Testimony of Clark; exhibit S-9.

On April 8, 9 and 11, 2013, Kristin Spanger Flaherty, MEd, SAIF (Triton's Special Education Liaison) conducted an educational evaluation of Student as part of his three-year re-evaluation. The evaluation found that Student evidenced solidly average academic abilities overall, with some weaknesses specifically in the areas of phonological awareness, phonological memory and spelling. The evaluation further concluded that a detailed measure of his reading ability was solidly in the average range. Ms. Flaherty testified that none of Student's educational weaknesses are sufficiently disabling to merit a continuation of special education services. Testimony of Flaherty; exhibit S-10.

On April 26, 2013, the IEP Team met and, over Parent's objection, found Student to be no longer eligible for special education or related services. In reaching this conclusion, the Team relied upon Student's teachers' reports that he was able to access the curriculum and grade level standards, and upon Triton's educational evaluation indicating that Student has solidly average academic abilities overall and has sufficient reading and writing skills to access the curriculum. The Team further found that Student would be best served by receiving regular education services throughout the day, rather than being pulled out of class for specialized instruction. Exhibits S-2, S-3.

On June 13, 2013, a Section 504 meeting occurred during which a Section 504 plan was developed for Student to accommodate his medical needs (insect allergy and asthma) and to provide that he be provided preferential seating so that he can access the curriculum. Parent did not attend the Section 504 meeting and has not accepted the Section 504 plan. Exhibit S-4.

On July 25, 2013, Student was administered a neuropsychological evaluation by Anne Marie Lasoski, PsyD (a neuropsychologist with LifeDimensions Neuropsychological Services, Inc.) at Parent's request. The evaluation found that Student had weaknesses in auditory working memory and visual processing speed, and that there had been a decline in his receptive vocabulary. The report noted that Student's ongoing deficits in fundamental language skills impede his reading and writing abilities, particularly when those abilities are viewed within

the context of his high average intellectual level as reflected in the Verbal Comprehension Index (75th %tile) on the WISC-IV. In her report and testimony, Dr. Lasoski emphasized that as Student progresses to higher grades, the increasing demands from reading loads and the complexity of texts will likely pose substantial, additional challenges for Student. She recommended that Student continue to receive the special education and related services set forth in his IEP, as well as remedial reading instruction. Testimony of Lasoski; exhibit P-44.

On August 6, 2013, Student was given a speech-language re-evaluation by Melissa Caron Ghiringhelli, MS, CCC-SLP (a speech-language pathologist at Massachusetts General Hospital) at Parent's request. The evaluation found that Student presents with a moderate spoken and written language disorder, particularly with respect to reading automaticity and fluency, and that he is not continuing to advance his skills at the rate expected for his age. The evaluation further determined that there was a favorable prognosis for improvement of spoken and written language skills because of his strong executive functioning skills, perseverance and family support, but only if there is "immediate attention to the recommendations for direct services and accommodations [listed in the report]." In her report and testimony, Ms. Ghiringhelli recommended continued special education services, including but not limited to speech-language services at least 2x50 minutes per week and reading remediation services of 2x50 minutes per week. Testimony of Ghiringhelli; exhibit P-22.

Student's MCAS scores, dated September 2013, were as follows:

- English language arts was 240, which is considered "proficient";
- mathematics was 258, which is considered "proficient"; and
- science and technology/engineering was 262 which is considered "advanced".

English language arts MCAS score reflects testing in language and reading. Student did substantially better (83% of possible points) on the language part than he did on the reading part (63% of possible points). Student's score of 240 in English language arts is the lowest possible passing grade and the cutoff between "needs improvement" and "proficient"; a score of 260 is the cutoff between "proficient" and "advanced". Exhibit P-36.

On October 9, 2013, the IEP Team reviewed Ms. Ghiringhelli's evaluation and found that it did not change their conclusion that Student does not meet standards for special education eligibility. The Team was not able to review Dr. Lasoski's evaluation prior to the hearing because Triton received a copy of the evaluation the morning of the first hearing day. Exhibits P-44, S-18.

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].”⁴ “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”⁵ An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.⁶ A student is not entitled to the maximum educational benefit possible or “even the best choice.”⁷ Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”⁸

The IDEA includes Massachusetts statutory and regulatory educational standards.⁹ Massachusetts statutes require that special education services be “designed to develop the [student’s] educational potential.”¹⁰ 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.”¹¹

I now turn more specifically to the eligibility standards relevant to this dispute. The federal and Massachusetts eligibility standards for special education are similarly structured in that each requires that Student meet two prongs: first, Student must have one or more of the requisite disabilities; and second, as a result of the disability(ies), Student must require special education or related services. Notwithstanding the similar structures, there are substantive differences between state and federal eligibility standards, and both state and federal standards must be considered. Student must be considered eligible for special education services if he meets either the state or the federal eligibility standards since state

⁴ 20 U.S.C. § 1400 (d)(1)(A).

⁵ *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

⁶ 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)).

⁷ 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”).

⁸ *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).

⁹ 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]”).

¹⁰ 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.”)

¹¹ 603 CMR 28.05 (4) (b).

standards are essentially incorporated into the IDEA but may nevertheless not diminish a student's rights under the IDEA.¹²

During the evidentiary hearing, Triton conceded that Student has one or more of the requisite disabilities and therefore satisfies the first prong of the two-part eligibility standard.¹³

Although Triton witnesses did not specify Student's particular disability during the hearing, it is apparent from his educational profile and history that he has been identified by Triton as having a specific learning disability in the areas of reading and comprehension.¹⁴ The term "specific learning disability" is defined by Massachusetts special education regulations as follows:

Specific Learning Disability - The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think speak, read, write, spell, or to do mathematical calculations. Use of the term shall meet all federal requirements given in federal law at 34 CFR §§300.8(c)(10) and 300.309.¹⁵

Thus, the essence of the instant dispute is whether, as a result of this disability, Student meets the second prong of the two-prong eligibility standard.

The second prong of the *federal* eligibility standard is that "by reason of" one of the requisite disabilities, Student "needs special education and related services."¹⁶ The IDEA defines "special education" as "specially designed instruction ... to meet the unique needs of a child

¹² See *Winkelman v. Parma City School Dist.*, 127 S.Ct. 1994, 2000-2001 (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) (IDEA "does not displace the states from their traditional role in setting their own educational policy"; state may "calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]").

¹³ During the hearing, Triton's attorney's opening argument made no reference to the first prong of the eligibility standards. At the completion of the opening argument, the Hearing Officer asked about this omission, and Triton's attorney explained that Triton was not going to present evidence that Student no longer meets the first prong and further explained that when Triton denied eligibility, the IEP Team focused on the second prong. See Transcript, vol. I, pp. 31-32. In its closing argument, Parent relied on Triton's representations at hearing and did not address the question of whether Student meets the first prong of the standards. See Parent's closing argument, p. 3. Similarly, in its closing argument, Triton conceded that "Triton ... does not contest the various diagnoses which ... supported his entitlement to special education services in the past." Triton's closing argument, p. 3. Nevertheless, later in its closing argument, Triton appeared to change its position and argued, for the first time, that Student did not necessarily meet the first prong of the state and federal eligibility standards. See Triton's closing argument, pp. 9-10. I find that Triton has waived any argument that Student does not meet the first prong of the eligibility standards. Furthermore, I find that the undisputed evidence is that Student satisfies the above-quoted definition of "specific learning disability" and therefore meets the first prong of the eligibility standards. See testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44, S-5 (page 2), S-10 (page 1) (discussed in the text above).

¹⁴ For example, Triton's most recently-proposed IEP for Student states that "[Student] has been identified with specific learning disability in the areas of reading and written expression." Exhibit S-5, page 2. Similarly, Triton's April 2013 educational evaluation of Student states that he "has been identified with a learning disability in the areas of reading and written expression." Exhibit S-10, page 1.

¹⁵ 603 CMR 28.02(7)(j). Federal special education regulations provide a similar definition of specific learning disability. See 34 CFR §300.8(c)(10).

¹⁶ 20 USC 1401(3); 34 CFR 300.7.

with a disability.”¹⁷ Regulations specify that special education requires adapting for each child, as appropriate, “the content, methodology, or delivery of instruction,” to address the child’s “unique needs”.¹⁸

Eligibility may be established by Student’s meeting the second prong of either the federal or the state eligibility standard.¹⁹ The second prong of the *Massachusetts* eligibility standard is similar although provides additional guidance. Massachusetts defines an eligible student as a child who, as a consequence of one or more of the requisite disabilities, “is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.”²⁰ “In determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student’s educational and developmental potential.”²¹

The term “progress effectively in the general education program”, as quoted above, is further defined by Massachusetts regulation to 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.”²²

In sum, the focus of the instant dispute revolves principally around the question of whether, without special education services, Student would be able to “progress effectively in the general education program”—that is, whether Student would be able to acquire “knowledge and skills ... according to his individual potential.”²³ And, to answer this question, one must “thoroughly evaluate ... student’s educational ... potential.”²⁴

This emphasis within these eligibility standards on considering a student’s learning potential is echoed in Massachusetts’ statutory educational standards, albeit from a slightly different angle: the “paramount goal of the commonwealth [is] to provide a public education system of sufficient quality to extend to all children ... including a school age child with a disability as defined in section 1 of chapter 71B the opportunity to reach their full potential ...”²⁵

Consistent with this statutory standard, the stated purpose of the Massachusetts special education regulations is “to ensure that eligible Massachusetts students receive special

¹⁷ 20 U.S.C. § 1401(29).

¹⁸ 34 C.F.R. § 300.39(b)(3).

¹⁹ See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”).

²⁰ 603 CMR 28.02(9). See also MGL c. 71B, s.1 (definition of “School age child with a disability”); 603 CMR 28.05(2)(a)1 (using same eligibility standard).

²¹ MGL c. 71B, s. 1; 603 CMR 28.02(9).

²² 603 CMR 28.02(17).

²³ 603 CMR 28.02(9); 603 CMR 28.02(17); 603 CMR 28.05(2)(a)1.

²⁴ MGL c. 71B, s. 1; 603 CMR 28.02(9).

²⁵ MGL c. 69, s. 1.

education services designed to develop the student’s individual educational potential.”²⁶ In a special education eligibility dispute, the First Circuit has found relevant the somewhat similar purposes of the IDEA. The Court noted “the broad purpose behind the IDEA [Individuals with Disabilities Education Act]: ‘to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to ... prepare them for further education’”²⁷ For these reasons, I find that Student’s learning (or educational) potential may be considered when analyzing his eligibility for special education services.

In a BSEA dispute, the burden of persuasion is placed upon the party seeking relief.²⁸ It is not disputed that the party seeking relief in the instant dispute is Triton since it seeks to terminate Student’s stay-put rights to continued special education eligibility. Accordingly, Triton has the burden to persuade me that Student no longer meets state or federal special education standards.²⁹

With these standards in mind, I turn to a consideration of Student’s need for special education and related services.

Triton has presented extensive, credible and un rebutted evidence that Student is actively engaged and participating in his 6th grade education in a number of ways. Student is bright, extremely conscientious and hard-working. He has learned strategies that help him compensate for his learning disabilities. His teachers clearly enjoy teaching him and having him in their classrooms. They also note that he has achieved passing grades in MCAS. From this evidence, there can be little doubt that Student has achieved notable and documented educational successes at Triton and, as a special education student, is accessing the 6th grade general education curriculum to a significant extent. Triton witnesses assert that Student could be similarly successful and could similarly access the general education

²⁶ 603 CMR 28.01(3).

²⁷ *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12-13 (1st Cir. 2007), quoting 20 U.S.C. § 1400(d)(1)(A).

²⁸ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

²⁹ Triton has argued that Parent should nevertheless have the burden of persuasion in light of the First Circuit’s determination that when a school district files a hearing request to defend its IEP, the parent has the burden of persuasion. See *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35 n.3 (1st Cir. 2012). In the instant dispute, Triton takes the position that it filed a hearing request with the BSEA to defend its IEP Team’s decision that Student is no longer eligible for special education services, which decision would be similar to an IEP Team’s decision to propose an IEP. Thus, Triton would have me terminate eligibility even if the evidence is “closely balanced.” See *Schaffer*, 546 U.S. at 62. I find this line of argument unpersuasive since a school district’s actions to defend its IEP may be distinguished from Triton’s actions in the instant dispute to change the most recently-proposed IEP by terminating Student’s eligibility. The instant dispute is analogous to the situation where “a school system challenges an existing IEP as over-accommodating, [and] the burden presumably lies with the school system.” *D.B.*, 675 F.3d at 35 n.3. As a result, the general rule should apply – that is the party seeking relief, which in this case is Triton, has the burden of persuasion. I also note that even were I to agree with Triton and assign the burden of persuasion to Parent, this would not alter the substantive outcome of the instant Decision. Although this was a closely contested dispute with substantial evidence supporting Triton’s position, in the final analysis the evidence was not closely balanced. Rather, for the reasons explained throughout the Decision, I find that the evidence persuasive of Student’s eligibility was decidedly and substantially in Parent’s favor.

curriculum as a regular education student. Testimony of Clark, Flaherty, LaPerriere, Moreland, Cutter; exhibits P-36, S-9, S-10, S-13, S-14, S-16.

For example, Student's regular education teacher for the current and previous school years (Ms. LaPerriere) testified that Student has excellent class participation, he asks insightful questions, he works hard and he is a delight to have in class. She noted that writing is a relative area of weakness in part because Student lacks motivation in this area; but that when he is motivated, he has demonstrated good writing abilities as reflected in his work samples. She explained that Student's need in this area is to work on adding details and elaboration, and that this need is being addressed in her classroom. In comparison to his peers in her mainstream classroom (only four of whom are on IEPs), Student is above average in math, average in reading, just below average in writing and a little below average in spelling, according to Ms. LaPerriere. Student's regular education teacher testified that he has been making substantial progress without any additional assistance needed from her in math, reading and writing, that he is reading at grade level, and that he has a relative weakness in spelling. Testimony of LaPerriere; exhibits S-13, S-16, P-45.

Student's current special education teacher testified that Student has a relative weakness in encoding and decoding. She noted that his spelling deficit does not impede his flow of ideas and as a general rule, one is able to figure out what he is intending to communicate. She testified that these weaknesses can be appropriately addressed through regular education instruction. Student's special education teachers from this year and last year agreed that Student did not last year and does not this year require special education services to access the curriculum or to learn. Testimony of Moreland, Cutter; exhibit S-14.

Triton retained the services of a reading consultant (Beverly Clark, MEd) who evaluated Student in February 2013, reviewed the evaluation reports of others, and talked with Student's teachers. Ms. Clark has substantial experience assessing children with reading issues and was a credible expert witness. Ms. Clark found that, overall, Student was intact cognitively, with no substantial learning weaknesses that would warrant special education or related services. She noted that Student has a weakness in phonological processing but opined that Student has by now been able to acquire phonics and does not require special education services in this area; she opined that it would be better to expose him to mainstream instruction. Similarly, she noted that Student has difficulties with spelling, but she testified that Student currently is a functional speller (i.e., he spells well enough so that a reader understands the message without difficulty) and his written language flows appropriately. She further opined that through the normal course of regular education instruction, Student will likely make sufficient progress in spelling with the result that special education services are no longer needed in this area. Ms. Clark concluded that Student has the basic literacy skills he needs to be successful and all that remains is for there to be sufficient application and practice of these skills, which will occur most appropriately within a mainstream classroom without the need for special education or related services. Testimony of Clark; exhibit S-9.

Triton's special education liaison (Kristin Flaherty, MEd, SAIF) testified that she conducted an education evaluation of Student in April 2013 and reviewed the evaluations of others. Similar to Ms. Clark, Ms. Flaherty noted Student's weaknesses in phonological memory and spelling but opined that none of these (or other) relative difficulties preclude his accessing the curriculum or learning in the mainstream. She therefore concluded that special education and related services are not needed or warranted. Testimony of Flaherty; exhibit S-10.

In sum, Triton educators and consultant believe that Student's learning skills have advanced to the point that he can best learn as a regular education student in a classroom with other regular education students, rather than being pulled out for specialized instruction. They see virtually no substantive distinction between Student with his learning abilities, and the regular education students whom they teach. The teachers and consultant opined that not only does Student not need special education, but that it is a disservice to his education to separate him out from the learning environment where he functions best—that is the regular education classroom. In these ways, the testimony and evaluation reports of the Triton educators and consultant supported the IEP Team's decision to terminate eligibility. Testimony of Moreland, LaPerriere, Cutter, Clark, Flaherty.

In response to this evidence and in support of her position that Student continues to require special education or related services, Parent called three expert witnesses—Melissa Caron Ghiringhelli, MS, CCC-SLP, who has been a speech-language pathologist for ten years at the Mass. General Hospital Chelsea Health Care Center and who most recently evaluated Student on August 6, 2013; Ann Marie Lasoski, PsyD, who has been a principal at LifeDimensions Neuropsychological Services since 2001 and who evaluated Student on July 25, 2013; and Alison Schonwald, MD, who has been a staff developmental pediatrician at Boston Children's Hospital since 2001 and who has seen Student 16 times since he was three years old and continues to be his treating pediatrician. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44, P-46.

These three experts did not seek to rebut the successes that Student has had in the classroom or the passing grades on the MCAS testing—in fact, they neither spoke with Student's teachers nor observed Student at school, and they did not see a need to do so. Rather, they relied upon their evaluation results and the evaluation results of others (including those of Triton's staff and consultant), together with their experience and expertise regarding the educational implications of these evaluation results. Testimony of Ghiringhelli, Lasoski, Schonwald.

There are some areas of agreement between Triton's and Parent's witnesses. In most respects, the actual testing scores obtained through Parent's experts' evaluations were consistent with the test scores obtained through Triton's evaluations. And, as noted above, it is not disputed that Student has a significant learning disability, which has been characterized by Triton as a "specific learning disability". This term is defined by Massachusetts special education regulations to mean that a student has "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written,

that may manifest itself in an imperfect ability to listen, think speak, read, write, spell, or to do mathematical calculations.”³⁰

Triton’s position is that although Student continues to have this disability and although there remain areas of weakness as reflected in test scores, Student’s disability and learning weaknesses do not sufficiently interfere with his learning and therefore do not merit direct remediation through specialized instruction. Triton seeks to establish that Student would be at least as successful a learner without any specialized instruction as he has been while receiving specialized instruction this school year and last. Testimony of Clark, Flaherty.

Parent’s experts disagreed, taking the position that one should not assume Student no longer needs special education services simply because he appears successful in certain academic areas or because he appears to be engaged at times within a general education classroom or because he has passed the MCAS. Rather, Parent’s experts opined that on the basis of Student’s learning profile, one would expect that he would be successful in a number of academic areas, including some parts of classroom performance and MCAS testing even without accommodations. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44, P-46.

Therefore, Parent’s experts declined to draw conclusions based upon the evidence of Student’s successes at school. Instead, Parent’s experts focused on the implications of the substantial amount of testing that has been completed on Student, including Triton’s own test results. They testified that notwithstanding his academic successes, Student demonstrates underlying, on-going and persistent deficits in certain discrete areas that significantly limit what he is able to learn, even as he is having success in certain areas at school. They explained that these deficits cannot be remediated without specialized instruction. Further, they testified that Student’s ability to learn (commensurate with his intelligence) will likely be impaired to a greater and greater extent over time as he advances from grade to grade, unless the needed specialized instruction is provided. For these reasons, they concluded that Student’s continued special education eligibility is essential to his learning and his learning potential. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44, P-46.

Specifically with respect to reading skills, I begin with Ms. Ghiringhelli’s testimony and report since I found her to be particularly persuasive.³¹ Ms. Ghiringhelli emphasized that

³⁰ 603 CMR 28.02(7)(j). Federal special education regulations provide a similar definition of specific learning disability. See 34 CFR §300.8(c)(10).

³¹ I found Ms. Ghiringhelli’s testimony and report to be particularly persuasive for the following reasons. She has the advantage of being both a speech-language pathologist and a certified reading teacher, she has completed hundreds of speech-language evaluations of students with profiles similar to that of Student over the course of ten years, she has evaluated Student recently and on two previous occasions thereby allowing her to understand Student’s deficits over time, and she has provided speech-language services to Student during the summers of 2011 and 2012. She has known Student since the spring of 2010 when she first evaluated Student. She carefully compared her own test scores with those of Ms. Clark and Ms. Flaherty (from Triton) and with those of Dr. Lasoski, allowing her to consider the meaning of her own test scores in a broader context. Testimony of Ghiringhelli. Her testimony and report were clear, candid, authoritative and instructive regarding the nature and implication of Student’s learning deficits. Testimony of Ghiringhelli.

although Student's skills are developing, he is not yet able to read with automaticity. She explained that at Student's current grade level, his reading should be automatic and fluent, but it is not.³² As a result, he must rely upon his strong vocabulary and background knowledge to predict upcoming text and fill in the blanks when his reading is inaccurate. In other words, Student has been able to compensate for his reading weakness as Triton acknowledges, but Ms. Ghiringhelli cautioned that these compensation strategies can only take Student so far. In the face of unfamiliar content or vocabulary, his reading accuracy and fluency likely decline, making it difficult for Student to read to learn new information. This negatively impacts Student's learning abilities now and will impact him to a significantly greater extent as he advances in grade and is faced with written information containing increasingly sophisticated language structure and unfamiliar content, and greater workloads. Testimony of Ghiringhelli; exhibit P-22 (page 2).³³

Ms. Ghiringhelli testified (and her report reflects) that a principal basis for these concerns is Student's below average score (19th %tile) in the phonemic decoding subtest of the Test of Word Reading Efficiency (TOWRE) test. This subtest uses nonsense words to simulate the reading process used when Student is faced with a novel word. Ms. Ghiringhelli testified that these test scores, which are consistent across a variety of assessments and test administrators,³⁴ indicate that Student's storage and retrieval of sound-symbol correspondence and orthographic patterns have not been mastered to the point of automaticity. Testimony of Ghiringhelli; exhibit P-22 (pages 2, 12).

Ms. Ghiringhelli testified that Student's weaknesses in syntax (i.e., word order and language organization) and morphology (i.e., word endings) also have a negative influence on his reading fluency and comprehension. She explained that these difficulties prevent him from predicting word endings and word order, resulting in his needing to read word by word. This deficit negatively impacts Student's learning throughout the day and can only be remedied through specialized instruction.³⁵ He has not internalized the structure of narrative text and

³² Ms. Ghiringhelli explained, in part, as follows: "[F]or a student to be able to focus on the meaning of text, mechanics of decoding must be automatic; otherwise, their cognitive efforts are spent on the process of decoding. Because [Student] is not automatic, he is at risk for comprehension difficulties." Transcript, vol. III, pp. 26.

³³ To illustrate, I note the following portions of Ms. Ghiringhelli's testimony: "He's at a point in his education where he's required to read to learn. If he's unable to read accurately, he will not be able to access the curriculum or learn the information he's expected to. This simulates his ability to decode words that are unfamiliar to him, which will be common in the upper grade levels, specifically in content areas. ... As he's faced with more unfamiliar words, if he doesn't build that skill, he will not be able to decode or access the curriculum efficiently, if he's expected to read to learn." ... [A]t the higher levels, the higher grade levels and in high school, he's going to be given a lot of work, and if it takes him ten hours to complete an assignment, he's not going to be able to complete all of his work." Transcript, vol. III, pp. 23-24, p. 52.

³⁴ As Ms. Ghiringhelli noted, this finding from her evaluation is generally consistent with recent administrations of the TOWRE by Ms. Clark (Triton's consultant) on February 7, 2013 (exhibit S-9), by Dr. Lasoski on July 29, 2013 (exhibit P-44) and by Ms. Hayden (Triton school psychologist) in May 2010.

³⁵ To illustrate, I note the following portions of Ms. Ghiringhelli's testimony: "syntax is one of the three components of language in terms of how it impacts reading. Kids who have adequate syntax are able to access their syntax to predict upcoming text while they're reading, so they don't need to necessarily read on a word-by-word basis but can access their language to predict text. ... This [syntax disorder] will impact his performance in oral and written communication, which at his level of his education, encompasses his whole day. So his ability to understand lecture

does not have a means of organizing what he reads for quick access, making it difficult for him to read for the purpose of finding salient information. Her report explained that this negatively impacts Student's learning abilities now and will impact him to a significantly greater extent as he advances in grade. Testimony of Ghiringhelli; exhibit P-22 (page 2).³⁶

In her report and testimony, Ms. Ghiringhelli strongly recommended specialized instruction, including reading remediation, as necessary to address Student's learning deficits, and opined that regular education would be ineffective in doing so. Testimony of Ghiringhelli (transcript, vol. III, pp. 20-21); exhibit P-22 (pages 3-6).

Dr. Lasoski's testimony and report supported Ms. Ghiringhelli's findings in several important respects. Dr. Lasoski found that Student presents with underlying deficits in phonological processing, directly related to his diagnosis of dyslexia, as reflected in his scores on the Elision (at the 2nd %tile) and the Phonological Awareness Composite Score (at the 3rd %tile). This is further reflected in her test of Student on the pseudoword decoding subtest of the Weschler Individual Achievement Test-III, which yielded a score at the 16th %tile. This score reflects a drop from the 25th %tile on this subtest when Student was tested at Boston Children's Hospital in April 2012. As Dr. Lasoski testified, Ms. Flaherty's testing scores placed Student at the 3rd %tile on the Ellison subtest of the CTOPP and the 3rd %tile in phonological awareness subtest of the CTOPP, with the result that the scores obtained by her and Triton reflect no substantial disagreement that Student presents with these deficits in areas that define him as being dyslexic. Testimony of Lasoski; exhibits P-44 (pages 8-9), S-10 (page 5).

Dr. Lasoski's report and testimony explained that Student's phonological deficit is what underlies his long-standing difficulty acquiring sound-symbol association such as sounding out nonsense words. She testified that Student's test score at the 5th %tile on the letter sequencing subtest of the Trail Making Test reflects Student's reading fluency difficulties and that "working with him on automaticity ... is critical to support fluency [transcript, vol. II, pp. 101, 131]." She opined that in order for Student to be able to read to learn, phonological rules must be learned, internalized, retrieved and applied with automaticity. She emphasized in her testimony that for Student, "automaticity is an enormous issue [and that] [a]utomaticity absolutely matters [transcript vol. II, pages 105-106]." She emphasized that Student's decoding and encoding skills must improve to attain a higher level of automaticity. Testimony of Lasoski; exhibit P-44 (pages 8, 9).

in the classroom, his ability to read, write, communicate with peers and teachers all rely on intact syntax." Transcript, vol. III, pp. 18, 20.

³⁶ Ms. Ghiringhelli testified (and her report reflects) that Student's syntax and morphology skills were assessed using the grammatical morphemes and sentence comprehension subtests of the Comprehensive Assessment of Spoken Language (CASL) test. Student's subtest scores were at the 27th %tile and 7th %tile respectively in these subtests, with the grammatical morphemes subtest score needing to be reduced when compared to Student's language abilities. Ms. Ghiringhelli noted that her scores were consistent with those of Dr. Lasoski's testing where Student scored at the 13th %tile in the grammaticality judgment subtest of the CASL and at the 16th %tile in the Menyuk syntactic comprehension subtest (exhibit P-44). Testimony of Ghiringhelli; exhibit P-22 (pages 2, 10-11).

Dr. Lasoski echoed Ms. Ghiringhelli's concerns that Student's development of further skills in these areas is essential to his gaining reading fluency and being able "to understand and extract meaning from sentences with different types of sentence construction." She noted that these are "skills required for his age and grade." In other words, Dr. Lasoski testified that Student should have acquired these fundamental reading skills at an earlier grade, and these lingering deficits will only become more problematic over time both with respect to reading and with respect to writing. Testimony of Lasoski; exhibit P-44 (pages 8, 9).³⁷

In the summary and recommendation sections of her report, Dr. Lasoski explained Student's current learning deficits and their impact on his learning. She particularly emphasized as a "prominent concern" Student's likely difficulties when he is faced with increasingly demanding reading, both with respect to reading load and reading complexity. She noted the need for "intervention so [he] will not fall below age peers and his verbal-intellectual ability", both now and in the future. She recommended as "critical" that Student receive specialized, remedial instruction to address his decoding/encoding deficit and develop skills that can be employed automatically. Exhibit P-44 (page 11).

Dr. Lasoski testified that without specialized instruction to address his fluency and automaticity deficits, Student is likely "to keep stumbling over words." Because one has "to sound out words multiple times to commit them to memory, [h]e's going to have difficulty committing words to memory. He's going to continue to be a worse speller ... than he is now, and that ... leaves him at risk, then, for difficulties at the word level also." Testimony of Lasoski (transcript, vol. II, p. 175).

Dr. Schonwald is a developmental pediatrician. Although she lacks some of the specific, technical knowledge of Dr. Lasoski and Ms. Ghiringhelli, she nevertheless has broad and substantial knowledge and experience regarding the educational needs of children with Student's learning profile, and she has seen and assessed Student on many occasions. She has sufficient experience and knowledge to render an expert opinion on the basis of her personal knowledge of Student and her review of the evaluations of others. Testimony of Schonwald.

Dr. Schonwald testified that she had read Student's recent evaluations (including Dr. Lasoski's neuropsychological evaluation, Ms. Clark's reading evaluation and Ms. Flaherty's educational evaluation). On the basis of these evaluations and her own knowledge of

³⁷ To illustrate Dr. Lasoski's testimony, I note the following portions of her testimony, as reflected in the transcript: "the real issue is, he is in sixth grade, so we expect younger children to be working on automaticity. By the time you're in sixth grade and you have to master more difficult words, particularly going forward in middle school, multi-syllabic words, words across different content areas that will be unfamiliar to him, he will have much more difficulty sounding those out. ... And the problem is that it's something that's occurring at the phonemic level. And why is that also a problem? Well, it affects reading, stumbling over words, but it also affects written output, because it leads to a sort of difficulty with insertion of more complicated words. ... So typically what the trajectory is is that difficulty with reading speed and the ability to extract information increases as the load increases or the complexity of the vocabulary words increase. ... But the problem is it's the automaticity. And the other problem is that the written expression is going to continue to be a difficulty also. So there are these pockets of predictable difficulty over time that need to be addressed." Transcript, vol. II, pp. 112-113, 121.

Student, she concluded that Student has underlying language deficits that negatively impact his ability to learn currently and will likely negatively impact his learning ability to a significantly greater extent as his academic program becomes more challenging. She noted, in particular, her concern about the effort that Student currently must use to decode words, with the consequent loss in reading fluency and comprehension. She emphasized the importance of currently addressing these deficits through specialized instruction. Testimony of Schonwald.

Dr. Schonwald testified that the presentation of Student's language deficits is subtle, but the deficits themselves (and their implications on his learning) are not. Dr. Schonwald explained as follows:

[H]is issues are subtle. And so that to the naked eye, they are harder to appreciate, yet they're not—I'm concerned that they're not -- the degree of the difficulties are not subtle, but the way they present can be. I am concerned; because when I read his testing, the neuropsychology testing -- that I know the tester expert who did the testing and is going to testify -- I'm concerned because it is very obvious to me that there are deficits there. To me, the findings are not subtle. I think the presentation in real life at any given moment can be less evident. But -- I find it confusing why we're even here, to tell you the truth, because the findings are so clear and black and white to me. I read testing reports like this every single day. He clearly has underlying deficits. He clearly has ongoing deficits that are diagnostic of a disability and indicate that absorbing the information around him as it gets more complicated in sixth grade is deficient. [Transcript, vol. II, pp. 41, 45-46.]

I have reviewed, above, in some detail the cogent and credible evidence submitted by each party to allow for an understanding of the depth and strength of each party's position, and the conflicting nature of their positions. One party's (Triton) witnesses would have me believe that Student is essentially no different than a regular education student with respect to his learning profile and needs, as evidenced by his successes in the classroom and on MCAS; while the other party's (Parent) witnesses seek to persuade me that when one looks below the surface of Student's apparent successes, one finds a fundamentally flawed learner whose deficits not only limit his learning now but will very likely do so to an ever greater extent in the future. After careful consideration of the weight to be accorded the reports and testimony of the parties, I make the following findings and conclusions.

I believe that Dr. Schonwald's testimony (in the block quote above) best sums up my understanding of the evidence as a whole. As she explained, the presentation of Student's language deficits at school may, at times, be subtle and therefore may be easily missed by his teachers. But, as she further explained and as the testimony and reports of Dr. Lasoski and Ms. Ghiringhelli made clear, the deficits themselves (and their implications on his learning) are not subtle, particularly in light of Student's substantial intellectual abilities. Testimony of Schonwald.

Student has substantial intellectual ability particularly in the verbal area, as reflected in his score on the Verbal Comprehension Index (75th %tile) of the WISC-IV. This particular subtest score is generally predictive of Student's high educational potential. Student is highly motivated to succeed at school. I consider Student's learning deficits in the context of these strengths. Testimony of Ghiringhelli, LaPerriere; exhibits P-44 (page 6), S-9.

The testimony and reports of Ms. Ghiringhelli, Dr. Lasoski and Dr. Schonwald, as summarized above, are persuasive that the nature of Student's underlying learning disability is that it limits his reading fluency and automaticity, as a result of decoding, syntax and morphology weaknesses. For example, Student's deficits negatively impact the amount of time that it takes him to read text and also limit his ability to gain meaning from text. He is, essentially, reading one word at a time. Typically, it is a struggle for him to understand a word that is not within his sight vocabulary. In sum, the testimony and reports of Parent's three experts were persuasive that these underlying language deficits substantially limit Student's ability to read and write, and to make progress in these areas commensurate with his educational potential. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44.

The testimony and reports of Parent's three experts, as summarized above, were also persuasive that one cannot expect or assume that Student's learning deficit can or will be remediated through general education, even with the best practices of his current, talented teachers. Ms. Clark, who was generally a credible expert regarding Student's reading, testified to the contrary, opining that Student's learning weaknesses would likely be rectified over time through general education services. But, the more persuasive testimony and reports of Parent's three experts were to the contrary. From their different professional perspectives of a speech-language pathologist/reading teacher, neuropsychologist and developmental physician, they repeatedly emphasized the same thing, which is that it is of critical importance that Student receive specialized instruction. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44. This evidence was persuasive that Student needs special education and related services to remediate his learning deficits and allow him to make meaningful and effective progress commensurate with his learning potential.

Triton argues to the contrary, summarizing its position that "[Student's] actual, successful performance in class and on the MCAS should be determinative." Triton's closing argument, p. 3. The response to this argument is contained within Ms. Ghiringhelli's testimony as explained below.

When responding on cross-examination to a series of questions from Triton's attorney, Ms. Ghiringhelli did not dispute Student's achievements in the classroom and on MCAS, but she explained that these achievements did not alter her opinion regarding Student's need for special education. She testified that her view, which I find persuasive, is that a child with Student's profile (he is bright, verbal and highly motivated) would be expected to be a "high participator" in the classroom while, at same time, his syntax disorder is likely limiting what he can understand or learn in the classroom. Similarly, he may be able to read text at grade level at this point in time, but Ms. Ghiringhelli explained that "as curriculum becomes more

difficult and he runs into words he's unfamiliar with, which may not be the case yet, he doesn't have the strategies to decode those words, and he will fall apart.” For essentially the same reasons, Ms. Ghiringhelli found Student’s barely passing score (240) on the English language arts portion of MCAS to be irrelevant since it is only a general test that did not specifically measure Student’s deficits in reading accuracy and fluency. In other words, when Student is measured by very general standards, such as his overall participation in class, overall reading level or MCAS scores, his intelligence, perseverance and compensatory strategies allow him to appear to be generally keeping up with his peers, but for Student these achievements do not reveal his specific but highly important learning deficits that are reflected in standardized testing results. Ms. Ghiringhelli was persuasive that these deficits continue to limit Student’s learning abilities to a significant degree even as he demonstrates areas of success at school. Testimony of Ghiringhelli (transcript, vol. III, pp. 41-44); exhibit P-22.

Triton has also taken the position that it is irrelevant that, in the future, Student may need special education services, and that therefore I should not consider the likely impact of Student’s learning deficits on his future learning. See Triton’s closing argument, pp. 7-8. I agree with Triton in so far as eligibility may not be established on the basis of Student’s future need for special education services. But, again, I find Ms. Ghiringhelli’s testimony on cross-examination to be a persuasive response to Triton’s line of reasoning. She explained in her testimony that it is appropriate and necessary to consider what Student must learn now in order to “build[] a foundation for his upper education”— that is, to provide specialized services currently in order to develop his learning potential. Testimony of Ghiringhelli (transcript, vol. III, p. 53, lines 4-5); exhibit P-22.

It is for these reasons that I find that although Triton has put forth credible, un rebutted and substantial evidence of Student’s various successes in school, this evidence does not effectively rebut the testimony and reports of Parent’s three experts that Student’s specific learning disability and dyslexia is substantially limiting what Student currently is able to learn in 6th grade.

I find that Student continues to meet the following state and federal eligibility standards. When taking into account Student’s “individual learning expectations”, his learning disability substantially limits his ability “to make documented growth in the acquisition of knowledge and skills ... within the general education program.”³⁸ And, “by reason of” one of the requisite disabilities, Student “needs special education and related services”³⁹ in order to address his “unique needs”.⁴⁰

Student’s eligibility may be established under the above analysis without more, but an additional and important basis supporting Student’s eligibility is the impact of his disability on learning potential. What Parent’s witnesses were most concerned about is that if

³⁸ 603 CMR 28.02(17).

³⁹ 20 USC 1401(3); 34 CFR 300.7.

⁴⁰ 34 C.F.R. § 300.39(b)(3).

Student's learning deficits are not addressed appropriately now through special education services, his foundational skills will not be appropriately developed, thereby substantially limiting his educational potential. Testimony of Ghiringhelli, Lasoski, Schonwald; exhibits P-22, P-44. As discussed above, the First Circuit has explained that the purpose of special education may be considered in an eligibility dispute,⁴¹ and the purpose of state and federal special education requirements includes "develop[ing] the student's individual educational potential"⁴² and "prepar[ing] [students] for further education."⁴³

Reduced to its essence, I make the following findings:

- 1) Student has learning disabilities (a specific learning disability and dyslexia) that preclude him from reading fluently;
- 2) his inability to read fluently substantially limits his ability to read to learn new information this school year and very likely will increasingly do so in each subsequent school year if unremediated;
- 3) reading to learn is fundamental to Student's education, including the development of his educational potential; and
- 4) only specialized instruction will likely remediate Student's fluency deficit.

On the basis of these findings, I conclude that it would be premature (both educationally and legally) to terminate Student's eligibility.

ORDER

Student remains eligible for special education and related services under state and federal special education laws.

By the Hearing Officer,

William Crane

Dated: December 18, 2013

⁴¹ See *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12-13 (1st Cir. 2007).

⁴² 603 CMR 28.01(3).

⁴³ 20 U.S.C. § 1400(d)(1)(A).

**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.