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

In Re: Quincy Public Schools **BSEA # 1403404**[1]

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 December 9, 10, 11 and 12, 2013 in Quincy, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Student's Father	
Chrisann Merrick	Clinical Social Worker, Private Practice
Jennifer Mayer	Audiologist, Private Practice
Terrell Clark	Pediatric Psychologist, Children's Hospital Boston
Kristen Oberg	Social Studies Teacher, Marshfield Public Schools
Joy Wilmouth[2]	Auditory Verbal Therapist, Private Practice
Judith Tryon	Science Teacher, Marshfield Public Schools
Stacy Burm	Math Teacher, Marshfield Public Schools
Joan Shea	Special Education Teacher, Marshfield Public Schools
Sylvia Pattavina	Student's Case Manager, Quincy Public Schools
Catherine Carey	Special Education Administrator, Quincy Public Schools
Richard Kelly	Administrator, Quincy Public Schools
Deborah Podbelski	Special Education Administrator, Marshfield Public Schools
Judith Todd	Director of Special Education, Quincy Public Schools
Susan Dupuis	Director of Special Education, Marshfield Public Schools
Michael Turner	Attorney for Parents and Student
Doris MacKenzie Ehrens	Attorney for Quincy Public Schools
Jane Williamson	Court Report, Doris O. Wong Associates

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-33; documents submitted by the Quincy Public Schools (hereinafter "Quincy") and marked as exhibits S-1 through S-37; and approximately three

[1] This case was consolidated with BSEA # 1307468 and # 1302133c.
[2] Ms. Wilmouth testified by telephone.

and one-half days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due on February 10, 2014, and the record closed on that date, except that by agreement of the parties, the record was held open until February 26, 2014 for the purpose of admitting into the record exhibit S-37 which is the IEP signed by Parents on February 19, 2014.

STATEMENT OF ISSUES

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

1. Is Quincy's IEP (proposed at the beginning of the 2013-2014 school year) reasonably calculated to provide Student with FAPE in the least restrictive environment; and if not, what changes to the IEP are required in order to meet this standard?

2. Has Quincy complied with the November 21, 2012 Decision (and Student's stay-put rights based on this Decision) and if not, what relief (including compensatory educational services), if any, should be awarded?

3. What residential living expenses, travel expenses, tutoring expenses and other expenses have been incurred by Parents from the beginning of the 2012-2013 school year to the present, and to what extent should these expenses be reimbursed by Quincy?

The Decision will also address Parents' request that the BSEA "[m]ake findings of facts that Quincy has acted with deliberate indifference, gross misjudgment, animus towards [Student] in violation of the IDEA, Section 504, MGL c. 71B and their regulations." See Parents' Hearing Request, last page.

STUDENT'S PROFILE

Student is a fourteen year old 7th grader. Since the beginning of the current school year, she has been attending a special education program within the Marshfield Public Schools pursuant to a tuition-in agreement between the Quincy School District and the Marshfield School District. While attending the Marshfield program, she has been living with her Parents in Quincy, MA.

It is not disputed that Student's educational profile remains essentially unchanged since I issued a previous Decision on November 21, 2012 regarding a dispute between the same parties (hereinafter "November 21, 2012 Decision"). Testimony of Mayer, Clark[3]; exhibit P-

[3] As a pediatric psychologist, Terrell Clark, PhD, has evaluated Student nearly every year since 2001, observed Student in her program at Learning Prep School and has substantial expertise both in the area of deafness and hard-of-hearing as an educational disability and in the area of learning disabilities. She has worked in the area of special education, is fluent in American Sign Language, is an assistant professor at Harvard Medical School Department of Psychiatry and for more than three decades has been the director of the Deaf and Hard-of-Hearing Program at

5. Accordingly, for purposes of describing Student's profile and other background information, I will borrow from the November 21, 2012 Decision, with updated additions and other modifications as needed.

Although not entirely deaf, Student has a bilateral, sensorineural hearing loss that is communicatively and educationally significant. Relying on her residual hearing, and the use of binaural hearing aids and an FM system for amplification at school, she is and always has been an aural/oral learner/communicator (i.e., she is a listener and talker). She also relies upon visual cues to support her understanding of spoken language. She has never learned (or wanted to learn) sign language. She (and Parents and Dr. Clark) understand her to be an aural/oral student who has a significant hearing loss. See November 21, 2012 Decision, p. 3.

Student is also diagnosed with deficits in expressive and receptive language, and language-based learning disabilities. It has never been disputed that in order to provide an appropriate educational program for Student, both her learning disability and her hearing disability need to be simultaneously and appropriately addressed. Thus, in the November 21, 2012 Decision, I wrote that it was undisputed that, as explained in an evaluation by Dr. Clark, Student "continues to require a small, language-based class where her language and learning needs are addressed by professionals who employ special educational techniques to circumvent and compensate for learning disabilities and for the effects of her significant hearing loss." See November 21, 2012 Decision, p. 3. In her testimony in the instant dispute and in her more recent evaluation of Student in February/March 2013, Dr. Clark continued to make this recommendation. Testimony of Clark; exhibit P-16(C).

Student's cognitive profile has remained relatively stable over time. Her 2011 test scores on the WISC-IV reflect functioning in the Low Average range in the Verbal Comprehension area (index score of 85) and functioning in the Average range in the Perceptual Reasoning or non-verbal area (index score of 96). See November 21, 2012 Decision, p. 3.

The one notable change in Student's profile since my earlier Decision is that her hearing receptivity has changed. Student's audiologist (Ms. Mayer) testified that as reflected in her testing of Student from December 2012 to August 2013, her hearing thresholds have decreased somewhat (by five to ten decibels), thereby requiring that sound be louder for her to hear it. She explained that this is considered only a "slight" decrease in hearing ability. Testimony of Mayer, Clark.

HEARING REQUESTS IN INSTANT DISPUTE AND PRELIMINARY RULINGS

On April 24, 2013, Parents filed with the BSEA their first hearing request in the instant dispute, alleging that Quincy had not complied with my November 21, 2012 Decision because Quincy had not located or created an appropriate educational program for Student. At that time, Student was still in her stay-put placement at the Clarke School as a day

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Children's Hospital Boston. Parents called Dr. Clark as their witness, but both Quincy and Parents have relied upon Dr. Clark's opinions for purpose of making educational decisions regarding Student.

student, with Mother maintaining a temporary residence in Northampton during the week for purposes of supporting Student's placement there. Thus, this part of the hearing request was essentially a compliance complaint.

Rather than seeking to require Quincy to "locate or create" an alternative placement (as required by my November 21, 2012 Decision), Parents' compliance complaint sought an order requiring Quincy to immediately provide Student (at Clarke School) with a special education teacher who is knowledgeable in deaf education and to take whatever additional steps are necessary to make Clarke an appropriate placement for Student.

Parents sought two years of compensatory services "due to the lack of appropriate summer services, lack of a current appropriate IEP, and failure to provide a special education teacher in [Student's] current placement". The hearing request also sought reimbursement of Parents for "all costs they have had to endure", which would include Mother's costs of living in Northampton during the week.

On May 6, 2013, Quincy filed its response to Parents' hearing request. Quincy generally denied that it had failed to comply with my Order requiring it to "locate or create" an appropriate program and took the position that "Parents have been and are sabotaging Quincy's efforts to create a program for [Student] which meets the hearing officer's criteria." Quincy denied any responsibility to improve the Clarke placement, and sought to rebut Parents' claims for compensatory services and reimbursement of living expenses in Northampton.

On June 14, 2013, Parents filed a Motion for Summary Judgment, seeking a finding by the Hearing Officer that Quincy violated the "locate or create" order in the November 21, 2012 Decision. Their Summary Judgment Motion also sought an order that Quincy take steps to make Clarke appropriate for Student so that she may continue to go to school there for the next two school years. Parents' Motion further sought "full reimbursement for their costs associated with the placement of [Student] at the Clark[e] School and the related travel costs included [sic] tutoring costs and support costs for the 2012-2013, 2013-2014, and 2014-2015 school years."

On June 14, 2013, Quincy filed a Motion to Dismiss and/or Summary Judgment. Quincy sought to dismiss Parents' hearing request, in its entirety, on the basis of res judicata and the rule prohibiting parties from splitting their cause of action. Quincy also sought dismissal of Parents' reimbursement claims for living expenses, arguing that there was no legal basis for such claims. Quincy sought summary judgment on Parents' claim for compensatory services, arguing that this claim is barred by a settlement agreement, accepted IEP and the November 21, 2012 Decision.

By ruling dated July 11, 2013, I denied Parents' Motion for Summary Judgment and allowed in part and denied in part Quincy's Motion to Dismiss and Motion for Summary Decision. More specifically, with respect to Parents' reimbursement claim regarding Mother's living expenses, I dismissed the claim with respect to expenses that had not actually been incurred

by the date of the evidentiary hearing because one may not reimburse expenses that have not been incurred, but otherwise denied Quincy's motion to dismiss this claim. With respect to Parents' compliance claim, I denied Quincy's motion to dismiss. With respect to Parents' compensatory claim, I dismissed this claim except for any compensatory relief that may be due as a result of any compliance violations. With respect to Parents' claim regarding Quincy's obligation to add a special education teacher and other supports at Clarke School, I allowed Quincy's motion to dismiss.

The above dispute was BSEA # 1307468 and BSEA # 1302133c.

On November 5, 2014, Parents filed a second hearing request in the instant dispute, again making compensatory and reimbursement claims and alleging that Quincy had not complied with the November 21, 2012 Decision. This hearing request named both Quincy and Marshfield School Districts as parties. Marshfield filed a motion to dismiss, which I allowed by Ruling dated November 26, 2013. The Ruling dismissed Marshfield because Parents' hearing request included neither legal claims nor requested relief against Marshfield. Exhibit P-6.

This dispute was BSEA # 1403404.

Through my Order of November 13, 2013, all outstanding claims were consolidated. In relevant part, my Order read as follows:

> By agreement of the parties, the instant dispute (BSEA # 1403404 which was initiated by Parents' November 5, 2013 Hearing Request) is consolidated with BSEA # 1307468 (which is a related, on-going dispute between Student and Quincy). Also consolidated herein are any outstanding compliance claims relative to BSEA # 1302133c. As a result, this consolidated action includes all outstanding issues between Student and Quincy, and incorporates all BSEA orders, rulings and decisions as well as all of the filings by the parties in the three cases.

The instant Decision therefore resolves all of the parties' outstanding claims in BSEA # 1403404, 1307468, and 1302133c.

FACTUAL AND PROCEDURAL BACKGROUND

2007-2008 school year through the 2010-2011 school year. For the 2007-2008 school year, Student was unilaterally placed by Parents at the Learning Prep School, a private school for learning disabled children in Newton, MA. For the subsequent three school years (i.e., through the 2010-2011 school year), Student continued to be placed at Learning Prep; but instead of this occurring through a unilateral placement by parents, the placement occurred through a settlement agreement between the parties. The settlement agreement provided for Quincy to pay for tuition and transportation, but specifically relieved Quincy of any responsibility to provide accommodations or services relevant to Student's hearing loss.

Parents believed that the Learning Prep School would appropriately address this area of need without any assistance from Quincy. See November 21, 2012 Decision, p. 5.

2011-2012 school year. For this school year, Quincy proposed an IEP that would continue Student's placement at Learning Prep. Because they were not satisfied with Learning Prep, Parents rejected the IEP and filed a hearing request with the BSEA. The parties resolved their dispute through a settlement agreement that provided for Quincy to place Student residentially at Clarke School for Hearing and Speech (hereinafter, "Clarke School") in Northampton, MA. The residential component of the program was needed only because the distance between Quincy and Northampton was too long for Student to commute daily. She typically spent Monday through Thursday nights at Clarke, returning home for the weekends. During this school year, she repeated 5th grade by agreement of Parents and the Clarke School. Student was then twelve years old. See November 21, 2012 Decision, p. 5.

2012-2013 school year. On May 3, 2012, Parents filed a hearing request with the BSEA, seeking an order requiring Quincy to continue funding Student's placement at Clarke for the 2012-2013 school year. As noted above, Student had previously attended Clarke as a residential student, but Clarke had terminated its residential program effective the end of the 2011-2012 school year, and Clarke offered only a day program for the 2012-2013 school year. In light of these changed circumstances, Parents, through their hearing request, sought an order from the BSEA requiring not only that Quincy pay for the Clarke day program tuition but also pay for Parents' living expenses in the Northampton area so that Student would have sufficient residential support from her Parents so that she could continue to attend Clarke, this time as a day student. See November 21, 2012 Decision, p. 5.

Prior to the scheduled hearing dates in that dispute and prior to the beginning of the 2012-2013 school year, the parties settled their differences, and Parents withdrew their hearing request. Their settlement agreement required Quincy to fund Student's tuition as a "publicly-funded residential student" at Clarke. Quincy's obligation to do so was made contingent upon Quincy's "obtain[ing] sole source approval for [Student's] residential placement at Clarke." See November 21, 2012 Decision, pp. 5-6.

Quincy included this "sole source" language in the agreement because Clarke no longer had a residential program and, to the extent Clarke had created an as yet unapproved residential program, Quincy could not place Student there without prior approval and it could not expend public funds for the program without price authorization. See November 21, 2012 Decision, p. 6.

After the settlement agreement was signed, Quincy completed its portion of the sole source application and forwarded the application to Clarke for it to complete its portion. Clarke did not do so. Clarke took the position that it could not complete the application because it did not have a residential program and could not develop a budget for a program it did not have. See November 21, 2012 Decision, p. 6.

Because Quincy's payment of the Clarke tuition was made expressly contingent upon sole source approval and because sole source approval was never obtained, Quincy did not make tuition payments to Clarke for the 2012-2013 school year. Nevertheless, apparently because the parties (and Clarke School) assumed that there was an agreement pursuant to which Student would attend Clarke School, she began attending Clarke as a day student at the beginning of the school year and continued to attend until September 24, 2012 when Clarke informed Parents that because it had received no tuition payment, Student must terminate immediately. See November 21, 2012 Decision, p. 6.

On September 14, 2012, Quincy filed its own hearing request with the BSEA, seeking a determination that its proposed IEP for the current school year was appropriate. On October 2, 2012, Parents' attorney filed a motion, seeking that I determine Student's stay-put placement to be the Clarke School, and that Quincy be ordered not only to pay for this day placement but also to pay for Parents' living expenses in the Northampton area, where Clarke is located. See October 10, 2012 Stay-Put Ruling, p. 1.

During the motion hearing, Parents' attorney represented that although Parents were seeking payment of their residential support services, they would be willing, at their own expense, to cover their residential expenses in Northampton so as to support their daughter's attendance at Clarke as a day student in the event that I did not order Quincy to pay for Parents' residential services. In a ruling dated October 10, 2012, I found that it was only the Clarke School day program that could offer Student an educational program that would be comparable to her previous residential placement at Clarke. My ruling determined the Clarke day program to be Student's stay-put placement but declined to consider the merits of Parents' prospective claim that Quincy pay for Parents' living expenses, essentially reserving this issue for possible consideration at a future time as a reimbursement claim. Quincy was ordered to immediately place Student in Clarke's day program. See October 10, 2012 Stay-Put Ruling, pp. 5-7.

Student then began attending Clarke again. At her own expense, Mother obtained a hotel room in the area during the week, providing Student with the residential support needed for her to attend Clarke. See November 21, 2012 Decision, p. 7.

An evidentiary hearing was held to resolve the issues in Quincy's September 14, 2012 hearing request regarding the appropriateness of its proposed IEP. The Decision was issued on November 21, 2012 (i.e., the November 21, 2012 Decision). The Order in the November 21, 2012 Decision stated the following:

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

> Clarke School for Hearing and Speech also does not (and cannot) satisfy this standard. Parents have not established a right to prospective payment of residential living expenses in the Northampton area to support Student's attending Clarke. Therefore, placement at Clarke is not appropriate.
>
> Because no appropriate educational program has been proposed by either party, Quincy shall, as soon as possible, locate or create an appropriate educational program that meets each of the three criteria specified above and that is otherwise consistent with the instant decision. [See November 21, 2012 Decision, p. 23.]

2012-2013 school year. After receiving the November 21, 2012 Decision, Quincy sought to locate or create a program that would meet the criteria set forth in that Decision and that would be acceptable to Parents. Quincy's efforts continued through the 2012-2013 school year, as detailed in a separate section below regarding reimbursement. Notwithstanding these efforts, Quincy was unable to locate or create such a program for the 2012-2013 school year. As a result, pursuant to the BSEA's stay-put order, Quincy continued to place Student at Clarke School as a day student through the entire 2012-2013 school year.[4]

2013-2014 school year. Since the beginning of the 2013-2014 school year, Student has been attending a special education program within the Marshfield Public Schools pursuant to a tuition-in agreement between the Quincy School District and the Marshfield School District. While attending the Marshfield program, Student has been living with her Parents in Quincy. I recount below the process that led to Student's placement in this program and then describe the program itself.

In July 2013, Quincy's attorney became aware of a Marshfield special education program and suggested it to the Quincy Director of Special Education (Ms. Todd) as a possible placement for Student. Ms. Todd spoke with Marshfield's Special Education Director (Dr. Dupuis), Quincy shared with Marshfield the November 21, 2012 Decision, and Marshfield notified Quincy that its program may be appropriate for Student. Quincy was encouraged that Marshfield had experience teaching deaf students and had a language-based learning center program taught by a special education teacher who is also a teacher of the deaf. Testimony of Todd, Dupuis. [5]

On August 1, 2013, there was a Team meeting that included Parents, Quincy staff and Marshfield staff. The Marshfield special education program was discussed, including the language-based learning center where Student would receive much of her instruction. Parents were informed that social studies and science would be taught within an inclusion

[4] The November 21, 2012 Decision explained that "pursuant to the stay-put order in my ruling of October 10, 2012, Quincy remains responsible for continuing Student's placement at the Clarke School until Quincy has located or created an appropriate program and the program is able to begin providing appropriate educational services to Student." November 21, 2012 Decision, p. 23.

[5] The Marshfield Public Schools had been briefly discussed by the parties on an earlier date and Ms. Todd had made an inquiry; but apparently Ms. Todd asked "the wrong question" and was told by Marshfield that it did not have a program that was appropriate for Student. Testimony of Todd.

classroom, rather than through a language-based, special education classroom. With its then current staffing, Marshfield would be unable to provide a language-based classroom for Student for science and social studies, and Marshfield believed that Student would benefit from inclusion classes for these subjects. Testimony of Todd, Podbelski, Mother; exhibit S-20.

On August 8, 2013, a second meeting occurred, and at Parents' request, Quincy staff were not present. During the meeting, Parents had further discussions with Marshfield staff about its program. Again, Parents were informed that the social studies and science classes would be taught through an inclusion model, rather than a language-based classroom. Dr. Dupuis testified that Parents expressed concern about social studies and science because they would not be taught by a teacher of the deaf. [6] Testimony of Dupuis, Mother.

It cannot be disputed that in proposing the Marshfield program for Student in general and in proposing the IEP in particular (discussed below), Quincy did not comply with the November 21, 2012 Decision. The Decision required that all of Student's academic subjects be taught within a language-based classroom. The requirement of language-based instruction in all academic subjects reflected Dr. Clark's continuing opinion that such instruction was a critical ingredient to an appropriate educational program for Student. During the hearing in the instant dispute, Dr. Clark testified that she continued to hold this opinion regarding Student's needs and how they should be met. However, as discussed above, Quincy and Parents knew since the Marshfield program began to be considered, that it would not be possible for Student to be taught social studies and science in a language-based classroom if she were to attend Marshfield.

By the time that the Marshfield program was being considered, Parents believed that they had no options other than the Marshfield program. Mother testified that it would be too expensive for Student to continue at the Clarke School (in part, because Mother cannot work while she is living in Northampton), and that no other schools had accepted Student. For reasons that will be explained below in the section of this Decision discussing reimbursement, I have found that Parents were directly responsible for the fact that no other schools had accepted Student for the 2013-2014 school year. And, as also discussed below, it is reasonably likely that, if Parents had provided their full cooperation, Student would have been accepted into an educational program where all academic subjects would be taught in a language-based classroom.

Thus, even though the Marshfield special education program did not fully comply with the November 21, 2012 Decision, the parties agreed that Student would attend this program for the 2013-2014 school year.

[6] Parents have not infrequently taken the position that a teacher of the deaf should instruct Student in all of her academic classes, even though Parents' expert (Dr. Clark) has never made this recommendation, nor is there is any other expert testimony or report making this recommendation, nor does the November 21, 2012 Decision require it. See, e.g., exhibits P-2 (par. 5), S-4 (par. 3), S-5 (par. 21), S-20 (pp. 31A, 31B).

Quincy proposed an IEP for the period 8/27/13 to 6/15/14, placing Student in the Marshfield program. According to this IEP, Student would have a 1:1 aide with her at all times, and would receive her English language arts, reading and math instruction in a substantially-separate classroom. Student would receive her science and social studies within an inclusion classroom. Student would also receive speech-language services 2X60 minutes per six-day cycle, academic support of 6X45 minutes per six-day cycle, and reading tutorial of 2X45 minutes per six-day cycle. Consultation was proposed from the special education teacher for ten minutes per day, from an educational audiologist for a half hour per month, and from the speech-language pathologist for a half hour per month. Exhibits P-18, S-13.

Student began the Marshfield program on August 27, 2013, which was the first day of the 2013-2014 school year, and she has continued in this program through the time of the hearing. On September 5, 2013, Parents accepted the IEP services and placement with the general caveat that they were requesting additional services as reflected in recommendations from their expert (Dr. Clark) and as reflected in my November 21, 2012 Decision. Parents' accompanying letter added specific concerns, including the need for Student to be taught in language-based classrooms for social studies and science. Student has been attending the Marshfield program and receiving special education and related services pursuant to this partially-accepted IEP. Testimony of Mother; exhibit S-13.

Within Student's inclusion social studies classroom, there are 24 children (nine of whom are on IEPs), one regular education teacher (Ms. Oberg), Student's 1:1 aide, another aide who is assigned to assist those students (including Student) from Ms. Shea's language-based program, and a third aide. Student's 1:1 aide and the aide from Ms. Shea's program are there to assist Student by checking to make sure that she understands (and hears correctly) what is being taught, by providing supplemental instruction as needed, and by taking notes for her. Ms. Oberg works closely with (and frequently receives consultation from) Student's special education teacher (Ms. Shea) whose classroom is directly across the hall. Testimony of Oberg, Shea.

In social studies, Student finished the first trimester (August 27, 2013 to November 22, 2013) with a grade of B, which placed her towards the top of the middle part of the class. Her academic performance since November 22, 2013 has been similar, although Ms. Oberg noted that several of Student's more recent homework assignments have not been completed. Ms. Oberg testified that Student participates in class, seems engaged and interested in learning, and appears to understand what is being said in class. However, when observing this class on one day, a private auditory verbal therapist (Joy Wilmouth)Clarke School noted that Student did not appear to completely understand what was being taught. Overall, Ms. Oberg opined that Student is making appropriate academic progress in her classroom. Testimony of Oberg, Wilmouth; exhibit S-14.

Within Student's inclusion science class, there are 22 children (four of whom are on IEPs), one regular education teacher (Ms. Tryon), Student's 1:1 aide, and another aide who is assigned to assist those students (including Student) from Ms. Shea's language-based program. As in social studies, the two aides are there to assist Student by checking to make

sure that she understands (and hears correctly) what is being taught, by providing supplemental instruction as needed, and by taking notes for her. Ms. Tryon works closely with (and frequently receives consultation from) Student's special education teacher (Ms. Shea) whose classroom is directly across the hall. Testimony of Tryon, Shea.

In science Student finished the first trimester (August 27, 2013 to November 22, 2013) with a grade of B minus (79), which placed her somewhat below the class average of 84. Her academic performance since November 22, 2013 has been similar or slightly better (grade of B or B minus). Ms. Oberg testified that Student's grade reflects her work on labs, tests, quizzes, and oral presentation in class. Ms. Tryon testified that Student understands the content most of the time, always understands what is being said, is an active learner in the classroom, participates in class almost daily and makes good connections between what she is learning and her own experiences. She noted, however, that Student has at times expressed frustration with her difficulty in understanding certain concepts. When observing this class on one day, Ms. Wilmouth noted that Student did not appear to understand some of the concepts being taught. Testimony of Tryon; exhibit S-14.

Ms. Shea testified that in both science and social studies, Student benefits from learning with regular education students. She explained that Student learns a substantial amount from her peers and Student values the opportunity to socialize and make friends with the regular education students. The Marshfield Director of Special Education Services for the Middle School (Ms. Podbelski) testified as to the importance of special education students in 7th grade having opportunities for social and academic involvement with regular education students. She supported the appropriateness of Student's participation in inclusion social studies and science classes, particularly where Student appears to have been successful so far. Student's private therapist (Ms. Merrick) testified that Student appears to be enjoying her social studies and science classes. Testimony of Shea, Merrick.

For reading, English language arts and academic support, Student is being taught by Ms. Shea who is both a special education teacher and a teacher of the deaf. These classes address Student's weaknesses in phonological awareness, word recognition, and reading comprehension. Ms. Shea specializes in oral/aural communication with children who are deaf or hard of hearing. Student receives her reading instruction from Ms. Shea in a 1:1 format. She receives her English language arts instruction from Ms. Shea in a small group of three or four children. Ms. Shea provides Student with language-based instruction in reading and English language arts. Ms. Shea testified that Student received a grade of A-minus in both reading and English language arts and opined that Student is making effective progress in these classes, as evidenced, for example, by Student's demonstrated progress in accessing reading materials at grade 4.0 level, learning new vocabulary words, and making progress in sequencing. Ms. Shea's written progress report further documents progress in reading and English language arts—for example, by completing the first unit in the Reading Milestones program and learning how to write a paper on a topic that includes specific information. At the same time, this testimony and report demonstrate Student's very low academic level in reading and English and the challenges she faces in these subjects. Testimony of Shea; exhibit S-33.

Student receives her academic support from Ms. Shea in a small group of three or four children. Academic support assists Student with her social studies and science classes by previewing, reviewing, developing study strategies and learning vocabulary used in these classes. Testimony of Shea.

For math, Student receives her instruction from Ms. Burm in a 1:1 format. Ms. Burm is a special education teacher. It is not disputed that Student's math instruction is excellent and is meeting her needs. Exhibit S-34.

Student also attends mainstream elective courses in music and computer science. Student's 1:1 aide accompanies Student for these classes. Testimony of Shea.

Quincy has recently hired Theresa Goodchild to provide additional services to Student for nine hours per week—seven and a half hours per week will be consultation and assistance within Student's inclusion classes (for example, assisting with previewing and reviewing, and helping Student learn language and concepts that are difficult for her), and the remaining time will be direct speech and language services for Student. Ms. Goodchild, who is speech-language pathologist and a teacher of the deaf, is expected to provide services that are responsive to Dr. Clark's concerns regarding Student's attendance in social studies and science inclusion classrooms. Testimony of Podbelski, Todd, Dupuis; exhibit S-31 (resume).

As discussed above, it is not disputed that appropriately accommodating Student's hearing disability is critical to effectively educating Student. In August 2013, Marshfield contacted Student's private audiologist (Ms. Mayer), requesting her assistance. At Marshfield's request, Ms. Mayer conducted an in-service training for Marshfield staff on September 5, 2013 for the purpose of helping staff understand how to use Student's FM system. The FM system provides direct audio output from the speaker to Student, through a transmitter worn by the speaker (typically, the teacher at school) and receivers that are attached to Student's hearing aids. Testimony of Mayer.

During the September 5th visit and again at Marshfield's request, Ms. Mayer visited Student's classroom. Ms. Mayer provided Marshfield with recommendations regarding sound-dampening techniques and equipment (including "hush-ups" that fit over chair legs, a quieter filter for a fish tank, and acoustical tiles) within the classrooms, as well as preferential classroom seating for Student. Within two days of Ms. Mayer's visit, Marshfield had ordered 16 boxes of "hush-ups" which would be sufficient for all of Student's classrooms and began the process of exploring what acoustic tiles should be purchased and installed. Dr. Dupuis testified that Marshfield is still in the process of determining what tiles to purchase and how they should be used; she noted that within Marshfield, there is a multi-layered decision-making process for making these kinds of decisions. Testimony of Mayer, Dupuis.

From September 5, 2013 through November 2013, Student had repeated difficulties with her hearing aids and FM system at school. Student complained of intermittent static,

interference and beeping. On numerous occasions, Ms. Mayer received telephone calls or e-mails from Marshfield staff reporting on these problems. Ms. Mayer would then seek to address the problems. Testimony of Mayer, Dupuis.

This was a very challenging several months for Student. At times, she even stopped trying to use the FM system and her hearing aids at school. This combined with Student's initial challenges adjusting to a public school for the first time in her life made September, October and November challenging months for Student. Yet, through all of this, Student wanted to continue attending the Marshfield program. Testimony of Mother, Merrick.

This was also a frustrating period of time for Marshfield staff as they sought, unsuccessfully, to address the on-going concerns with the FM system with Ms. Mayer's assistance. Although Marshfield has a teacher of the deaf on staff (Ms. Shea), neither she nor any other Marshfield or Quincy staff is capable of addressing equipment malfunctions (i.e., problems with Student's FM system and hearing aids). Thus Marshfield and Quincy were entirely dependent upon the assistance and recommendations of Student's private audiologist (Ms. Mayer). Ms. Mayer testified that in her opinion, Marshfield and Quincy followed appropriate protocols, and she does not believe that anything additional should have been done to address this on-going concern, and that the malfunctioning of the FM system had nothing to do with Student's placement at Marshfield. There is no evidence to the contrary. Testimony of Mayer.

Eventually, Ms. Mayer recommended that a new FM system be purchased for Student, and Quincy immediately purchased a new system. Ms. Mayer ultimately concluded that the problem was caused by the combination of the FM system and Student's hearing aids. It is not disputed that if Ms. Mayer had recommended purchase of a new FM system at any earlier time, Quincy would have purchased it then. Since the purchase of the new FM system at the end of November 2013 together with new hearing aids, Student has not had further difficulties with her FM system and hearing aids. Testimony of Mayer; exhibit S-21.

LEGAL STANDARDS

It is not disputed that Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA) and the Massachusetts special education statute (M.G.L. c. 71B).

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."[7] "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."[8] An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability.[9] A student is not entitled to

[7] 20 U.S.C. § 1400 (d)(1)(A).
[8] *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).
[9] 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

the maximum educational benefit possible or "even the best choice".[10] Rather, the IEP must be "reasonably calculated to confer a meaningful educational benefit."[11] The appropriate level of progress varies for each student, "with infinite variations" depending on the particular individual's constellation of disabilities and strengths.[12]

The IDEA reflects a preference for mainstreaming disabled students.[13] This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children.[14] "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs."[15] Similarly under Massachusetts law, FAPE must be provided in the least restrictive environment.[16]

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

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations[17] and which may exceed the federal floor[18]) seek "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment."[19] In addition,

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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)).

[10] 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.").

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

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

[13] 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

[14] 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).

[15] *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).

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

[17] See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the "education standards established by statue or established by regulation promulgated by the board of education").

[18] 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]").

[19] See 603 CMR 28.01(3) ("purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws"). See also MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential"); MGL c. 71B, s. 1 (term "special education" defined to mean "educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities").

Massachusetts regulatory standards require that Student's IEP Team "include specially designed instruction or related services in the IEP designed to enable the student to progress effectively in the content areas of the general curriculum."[20] For purpose of determining whether a student is making effective progress, consideration must be given to a student's "chronological age and developmental expectations" as well as his or her "individual educational potential".[21]

Parents have the burden of persuasion on all issues.[22]

DISCUSSION

Parents' Prospective Claims

Parents' hearing request includes a claim that Quincy's IEP (proposed at the beginning of the 2013-2014 school year) is not reasonably calculated to provide Student with FAPE.[23] During the evidentiary hearing, the parties provided substantial evidence regarding this prospective claim.

However, very near the end of the hearing, Parents requested an opportunity to meet privately with Dr. Dupuis and (with the attorneys' concurrence) the hearing was postponed for a short period of time while these discussions occurred. Through this meeting, the parties were able to reach an agreement in principle regarding Student's continuing placement in the Marshfield program and the services she would receive there. As agreed by the attorneys, Dr. Dupuis read into the record her understanding of the parties' agreement and the parties agreed, on the record, that her understanding was correct and made unnecessary my resolution of the question of the appropriateness of Quincy's most recent IEP. Also by agreement of the parties, I held the record open so that the parties could file with me Quincy's new IEP that would be agreed to by Parents, and this IEP would be marked as exhibit S-37.

After the close of the evidentiary portion of the hearing, and after further discussions and meetings with Parents and Marshfield, Quincy proposed an IEP that has been full accepted

[20] 603 CMR 28.05 (4) (b).
[21] See 603 CMR 28.02(17) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.")
[22] See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing is placed upon the party seeking relief).
[23] This prospective issue is substantively different than Quincy's obligations to comply with my November 21, 2012 Decision (discussed above). As explained to the parties in my Order of November 13, 2013, I would not find that Quincy has a prospective, continuing obligation to provide services mandated within my November 21, 2012 Decision without persuasive evidence presented at the then-upcoming Hearing that Student continues to require these same services in order to receive FAPE.

by Parents. Exhibit S-37. It is agreed by the parties that this accepted IEP resolves all of Parents' prospective claims within their hearing requests in the instant dispute.

For these reasons, I find that Parents' prospective claims, has been resolved informally by the parties, with the result that I need not make any findings or rulings on this part of the dispute, which is issue # 1 (see "Statement of Issues", above).

Parents' Compensatory Claims

As discussed above in the section entitled "Hearing Requests in Instant Dispute and Preliminary Rulings", Parents raised compensatory claims in their various hearing requests in the instant dispute. Through their hearing requests, Parents sought two years of compensatory services "due to the lack of appropriate summer services, lack of a current appropriate IEP, and failure to provide a special education teacher in [Student's] current placement."

My November 26, 2013 Order stated that Parents' compensatory claim would be addressed at the evidentiary hearing (see the November 26th Order, as well as Parents' closing argument, p. 1, referencing this Order); at the beginning of the evidentiary hearing in the instant dispute, the compensatory claim was recited by me as one of three issues to be addressed during the evidentiary hearing (see Transcript, vol. I, p. 7); and when the prospective claims were settled near the end of the evidentiary hearing, I explained on the record (and it was agreed by Parents' attorney) that the remaining two issues included Parents' compensatory claims (see Transcript, vol. IV, p. 33).

Parents' closing argument makes no reference to their compensatory claims. Quincy's closing argument addressed Parents' compensatory claims (as well as their reimbursement claims). After receiving Quincy's closing argument, Parents have not requested an opportunity to supplement their closing argument for the purpose of addressing compensatory claims.

In the First Circuit, the rule of waiver for failure to argue a claim is well-settled: "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."[24] "[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."[25]

Because Parents, through their attorney, have not addressed the compensatory claims within their closing argument, I consider Parents' compensatory claims to be waived, with the result that I need not make any findings or rulings on this part of the dispute, which is issue # 2 (see "Statement of Issues", above).

[24] *Rose et al. v. Yeaw*, 214 F.3d 206, n.2 (1st Cir. 2000), quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990). See also *De Giovanni v. Jani-King Intern.*, Inc., 2013 WL 5108659, *2-3 (D.Mass. 2013) (discussing waiver rule).
[25] *Zannino*, 895 F.2d at 17 (internal quotation marks omitted).

Parents' Reimbursement Claims

I now turn to the remaining question of what residential living expenses, travel expenses, tutoring expenses and other expenses have been incurred by Parents for the 2012-2013 school year, and to what extent these expenses should be reimbursed by Quincy. This is issue # 3 (see "Statement of Issues", above).

Reimbursement is discretionary, equitable relief.[26] "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors"[27] including, among other things, the reasonableness of the parties' conduct.[28] In the November 21, 2012 Decision, I advised the parties that I may appropriately consider any conduct by Parents that may delay or hinder Quincy's efforts to find an appropriate program for Student as soon as possible.[29]

Parents' reimbursement claims are based on my previous determination that the Clarke School day placement was the stay-put placement that Student had the right to attend under state and federal special education laws until an appropriate program was located or created. See October 10, 2012 Stay-Put Ruling. I also had previously concluded in my Ruling of July 11, 2013 (BSEA # 1307468), that Student's stay put rights at Clarke School began with the beginning of the 2012-2013 school year. During the hearing, I made a finding that Quincy was not responsible for reimbursing any expenses during the summer of 2013 based on the undisputed fact that Quincy bore no responsibility to provide Student with services for that summer. See Transcript, vol. IV, p. 21. For these reasons, I consider Parents' reimbursement claims for the 2012-2013 school year.

It is not disputed that Student could only attend this placement if she was supported residentially since her family home in Quincy was too far from Northampton to permit a daily commute. Where a residential component is required in order that Student access the program to which she is entitled, Student's residential component "must be at no cost to the parents of the child."[30] Thus, as I concluded in my July 11, 2013 Ruling on Quincy's Motion to Dismiss and Each Party's Motion for Summary Judgment (BSEA # 1307468), reimbursement of certain expenses related to Mother's maintaining a temporary home in the

[26] See *School Union No. 37 v. Ms. C.*, 518 F.3d 31, 34 (1st Cir. 2008) ("Reimbursement is an equitable remedy"); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006) ("Reimbursement is a matter of equitable relief, committed to the sound discretion of the district court") (internal quotations omitted).
[27] *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993).
[28] See *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) (parent's unreasonable actions may justify a denial of reimbursement under the IDEA).
[29] See the November 21, 2012 Decision, p. 23, n. 36.
[30] See 34 CFR §300.104 ("If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.").

Northampton area may be warranted if shown to be necessary to allow Student to attend her stay-put placement.[31]

As explained in my Ruling of July 11, 2013 (BSEA # 1307468), any such reimbursement claims must be limited to costs that have actually been incurred by the time of the evidentiary hearing in the instant dispute. I further explained in that Ruling, in order to determine that an expense may be reimbursed, I would need to determine not only that Parents actually incurred each particular expense for which they seek reimbursement but also that each particular expense was necessary for purposes of supporting Student at Clarke and that each particular expense was reasonable with respect to its nature and amount. I also consider the parties' conduct in evaluating whether to impose any limitations regarding the reimbursement to be ordered.[32]

As discussed above, the November 21, 2012 Decision required Quincy, as soon as possible, to locate or create an appropriate educational program that meets each of the three criteria specified in the November 21, 2012 Decision and that is otherwise consistent with that Decision.

The November 21, 2012 Decision specifically concluded that Quincy would not likely be able to locate for Student an existing school that specializes in serving deaf and hard-of-hearing children because the Decision found that there appears to be no aural/oral school that could meet Student's learning disability needs. Rather, the Decision explained that Quincy would likely need to identify an educational program that is already well-suited to address Student's learning deficits through language-based instruction, and then take such steps as are necessary to ensure that the program will also have the needed expertise and resources to accommodate appropriately Student's hearing disability.[33] November 21, 2012 Decision, p. 21.

I now review Quincy's actions to comply with the mandate (from the November 21, 2012 Decision) to locate or create, as soon as possible, an appropriate educational program, and I consider Parents' conduct in response to those actions.

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[31] See *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1527-1528 (9th Cir. 1994) ("[i]f a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education" and ordered reimbursement of the cost of lodging for the student and his grandmother in Los Angeles, as well as reimbursement of transportation costs). See also *In Re: Provincetown Public Schools and Mass. Dept. of Education and Anne*, BSEA # 04-3100 & 05-0340, 10 MSER 493 (November 2, 2004) (BSEA Hearing Officer ordered prospective payment of certain expenses, including some of parents' living expenses).

[32] Quincy seeks to re-argue the point that because I had determined Clarke School to be an inappropriate placement for Student, no reimbursement of Parents' expenses may be ordered. I have previously addressed this argument in my Ruling of July 11, 2013 (BSEA # 1307468).

[33] The November 21, 2012 Decision noted Dr. Clark's undisputed testimony that there is no reason to believe that a language-based, learning disabilities program cannot appropriately educate Student if additional resources and expertise are provided to accommodate appropriately her hearing loss. The Decision encouraged (but did not require) Quincy to consider engaging Dr. Clark (with Parents' permission) to evaluate the proposed program and to advise the parties regarding what, if any, additional changes should be made to accommodate Student's hearing loss in order to allow her to make meaningful educational progress. See November 21, 2012 Decision, pp. 21-22.

In order to comply with the November 21, 2012 Decision, the Quincy Director of Special Education (Judith Todd) assigned her Out-of-District Liaison (Sylvia Pattavina, PhD) to locate or create an appropriate educational program. Testimony of Todd, Pattavina; exhibit S-5.[34] Quincy's efforts to locate such a program were described in Dr. Pattavina's affidavit and testimony which, to a large extent, were uncontroverted. Where they were controverted, it was only by Mother's testimony. On the basis of Dr. Pattavina's and Mother's testimony, Dr. Pattavina's affidavit and other documents noted below, I make the following findings of fact regarding what occurred from the date my Decision was received by Quincy (November 26, 2012) through the 2012-2013 school year.

As contemplated by the November 21, 2012 Decision (as discussed above), it was Quincy's intent to locate a program which could address Student's significant learning disabilities and then supplement the existing services in the program with the services and accommodations Student required to address her hearing needs, and to utilize Parents' expert (Dr. Clark) to help ensure that these services and accommodations would be appropriate. Testimony of Pattavina; exhibit S-5.

For this purpose, Dr. Pattavina sent out the referral packets to special education programs for students with language-based learning disabilities and spoke with the admissions personnel to follow-up on the process. This process began with Quincy's sending referral packets to Riverview School and Willow Hill School on November 28, 2013, shortly after Quincy received the BSEA Decision on November 26, 2013. Dr. Pattavina informed both Riverview and Willow Hill that Quincy would be providing the services and accommodations Student required to address her hearing needs and that Student would be a residential student because these schools were too far from Quincy to permit her to commute. At the time, Quincy believed these were the two best options for Student. Testimony of Pattavina, Todd; exhibits S-5, S-6.

Quincy was particularly hopeful that Riverview would work out because Parents' expert (Dr. Clark) had suggested the school, the school has experience with deaf students and FM systems (which Student requires), and Student fits within the intellectual range of the students attending the school. (Although Student's IQ of 88 is in the upper range of IQs of students at Riverview, it is nevertheless within the range.) Dr. Pattavina believed that given that Student is so far below grade level academically, her placement at Riverview would permit her to make up lost ground and achieve a level of success she had not achieved in the past. Testimony of Pattavina; exhibit S-5.

Riverview was willing to work with Quincy and was interested in accepting Student. After reviewing Student's packet, Riverview reported to Dr. Pattavina that it believed Student was appropriate for its program and that it had a peer group for her. Student could not be

[34] Dr. Pattavina has been the Quincy Out-of-District Liaison for seven years. Previously, she was Quincy's Director of Title 1 and English Language Learners from 1998 to 2009. Testimony of Pattavina; exhibit S-5.

admitted, however, without the required two-night overnight visit by Student. Testimony of Pattavina; exhibit S-5.

In December 2012 (near the Christmas holidays), Mother spoke to Riverview, which suggested that Parents visit the school in January without Student, which Parents did. Parents returned to Riverview for a second visit, this time with Student, on or about April 2, 2013, but it was for a brief tour, rather than the required two-night overnight visit. Riverview informed Dr. Pattavina that Student's visit was approximately an hour long. Testimony of Pattavina, Mother; exhibit S-5.

Dr. Pattavina was in regular contact with Riverview concerning placing Student there. With the exception of the length of time it took for Parents to visit and then bring Student there for a visit, the process was going smoothly from Quincy's perspective. Because placement at Riverview seemed to Dr. Pattavina to be promising, she made arrangements with Dr. Clark and with Riverview for Dr. Clark to visit the campus on May 23, 2013, to review learning spaces and make any recommendations or suggestions about what, if anything, needed to be done in terms of physical modifications to those learning spaces to make them appropriate for purposes of accommodating Student's hearing disability. Testimony of Mother, Pattavina; exhibit S-5.

However, during a May 10, 2013 Team meeting, Parents made it clear for the first time that they would not permit Student to attend Riverview. On her April 2, 2013 visit, Student did not like the school, believing that the students there were not similar to her. Parents also did not believe that Student's peers at Riverview would be appropriate, having concluded that the Riverview students were significantly lower functioning than Student. Because they believed that the school was not appropriate, they declined to have Student visit further, thereby precluding Riverview from completing the admission process. Testimony of Mother, Pattavina; exhibit S-5.

As noted above, Dr. Pattavina sent a packet to Willow Hill (a Mass. Department of Elementary and Secondary Education-approved special education school) on November 28, 2013. She kept in contact with Willow Hill through Ann Marie Reen in its admissions office. Ms. Reen spoke with Mother on May 28, 2013 and invited Mother to visit the school, but Mother said she would have to call back about scheduling a visit. Mother never called back. In mid-June, Ms. Reen advised Dr. Pattavina that she did not believe Mother wanted her daughter to attend Willow Hill. Testimony of Mother, Pattavina; exhibit S-5.

Quincy also explored the possibility of Student's attending the Learning Prep School, which as discussed above, Student had attended for four school years immediately prior to her placement at Clarke School. Dr. Pattavina testified that Learning Prep has language-based classes that would be appropriate for Student but would have needed Quincy's assistance to address appropriately Student's hearing disability. Dr. Pattavina opined that it would have taken approximately eight weeks to make any accommodations and provide appropriate consultation services at Learning Prep regarding Student's hearing disability. Testimony of Mother, Pattavina; exhibit S-7, pp. 2-3.

Correspondence between the parties' attorneys indicates that Quincy was aware of acoustic concerns at Learning Prep (particularly in a trailer where speech services were provided) and apparently for that reason, considered this as only a temporary placement from January 2013 through the end of the 2012-2013 school year. Exhibits P-24, S-8.

Dr. Pattavina testified that on December 17, 2012, she telephoned the Director of Learning Prep who said that the school was familiar with Student from her previous attendance there and would accept Student for placement beginning on January 2, 2013. Dr. Pattavina then left a message on Parents' voice mail, stating that Student could attend Learning Prep and giving Parents the e-mail address of the Learning Prep Director. Testimony of Pattavina; exhibit S-7, pp. 2-3.

However, Mother testified that she never received this voice mail message. Dr. Pattavina testified that Quincy made no further attempts to communicate with Parents about Learning Prep and did not send a packet to Learning Prep. Mother testified that Learning Prep never contacted her, nor did Quincy, to explore this placement further. Mother explained that she first learned of Quincy's proposal of Learning Prep through a January 18, 2013 e-mail from Quincy's attorney to Parents' attorney. Testimony of Mother, Pattavina; exhibit S-7, pp. 2-3.

Mother testified that because of the negative experiences when Student previously attended Learning Prep without adequate accommodations and services regarding her hearing disability, it would likely be quite difficult, from an emotional perspective, for Student to return there. Mother also testified that Student has difficulty with transitions, with the result that it would be challenging for Student to attend a new school for part of the 2012-2013 school year, and then to transfer to another new school for the 2013-2014 school year. Testimony of Mother; exhibit P-24.

As discussed above, Parents made it clear, during the May 10, 2013 Team meeting, that Student would not attend Riverview. Then, Dr. Pattavina sent referral packets to other schools for students with language-based learning disabilities—specifically, Broccoli Hall School, Clearway School, and Community Therapeutic School. Following Dr. Clark's suggestion at the May 10, 2013, Team meeting, Dr. Pattavina also contacted EDCO and the Newton Public Schools to see if a program could be created with a combination of those resources. Testimony Pattavina; exhibit S-5.

After speaking with Mother, Broccoli Hall denied Student admission. Dr. Pattavina received a voicemail from Broccoli Hall letting her know they spoke with Mother, and this was followed by a letter dated May 29, 2013, denying Student admission. Testimony Pattavina; exhibit S-5.

When Dr. Pattavina first spoke with a co-director of Clearway School (Peter Rosen), he was receptive to having Student attend school there, with Quincy providing the teacher of the deaf and the other services and accommodations required to address Student's hearing needs.

However, Mr. Rosen informed Dr. Pattavina that he spoke with Mother on May 23, 2013, that Mother asked if Clearway had ever taught deaf children, and he responded that it had not. They spoke for a while and Mr. Rosen invited Mother to come in for a visit and tour. Mother said she did not want to come in for a tour and told him she felt Clearway would not be an appropriate fit. Testimony Pattavina; exhibit S-5.

After carefully considering this evidentiary record, I find that Quincy appropriately sought to locate a language-based educational program for Student, with the understanding that Quincy would add resources to the program to ensure that it accommodate Student's hearing deficits appropriately and that Dr. Clark would assist Quincy in this regard. Quincy took all reasonable steps to identify such a program as quickly as possible. And, by the time Quincy proposed the Marshfield program during the summer of 2013, it had reasonably completed its search of all potentially-appropriate language-based programs for Student.

After carefully considering the evidentiary record, I find that Parents did not fully cooperate with Quincy's process of finding Student an educational program, with the result that Parents' actions and inactions likely precluded full consideration of one or more educational programs that would have been appropriate for Student and that would have accepted her during the 2012-2013 school year. My reasoning follows.

As explained by Ms. Todd and Ms. Pattavina in their testimony (as well as in a recent BSEA decision in another dispute, *In Re: Andover Public Schools*, BSEA #1402762 (January 21, 2014)), the process of locating a private school for a student requires both the initiative of the school district and the cooperation and participation of the parents. At any point in the process, parents are able to sabotage the school district's efforts—for example, by refusing to allow the school district to make a referral to a particular private school (Parents did not preclude Quincy from making referrals), by refusing to appear for an interview, or by otherwise advising the private school that the parents are not willing to send their son or daughter to the school. In the instant dispute, it is undisputed that none of the private schools that Quincy was considering would be willing to offer an acceptance to Student without the cooperation and participation of Parents. Testimony of Todd, Pattavina. [35]

Parents rejected all of the language-based schools that Quincy proposed—including Riverview School, Willow Hill School, Learning Prep School, Broccoli Hall School, Clearway School, and Community Therapeutic School. Parents found them to be unacceptable because they believed that, for example, a school must have prior experience teaching students with a hearing disability or that other students with a hearing disability

[35] The November 21, 2012 Decision cautioned Parents that although they do not have the legal responsibility to locate or create an appropriate educational program, their conduct may impact the process. The Decision noted, for example, that a program identified by Quincy may require an interview with Parents and Student as part of the process of reviewing its appropriateness; a program may need to speak with Student's current service providers to evaluate her appropriateness, thus requiring Parental consent; or a program may be reluctant to seriously consider Student if Parents communicate to the program that they will aggressively oppose Student's placement there. The Decision explicitly noted that Parents' conduct in this regard may be relevant to any future reimbursement claim. See November 21, 2012 Decision, pp. 22-23 and n. 36.

must be currently attending the school in order for it to be appropriate. Testimony of Pattavina; exhibit S-5.[36]

Quincy's obligation to reimburse Parents for living expenses in Northampton would have ended when Quincy located a placement that (1) satisfied Quincy's obligations under the November 21, 2012 Decision, (2) accepted Student for admission, and (3) was ready for Student to attend (including completion of any needed accommodations for her hearing disability).

It seems likely that at least one of the above placements that Quincy identified and Parents rejected would have satisfied Quincy's obligations under the November 21, 2012 Decision to locate an appropriate program had Parents fully cooperated and participated in the admissions process. Parents precluded full consideration of each of these placements by essentially imposing their own criteria that are not found within the November 21, 2012 Decision.

Because Parents essentially interrupted the admissions process and precluded any determination of appropriateness by each private school being considered, one cannot know for certain whether any particular school would have actually accepted Student and been appropriate for her, nor can the specific date by which the school would have been prepared to have Student begin attendance be known.

For these reasons, it is impossible to determine with any degree of precision even an approximate date by when Student would have been able to begin attending a school other than Clarke, thereby terminating Quincy's need to pay for Mother's residential expenses. At the same time, it would be unfair to Quincy if I were to allow Parents, without any negative consequences, to undermine its school search efforts so that Student could continue at Clarke School with living expenses paid by Quincy for the entire 2012-2013 school year.

Under these circumstances, it seems reasonable to identify the range of time, from the earliest possible date when Student could have started an educational program if Parents had fully cooperated to the latest possible date when Student could have started an educational program if Parents had fully cooperated. The two schools where Student would likely have started most quickly were Learning Prep School and Riverview School.

I credit Mother's testimony that she first learned about the possibility of a Learning Prep placement through a January 18, 2013 e-mail from Quincy's attorney to Parents' attorney. I credit Ms. Pattavina's testimony that Mother would have needed to meet with Learning Prep

[36] During this time, Parents also took the position that Quincy should add a special education teacher to the Clarke School placement to better support this placement. Quincy declined this request for good reason. The November 21, 2012 Decision had already concluded that Clarke School was not only an inappropriate placement but also could not be made appropriate. As specifically directed by the November 21, 2012 Decision, Quincy's efforts were focused on locating an appropriate language-based placement (and adding resources to that placement, as necessary, to accommodate Student's hearing disability) rather than seeking to improve Student's stay-put placement at Clarke, and Quincy was fully justified in following this approach.

staff before agreeing to admit Student, and it would have taken approximately eight weeks to have Dr. Clark visit Learning Prep school to advise Quincy what needed to be done to accommodate Student's hearing disability and to implement those recommendations. See Transcript, vol. IV, p. 69-72. Under these circumstances, Student might have begun Learning Prep around mid-March 2013 at the earliest.

If Parents had fully cooperated with Riverview School, they would have arranged for their visit and Student's overnight visit to occur much more quickly than what actually occurred. Once Riverview formally accepted Student, Dr. Clark would have needed to visit the school and she would likely have made recommendations that would have taken time to implement, roughly similar to what Dr. Pattavina testified to regarding Learning Prep School. Under these circumstances, I estimate that Student could have begun Riverview School by around March 1, 2013 at the earliest.

There is also a reasonable likelihood that even with the full cooperation of Parents, no school would have been prepared to accept Student and have her start until the following school year—that is, September 2013. This could have occurred, in part, because by the time that a school had accepted Student and completed its accommodations for Student's hearing disability, there would be only several months left in the school year, making it unwise to transfer Student from Clarke School to a new school for such a short period of time.

In other words, assuming full cooperation of Parents, I estimate that Student would have been able to leave Clarke School and begin another educational program at the earliest, on March 1, 2013 and at the latest, the beginning of the following school year. This would have made it unnecessary for Student to attend Clarke for anywhere up to four months (March 1st through the end of the school year). For purposes of reimbursement to Parents for expenses necessary to allow Student to attend Clarke School, I will split the difference and deny reimbursement for the last two months of the 2012-2013 school year—that is, May and June 2013—with the result that the time period for reimbursement will be from the beginning of the 2012-2013 school year through the end of April 2013.[37]

Although Parents initially alleged that they should be reimbursed for a variety of expenses, including tutorial expenses, for the purpose of supporting Student's attendance at Clarke

[37] One might argue that a more appropriate way of determining the limits of Quincy's responsibility to reimburse Parents for living expenses would be to identify the actual date when Parents first evidenced a failure to fully cooperate with Quincy's search, and then to find that Quincy has no liability to reimburse after that date. I decline to utilize this approach for two reasons. First, I find that it would be impossible to determine this actual date on the basis of the evidentiary record. Second, just as a school district is not liable for compensatory services as a result of *any* failure to implement an IEP or for *any* procedural violation, so too Parents' reimbursement claim should not be foreclosed the moment that they did not provide full cooperation. Rather, Parents' failure to cooperate became legally significant when it materially impacted the date when Student could leave the Clark School and attend another program. Cf. *Van Duyn v. Baker School Dist. 5J***,** 481 F.3d 770 (9th 2007) ("when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP."); *Roland M. v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990) (a school district's "procedural flaws do not automatically render an IEP legally defective").

School during the 2012-2013 school year, Parents have only presented evidence supporting reimbursement of living expenses (specifically, hotel and food costs) and transportation expenses (for commuting between Quincy and Northampton).

I begin with the living expenses as reflected in Parents' hotel bills in Northampton. Parents have provided written documentation of charges paid at the Quality Inn & Suites in Northampton from September 2, 2012 through April 30, 2013. Mother obtained the benefit of a relatively low nightly rate ($99.00 or $100.00 per night except for one night on September 2, 2012 which was $139.00 plus taxes) because of Student's attendance at Clarke. I find that all of Mother's hotel costs from September 2, 2012 through April 2013 should be reimbursed, except with respect to charges for pay-per-view movie (included in the invoice from 10/22/2012 to 10/26/2012). Accordingly, Quincy shall reimburse Parents for the charges reflected in Parents' hotel bills, as found in exhibit P-32, except for pay-per-view movie charges, from September 2, 2012 through April 2013.[38]

I have calculated these hotel expenses to be $10, 821.29.

Parents seek reimbursement of food costs. In support of this claim, Parents submitted receipts from restaurants and food stores. However, on cross-examination, it became clear that Parents did not intend Quincy to reimburse everything listed on the receipts—for example, a pair of pants and frozen food. Also, some of the receipts were marked by a large "X" across the entire receipt, but Mother was unsure whether this indicated that Quincy was not to reimburse for the receipt. In addition, Mother acknowledged that the purchase of liquor should not be reimbursed but she testified that liquor was nevertheless included in some of the receipts that were not itemized. Testimony of Mother; transcript, vol. IV, pp. 5-18.[39]

What is also unclear from the food receipts is to what extent Parents' food expenses reflect out-of-pocket expenses that are over and above those expenses that Parents would have normally incurred if Mother and Student had been living in Quincy during this time period. In note that a substantial majority of the food receipts are from food stores such as Stop & Shop and Star Market. There is no evidence to allow me to determine which, if any, of these food store purchases (as well as Parents' occasional restaurant meals) were expenses that Parents would not typically have incurred had Student and Mother been living at home in

[38] Quincy seeks to avoid reimbursement for several nights when, arguably, Student did not need to be in Northampton for purposes of attending Clarke School. For example, Quincy seeks to avoid reimbursement for hotel expenses for the night of September 2, 2012, which was the Sunday immediately prior to Labor Day. Quincy argues that since school began the day after Labor Day, there was no need for Parent and Student to stay in Northampton on the night of September 2, 2012. Quincy's arguments rest on facts that may seem logical but that are not in the evidentiary record. Quincy also sought to show that these residential expenses were unnecessarily high because Parent and Student could have obtained an apartment at a lower rate. But, Parent's testimony was persuasive that the cost of renting a furnished apartment would have been more expensive than their hotel costs. Testimony of Mother.

[39] Parents' food receipts were not included in Parents' exhibits that were filed in advance of the hearing. However, the receipts had been attached to an affidavit filed by Mother on July 22, 2013. Over Quincy's objection, I allowed Parents to admit these receipts into evidence during the hearing.

Quincy. Exhibit P-32. I find that Quincy should not have to reimburse Parents for food costs that they would have had to incur regardless of whether Student and Mother were living in Northampton so that Student could attend Clarke School.

Because so much was unclear from the food receipts in evidence as discussed above, I suggested during the hearing (on the record), Mother agreed and Parents' attorney stated that he had no objection, that Parents would re-submit all of the food receipts in a form that would be clear on its face what expenses they were asking Quincy to reimburse. It was further agreed that reimbursement would be determined on the basis of the re-submitted food receipts, rather than exhibit P-32. Transcript, vol. IV, pp. 5-18. By agreement of the parties, and as reflected in my Order of December 16, 2013, Parents were to file the new version of their receipts for food by December 23, 2013. Parents never filed a new version of food receipts, nor did they file any other document either explaining why Parents had not filed a new version of the food receipts or arguing that the original version of food receipts should be considered. Instead, during a conference call with the attorneys on January 21, 2014, in response to my question, Parents' attorney explained that the Parents were not able to file a new version of the food receipts.

I find that Parents have not sustained their burden of providing factual evidence from which I may determine that they have had out-of-pocket food expenses over and above what would be Parents' expected food costs if Mother and Student were living in Quincy. I further find that Parents have waived their claim to reimbursement for food expenses by first agreeing that reimbursement of food expenses would be based entirely on a revised version of food receipts and by then not filing a new version of Parents' food reimbursement claim (or any other relevant document).[40]

With respect to reimbursement of commuting expenses, Parents did not provide testimonial or documentary evidence to substantiate the dates or number of trips between Quincy and Northampton for purposes of allowing Student to attend Clarke School, with the result that I am not able to determine reimbursement expenses on the basis of mileage driven.[41] Instead, Parents submitted receipts for gas and tolls; and during the evidentiary hearing, Parents' attorney indicated that Parents' claim for commuting expenses was based upon these

[40] See *Rose et al. v. Yeaw*, 214 F.3d 206, n.2 (1st Cir. 2000) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) ("a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace") (internal quotation marks omitted); *De Giovanni v. Jani-King Intern*., Inc., 2013 WL 5108659, *2-3 (D.Mass. 2013) (discussing waiver rule).

[41] In their closing argument, Parents argued for the first time that they are entitled to reimbursement on the basis of mileage driven. Parents sought to make up for the lack of evidence supporting this claim by relying on Quincy's exhibit (S-2) showing Student's attendance at Clarke School, together with Parents' hotel receipts. See Parents' closing argument, pp. 11-13. But, this factual evidence does not directly answer the question of how many commuting trips Parents took between Quincy and Northampton—I would have to speculate by making a determination based upon facts not in the record, and I decline to do so. Arguably, the toll receipts in evidence could be used to support a determination regarding number of commuting trips, but Parents have not taken the position that the toll receipts are an accurate or complete record of their commuting trips, and the dates on a number of toll receipts are not legible. I therefore do not rely upon these receipts.

receipts. I find that it is reasonable for Parents to be reimbursed for gas and tolls. Quincy shall reimburse Parents for all gas and toll receipts in evidence for the period of time from September 2, 2012 through April 2013, as found in exhibit P-32, provided that the amount of money and the date on the receipt are legible.

On the basis of the legible receipts, I have calculated Parents' gas costs to be $1,068.59 and their toll costs to be $108.00.

As discussed above, Parents are only entitled to reimbursement of actual out-of-pocket expenses. Parents received a stipend from Clarke School to offset Parents' living expenses needed to support Student's attendance at Clarke during the 2012-2013 school year. The amount of the stipend was $1,200 for each full month (and a proportionate share for less than a full month) that Student was enrolled at Clarke and the tuition was paid by Quincy. Quincy began paying for Clarke after my stay-put Ruling was issued on October 10, 2012. Parents received a total of $8,400 from Clarke. Testimony of Mother. Therefore, Quincy's liability for reimbursement of Parents' living expenses (as calculated above) shall be reduced by $6,000.00 (which is $8,400 minus two months—that is May and June—multiplied times $1,200.00 per month).

In sum, Quincy shall reimburse Parents $10, 821.29 for hotel expenses, $1,068.59 for gas expenses, and $108.00 for toll expenses from September 2, 2012 through April 2013, less the $6,000.00 received from Clarke School to offset these expenses.

The total amount to be reimbursed is $5,997.88.

Alleged Deliberate Indifference

Parents have alleged that Quincy "has acted with deliberate indifference, gross misjudgment, animus towards [Student] in violation of the IDEA, Section 504, MGL c. 71B and their regulations." See Parents' hearing request, last page, in BSEA # 1403404. Parents seek findings of fact in furtherance of a possible damages claim.

Through their arguments, Parents have strongly attacked Quincy's efforts to provide Student with an appropriate educational program, and after placement at Marshfield was agreed upon, Parents strongly criticized Quincy's efforts to accommodate Student's hearing disability. Notwithstanding these arguments and for the reasons explained throughout the instant Decision, I find that there is not the slightest evidence of deliberate indifference, gross misjudgment, or animus towards Student. Instead, I find that Quincy has acted with considerable effort, reasonableness and even magnanimity towards resolving what has been an extremely challenging task of finding an appropriate educational program for Student.

This is not to say that Quincy has been perfect; there have been occasional missteps and omissions along the way, as Parents have been quick to point out. For example, there may have been delay in sending out Dr. Clark's most recent evaluation to private schools being

considered by Quincy. And, it was extremely unfortunate that Student's FM system was faulty for approximately the first three months of this school year.

Nevertheless, Quincy demonstrated time and again its willingness to place Student in literally any program, regardless of expense, that would appropriately meet Student's needs and that would be acceptable to Parents. For each of these programs that it has considered (including a residential program), Quincy has been willing to put additional resources into the school to ensure that the program would accommodate Student's hearing needs and where the school did not have appropriate expertise with educating students with a hearing disability, Quincy has been willing to hire Parents' expert (Dr. Clark) to ensure that this occurred correctly. And, once Quincy found the Marshfield program to which Parents were willing to send Student, Quincy has been willing to essentially give the Marshfield Director of Special Education (Dr. Dupuis) a "blank check" to provide (and Quincy would pay for) whatever additional educational services Dr. Dupuis believes to be needed for Student. Testimony of Dupuis. Moreover, Quincy has been willing to pay for Student's stay-put placement at Clarke School for the entire 2012-2013 school year, even as Quincy became convinced that Parents were intentionally undermining its efforts to locate or create an appropriate educational placement and thereby prolonging Student's placement at Clark.

I also commend the Marshfield program and its Special Education Director for agreeing to allow Student to attend its program and to patiently work towards a solution for Student that would satisfy Parents, even in the midst of the instant litigation that has required Marshfield and its staff to testify and defend its program. Without Marshfield's assistance, it is unclear whether there would be any educational program for Student, other than home schooling.

ORDER

Parents' prospective claims (issue # 1) have been resolved informally by the parties and need not be further addressed through this Decision.

Parents' compensatory claims (issue # 2) have been waived and need not be further addressed through this Decision.

With respect to Parents' reimbursement claims (issue # 3), Quincy shall pay Parents $5,997.88 in order to reimburse them for out-of-pocket expenses necessary for Student to attend her stay-put placement at Clarke School during the 2012-2013 school year.

By the Hearing Officer,

William Crane
Dated: March 6, 2014

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.