

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

In Re: Veryl¹

&

BSEA#1511135

Nantucket Public Schools

DECISION

This Decision is issued pursuant to M.G.L.c.71B and 30A, 20 U.S.C §1400 *et seq.*, 29 U.S.C §794 and the regulations promulgated thereunder. A Hearing was held on April 12 and 13, 2017 at the Administrative Offices of the Nantucket Public Schools and on July 6 and 7, 2017 at the BSEA in Boston, MA. The official record of the Hearing consists of exhibits submitted by the Parents marked P-1 through P-27, exhibits submitted by the School marked S-1 through S-22, and approximately 21hours of recorded oral testimony and agreement. The Parties agreed to submit written closing arguments which were received by the BSEA on August 7, 2017. The Record closed on that date. The Parents were at all times represented by Attorney Michael Turner; Nantucket Public Schools was represented by Attorney Andrea Bell.

PROCEDURAL HISTORY

The Parents filed a Hearing Request on June 26, 2015 and shortly thereafter requested that it be placed on “off calendar” status to permit the Parties to negotiate a resolution. The Parties reached an Agreement covering the 2015-2016 school year, but requested that the matter remain open at the BSEA for supervision and enforcement purposes. On September 8, 2015 the BSEA granted the Parties’ request and ordered submission of written status reports on November 18, 2015. The Parties failed to submit the required status reports or to communicate with the BSEA in any way during the remainder of the 2015-2016 school year. On August 1, 2016 the BSEA sent a ten day Show Cause Order to the Parties. The Parents objected to dismissal and requested that the matter remain active for thirty days. The BSEA scheduled the matter for Hearing on November 4, 7, 9 & 10, 2016. On October 27, 2016 the Parties requested a postponement of the Hearing and rescheduling to January 25, 26, and 27, 2017. Both requests

¹ “Veryl” is a pseudonym selected by the Hearing Officer to protect the privacy of the Student in documents available to the public. Mr. & Mrs. “V” are derivative pseudonym’s for the Parents.

were GRANTED. On January 17, 2017 the Parents requested a postponement of the Hearing. The Parents' Motion was GRANTED. During a conference call held on February 15, 2017 the Parties selected April 12 and 13, 2017 as the rescheduled Hearing dates. The Hearing began on those dates and resumed, by agreement of the Parties, in July 2017.

ISSUES

I. a) Whether the 2016-2017 IEP developed by Nantucket Public Schools is reasonably calculated to provide a free appropriate public education to Veryl?

b) If not, is placement in a private special education day school necessary in order to meet Veryl's special learning needs?²

PARENTS' POSITION

The Student requires a comprehensive, intensive, integrated language-based program in order to acquire academic skills commensurate with his learning potential. The School's proposed program and IEP do not provide that. In the past two years the Student has failed to make measurable progress in his areas of disability with similar interventions to those Nantucket proposed to deliver under the 2016-2017 IEP. The Landmark School offers a specialized, language-based program that can meet the Student's significant learning needs.

SCHOOL'S POSITION

The High School's language based program is designed to meet the needs of students with specific with learning disabilities in reading, writing and math. It offers specialized instruction and support in those areas and accommodations and parallel instruction in other content areas in a setting which can maximize the students exposure to, and integration in, regular education activities and curricula. Veryl has made slow but measurable progress when using the supports and services available to him in the High School language-based program. The program meets both the standards for language-based programming as identified by expert educational programming consultants and Veryl's individual learning needs as identified by expert educational evaluators. Any additional or more intensive services determined to be necessary for him can be supplied within the flexible context of the High School.

FINDINGS OF FACT

1. Veryl is a 16 year old 10th grade student at Nantucket High School. He has received special education services to address specific learning disabilities in the areas of math, reading and writing since elementary school. While Veryl's intellectual functioning consistently falls within the low end of the average range on standardized measures of cognitive performance, Veryl displays significant weaknesses in auditory and visual processing and working memory.

² There was no evidence that placement in a residential school would be necessary, or appropriate, to address Veryl's special learning needs. As a consequence of geography, as Nantucket is an island without a special education day school, the placement requested by the Parents would necessarily be residential in nature.

He is uniformly described as kind, participatory, motivated, persistent and appropriately engaged in school, community and family activities. He plays high school football and lacrosse, is interested in auto mechanics, works outside of school and has friends in the community. (Student; Mr. & Mrs. V; Townsend; Johnson.)

2. Veryl was evaluated at the Boston Children's Hospital Learning Disabilities Clinic in 2012 and 2014. Both evaluations concluded that Veryl functioned within the low average range of intellectual capacity, had slow rates of processing and output and displayed significant weaknesses in language based academic skills, consistent with a diagnosis of specific learning disability. Both evaluation teams recommended an intensive, coordinated, individualized, systematic program of instruction geared to acquisition of basic academic skills rather than supportive participation in grade level curriculum. To that end the Children's Hospital evaluators recommended placement in a structured setting with a "relaxed" pace of instruction targeted to Veryl's functional level. (P-14; P-15; P-16; P-17; P-18.)

3. At Team meetings held in October 2014 and June 2015 Nantucket developed an IEP for Veryl calling for his placement in the High School Language based program. (P-9; P-10). This program, designed collaboratively with Ann Larsen of the Landmark School, uses a co-teaching model to deliver adapted grade level curriculum content and specialized, at times individualized, instruction geared to each student's specific language level and remediation needs to a small cohort of similarly situated students. One special education teacher provides direct instruction in grade level English language arts to the cohort. Another special education teacher teaches grade level math, science and social studies classes to mixed special and regular education students alongside the general subject content teacher, as well as specialized reading and study skills classes to cohort students in smaller groups. That special education teacher, Jessica Townsend, is responsible for adapting the grade level curriculum presentation, assignments and evaluations to the learning needs of the language-based class cohort, as well as for ensuring that the appropriate accommodations are delivered and that each student's IEP goals and objectives are being addressed. (Townsend; Johnson)

4. The Parents rejected the proposed 9th grade 2015-2016 IEP indicating that it was insufficiently intensive to address Veryl's learning needs. They requested an out of district placement. To resolve the disagreement about the appropriateness of the proposed 9th grade placement at the Nantucket High School the Parties agreed that Veryl would participate in the language based learning disabilities program and that Nantucket would arrange for an independent evaluator to administer pre and post testing to objectively ascertain Veryl's progress. (Ms. V.; See also Procedural History, *infra*.)

5. David Callahan, a Phd level clinical psychologist with 32 years of experience in the assessment of children and adolescents, conducted the initial neuropsychological evaluation of Veryl on September 29, 2015. The results were consistent with the earlier Children's Hospital evaluations. Dr. Callahan reported that on a standardized measure of cognitive functioning Veryl placed solidly in the low average range. He demonstrated skills in the average range on tasks involving verbal processing at the concrete level such as decoding, vocabulary, reading comprehension of concrete material, verbal fluency and rote memory. His scores were significantly weaker when the tests challenged working memory, processing or output speed, or

required manipulation of abstract concepts. This constellation of deficits resulted in poor performance on all math tests as he lacked automaticity of basic math facts. Veryl also demonstrated difficulty in all areas of written language output.

Dr. Callahan concluded that Veryl's academic skills and production were broadly consistent with what would be expected of a student with his cognitive profile. While noting that Veryl's functional academic performance, particularly in reading and writing, is significantly adversely affected by his slow processing speed, Dr. Callahan did not find evidence to support a diagnosis of dyslexia, attention-deficit disorder, or executive functioning disorder. He did find sufficient evidence to support a diagnosis of specific learning disability in mathematics.

Dr. Callahan recommended interventions to support adaptation to Veryl's cognitive style and slow processing speed, such as slower rate of presentation of materials, oral testing, use of assistive technology in writing assignments and math calculations, reduced homework and production demands, a focus on functional mathematics and a structured written language program. He cautioned not to expect significant changes in Veryl's academic skills and to focus on developing his strengths and accommodating his "hard-wired" challenges. (P-4; Callahan)

6. Veryl participated in the language-based co-taught special education program at Nantucket throughout his 9th grade year. (2015-2016) Quarterly Progress Reports prepared over the course of the 2015-2016 school year indicate that Veryl achieved 5 of 6 Reading Comprehension objectives and 9 of 9 Decoding/Encoding objectives. During this time Veryl also progressed from Step 7.3 to Step 9.2 in the Wilson structured reading program and demonstrated a gain from 70% to 90% with improvement in reading speed and comprehension on the QRI on an upper middle school passage and a score of 80% on a high school level passage.
(S-14; S-15; S-12; S-13)

Quarterly Progress Reports also indicate that Veryl achieved 8 of 9 objectives in math with the content of one objective not having been taught and achieved 4 of 6 objectives in study skills while "working towards" achievement of the remaining 2. For written language, the progress reports indicate continued work on and progress toward all six objectives. The June 2016 report notes that Veryl had increased his writing proficiency to the 8th grade level and increased his score on the District-Wide Open Response Question.
(S-12-S-15)³

7. Dr. Callahan re-evaluated Veryl on May 23, 2016 to assess his progress over the course of his 9th grade year in Nantucket High School's language-based program. (S-3, P-5) Dr. Callahan testified that, given Veryl's age and learning disabilities, he would not expect significant, or even measurable, progress in the areas tested over the course of eight months, even with appropriate special education interventions. (See P-4). The standardized test results

³ There is an additional academic evaluation report authored by Gary Simpson, Psy.D. He used the Woodcock-Johnson Test of Achievement IV in October 2015 and again in May 2016 to assess Veryl's progress as measured by that test. On its face there appears to be minimal change in the two sets of scores. As there was no explanation about the circumstances of administration of the test or the meaning of the results, Dr. Simpson's report has minimal probative value. (P-6)

obtained in May 2016 were consistent both with Veryl's learning profile and with Dr. Callahan's expectations, as they did not demonstrate any marked change in skill or function. Dr. Callahan nevertheless noted that Veryl improved his scores on all written language subtests of the Wechsler Individual Achievement Test-III (WIAT-III) moving from the "deficient" to the "low average" skill range despite his "hard wired" slow processing and production speed. That slow speed also continued to negatively affect reading and math fluency. According to Dr. Callahan, the drop in scores obtained in two math subtests were not significant as they reflected just one wrong answer and did not indicate a trend in functioning.
(S-3, P-5) Callahan.

Summarizing his findings in May 2016, Dr. Callahan wrote:

In the big picture [Veryl] shows regression only in his math fluency, a finding that is probably not highly significant in terms of his effectiveness in being able to perform tasks successfully. His fluency was rather weak previously and we still see poor performance, but again this is not an area typically of emphasis or substantial intervention at this age level. As I stated in my original assessment, this is not an area that is expected to change dramatically. The use of a calculator to allow him to compensate for what is probably fairly substantial difficulties in terms of fundamental calculation would be encouraged based on these findings.

It is encouraging to see some improvement in his writing skills. Increased output is encouraging, but he still remains quite a bit below the typical peer. I would note, however, that improvement from Deficient to Low Average functioning is an impressive change. We see substantial improvement in basic mechanics relative to previously as well, as he shows fewer errors of punctuation and capitalization than previously. Again, this is an encouraging finding, showing some improvement in an important area of output.

In my conversations with school personnel, there seems to be an observation of similar findings. Written output was generally perceived as a fairly significant area of vulnerability, but with some improvement relative to previously. I believe that is accurately reflected here. [Veryl] continues to show struggles in areas related to performing tasks independently in a full fashion, but again shows a general sense of growth that certainly does not eradicate difficulties. I believe that he continues to show functioning consistent with his preexisting Specific Learning Disorders, which are also not anticipated to be fully eradicated. Some amelioration seems to be evident here. I will defer to the education team and his parents as to what constitutes sufficient change. The data here suggest that there have been some areas of substantial improvement, but I would not describe these as consistent across all tasks. Most areas that show improvement do show substantial gains relative to expectation based

on his age and his baseline states as assessed in the fall.
Thus, we see some encouraging signs but he certainly remains vulnerable
in many areas as well.
(S-3, P-5)

Dr. Callahan testified that none of the results of the pre and post testing he conducted was surprising, and that Veryl is operating and acquiring academic skills in a manner and at a rate consistent with his intellectual potential, the irremediable disabilities of slow processing and dyscalculia, and his age. He stated that Veryl understands far more than he is able to demonstrate in the testing and classroom settings. Veryl grasps concepts, including abstract ones, but his response speed prevents him from showing his understanding.

Dr. Callahan recommended the use of a structured, sequential written language program to address Veryl's written language deficits, and the use of assistive technology and other accommodations to "work around" the processing speed and fluency challenges Veryl will continue to confront in school. (Callahan)

8. The Team met on June 17, 2016 to develop an IEP for Veryl's 10th grade year. The Team incorporated the findings and recommendations set out in Dr. Callahan's evaluation reports. It proposed continuing Veryl's placement in the partial inclusion language-based high school program. According to the proposed IEP Veryl's schedule would include:

- co-taught content classes in history, science and math 4x wk;
- substantially separate content classes in science, English language arts and reading 4x wk;
- substantially separate study skills class 4 x wk;
- individual tutoring in written expression 2 x wk with a speech-language pathologist or special education teacher.

The IEP also included a variety of presentation, production and testing accommodations, assistive technology for use in class and homework, and summer services to address Veryl's math deficits.
(S-1)

9. Veryl declined to attend extended year services during the summer 2016, opting to work instead. He returned to the language based program at Nantucket High School when school resumed for the 2016-2017 academic year. (Veryl)

10. Parents returned the proposed 2016-2017 IEP on October 1, 2016, indicating that they accepted the placement in the partial inclusion program, but rejected a portion of the IEP writing: "The IEP is vague and inappropriate and does not meet his needs." Ms. V. testified at the hearing that she intended to indicate that the objectives set out in the IEP for mathematics, reading comprehension, written expression, study skills and decoding/encoding did not contain baseline information and were not sufficiently measurable.

11. Jessica Townsend was the special education teacher in the partial inclusion language based learning disabilities program for the 9th grade academic year (2015-2016) and for the 10th grade academic year (2016-2017). She described the components available to Veryl and his participation in the program. She stated that Veryl is a highly motivated, attentive learner.

During 2015-2016 Ms. Townsend taught Veryl study skills in a small group of seven students and Wilson program reading strategies in a small group of four students. She also co-taught Algebra I and History alongside a general grade level content teacher to a group of 18 mixed general and language-based program students, as well as a reduced class of 7 students in Essentials of Biology. All classes followed the same basic structure/schedule. Each started with an “activator”, an activity that draws on previously or currently taught material, which links content/language to goals/material presented in a class, introduction of new material through activity; lab or lecture; guided practice; individual practice; and use of supportive technology when appropriate.

Ms. Townsend testified that the accommodations listed in Veryl’s IEP that were appropriate to the course and his needs were provided. She also stated that Veryl made progress toward or achieved all objectives he worked on during the 2015-2016 school year. (Townsend; S-12, S-13, S-14, S-15) She noted that one would not necessarily expect his progress to be reflected in standardized test scores as those tests were designed to be administered once every three years. (Townsend)

12. During the 2016-2017 school year, Veryl’s 10th grade, Ms. Townsend remained the special education co-teacher for Veryl’s integrated grade level content classes. She taught geometry to a mixed group of 16 students, history to a mixed group of 17 students and forensic science to a mixed group of 16 students. Veryl was one of 8 students in Ms. Townsend’s Study Skills class and one of four students in the reading class. The English language arts class was taught by another special education teacher, Stephanie Johnson.

In history a modified text presentation was used which drew heavily on document based question technique that reinforced student skills in producing 5 paragraph essays. Veryl successfully participated in that class. College prep geometry class used both live teachers and on-line supplemental instruction with teacher modified language presentation and testing. Veryl successfully applied the skills taught in the study skills class to geometry. (Townsend)

13. Ms. Townsend assessed progress quarterly using her own observations along with the benchmarks set out in each student’s IEP, administering the QRI (Qualitative Reading Inventory) each quarter, and the GORT and WADE-2 at the beginning and end of each school year. For Veryl, Ms. Townsend also sent the Parents biweekly progress notes. (S-10-S-11) Ms. Townsend testified that Veryl was making progress in all IEP areas through the 2016-2017 school year. (Townsend)

14. Stephanie Johnson taught the substantially separate English language arts component of the High School’s language based learning disabilities program. The class used a modified grade level curriculum which emphasized literature-based reading and writing exercises. Ms. Johnson taught specific strategies for accessing literature: previewing vocabulary; class discussions;

quizlet, text annotation, skeleton notes; highlighting and color coding text. In addition the accommodations listed on Veryl's IEP were provided: small group instruction, frequent checks for understanding; preteaching; brainstorming, text to speech technology (Kurzweil and iPhone); and corresponding videos. Written language was a significant element of the class. Ms. Johnson taught a formula, TIQA, for open responses. She also ensured that Veryl had available, and knew how to use, graphic organizers, speech-text programs, notetaking techniques, spell checkers, rubrics for editing and self assessment as well as specific IEP accommodations such as restating/repeating directions, smartboard supplemented by hard copy, movement breaks and extended time. Ms. Johnson was available for additional help before and after school, and by appointment. Veryl did not participate in extra help sessions. (Johnson)

During his 9th grade year, 2015-2016, Veryl was one of four students in the English language arts class. Ms. Johnson described Veryl as having a great vocabulary, but hesitant and not consistently motivated during his 9th grade. Nevertheless he made progress in the acquisition of writing skills, use of appropriate accommodations, and critical thinking. In particular the length and complexity of his written output increased over the course of the year, as demonstrated on the district measures of performance rubric and recorded in the quarterly progress reports. (Johnson S-8, S-12- S-15)

Ms. Johnson continued her role as Veryl's teacher in the English language arts language based program during his 10th grade year. She described him as engaged, confident and participatory. He was willing to read out loud to the class and offered insightful contributions to class discussions. She stated that Veryl continued to make good progress in written language, improving both the content and the length of his written output. He could independently use the tools he needed: brainstorming, annotating, highlighting, writing and revisions according to a rubric, to produce a four paragraph essay. (Johnson)

Ms. Johnson noted that, although the written language benchmarks in Veryl's IEP were not optimally worded and not amenable to numerical measurement, she provided qualitative feedback on his progress in English language arts class to the Parents through biweekly progress reports and on the specific IEP written language benchmarks and objectives through quarterly progress reports. (S-7; S-8; S-10; S-11) All show that Veryl demonstrated steady growth in acquisition of written language skills. (Johnson)

15. Elissa Gilgen co-taught math to the students in the language-based program alongside Jessica Townsend. During the 2016-2017 school year there were 16 students in the college prep plane geometry class. Fifteen of the students had IEPs. Ms. Gilgen and Ms. Townsend worked closely together to cover approximately 35% of the Massachusetts math curriculum. They modified presentation through the use of word walls, 2 column notes, small group instruction and practice, one-to-one teaching, reduced/simplified number of question, pacing at student preference, rephrasing and repetition, reduced language demands for production and assessment and use of google classroom, i excel, ck12.org and Khan Academy. For Veryl in particular, Ms. Gilgen and Ms. Townsend provided reference tables, reduced assignment length, extended time and frequent breaks. Ms. Gilgen also occasionally tutored Veryl after school. The tutoring focused on improving Veryl's math fluency through drills of geometric and algebraic principles, in preparation for MCAS. Though he only attended 9 after school sessions during 2016-2017

Veryl was more confident and participatory after tutoring. Ms. Townsend also provided one-to-one math sessions using drills and flashcards to improve Veryl's basic arithmetic fluency. These drills were discontinued at the Parent's request. Veryl made progress throughout the year in acquisition of targeted geometry skills. He successfully applied the skills taught in the study skills class to geometry classwork and homework. (Gilgen; Townsend) While the objectives do not contain numerical/objectively measurable benchmarks, Veryl's progress is reported as replicable/comparable data (S-10, S-11)

16. Nancy Christie co-taught 10th grade US history with Jessica Townsend to a group of 17 students, including Veryl, during the 2016-2017 school year. There were approximately five students in the class with IEPs. Students were not divided by, or taught differently because of, their disability status. All students were taught the same concepts and used the same materials. Tests, materials and activities were modified, collaboratively by Ms. Christie and Ms. Townsend, to ensure access for all students. Presentation and production drew heavily on document-based question technique that reinforced Veryl's learning and skill in producing 4-5 paragraph essays. Review, in-class readings, answer quest, map activities, smartboard paired with hard copies of presentation, notetaking strategies and graphic organizers were used in the class. Veryl had access to all presentations through google classroom available on his school-provided chromebook or his personal iphone. (Christie; Townsend)

Ms. Christie testified that Veryl's comprehension of written material and abstract concepts at the high school level of complexity and vocabulary is improved with audio support. While he needs additional processing time for integration and production of concepts, he demonstrates understanding with original thoughts and accurate, though brief, written responses. (Christie)

17. Amy Hinson co-taught forensic science with Jessica Townsend and a teaching assistant to a group of 16 students including Veryl during the 2016-2017 school year. Forensic Science is an elective class meant to be enjoyed. Instruction is primarily through lecture, demonstration and experimentation. There is no homework. Assignments and tests are completed in class.

Dr. Hinson and Ms. Townsend worked together to modify test language, if appropriate. Ms. Townsend occasionally reviewed vocabulary, read material aloud, highlighted/underlined/organized written materials, etc. in a smaller group.

Dr. Hinson testified that Veryl sat in the front row, appeared happy, was quiet and attentive to lectures. He volunteered and participated successfully in class discussions and teacher-directed activities. He was able to retell/rephrase new material and completed written assignments that demonstrated understanding and mastery of the material. (Hinson)

18. Ann Larsen of the Landmark School provides ongoing consultation and support to the language-based program at Nantucket High School. She visits the High School every other month to observe the teachers and classrooms and offer feedback. Her suggestions are incorporated into the instruction and environment of the language-based program and, occasionally, into a student specific intervention. (Townsend)

19. Diane L. Stephens, (B.A. Linguistics; M.Ed in Special Education; Phd Educational Studies) of the Integrated Center for Child Development has 4 years of experience evaluating special education programs, primarily on behalf of parents. She was engaged by Nantucket Public Schools to provide an independent assessment of the High School's language based program and to determine whether the program components were aligned with accepted "best practice" for language based programs. On February 23, 2017 Dr. Stephens observed the inclusion classes in Geometry and US history as well as the substantially separate English language arts class.

She concluded that each individual teacher demonstrated skill in the use of language based presentation, modification and intervention strategies, offered individualized support and accommodation within the context of well structured lessons, and created nice dynamics among the students and between the students and the teacher. Dr. Stephens also testified that there was the type of consistency of language, instructional approach and use of commonly accepted methodologies across the three different classes that is the hallmark of a well-designed language-based program. (Stephens)

In the Consultation Report produced after the observation Dr. Stephens wrote:

Across all three class periods observed, teachers seamlessly embedded a range of instructional supports into well-structured lessons. Specifically, teachers supported organizational challenges by using agendas, previewing activities, and making explicit the demands of individual assignments. Indeed, expectations were consistently stated clearly and presented visually (e.g. agenda written on the board, permanent reminder of task steps, model of task expectations). In addition, teachers accommodated processing and integrative challenges by presenting a limited amount of new information at one time, connecting new content to previously learned concepts, assessing student learning (asking questions and checking individual work), and teaching through multiple modalities (e.g. verbal, visual, kinesthetic). Furthermore, because of the low staff to student ratio of 1:8 or less, teachers had the capacity to provide students with individual support.

During Geometry and Basic English when direct instruction was observed, teachers supported challenges associated with processing, consolidating, and recalling information by activating prior knowledge; breaking skills down and scaffolding instruction, pairing verbal information with visual support; modeling processes and making steps explicit; facilitating active engagement (e.g., asking students to answer questions and explaining processes); and repeatedly reviewing target concepts, which helps develop automaticity for rote skills. In addition, during Basic English, Ms. Johnson provided time for students to process questions and formulate responses, as well as promoted understanding of the text by asking students to make personal connections

with the characters in the passage they were reading.

Finally, across the three classrooms observed, it was evident that teachers had established classroom norms and clear expectations with their students. Indeed, students consistently participated in instructional activities, responded well to questions, and demonstrated respect for their teachers.

At present there are no universally recognized guidelines to assist educators in the development of a language-based model. However, it is commonly understood that instruction in a language-based program will include a range of instructional strategies that support students with expressive and receptive language delays and executive functioning challenges. These strategies include, but are not limited to, use of visual supports and multisensory instructional strategies; break down of skills; models of process and product; support to connect new content with prior learning; a slower pace of instruction with multiple opportunities to preview, review, and practice skills; and scaffolding that is faded over time. Importantly, these instructional strategies are expected to be embedded seamlessly into instruction in a pro-active approach to teaching and learning. In considering information gathered through classroom observation and interview with staff, it is felt that the language-based program located at Nantucket High School aligns with practices recommended for students with language-based disabilities and indeed, all three classes presented as positive, well-structured learning environments led by educators who hold high expectations for their students and for themselves.

(S-5)

20. Susan Brefach, a Ph.D level educational psychologist, evaluated Veryl on November 30, 2016. She reviewed the results of earlier evaluations to aid in interpretation of her own test results. She administered a variety of standardized measures of intellectual function, learning style, and academic achievement along with non-standardized assessments of cognitive and behavioral function. The results and/or presumptions set out in Dr. Brefach's written report of Veryl's evaluation contain numerous errors or omissions that weaken reliability, eg. an incorrect birthdate resulting in an incorrect age/norm related score; failure to use a timer on a timed test resulting in a lower score; incorrect name at various points in the report; inconsistent conclusions based on social-emotional testing that lacked validity measures. Nevertheless, the reported results are broadly consistent with those outlined in earlier evaluations conducted by Children's Hospital, Dr. Callahan and Dr. Simpson. (P-2; see also P-22; P-14; P-15; P-16; P-17; P-18; P-6; S-4; P-5; S-3; P-4; P-3; S-2.) Dr. Brefach found that Veryl's weaknesses in processing speed and working memory affected all aspects of his learning and cognitive potential. She recommended that he receive all academic instruction in the context of a comprehensive language-based program that included specialized presentation and production geared to students with language learning challenges and slow processing; direct, specialized instruction in reading, written language and math; structured rules-based programs in written language and

reading; consistent structure and expectations from class to class; emphasis on metacognitive, strategies and accommodations; and skilled, experienced teachers.

(Brefach)

Dr. Brefach testified that she observed 5 classes in the High School's language-based program on one day during the spring, 2017. She could not remember the date, had not taken contemporaneous notes and did not write a report of her observation. Dr. Brefach testified that the High School program was not a comprehensive, consistent language-based program and that Veryl appeared to be lost and disengaged. She concluded that Nantucket did not have an appropriate program and placement for Veryl and recommended that he attend a private special education school, such as Landmark.

(Brefach)

21. Sheilah Reardon, Interim Special Education Director for Nantucket, testified that she accompanied Dr. Brefach during her program observation on March 24, 2017 and took notes. She observed Veryl to be appropriately participatory, confident, and making use of accommodations. (Reardon)

22. The Team reconvened on March 10, 2017 to review the results of Dr. Brefach's evaluation. No changes were made to the IEP as the Team believed the recommendations for program placement, instructional strategies and accommodations were already set out in the 2016-2017 IEP and in place for Veryl in the High School's language-based program. (Reardon) In July 2017 Dr. Reardon noted that transition assessments were currently being conducted in accordance with parental consent obtained at the end of the 2016-2017 school year. (Reardon)

23. Veryl's IEP and program provides for standard grading in his inclusion classes against the standards and expectations of the mainstream class. Veryl achieved passing grades in all 2015-2016 and 2016-2017 academic year inclusion classes and was promoted to the next grade. He passed the Biology MCAS with a score of 236. While some of the benchmarks set out in the 2016-2017 IEP do not contain objective, numerically measurable goals for skill attainment, the progress reports submitted by the responsible teacher do report Veryl's skill acquisition in measurable, replicable fashion, (see eg. S-10, S-11; Reardon; Townsend)

LEGAL STANDARDS

A school-age child with a disability who is determined to be eligible for special education and related services⁴ is entitled to a free appropriate public education (FAPE), which is delivered primarily through the child's Individualized Education Program (IEP).⁵ As the First Circuit noted, "the substance of an IEP must be something different than the normal school curriculum and something more than a generic, one-size-fits-all program for children with special needs."⁶

⁴ Eligibility is determined pursuant to the IDEA, 20 U.S.C. §1401, et seq., and the Massachusetts special education statute, M.G.L. c71B

⁵ See *Lessard v. Wilton-Lydeborough Coop. Sch. Dist.* ("Lessard I"), 518 F.3d 18, 23 (1st Cir.2008).

⁶ *Id.*

While a tailored IEP does not entitle the child to the maximum educational benefit possible,⁷ as the Supreme Court has recently articulated, the IEP must be reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances.⁸ Even if it is not reasonable for a child to advance from grade to grade, "every child should have the chance to meet challenging objectives."⁹

Meaningful educational benefits and levels of progress are judged within the context of the child's potential. Where a child's potential for learning and self-sufficiency cannot feasibly be determined precisely, it is still possible to access "the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence."¹⁰

To the maximum extent appropriate, eligible children must also be educated in the least restrictive environment (LRE), or with children who are non-disabled; students should only be placed in a separate setting, such as a private day school, if the nature or severity of the disability is such that a student cannot remain in a regular education setting that employs the use of supplementary aids and services.¹¹

The requirements of LRE and meaningful education benefit are "correlative": "a placement... considered better for academic reasons" does not relieve the State from the requirement to comply with the LRE provisions, and compliance with the LRE provisions does not "cure" an inappropriate placement.¹² In *Roland M.*, the First Circuit ruled that the desirability of mainstreaming must be weighed "in concert with" the IDEA's mandate for educational improvement: an appropriate educational plan balances the benefits gained or lost on both sides.¹³

The burden of proof in an administrative hearing challenging an IEP is placed upon the party seeking relief. In a due process proceeding to determine whether a school district has offered or provided a free appropriate public education (FAPE), the moving party must prove its case by a preponderance of the evidence; if the evidence is equivalent, the party seeking to maintain the status quo will prevail¹⁴

If the Parents successfully prove at Hearing that the School has failed to offer or provide FAPE, the Hearing Officer may issue an order providing for a remedy that would place the student in the educational situation the student should have, or would have, been in had the

⁷ See *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012)(quoting *Lessard I.*), 518 f.3d at 23.

⁸ See *Andrew F. v. Douglas Cnty. Sch. Dist.* 137 S. Ct. 988, 999 (March 22, 2017).

⁹ *Id.* at 1000.

¹⁰ See *D.B.*, supra at 36; *Lessard I.*, supra at 23.

¹¹ *D.B.*, 675 F.3d at 36.

¹² 20 U.S.C. §1412 (a)(5)(A); 34 C.F.R. §300.114(a)(2). See also M.G.L. c71 §§2, 3 (definition of disability and remedy to assure that child receives a FAPE in the LRE, with a presumption to direct placement to the regular education environment).

¹³ See *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990)(quoting *Burlington v. Dept of Educ.*, 736 F.2d 773, 789 n.190 (1st Cir. 1984) and *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983)).

¹⁴ *Schaffer v. Weast*, 546 U.S. 49 (2005).

school district appropriately carried out its duties under the IDEA and M.G.L. c71B appropriately.¹⁵

FINDINGS AND CONCLUSIONS

The Parties agree that Veryl is a student with special learning needs entitled to a free, appropriate public education in accordance with 20 U.S.C. §1400 et seq. and M.G.L. c71B. They disagree about whether Nantucket Public Schools has met its obligation to make that education available to Veryl. After careful consideration of the evidence submitted in this matter, and the arguments of counsel for both parties, it is my determination that Nantucket Public Schools developed and implemented an Individualized Education Program for Veryl that appropriately addressed all his special education needs during the 2016-2017 school year in the least restrictive setting. The parents did not carry their burden of proving otherwise by a preponderance of the evidence. My reasoning follows:

First, Parents argue that the language-based program at Nantucket High School is insufficiently “language-based” and intensive to address Veryl’s academic deficits in reading, written language and math. They assert that he needs a comprehensive, segregated program in a separate day school setting to address the severity of his language learning disabilities. They point to the recommendations and observations of Dr. Brefach for support.

The preponderance of the evidence shows, however, that the language-based program at Nantucket High School is a tightly coordinated and supervised program that uses teaching strategies, methodologies, materials and tools across classes and curriculum to deliver remediation, practice, accommodations and access to grade level curriculum in accordance with best practices for language-based instruction. For Veryl in particular, core academic classes in small groups, using language-based instructional techniques along with individualized, systematic reading and writing programs, meet the recommendations of all evaluators. Veryl also has access to mainstream electives, classes, activities and peers, a component of his high school life in which he demonstrates marked success. All teachers credibly testified to the techniques they use to ensure Veryl’s comprehension of material, to develop his literacy and numeracy skills, and to encourage his independent use of accommodations (§§11, 14, 15, 16, 17). In particular, Ms. Townsend and Ms. Johnson described the coordinated, intensive language intervention strategies used in their work that mirror the recommendations made in the Children’s Hospital, Callahan and Brefach evaluations. The program is supported by an expert in the design and implementation of high school level language learning disabilities programs, Ann Larsen. I was particularly persuaded by the testimony of Dr. Stephens, an experienced special education program evaluator, whom I found to be knowledgeable, careful, candid and unaffiliated with either party. Dr. Stephens endorsed the Nantucket program, describing it as possessing all the recommended features of an appropriate language-based program. (Stephens; S-5). I found Dr. Brefach’s testimony to the contrary to be unreliable. She did not take notes, did not produce a contemporaneous report, had several significant memory lapses perhaps reflecting the three month gap between her observation and her testimony and testified to facts not observed, or directly contradicted, by Dr. Reardon who had accompanied Dr. Brefach during

¹⁵ *Matthew J. v. Mass. Dept. of Education*, 989 F.Supp 387 (D.Mass.1998).

the observation. Where their observations vary I credit Dr. Reardon's version as I found her to be precise, open and disinterested.

Based on the above I find the partial inclusion language-based program at Nantucket High School to conform to commonly accepted standards for language-based programming, to have been accurately described in the 2015-2016 and 2016-2017 IEPs offered to Veryl, and to have been available to and implemented for, him throughout the 2015-2016 and 2016-2017 academic years.

Second, the Parents' central complaint about Veryl's educational experience at Nantucket High School is that he was making insufficient academic progress during the 2015-2016 school year. The preponderance of the evidence demonstrates, however, that Veryl was making slow, but steady, progress in all areas of identified special needs. The quarterly reports completed during that year show consistent progress toward achievement of his IEP benchmarks, (S-12- S-15) His teachers credibly described growth in acquisition of specific English language, reading and writing skills. (Townsend; Johnson; see ¶11 & 14) That growth was confirmed, in part, by results of standardized testing administered by Dr. Callahan near the conclusion of the 2015-2016 school year. Dr. Callahan noted that the insignificant changes on most of the pre/post test items reflected both Veryl's cognitive functioning level, learning style and type of learning disabilities, as well as the brief period of instructional time between the pre and post tests. (See also Townsend) Nevertheless, some of the measures of writing skill showed unexpected and welcome positive growth, consistent with the observations of Veryl's teachers. Based on this information, the information available to the Team at the time it developed the 2016-2017 IEP, the plan for Veryl to continue to receive his special education services in the language-based program was appropriate.

The Parents argue that the results of testing performed by Dr. Brefach in November 2016 contradict those of Dr. Callahan and prove that Veryl was not making progress, but rather regressing in academic functioning. I do not agree. First, I note that the standardized test scores obtained by Dr. Brefach were not available to the Team that developed the 2016-2017 IEP and therefore could not have factored into the Team's decision to continue to make the partial inclusion language based program available to Veryl. Second, I note that Dr. Brefach's testing, scoring and reporting was marked by errors and inaccurate assumptions that render her conclusions suspect. Due to this, and although Dr. Brefach reached many of the same conclusions and recommendations as had previous evaluators at Boston Children's Hospital, Nantucket Public Schools and Dr. Callahan, I accord her report considerably less weight than that of Dr. Callahan.

Finally, I note that Veryl's progress during his second year in the language-based program was more robust. His teachers reported improved attitude and engagement, independent use of previously learned language-based techniques to support current learning, and growth in written language skills, reading fluency, and critical thinking. (Townsend, Johnson, Gilgen) Veryl had been promoted from 9th to 10th grade in accordance with regular education criteria (Reardon); he passed a high school exit examination (Townsend) he participated in and passed a general education elective in the fall 2016 semester; quarterly and biweekly progress reports

consistently reflect steady acquisition of academic skills. (S-11; S-12) There is no persuasive countervailing evidence of regression or stagnation. It is notable that Veryl has demonstrated this growth without using additional supports and services offered to him such as extended year instruction in math, individualized math fluency drills, and after school tutoring. Therefore, I find that Veryl has made, and continues to make, progress commensurate with his learning potential, and consistent with his identified disabilities, in the partial-inclusion language-based high school program outlined in the 2015-2016 and 2016-2017 IEPs.

The Parents point to “vague” and “not measurable” IEP benchmarks and objectives as evidence that the 2016-2017 IEP was inadequately drafted and/or insufficiently targeted to Veryl’s disabilities. (Ms. V.) I disagree. A plain reading of the 2016-2017 IEP and progress reports shows the objectives and benchmarks outlined in the challenged IEP are sufficiently capable of measured reporting. (See paragraphs 14, 15, 23) Where the benchmark language was imprecise the teachers responsible for reporting progress, or lack of it, adjusted their responses to provide “measurable data”. Other than that one element, “vague benchmarks”, the Parents did not outline any particular objection to the 2016-2017 IEP or placement. Even if the IEP benchmarks and objectives had been overly broad and/or resistant to objective measurement, that flaw alone would not provide sufficient justification for Veryl’s removal from an otherwise appropriate integrated placement. The remedy for “vagueness” is sending the IEP back to the Team to develop appropriately measurable objectives.

Nevertheless, the Parents’ request for intensification of academic support for their son is understandable given his age and ambition. That the necessarily qualitative assessments of his current and projected academic skills could be interpreted as subjective or manipulated adds to their urgent concern. My impartial and practiced reading of the IEPs, the evaluations, the progress reports and the testimony presented in this matter yields only a positive conclusion: that given his documented learning disabilities in the context of an appropriately responsive and challenging educational environment Veryl is thriving, is engaging in the opportunities for vocational and recreational activities with his peers, and is working hard toward fulfilling high expectations.

Based on the above I find that Nantucket: a) designed and implemented a 2016-2017 IEP which appropriately addressed Veryl’s identified learning needs, b) offered individualized special education services which met the recommendations of evaluators and teachers available to the Team, and c) provided that appropriate program in a setting which allows Veryl the access to general education curricula, activities and peers to which he is entitled.¹⁶

Considering Veryl’s unique circumstances Nantucket appropriately met its obligation to make a free appropriate public education available to him throughout 2015-2016 and 2016-2017. I therefore do not reach the Parents’ request for an award of compensatory services in the form of a publicly funded private day school placement for the 2017-2018 school year.

¹⁶ 603 CMR 28.06 (2) (c).

ORDER

The 2016-2017 Individualized Education Program developed and implemented by Nantucket Public Schools is reasonably calculated to provide a free, appropriate public education to Veryl in light of his individual circumstances and in the least restrictive available environment.

By the Hearing Officer

Lindsay Byrne¹⁷
Dated: September 1, 2017

¹⁷ The Hearing Officer gratefully acknowledges the invaluable assistance of BSEA Legal Intern Alina Voronov in the preparation of the Decision.