

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

In re: Trina<sup>1</sup>

BSEA #1601943

**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 March 22 and April 8, 11, 12, and 13, 2016 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student's Mother	
James Anderson	Principal, Barnstable Public Schools
Jeanne Baskin	Speech Language Pathologist, Barnstable Public Schools
Eric Bruinooge	Assistant Director of Special Education, Barnstable Public Schools
Constance Capra	Previous Paraprofessional for Student in the Barnstable Public Schools
Christina Graham	Special Educator, Barnstable Public Schools
Jane Jezard	Director of Special Education, Barnstable Public Schools
Cheryl Jorgensen	Educational Consultant
Deborah Leary	Reading Teacher, Barnstable Public Schools
Lauren Marble	Speech Language Pathologist, Spaulding Center for Children
Pamela Troutman	Coordinator of Special Education, Barnstable Public Schools
Joan Stein, Esq.	Attorney for Barnstable Public Schools
Michael Turner, Esq.	Attorney for Parent

The official record of the hearing consists of documents submitted by the Barnstable Public Schools and marked as Exhibits S-1 to S-20; documents submitted by Parent and marked as Exhibits P-1 to P-10; P-13 to P-29; P-31 to P-53; P-55 to P-60;<sup>2</sup> approximately four and a half days of recorded oral testimony and argument; and a five volume transcript produced by a court reporter. As agreed to by the parties the record was held open until May 10, 2016. Closing arguments were received and the record closed on that date.<sup>3</sup>

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<sup>1</sup> "Trina" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> Parent's Exhibits 17, 24-28, 31-33, 41-44, 46, 55, and 59-60 were admitted only to the extent testimony linked them to the relevant issues. Additional exhibits proffered by Parent were not admitted.

<sup>3</sup> Along with her closing argument, Parent submitted an affidavit from a non-party who did not appear at the Hearing. The District objected to the affidavit as untimely and irrelevant, and asked that it be struck from the record. I decline Parent's invitation to consider evidence submitted for the first time in a closing argument. The affidavit has been struck.

## INTRODUCTION

On August 28, 2015, Parent filed a Hearing Request against the Barnstable Public Schools (“District”) asserting, among other things, that the District has low expectations for Trina and has failed to take into account her potential in establishing its goals for her in her Individualized Education Program (IEP); that it has falsified communication with Parent; that it should implement a technology goal and reimburse Parent for money she spent on programs used on Trina’s iPad last year; that it should fund her outside-of-school math tutoring and utilize her math block in school to work on the assignments given by that tutor; that it should provide her pull-out math and English instruction in a room separate from other students to limit her exposure to “children with bad behaviors”; and that it must assign a different special education teacher to Trina. Specifically, Parent requested that the BSEA take the following actions:

1. Order the District to adopt and integrate the recommendations of Dr. Sharma<sup>4</sup> and pay for all past evaluations and services provided by Dr. Sharma for the past two years and to have Dr. Sharma provide ongoing tutoring services for [Trina].
2. Order the District to adopt and integrate the recommendation of Dr. Jorgensen<sup>5</sup> into [Trina]’s program.
3. Continue to provide one-on-one English and Math services with a pull-out instructional environment appropriate for [Trina], conducive (*sic*) to learning, and where she will not be exposed to inappropriate behavior.
4. All specialized services such as OT, speech, and reading etc. need to be provided by a highly trained specialist with a highly trained consistent paraprofessional to provide meaningful carryover.
5. Order the Barnstable (*sic*) to provide an appropriate special education teacher who can teach [Trina] appropriately and to her potential and specifically not the prior year’s special education teacher who did not teach [Trina] appropriately.
6. Pay for all past services and evaluations provided by the mother.
7. Provide mother with daily, complete and thorough reports and school work and tests in a timely manner each school week.
8. Order the district to have all participants involved with [Trina]’s education work collaboratively.
9. Make findings of facts (*sic*) and rulings of law that [Trina]’s past IEP and most current proposed IEP deny [Trina] the ability to make effective progress based on her potential

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<sup>4</sup> Mr. Sharma is Parent’s independent evaluator. Although Parent refers to him as “Dr. Sharma” or “Professor Sharma,” no evidence was offered as to Mahesh Sharma’s education, training, or title. See Finding 12, *infra*.

<sup>5</sup> Dr. Jorgensen is Parent’s Educational Consultant. See Finding 33, *infra*.

and that the actions and non-actions of the District did violate [Trina]'s right to FAPE pursuant to the IDEA, Section 504, and MGL c. 71B and their regulations.

10. Order two years of compensatory education services.
11. Order the district to have sufficient administrative leadership to follow the laws and ensure IEPs and subsequent services are appropriate for [Trina].
12. Make other such ruling (*sic*) and order as the facts presented during the hearing should warrant.<sup>6</sup>

The District filed its response on September 9, 2015. The Hearing was postponed four times at the request of Parent, with the District's assent, and twice at the District's request, with Parent's assent. On March 8, 2016, Parent filed a Motion to Sequester witnesses, to which the District filed an Objection on March 14, 2016. On March 21, 2016 I issued a Ruling denying Parent's Motion. Following a Conference Call on March 17, 2016, the Parties each submitted a brief statement of the issues to aid in clarifying the questions to be determined. On March 21, 2016, I issued an Order framing the issues as follows:

1. Whether the Individualized Education Program (IEP) proposed by Barnstable dated June 8, 2015 to June 8, 2016 provides [Trina] with a free, appropriate public education in the least restrictive environment;

Specifically, Parent argues that for Trina to receive FAPE, she must be separated from other children with special educational needs in order to receive her pull-out English Language Arts (ELA) and math instruction; she cannot receive this instruction from her current special education teacher and in fact must receive her ELA instruction from a reading specialist; and her mother must receive daily, complete and thorough reports, school work and tests in a timely manner each week.

2. Whether [Trina]'s accepted, expired IEPs for the period beginning August 28, 2013 were implemented as written.

In my Order, I noted that if the Parent wanted me to decide the additional issues raised for the first time in her Statement of Issues she filed on March 21, 2016, she would need to amend her Hearing Request.

The Hearing began on March 22, 2016 and was scheduled to continue on March 24, 2016. On the afternoon of March 23, 2016, Parent requested that the second day of Hearing be postponed due to the unavailability of her counsel. As such, the Hearing took place on March 22 and April 8, 11, 12, and 13, 2016.

Upon the completion of Parent's case in chief, Barnstable moved for a Directed Verdict as to several issues. Although I denied the District's Motion, the parties were able to establish several points of agreement: (1) Trina requires, and will be provided, a partial inclusion IEP

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<sup>6</sup> Hearing Request.

under which she receives pull-out special education services for ELA, math, occupational therapy (OT), and speech and language, and otherwise participates in general education classes; (2) Trina requires, and will be provided, 1:1 support at all times when she is in inclusion classes; (3) to the extent she continues to be tutored by Mr. Sharma outside of school, the District will align its math teaching of Trina with his recommendations; (4) there is no dispute as to the structure and amount of her related services, i.e. OT and speech and language.

For the reasons below, I find that the IEP proposed for Trina for the 2015-16 school year provides her with FAPE, and that Parent has not proven that Barnstable failed to implement any past accepted, expired IEPs as written.

## FINDINGS OF FACT

### Trina's Profile

1. Trina is thirteen year-old resident of Barnstable, Massachusetts. (S-4) She is a social learner who is interested in other students and connected to her teachers; she enjoys school and spending time with her peers. (Graham; Marble; Baskin) She is hard-working and capable of maintaining her focus for extended periods of time. (Parent; Graham; Marble; Capra; Leary) Barnstable staff describe Trina as a “fabulous kid” – happy, well-adjusted, courteous, well-behaved, and dedicated. (Bruinooge; Graham)
2. There is general agreement between Parent and the District as to Trina's cognitive profile. She has been diagnosed with Down Syndrome and a severe communication disorder. (S-4) Her Full Scale Intellectual Quotient (FSIQ) is below the first percentile, as are her verbal comprehension, perceptual reasoning, working memory, and processing speed scores. (S-4; P-7) Her cognitive skills cluster in the moderate range of intellectual disability; testing performed in July 2015, when Trina was twelve years, nine months old measured her overall skill level at three years, seven months. Trina's verbal skills are a weakness, whereas she has stronger nonverbal reasoning abilities. (P-7) Trina's significant processing and working memory deficits impact her ability to process language and her expression is also reduced. (Marble) Trina may become frustrated when she gets overwhelmed, and she may shut down when she cannot comprehend what is expected of her. (Marble; Capra)
3. In July 2015, Trina was assessed by Dr. David Stein, Psy.D, of the Developmental Medicine Center at Children's Hospital. Dr. Stein conducted a record review and parent interview in addition to administering a number of standardized tests,<sup>7</sup> after which he concluded that Trina's academic skills were at the first grade, ninth month level. He reported no difficulties administering any of the testing, (P-7) and his evaluation of Trina

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<sup>7</sup> Dr. Stein administered the Stanford Binet Intelligence Scales, Fifth Edition; Beery Buktenika Test of Visual Motor Integration, Sixth Edition; Peabody Picture Vocabulary Test, Fourth Edition; Expressive Vocabulary Test, Second Edition; Wide Range Achievement Test, Fourth Edition; Gray Oral Reading Tests, Fifth Edition; Development Behaviour Checklist, Parent; Aberrant Behavior Checklist, Community Edition; and the Vineland Adaptive Behavior Scales, Second Edition, Parent Report. (P-7)

was largely consistent with that performed by Barnstable Public Schools in the spring of 2014 as part of her three year re-evaluation. (P-14)

4. Dr. Stein recommended that Trina receive both integrated and individualized programming, with access to a 1:1 aide for integrated periods. He suggested that new learning, particularly in core subjects, occur with a special educator with expertise in the particular subject area, outside of the mainstream setting. He also recommended that Trina's peers in a specialized setting be carefully considered since she is a social learner. (P-7)
5. Decoding is a relative strength for Trina. (S-4) Over the course of the last several years, she has progressed in her reading fluency, but her comprehension has not progressed at the same rate. (Graham) As of July 2015, Trina's reading rate, accuracy, and fluency skills were within the early end of the first grade level; she scored below the first grade level on reading comprehension. (P-7)
6. Mathematics is a weakness for Trina. As of July 2015, her math skills were at the kindergarten, first month level. (P-7) Trina has had difficulty mastering some basic math concepts, including simple number conceptualization and arithmetic problems such as counting. (P-6; P-7) Dr. Stein recommended that examples, hands-on materials, and a focus on functional skills such as making purchases, using money, telling time, and reading schedules, be utilized in Trina's mathematics instruction. (P-7)
7. Trina made progress in most areas of her adaptive functioning between 2012 and 2015. For example, her personal relating, play, coping, and self-care skills increased, and she made modest gains in her communication skills. (P-7)
8. Trina has been receiving private speech and language services from Lauren Marble at Spaulding Outpatient Center for Children since approximately 2011. Ms. Marble has a Master's degree in Communication Sciences and Disorders and is licensed in Massachusetts as a Speech-Language Pathologist and Educator. At this time Ms. Marble sees Trina once a week for forty-five minutes. (P-22; Marble) Together, they use ProLoquo2Go, a research-based alternative and augmentative communication application for the iPad. According to Ms. Marble, Trina "makes slow progress, but she makes progress." (Marble)
9. Ms. Marble testified that it is very important that the people working with Trina employ the same strategies across various contexts. She suggested that more communication and collaboration between her, as Trina's outside speech and language pathologist, and Trina's Team would be helpful, a recommendation supported by Dr. Stein. (P-7; Marble) To date, Parent has not asked Jeanne Baskin, the speech pathologist who works with Trina in school, to be in contact with Ms. Marble. (Baskin)
10. Ms. Marble last evaluated Trina in April 2015. (P-9) Her findings were similar to those of Barnstable Speech Language Pathologist Jennifer Jones, who evaluated Trina in the spring of 2014, as part of her three-year re-evaluation. (S-16; Baskin)

11. At Hearing, Ms. Marble testified that standardized batteries do not capture accurately what Trina knows and is able to do. Because of her complex communication needs, combined with her cognitive impairment and expressive language disorder, Trina cannot necessarily communicate all she knows. Asked directly by Parent's attorney about Trina's potential, Ms. Marble stated, "There's no way I could answer that. Nobody could answer that. We don't know anybody's potential unless we give them access and learning. I don't think anybody reaches a ceiling in learning." (Marble)
12. Mahesh Sharma, at the Center for Teaching/Learning of Mathematics, conducted a Diagnostic Evaluation and Assessment of Trina's Learning and Achievement dated May 10, 2015. The purpose of this evaluation was to "discover the nature of her potential for learning mathematics" and find out whether "there are special ways to help [Trina] acquire numeracy skills. (P-6) Although the parties referred to Mahesh Sharma during the Hearing as "Dr. Sharma" or "Professor Sharma," no evidence was offered regarding Mr. Sharma's education, certification, or qualifications.
13. In his evaluation of Trina, Mr. Sharma noted that due to Trina's "difficulty with language and lack of numeracy skills, [he] was not able to administer any of the standard tests and protocols with any level of reliability." Instead, he relied on the concrete diagnostic activities she performed while with him as the basis for his assessment. Mr. Sharma concluded that Trina "has not yet acquired many of the cognitive skills at the concrete level of thinking at a sufficient level of mastery so that she can use them in acquiring abstract mathematical concepts." According to Mr. Sharma, Trina has acquired dyscalculia, "contributed to by her neurological and cognitive status." He recommended that she be shown number concepts through appropriate concrete models that "integrate the essential pre-skills of one-to-one correspondence, visual clustering, and sequencing." Specifically, Mr. Sharma suggested that special playing cards, Cuisenaire rods and Base Ten materials be utilized in Trina's mathematics instruction. He also suggested that games and toys such as puzzles, Legos, cards, and dominos, would help Trina to develop pre-requisite mathematics skills. (P-6)
14. Notwithstanding Mr. Sharma's recommendation, Parent has indicated that she wants Trina sitting at a desk or table doing work and learning in school, not playing with toys. (Parent)
15. Trina received tutoring from Mr. Sharma, at Parent's expense, once a month for one hour between April and December 2015, at which time tutoring was discontinued. She then resumed tutoring at the beginning of May, 2016. (Parent)
16. Trina received physical and occupational therapy evaluations through the District in March 2014 and an occupational therapy evaluation through the Spaulding Outpatient Center for Children in September 2015. There is no dispute concerning her occupational therapy needs and services. (S-17; S-18; P-9)

## Barnstable Intermediate School

17. During the spring of 2014, while Trina was in the fifth grade at Barnstable United, several staff members from Barnstable Intermediate School (BIS) attended one or more of her Team meetings. (Bruinooge, Graham) Christina Graham, who became Trina's special education teacher for sixth and seventh grades, observed her in both general education and self-contained classrooms before she began at BIS. (Graham)
18. Trina's IEP for 2014-15, her sixth grade year, called for partial inclusion. (S-6) Trina was assigned to a team that included the Integrated Learning Center, a "fluid" program comprised of "the most significantly challenged children" at BIS. (Graham) The sixth grade students in the ILC who were in inclusion classes for science and social studies were assigned to the same teachers, and attended these classes together along with their paraprofessionals. (Graham, Capra) Trina attended general education classes and activities, with the exception of some of her direct services (speech and language, OT) and ELA and math, which she received in the ILC.(Graham)
19. Christina Graham is the teacher assigned to the ILC, which provides students with academics, instruction in activities of daily living, and any other kind of learning they need. Ms. Graham is certified in elementary education, grades K-6, and special education grades pre-K-9. She has been teaching for almost thirty years, seventeen at BIS. (P-23; Graham)
20. Trina receives speech and language services at BIS from Jeanne Baskin. Ms. Baskin has a Master's degree in speech and language and is certified through the Massachusetts Department of Elementary and Secondary Education. She also has training in augmentative and assistive technology and a specialization in social cognitive disorders. Ms. Baskin has worked in the District for sixteen years with children with communication impairments, focusing on students who also have cognitive impairments or other related disabilities that might affect their communication, including Down Syndrome. She has been working with Trina for three years, since she was at Barnstable United. Ms. Baskin sees Trina two or three times a week; she has one individual session and one social skills lunch group per week, and twice a month Ms. Baskin accompanies Trina to one of her general education classes to support social communication in the classroom setting. She is working with Trina on functional communication, assisting her in becoming independent with her language so she is able to get her needs met, share information, answer questions, participate in meaningful discussion, access the curriculum meaningfully, take turns, participate in a general education class, and apply the language she has in natural settings. (Baskin)
21. Trina is very motivated to learn speech and language strategies, though she needs scaffolding. She has made progress through each of the last three years on the speech and language objectives on her IEP through a "tremendous amount of effective effort." Asked Trina's potential, Ms. Baskin stated that she thinks Trina has the ability to make gains in

communication for the rest of her life, less in foundational language and more in functional social communication. (Baskin)

22. Parent observed Trina in school once in her social studies class during the 2014-15 school year. She did not observe her daughter in Ms. Graham's class during this school year. (Parent)
23. During the fall of 2014, while Trina was in sixth grade, her teachers monitored her progress and met regularly with Parent. At these meetings, Parent requested multiple changes, including a reordering of Trina's goals, and changes to the location of her services and the identity of those responsible for delivering them. She expressed a preference that Trina not be "exposed to students who demonstrate significant behaviors and distract her from instruction."<sup>8</sup> (Graham; Anderson) Although she had never observed her daughter in Ms. Graham's room, Parent testified that she knows who the other students are and knows their behaviors. (Parent)
24. Several of these changes were made, in an attempt to accommodate Parent's concerns. Specifically, Trina was moved to a different sixth grade team, which meant that she no longer attended science or social studies with the "pod" of students on IEPs. She also began receiving her math and ELA instruction in a separate classroom approximately twenty yards away from Ms. Graham's room. (Anderson; Bruinooge; Graham)
25. At Parent's request, Ms. Graham stopped providing Trina's ELA instruction. Reading specialist Deborah Leary began teaching her reading for thirty minutes a day instead. (Parent) Ms. Leary is a certified reading teacher, and she has her Master's degree in reading. In her position as a Title I reading teacher with the Barnstable Public Schools, Ms. Leary provides remedial assistance for students who are reading approximately one to two years below grade level, and sometimes up to three years behind in vocabulary development. The students on her caseload are generally chosen based on teachers' recommendations, MCAS scores, and report card grades. Before Trina, Ms. Leary had never taught reading to anyone with Down Syndrome. She believes she was chosen by Mr. Anderson to work with Trina because of her phonics background and because she had some flexibility in her schedule. Ms. Leary felt she was "out of her realm" with Trina because even though she has a good reading background, she has neither education nor experience working with children with Down Syndrome in an academic setting. (Leary)
26. In her work with Trina over a period of about four and a half months, Ms. Leary used the Go Phonics program. Trina made progress, particularly in her decoding, but she did not make much progress in reading comprehension. Ms. Leary had to provide additional prompts and supports to enable Trina to answer questions in some lessons because her comprehension was not keeping pace with her fluency. (Leary)
27. Trina received her mathematics instruction from her paraprofessional in the separate classroom, under the supervision of Ms. Graham. (Graham)

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<sup>8</sup> Parent testified that she felt like it was bad for Trina, who is highly distractible, "to be in a room with that many SPED kids." (Parent)



28. As a result of all of these changes, it was difficult for Ms. Graham to oversee the performance of Trina's paraprofessional and give her feedback. (Graham)
29. During the 2014-15 school year, Trina used an iPad at school that had been provided by Parent, with programs and applications that were also provided by Parent. (Parent)
30. Parent was satisfied with this arrangement and wanted to continue it through the remainder of sixth grade and into the following school year. (Parent; Anderson) She testified that Trina came home talking about what she had learned in school and was excited to share her lessons. (Parent)
31. Despite Parent's request, these changes were never written into Trina's IEP. (Parent; Graham)
32. Members of Trina's Team believed this arrangement was not ideal for her because she was receiving two periods a day of instruction "basically in a small, little, windowless office space with a one-to-one paraprofessional without access to other students," and "was disconnected physically and in terms of educational programming was disconnected from her special education teacher, the team to which she was assigned and her students were assigned." (Bruinooge) Moreover this arrangement made it difficult for Trina's special education teacher to properly supervise the implementation of her services, including the support provided by her paraprofessional.<sup>9</sup> (Graham) Team members raised concerns about segregation and the impact of separation from her peers on Trina's social and emotional development. (Anderson)
33. On February 26, 2015, Cheryl Jorgensen, Ph.D. observed Trina for half a day at BIS. (P-5) Dr. Jorgensen has a Master's degree in Public Health and a Doctor of Philosophy. She taught at the University of New Hampshire between 1986 and 2011 in two different programs: a teacher certification program for students with intellectual and other developmental disabilities, and a graduate certificate in autism spectrum disorders. (Jorgensen) Dr. Jorgensen has managed or directed several grant-funded projects at UNH focused on, for example, inclusive education for children with autism and related disabilities, or personnel preparation in intellectual and developmental disabilities. She has written extensively and made presentations to various audiences about inclusion and certification for teachers of students with disabilities, among other things. (P-21) For the last several years she has presented at the Massachusetts Down Syndrome Congress Educators Forum. (P-5) Dr. Jorgensen currently works as an independent Inclusive Education Consultant. (P-21)
34. Before her observation of Trina, Dr. Jorgensen reviewed Trina's IEP and her private evaluations, and she spoke with Parent on the phone. (Jorgensen) Dr. Jorgensen did not meet with Trina or conduct any evaluations herself.

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<sup>9</sup> The paraprofessional who worked with Trina during the 2014-15 school year noted that she had to choose among various papers to work on with Trina with little guidance, and often had to modify assignments further for Trina. (Capra)

35. Dr. Jorgensen observed Trina in her inclusion social studies and science classes, as well as in the small room where she was being taught ELA and math by Ms. Graham and her paraprofessional. Dr. Jorgensen reported that Trina was happy, focused in class with the supports she was given, engaged in her lessons, and using her iPad appropriately. (P-5; Jorgensen) Dr. Jorgensen endorsed Trina's 2014-15 IEP as providing Trina with a high quality education. (Jorgensen)
36. On or about March 26, 2015, the parties entered into a mediation agreement whereby the arrangement described in Findings 24-27, above, would remain in place through the end of the 2014-2015 school year. Pursuant to the agreement, Trina would revert to the stay-put IEP for 2014-15, described in Finding 18, above, in the absence of an accepted 2015-16 IEP. (S-11; Bruinooge)
37. Parent testified that she believes there were days during the 2014-15 school year when Trina's paraprofessional was out that she did not receive all of her academics. She provided a document reflecting her calculations of what she referred to as services owed to Trina, but was unable to specify which services on Trina's IEP had not been implemented. Asked specifically for any evidence that Trina's IEP was not implemented during the 2014-15 school year, Parent responded, "I do know it's difficult for the staff to make up sessions that are missed, and I don't think they're always made up, and I have caught them on a few of those so she's probably missed some. I got too tired to keep track, to be honest with you." (P-36; Parent)
38. Parent also testified that she believes some of the daily communication sheets she received for Trina were inaccurate. (Parent)
39. Trina made progress during the 2014-2015 school year on her IEP goals and objectives. (Anderson; Graham; Parent)

#### 2015-16 School Year

40. The individuals responsible for writing Trina's goals used assessment data, both formal (evaluations and re-evaluations) and informal, that was collected over time to determine her current performance level. They then used that information to set meaningful, measurable goals as well as objectives and benchmarks to assist her in meeting these goals. (Bruinooge) For example, in drafting Trina's ELA goal in the proposed IEP, Ms. Graham coordinated with Ms. Leary to describe Trina's current performance level, incorporating her Dolch words, Burns & Roe and GRADE Reading assessments. (S-4; Graham)
41. The challenging, yet attainable goals set for Trina "take into account her as a person, the nature and severity of her disability, what she's able to show in the classroom, what she's been able to show on assessments, and what she has been able to do in the past." (Bruinooge)

42. A Team meeting was facilitated by the BSEA on May 13, 2015, in advance of Trina's annual meeting scheduled to occur on June 8, 2015. (S-13) The Team reconvened to consider reports provided by Mahesh Sharma (math), Spaulding Children's Center (speech and language), and Dr. Cheryl Jorgensen (observation). At this time the District indicated on its N-1 form, issued on June 11, 2015, that it would revise Trina's math goal to make explicit her need to develop foundational numeracy skills, as emphasized in Mr. Sharma's report. It also agreed to update her communication goal to clarify expectations. The Team rejected Dr. Jorgensen's recommendation for an assistive technology evaluation, as well as her recommendation that speech and language and OT services be provided within the general education classroom rather than outside of general education classroom. Parent agreed that speech and language and OT services would continue to be delivered outside of the general education classroom. The Team refused to change proposed ELA goals, as requested by Parent; refused to have an outside tutor provide math instruction; refused to eliminate the independence goal; and rejected Parent's request that Trina receive ELA and math in a separate distraction free environment where she would not be exposed to any other students' negative behaviors. (S-3)
43. The PL1 form for Trina's proposed 2015-16 IEP (dated June 8, 2015-June 8, 2016) places her in a Substantially Separate Classroom. (S-4) This designation, which requires that she receive services outside of the general education classroom for more than 60% of the time, is inconsistent with the services proposed. The parties clarified during testimony that Trina's program should have been designated Partial Inclusion.
44. Parent rejected the IEP proposed for 2015-16 school year on July 22, 2015. (S-6) This IEP was amended subsequent to the filing of the Hearing Request to address evaluations provided by the Parent to the District on January 4, 2016. (S-19; S-20)
45. Parent kept Trina home at the beginning of the 2015-16 school year. She was dissatisfied that Trina had been placed in a "SPED pod" and with Ms. Graham. (Parent)
46. Kathleen Reilly, Ed.S., M.Ed. of the Integrated Center for Child Development conducted an assistive technology evaluation of Trina dated September 17, 2015. (P-5; P-8) This evaluation included a review of evaluations and Trina's IEP, parent intake, and two separate 1.5-2 hour hands-on sessions. A school observation was not included due to summer timing.<sup>10</sup>(P-8)
47. It is not clear from the evidence whether Parent actually requested public funding for an independent assistive technology evaluation. The District issued an N-1 indicating that it

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<sup>10</sup> Ms. Reilly recommended that Trina continue to be provided with a dedicated iPad and requisite accessories; modified materials, alternate response formats, and independent practice activities designed using customized templates with several different iPad applications; a diagnostic-prescriptive reading program that includes explicit daily instruction in phonics and sign words in addition to guided reading in appropriately leveled books; an iPad application called Clicker Connect to facilitate written expression across classes and settings; and uninterrupted, facilitated access to her iPad and Proloquo2Go to support her functional communication across settings. (P-8) As this evaluation was not shared with the Team until January 2016 and, as such, was used by the Team to develop the February 2016 amendment to the proposed IEP, I do not consider it in determining whether the 2015-16 IEP provides Trina with FAPE.

did not accept Dr. Jorgensen's recommendation for one. (S-3) Parent testified that she told the District she was getting an outside evaluation in this area.<sup>11</sup> (Parent)

48. Seventh graders at BIS are assigned school iPads. Despite Parent's request, Trina was not permitted to take this iPad home. (Parent) In January 2016, upon considering Ms. Reilly's assistive technology evaluation, the Team agreed that Trina should have access to the school iPad at home and issued an amendment to the proposed 2015-16 IEP reflecting this change. (S-20)
49. Trina returned to school in late October 2015. (Parent) Pursuant to her last-accepted IEP, Trina receives ELA and math instruction in the ILC. She is included in general education classes for social studies, science, and electives such as band, drum lessons, art, and gym, as well as for lunch and homeroom. Trina is supported in her general education classes by Ms. Graham or, more frequently, by a paraprofessional under Ms. Graham's supervision. (Graham, Bruinooge) Trina's general education classes are in relatively close proximity to Ms. Graham's classroom, which allows Ms. Graham to be effective in providing support and services to her. (Bruinooge) In social studies, to the extent there are other students with disabilities in the class, they are low incidence disabilities. In science, Trina is integrated with a few other students with less severe disabilities. (Graham)
50. The math instruction Trina receives this year is aligned with Mr. Sharma's recommendations for her. After Parent brought Mr. Sharma's report to the Team, the Team incorporated his strategies into the writing of Trina's math goal with regard to methodology. (Bruinooge) The District hired Mr. Sharma to conduct two separate half-day professional development workshops. (Graham; Parent) Ms. Graham attended one and watched several video clips of him working with students. She is implementing some of his strategies with Trina and has noted that Trina is making progress. (Graham)
51. Trina receives her ELA instruction this year from Ms. Graham rather than Ms. Leary. Trina's cognitive profile has an impact on her reading, as key areas of her cognition are impaired, including her processing speed and working memory. She also has significant language processing deficits that impact vocabulary and comprehension. As a special education teacher, Ms. Graham has experience working with students with cognitive profiles similar to Trina's. Reading specialists at BIS typically do not have this knowledge and experience. (Bruinooge)
52. Ms. Graham's classroom currently serves five students, including Trina. (Graham) Trina has an excellent relationship with Ms. Graham and good relationships with her peers with disabilities in Ms. Graham's class. (Bruinooge)<sup>12</sup>

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<sup>11</sup> As these events occurred after the filing of Parent's Hearing Request and her request was never amended, to the extent the Parent may have formally requested public funding for an assistive technology evaluation and the District denied this request without filing for a Hearing at the BSEA, as it would have been required to do, I need not determine whether a procedural violation occurred.

<sup>12</sup> Barnstable Public Schools Assistant Director of Special Education Eric Bruinooge based this conclusion on his six or seven observations of Trina in Ms. Graham's class during the 2015-16 school year. Dr. Bruinooge has a Master's degree in teacher education and a Ph.D in school psychology. In addition to his current role, Dr. Bruinooge has held

53. Ms. Graham's classroom is divided into sections by partitions and ready-built walls, such that each student and his or her paraprofessional have their own area of the classroom. Ms. Graham is able to see all areas of the classroom from where she is based. Trina sits in the section of the room furthest from the door, and all of her materials, including manipulatives, are in her space. (Graham) The arrangement of the room allows for Ms. Graham to provide individualized instruction to students while also being able to serve multiple students in the same room at the same time. (Bruinooge),
54. Parent has expressed concerns repeatedly about the behavior of other students in Ms. Graham's class, which she believes distracts Trina from her academics. (Parent) The credible evidence before me, however, demonstrates that to the extent other students have behavioral issues, any disruptions are minor<sup>13</sup> and other than brief social interactions with her peers,<sup>14</sup> Trina remains focused on her work.<sup>15</sup> (Graham, Anderson, Jorgensen, Baskin, Bruinooge)
55. In fact, the social aspects of the ILC are beneficial to Trina, as is her presence in her science, social studies, and other inclusion classes. Interacting with other students enables Trina to generalize and has strengthened her language skills.<sup>16</sup> (Graham)
56. Ms. Graham works closely with Trina's general education science and social studies teachers to learn what they will be covering and provide materials appropriate for Trina's entry and access levels of the curriculum frameworks. She provides a range of materials

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several positions within the Barnstable Public Schools, including school psychologist, curriculum director, and special education coordinator. (Bruinooge)

<sup>13</sup> BIS Principal James Anderson acknowledged that some of the students in Ms. Graham's class "exhibit behaviors" and that he had been called in to assist in Ms. Graham's room four or five times over the course of the last year. He noted that he has no evidence to suggest that this has affected Trina; when he observed Trina in Ms. Graham's classroom in the fall of 2014 and again during the 2015-16 school year, he witnessed her working with other students and saw no concerning behaviors on the part of anyone. (Anderson) Ms. Graham testified that behavioral issues in her classroom most often present as attention-seeking or speaking out, both of which are generally low incidence. At the beginning of this school year, one child had a spike in behaviors such as yelling and screaming, which she believes was related to a change in medications and this behavior has ceased; another student's attention-getting behaviors (i.e. burping) have been addressed and extinguished. None of Ms. Graham's students has been restrained during Trina's two years at BIS. (Graham)

<sup>14</sup> Both Mr. Anderson and Ms. Graham testified that students and the staff members working with them enter and exit the classroom, mostly at the breaks between 52 minute periods, though at times they may come in after 30 minute blocks, such as for speech and language. (Anderson, Graham) Trina is a dedicated worker who is serious about her work; she will stop and acknowledge someone who comes over to acknowledge her, but she then returns to her work. (Graham)

<sup>15</sup> Parent testified that when she observed Trina in the ILC, she noticed that another student was displaying attention-getting behaviors such as burping and not following instructions. Trina observed this and giggled. Another student was smacking his head and raising his voice; Trina responded by saying "Oh my." On another visit to the classroom, Parent heard a child on the other side of Trina's partition yell, "I don't want to do it." Trina stopped, looked up, and said, "Oh." Several students entered the room in groups, and they stopped by to greet Trina. (Parent) Taken together, these observations do not support Parent's contention that Trina is so distracted in the ILC that she is unable to focus on her work.

<sup>16</sup> Barnstable Public Schools Speech and Language Pathologist Jeanne Baskin testified that Trina has nice relationships with peers who are able to scaffold conversation, as well as with other peers who communicate socially with her at a level they are both comfortable with, joking around and being silly. (Baskin)

to Trina's paraprofessionals, as she does not know what will be covered on a given day, and the paraprofessional tweaks that work. (Graham)

57. In order to prepare and supervise paraprofessionals to support her students, Ms. Graham reviews students' IEPs, goals and objectives with their paraprofessionals. She sets up routines, programs, and curricula to be supported by the paraprofessionals in their work together to assist students in meeting their goals. She noted that when a student/paraprofessional team is new, it may take some time for the paraprofessional to get to know the student and to build her own skills. After this transitional period, once the paraprofessional and the student build a relationship the paraprofessional often fades back. (Graham)
58. Parent's expert Dr. Jorgensen observed Trina for an entire school day on January 19, 2016. (P-5) In advance of her observation she reviewed Trina's IEP and her private evaluations and spoke with Parent. (Jorgensen) She did not conduct any evaluations herself.
59. In her report, Dr. Jorgensen observed that Trina did not have consistent access to adapted materials or visual supports across all of her inclusion classes, though she was able to participate in learning activities with access to her iPad and the support of her paraprofessional or Ms. Graham. (P-5) She noted brief interactions throughout the day between Trina and her neurotypical peers. (P-5)
60. As she did following her previous observation of Trina, Dr. Jorgensen recommended evidence-based practices for students with Trina's learning profile in her report. For the most part her recommendations were general and drawn from her own previous research summaries; many of them aligned with the content of Trina's most recently proposed IEP (i.e. encouraging her social independence, using accessible adapted text, employing evidence-based instructional practices, etc.). Dr. Jorgensen also emphasized the need for all staff working with Trina to participate in a common planning time and recommended that Parent receive information regarding upcoming lessons, graded homework and projects. (Jorgensen)
61. In her observations, Dr. Jorgensen indicated that Trina's paraprofessional was hanging back appropriately and facilitating her participation in her education, though in her recommendations, Dr. Jorgensen noted that staff working with Trina was "over supporting" her, for example, by assuming she might need help when she does not; by providing too much verbal cuing; and by giving too much verbal praise. (P-5; Jorgensen)
62. Dr. Jorgensen testified that a paraprofessional should give Trina more independence and also work closely with her teacher; she stated, "I don't think you want somebody just kind of out there all on his own or her own without having planning time with those professionally licensed people, and observation and supervision by those people." (Jorgensen)

63. The paraprofessional working with Trina at the time of Dr. Jorgensen's observation was new to her; they had been working together only one week. (Graham) At this point, Trina has been observed to have a good rapport with the same paraprofessional, and she is showing progress because of that level of comfort. (Baskin)
64. Dr. Jorgensen reported that Ms. Graham delivered effective math instruction utilizing manipulatives to teach early number sense and "subitization," as recommended by Mr. Sharma, and that Trina appeared to be learning math more quickly this year at an appropriate level.<sup>17</sup> (P-5; Jorgensen) In addition to these methods, Dr. Jorgensen endorsed the teaching of functional skills (use of money, time-telling) skills in context. (P-5) Ms. Graham believes that Mr. Sharma's methodology is working to teach Trina numeracy skills, but agrees with Dr. Jorgenson that Trina also needs functional skills such as those involving money, shopping, and measuring. (Graham) Dr. Bruinooge, Barnstable Public Schools' Assistant Director of Special Education, testified that it is important that Trina be able to use her math skills for "meaningful productive purposes," particularly as she moves from the elementary to the secondary level. (Bruinooge)
65. Dr. Jorgenson stated that a good literacy curriculum must include phonemic awareness, phonics, vocabulary, comprehension, fluency, and writing. Regarding who should instruct Trina in this subject, she recommended that it be a licensed reading specialist who has participated in and successfully completed some professional development in teaching reading to students with complex support needs. (Jorgensen)
66. Asked directly by Parent's counsel about Trina's potential, Dr. Jorgensen stated, "I think she has – I can't tell you how much but great potential. I think she has the potential to make more progress at a greater rate of progress than she has in the previous years." She based this assessment on her thirty-one years observing, recommending and overseeing math curricula for children with disabilities and providing expert advice to the United States Department of Education, rather than on any intimate knowledge of Trina. In fact, she acknowledged in her testimony, "I don't know [Trina] well enough to give you the kind of measurable objective part of" her goals. (Jorgensen)
67. Parent remains dissatisfied with the support provided by the paraprofessionals working with Trina during the 2015-16 school year. (Parent) The paraprofessional who worked with Trina during her sixth grade year had worked with her previously for a year and a half. (Capra) She allowed Trina a certain degree of independence in using the bathroom, gathering her materials, etc. (Parent) During the 2015-16 school year, Trina was supported by at least two different paraprofessionals. Each of them stayed closer to Trina and provided a higher level of assistance than Parent preferred. (Parent, Graham) At the same time, Parent has expressed concern that Trina has been unsafe because she was left alone by her special education teacher and her current paraprofessional. (Parent)
68. Parent believes Trina is isolated from her typical peers at lunch and required to sit at the "SPED" table. (Parent) The credible evidence before me does not support this concern. Trina chooses where to sit, and appears to gravitate toward other ILC students because

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<sup>17</sup> Dr. Bruinooge also testified that Ms. Graham works effectively with Mr. Sharma's methods. (Bruinooge)

she is comfortable with them. She enjoys lunch, and has been observed giggling and laughing with other students. (Graham)

69. Parent remains dissatisfied with the quantity and content of the school work that has been sent home with Trina this year. She believes the work has been below Trina's level and the text above her level. As for the homework she receives sporadically, Parent stated, "It is so ridiculous I refuse to do it." She believes that the communication log sent home with Trina this year contains insufficient meaningful information about her day, and that it has been, at times, falsified by Ms. Graham. (Parent) Ms. Graham acknowledged that she has rewritten communication sheets submitted to her by paraprofessionals, but she testified that she did so to clear up wording, not to deceive Parent. (Graham)
70. Because the proposed 2015-16 IEP was never accepted, Trina's Team has had to continue working on the goals delineated in her 2014-15 IEP, though they have "continued moving the marker up." Ms. Graham is continuing to emphasize phonics and sight words for ELA, though the as-yet unsigned IEP focuses more on functional words and menus. Even once Trina meets a particular goal, she needs to continue to practice the underlying skills to prevent regression. (Graham)
71. The parties offered conflicting evidence as to whether Trina is becoming more or less prompt-dependent. Ms. Baskin testified that Trina has become far less prompt-dependent in the natural environment than she used to be, and requires less support from paraprofessionals to engage with her peers and her teachers. She has seen continuing progress, without regression, particularly in Trina's desire to be more independent in daily living tasks and communication. Trina is showing growth in her ability to identify when she needs something and ask for it, rather than wait for prompting from the adults around her. (Baskin) Ms. Graham also testified that Trina is making progress toward greater independence this year. (Graham)
72. Parent believes that since her return to school in October 2015, Trina has been less confident, more prompt-dependent, and more likely to shut down. (Parent) According to Ms. Marble, when Trina was working with Mr. Sharma she had a confidence and greater response rate, and demonstrated less dependency. She also believes that Trina was making gains in her working memory. (Marble) Ms. Marble has noticed Trina displaying less confidence and more prompt dependence, particularly when language gets too hard for her, since early November 2015. She attributes this shift to Trina's return to school in late October, though she noted that for the month and a half preceding the hearing, Trina had begun asking for help when she needed it. (Marble)

## DISCUSSION

- A. Legal Standards: Free Appropriate Public Education, Least Restrictive Environment and Burden of Proof



The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education” (FAPE).<sup>18</sup> FAPE is delivered primarily through a child’s individualized education program (IEP).<sup>19</sup> An IEP must be tailored to address each student’s unique needs that result from his or her disability.<sup>20</sup> The IEP must be “reasonably calculated to confer a meaningful educational benefit.”<sup>21</sup>

Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the “least restrictive environment.”<sup>22</sup> This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that “removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily.”<sup>23</sup> “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”<sup>24</sup> Removing a child from the mainstream setting is permissible when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting . . .”<sup>25</sup>

FAPE is defined by the IDEA to include state educational standards, which may exceed the federal floor.<sup>26</sup> Massachusetts FAPE standards seek “to ensure that eligible Massachusetts students receive special educational services designed to develop the student’s individual educational potential in the least restrictive environment.”<sup>27</sup> Moreover a student’s IEP must be designed to enable the student to make “effective progress.”<sup>28</sup>

As the Supreme Court, lower federal courts and Massachusetts special education statutes have recognized, the application of the meaningful benefit standard is individualized. “[L]evels of progress must be judged with respect to the potential of the particular child,”<sup>29</sup> unless the potential is unknowable,<sup>30</sup> because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite

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<sup>18</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>19</sup> *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

<sup>20</sup> See *Bd. of Educ. of 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”).

<sup>21</sup> *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012).

<sup>22</sup> 20 USC § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

<sup>23</sup> 20 USC 1412(a)(5)(A).

<sup>24</sup> *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008).

<sup>25</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006)(internal citation omitted).

<sup>26</sup> 20 USC 1401(9)(b); see *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524-25 (2007); see also *Mr. I. v. Maine Sch. Admin. Dist. 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]”).

<sup>27</sup> 603 CMR 28.01(3); see MGL c. 69, § 1; MGL c. 71B, § 1.

<sup>28</sup> 603 CMR 28.05(4)(b) (IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”).

<sup>29</sup> *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (*Lessard I*); see *Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP”).

<sup>30</sup> See *Esposito*, 675 F.3d at 36.

variations in between.”<sup>31</sup> The sufficiency of any student’s progress, including Trina’s, must be judged within the context of her individual potential or capacity to learn.<sup>32</sup>

As the party challenging the status quo in this matter, the Parents bear the burden of proof.<sup>33</sup>

B. Barnstable Public Schools’ 2015-16 IEP for Trina Is Reasonably Calculated to Provide Her With FAPE.

It is not disputed that Trina is a student with a disability under federal and state special education law. The issue is whether Barnstable Public Schools’ IEP for Trina is reasonably calculated to provide her with FAPE. Whether Trina is making effective progress that allows her to benefit meaningfully from her IEP is, as explained above, an individualized determination based on her potential or capacity to learn.<sup>34</sup>

In this case, the profile of Trina developed by Parent’s experts is similar to that developed by Barnstable in terms of her disabilities and the methodology appropriate for delivery of instruction and related services. The District and Parent agree that Trina should participate in general education for all subjects except her direct services in speech and language and OT (and there is no disagreement as to the amount or delivery of these services), and ELA and math. Dr. Stein and Dr. Jorgensen, Parent’s experts, support this partial inclusion model. Moreover the parties agree that Trina made progress during the 2014-15 school year, under this model.

Parent suggests that Trina’s IEP deprives her of FAPE for several reasons: it does not provide for math and ELA instruction in a room separate from other children who might distract her due to their disabilities; it does not require that Trina receive ELA instruction from a certified reading teacher; it does not prevent Ms. Graham from being Trina’s teacher; it does not require a certain type or amount of communication with Parent; and it does not require that the District permit Parent to participate in the selection of the paraprofessional and other staff members who work with her daughter. Furthermore, the goals in Trina’s IEP, according to Parent, are neither based on Trina’s potential nor sufficiently ambitious. I address these objections in turn.

1. Math and ELA instruction should be provided by Trina’s special education teacher in a substantially separate setting such as the ILC.

I find that the ILC is an appropriate setting for Trina’s math and ELA instruction. As many of the people who work with her testified, Trina is a social learner. Dr. Jorgensen and Ms. Baskin both emphasized that she benefits from exposure to peers, particularly in her functional

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<sup>31</sup> *Rowley*, 458 U.S. at 202.

<sup>32</sup> See *Rowley*, 468 U.S. at 202; 603 CMR 28.01(3).

<sup>33</sup> See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008). As such, to prevail she must prove, by a preponderance of the evidence, that Trina’s current IEP does not provide her with a free appropriate public education. See *id.*

<sup>34</sup> See *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270 (1st Cir. 2010)(*Lessard II*)(upholding appropriateness of IEP where evidence demonstrated student “was progressing at a level commensurate with her cognitive profile”; *Lessard I*, 518 F.3d at 29 (“levels of progress must be judged with respect to the potential of the particular child”).

communication. This includes both students with disabilities and typical students. The ILC is set up physically to minimize distractions. Although other students may infrequently display behavioral issues, Trina is able to refocus on her work fairly quickly. Moreover to the extent students greet her upon entering and exiting the room while she is working, these interactions provide her with informal opportunities to practice the language and communication skills she is developing. If Trina were to receive math and ELA instruction in a separate room, she would be deprived of these opportunities. Moreover such an arrangement is more restrictive than participation in the ILC; I find that one-to-one instruction in a private room is not the least restrictive environment in which Trina can learn.

With respect to the credentials of the ELA provider, the testimony of Ms. Leary, the reading teacher who provided Trina's reading instruction for four and a half months during the 2014-15 school year, is persuasive. Although Ms. Leary endorsed the continuation of the phonics program she delivered to Trina, she recognized that Trina's decoding skills were outpacing her comprehension. An experienced reading teacher, Ms. Leary felt that her lack of training in special education may have limited her effectiveness as an instructor for a student with Trina's cognitive profile. As such, I conclude that a delivery of Trina's ELA instruction by a certified reading teacher is not required for her to receive FAPE.

2. The goals and benchmarks in Trina's IEP are reasonably calculated to enable her to make effective progress.

At Hearing, Parent emphasized the District's obligation to develop goals for Trina based on her potential. She highlighted the fact that the District's evaluations did not focus on the word "potential" and that the District did not appear to have measured her potential accurately. Parent's own experts, however, could not measure Trina's potential either. Ms. Marble and Dr. Jorgensen, testified that Trina has the potential to continue to progress, but they could not quantify her potential. District witnesses, such as Ms. Baskin, testified similarly. As Dr. Bruinooge, Ms. Graham, and Ms. Leary testified, Trina's Team members reviewed formal and informal assessments to set current performance levels and relied on their knowledge and understanding of her as a person and the nature and severity of her disabilities to set challenging yet attainable goals. Parent offered no concrete evidence that Trina had already surpassed the benchmarks established by the Team other than her own testimony, which was disputed by multiple District witnesses who work with Trina at school.

For these reasons, I find that the IEP proposed by Barnstable for the 2015-16 school year is reasonably calculated to provide Trina with FAPE in the least restrictive environment. Parent has not met her burden to prove otherwise.<sup>35</sup>

C. Because Trina's IEP Provides Her with FAPE, No Additions or Modifications are Necessary

As Barnstable's proposed 2015-16 IEP is reasonably calculated to provide Trina with FAPE, the District need not incorporate the requests Parent has made for modifications to the IEP.<sup>36</sup> In

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<sup>35</sup> See *Schaffer*, 546 U.S. at 62.

fact, if the District were to place Trina in a separate room for ELA and math instruction, I might well find that this arrangement was too restrictive for a social learner like Trina.

Moreover, several of the modifications Parent has requested are beyond the jurisdiction of the BSEA. A BSEA Hearing Officer has jurisdiction to address “a complaint . . . with respect to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.”<sup>37</sup> On the basis of this authority (and related state statute and regulations), the BSEA resolves special education disputes between parents or students and their school districts. State special education regulations have extended this jurisdiction to include a parent’s (and student’s) claims regarding “any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§104.31-104.39.”<sup>38</sup> Even with this expanded definition of claims that may come before the BSEA, courts have held that certain decisions regarding the delivery of services remain firmly in the hands of school districts. For example, a school district is generally given discretion to determine the appropriate methodology for instructing a particular student, so long as the selected methodology is likely to allow the student the opportunity to receive FAPE.<sup>39</sup> A school district also has the discretion to select which of its staff members will deliver a particular student’s services, so long as the chosen staff members have the qualifications required to deliver the services set forth in the student’s IEP.<sup>40</sup>

In this case, Parent asserts that the District must employ Mr. Sharma’s approach to Trina’s math instruction, which she argues entails funding private tutoring with him outside of school and practice, rather than instruction, in school. She also contends that Trina must receive ELA instruction from a certified reading teacher rather than a special education teacher, and that Trina should not be assigned to Ms. Graham as her special education teacher. In her closing statement, Parent argued that due to the conduct of the District, she should “be ordered the ability to pick and choose those individuals who are going to teach and educate her daughter.”<sup>41</sup>

The District has agreed to utilize Mr. Sharma’s approach to Trina’s math instruction insofar as Trina continues to receive private tutoring from him. In addition to Mr. Sharma’s methodology, both Dr. Stein and Dr. Jorgensen endorsed instruction in functional math skills,

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<sup>36</sup> Although Trina’s IEP provides for modified work to be made available to Trina to assist her in accessing the content of her science and social studies classes (S-3), Dr. Jorgensen testified that such work was not available to Trina consistently on the day of her observation in January 2016. (S-3; P-5) Modified work is an important feature of Trina’s IEP and must be made available to her consistently.

<sup>37</sup> 20 USC 1415(b)(6)(A).

<sup>38</sup> 20 USC § 1415(b)(6); 603 CMR 28.08(3); 603 CMR 28.10(9).

<sup>39</sup> See *Rowley*, 458 U.S. at 207-08 (1982) (noting that the primary responsibility for “choosing the educational method most suitable” to the needs of a child with a disability “was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child,” not to courts, such that “once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States); *Kuszewski ex rel. Kuszewski v. Chippewa Valley Sch.*, 131 F. Supp. 2d 926, 933 (E.D. Mich. 2001) (upholding Hearing Officer’s characterization of District’s determinations not to provide student with a paraprofessional with specific training or include cursive writing in his curriculum as issues of methodology, and concluding that “plaintiffs are not entitled to prescribe or require a specific desired methodology”) (internal citations omitted).

<sup>40</sup> See *Lessard II* at 270 (holding that IEP provided FAPE even though staff assigned to student, a speech pathologist newly trained in a particularly literacy program, did not have the experience recommended by parents’ expert).

<sup>41</sup> Parent’s Closing Arguments, submitted May 10, 2016.

which is included in Trina's proposed IEP. Moreover although Parent prefers a phonics-based approach delivered by a reading teacher for Trina's ELA instruction, the evidence before me supports the District's focus on comprehension in addition to phonics, and delivery of services by a qualified special education teacher. Ms. Graham possesses the necessary licensure to instruct Trina in ELA and math, and testimony demonstrated that she has a good relationship with Trina, that she is capable of instructing her in these subjects, and that Trina is making progress. The District has selected methodology and personnel likely to allow Trina to receive FAPE; as such, the BSEA will not interfere with its discretion to do so.

D. Parent Has Not Met Her Burden to Prove that Trina's Accepted, Expired IEPs Were Not Implemented as Written

Parent did not offer any evidence regarding the delivery of services contained in any IEPs that were accepted and expired prior to the 2014-15 school year. She testified that she was happy with the progress Trina made during the 2014-15 school year, and she offered no concrete evidence other than her belief that Trina did not receive the services to which her 2014-15 IEP entitled her.

E. Parent's Request for Reimbursement is Denied.

To the extent Parent has requested an order that the District reimburse her for all services provided to Trina at her expense, because she has proven neither that the District failed to implement any accepted, expired IEPs nor that the IEP proposed for 2015-16 failed to provide FAPE, she is not entitled to reimbursement for any services she chose to provide.

To the extent Parent has requested that the District reimburse her for all evaluations of Trina that she obtained at her own expense, with the possible exception of the assistive technology evaluation, which is not before me, Parent offered no evidence that she sought public funding in advance of obtaining any of these evaluation. As such, she is not entitled to reimbursement.<sup>42</sup>

## CONCLUSION

For the reasons above, I find that Parent has failed to meet her burden to prove that the IEP proposed for Trina for the 2015-16 school year is not reasonably calculated to provide her with FAPE. Furthermore, she has not proven that any of Trina's accepted, expired IEPs dating back to August 28, 2013 were not implemented fully.

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<sup>42</sup> See 34 CFR 300.502(b) (outlining procedure to be followed when parent requests an independent educational evaluation at public expense); 603 CMR 28.04(5) (same).

**ORDER**

The June 8, 2015 to June 8, 2016 IEP proposed by the Barnstable Public Schools is reasonably calculated to provide Trina with FAPE.

The District is not required to offer any reimbursement or compensatory services to Parent.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: June 17, 2016