

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

**In Re:** Student v.  
Dennis-Yarmouth Regional School District

**BSEA# 1607923**

**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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On April 4, 2016, Student/Parents requested a hearing in the above-referenced matter. Thereafter, the matter was continued on several occasions for good cause at the request of both Parties. On June 28, 2016, a Ruling was issued on a Motion to Dismiss filed by Dennis-Yarmouth Regional Schools District. The issues for Hearing were narrowed as claims regarding RICO, fraudulent manufacturing of grades, criminal conspiracy, ADA and §1983 were dismissed with prejudice. Additionally, Student's/Parents' claims prior to April 4, 2014 were dismissed as falling outside the two year statute of limitations.<sup>1</sup>

The Hearing in this matter was held on October 20 and 21, 2016, at the offices of Murphy, Hesse, Toomey & Lehane, LLP, 300 Crown Colony Drive, Suite 410, Quincy, Massachusetts, before Hearing Officer Rosa Figueroa. Those present for all or part of the proceedings were:

Student	
Student's Parent	
Michael Turner, Esq.	Attorney for Student
Diana B. Ross	Teacher, Dennis-Yarmouth Regional School District
Kenneth Jenks	High School Principal, Dennis-Yarmouth Regional School District
Jaime Curley	Director of Pupil Services, Dennis-Yarmouth Regional School District
Carol Woodbury	Superintendent of Schools, Dennis-Yarmouth Regional School District
Chai Kim Yau	Team Leader/Instructional Support staff/ Coach Brewster Academy
Susan Brefach, Ed.D.	Private Licensed Psychologist

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<sup>1</sup> Student/ Parents filed their first Hearing Request regarding the issues raised in the instant case on March 26, 2014 (BSEA #1407065). That case was dismissed without prejudice on July 22, 2014 when Student's/Parents' attorney failed to respond to a Show Cause Order. A second Hearing Request (BSEA 1502345) filed on September 18, 2014 was also dismissed without prejudice on December 5, 2014 when Student's/Parents' attorney again failed to timely respond to a Show Cause Order.

Alisia St. Florian, Esq.

Attorney for Dennis-Yarmouth Regional School District

Jane Williamson

Doris O. Wong Associates Inc., Court Reporter

The official record of the hearing consists of documents submitted by Parent marked as exhibits PE-1 through PE-23<sup>2</sup>, and documents submitted by Dennis- Yarmouth Regional School District (DY) marked as exhibits SE-1 through SE-18; recorded oral testimony, and written closing arguments. The Parties' written closing arguments were received on November 14, 2016, and the record closed on that date.

### **ISSUES FOR HEARING:**

1. Whether DY failed to offer Student a free, appropriate public education (FAPE), under her Section 504 plan, resulting in her lack of preparedness for college?<sup>3</sup>
2. Whether DY failed to deliver the services and/ or implement Student's Section 504 plan in a manner that allowed her to make meaningful, effective progress and if sufficient services were offered;
3. Whether Student is entitled to reimbursement for her post-high school year at Brewster Academy?

### **POSITIONS OF THE PARTIES:**

#### **Student's Position:**

Student asserts that DY should have found her eligible to receive special education services since 2013 and states that failure to do so was educationally prejudicial to Student.<sup>4</sup> Student asserts that she was nowhere near ready to graduate when she did so, despite having received a reading and writing tutorial during her senior year under what she claims was a partially implemented Section 504 Plan.

Student further challenges DY's assertions that she was making effective progress in general, and in particular, as to her calculus class, reading and writing. Moreover, she states that her deficits, which went unaddressed until the summer prior to her senior year, were so significant that there was nothing DY could have done to remedy them in the short period of time during which she received services (one year). Student argues that she needed additional time and services to bridge the gap between her cognitive abilities and deficits before attending college and thus, she opted to attend an extra year at Brewster Academy.

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<sup>2</sup> DY objected to PE-6 and PE-7 however, these two exhibits were taken under advisement. The record contains persuasive testimonial evidence regarding these exhibits and DY's access to them. Moreover, these exhibits contain helpful, reliable information regarding Student's functioning and what occurred during her tutorial sessions. Therefore, both exhibits are admitted into evidence, and DY's objections are overruled.

<sup>3</sup> There was much back and forth prior to Hearing regarding Student's ability to clearly define the issues in this case. Even at Hearing, when Student's attorney was requested to state the issues, the response was a statement that Student was entitled to compensatory services because she was not ready for college at the time of graduation, and because the Section 504 Plan had not been properly implemented. The framing of the issues herein represents the Hearing Officer's best efforts to frame the issues accordingly.

<sup>4</sup> IDEA claims were barred pursuant to the applicable two year statute of limitations via Ruling issued prior to Hearing.

Student asserts that as a result of DY's denial of FAPE, she is entitled to compensatory services and she seeks reimbursement for her fifth year at Brewster Academy.

### **DY's Position:**

DY asserts that Student was appropriately educated and serviced under her accepted Section 504 Plan. Since Student passed all of her MCAS and obtained As, Bs, or Cs as final grades in all of her courses, DY argues that she satisfactorily completed all of the graduation requirements. Furthermore, Student accepted her diploma in June of 2014.

Given that Student did not challenge the finding of no eligibility under the IDEA, accepted a Section 504 plan which DY implemented, and successfully graduated, she is not entitled to compensatory education. DY asserts that it is therefore, not responsible to reimburse Student/Parents for Student's year at Brewster Academy which, according to DY, is a regular education private boarding school. DY further argues that the experience at Brewster Academy would have helped Student play competitive sports in college.

Lastly, DY argues that Student and Parents had numerous opportunities to file and follow through with a Hearing before the BSEA and failed to do so in a timely manner.

### **FINDINGS OF FACT:**

1. Student is a first year college student. She graduated from Dennis-Yarmouth High School (DYHS) in June 2014.
2. Student is described as a bright, hard-working, extremely responsible, kind and personable young woman. She is gifted in sports, and during senior year participated in competitive sports during all three seasons (field hockey, winter track and sailing) (SE-2; Parent, Student). Student was the editor of the high school yearbook during her senior year (Student).
3. Parents concerns over Student possibly having a learning disability were brought to DY's attention on several occasions starting in 2004 (SE-13). DY conducted special education evaluations/informal assessments in 2004 and in 2007, and both times found Student to be ineligible to receive special education services. Although Student's overall language skills fell within the average and high average range, the 2004 speech and language evaluation raised concerns regarding Student's phonological awareness skills (PE-2).
4. Throughout Student's academic career, Mother has consistently offered Student assistance and support, keeping track of Student's assignments and helping her with academic tasks, providing private tutors, and raising awareness of Student's learning difficulties with teachers. Mother has also offered Student much encouragement and support during emotionally challenging times (SE-2; Mother, Student).
5. In a letter dated October 2, 2007, Linda Santerre, DY Special Education Team Leader, acknowledged having received a District Accommodation referral form in which Parents

raised concern regarding Student's reading, spelling and writing abilities (PE-20; SE-11). Ms. Santerre conducted an informal reading assessment (*Level 6 Expository Passage: Computers*) in which Student demonstrated an accuracy rate of 99% (SE-12). Student's silent fluency rate was 145 words per minute and her oral reading rate was 130 words per minute. Student's comprehension was 100%, and phrasing and inflection fell within normal limits. Student demonstrated a relative weakness segmenting blends, although according to Ms. Santerre, once the mistakes were brought to Student's attention and explained, Student was able to self-correct in subsequent trials. Her report also discussed Student's visual miscues. Ms. Santerre further noted that Student was aware of her "learning differences", but was able to automatically apply strategies, access contextual cues and language structure rules that helped her understand what she read. Ms. Santerre concluded that no additional testing would be necessary because Student had demonstrated skills commensurate with same grade peers (SE-12).

6. Ms. Santerre recommended that at least five times per week Student read thirty to forty-five minutes, and that she should read challenging text aloud to increase comprehension and silently read less challenging text to increase reading speed. She noted that Student's teachers would monitor her progress in case instructional changes were required (PE-20; SE-11; SE-12).
7. According to DY, Student received accommodations through district curriculum accommodations plans (DCAPs) and later through Section 504 Plans in 2013 and 2014.
8. In November of 2012, Student's 11<sup>th</sup> grade, Student began to feel overwhelmed and she experienced severe anxiety. She testified that in school she experienced "overheating", shaking, developed panic attacks, and she often cried at night. When she began to hyperventilate and felt her heart rate increase it would take her anywhere from fifteen minutes to hours to calm herself down. Student's breakdowns happened in school and at home. Student shared her feelings and fears with Mother and told her that she was not able to do things like her peers (Student). Parents sought psychological assistance for Student who began seeing a private therapist every two weeks to address anxiety and distress over school work. (PE-2; Mother).
9. Mother testified that prior to Student being diagnosed with a learning disability, she and Student studied hour after hour, to "pour [the information] down [Student's] throat" (Mother).
10. On December 4, 2012, Parents arranged for Student to undergo a neuropsychological evaluation with Susan Brefach, Ed.D (C.V. at PE-22; PE-2). Thereafter, Parents also arranged for Kathleen Grabowski, M.S., C.C.C., to perform a speech and oral/written language evaluation of Student on January 8, 2013 (Mother). Student was approximately sixteen and a half years old at the time of these evaluations and half-way through eleventh grade (PE-2; Student).
11. Dr. Brefach administered the Wechsler Adult Intelligence Scale–Fourth Edition; Wechsler Adult Intelligence Scale–III (Picture Arrangement); Boston Naming Test;

NCCEA Sentence Imitation; Syntactic Comprehension (Menyuk); Rey Auditory Verbal Learning Test; Cancellation Tasks; Stroop Color Word Interference Test; Wisconsin Card Sorting Test; Wide-Range Assessment of Memory and Learning-II (Visual Memory); Bender Gestalt Test; Rey-Osterrieth Complex Figure; Test of Word Reading Efficiency-Forma B; Wide-Range Achievement Test -IV, Reading, Spelling, Arithmetic Subtests; Gray Oral Reading Tests-IV, Form A; Test of Written Language-III; Key Math Diagnostic Arithmetic Test-III; Gates MacGinitie Silent Reading Comprehension Test-Level 10/12; Human Figure Drawings; Sentence Completion Test; Diagnostic Interview. Dr. Brefach also conducted interviews with Mother and Student and performed a records review (PE-2). As discussed below, the evaluation revealed that Student presented with significant language-based learning disability (dyslexia).

12. According to Dr. Brefach, Student worked adequately during the evaluation and was cooperative, displaying superior attention, persistence and organizational skills on non-verbal tasks. Student displayed uneven pace on written tasks. Anxiety, restlessness and physical tension were noted and, according to Dr. Brefach, Student tired “more easily than would have been expected” for her age (PE-2). While Student was able to use proper articulation, grammar and syntax, her verbal fluency was impacted by inaccurate or incomplete responses, and she displayed auditory processing and word retrieval deficits (PE-2).

13. Student’s subtest scores on the Wechsler Adult Intelligence Scale-Forth Edition were as follows (note-scores between 8 and 12 are within the average range):

<u>Verbal Subtests</u>		<u>Performance Subtests</u>	
2. Similarities	7	Block Design	13
3. Digit Span	6	Matrix Reasoning	11
4. Vocabulary	8	Symbol Search	15
5. Arithmetic	7	Visual Puzzles	13
6. Information	9	Coding	8
7. Comprehension	8	Figure Weights	12
		i. Picture Completion	9

14. Student’s Verbal Comprehension scores were mildly below average. She demonstrated deficits with the entire spectrum of language functioning including: processing auditory information, storing information in her short and long-term memory, information retrieval and with organization of her expressive narrative (PE-2). Student’s verbal abstract reasoning as measured through the Similarities subtest was characterized by partial or concrete responses, rather than abstract, and she struggled when providing precise similarities and when elaborating. While she understood relationships, she could not verbalize them. She also scored at the low end of the average range in Comprehension, measuring her understanding of the rationales behind certain social conventions. She could not accurately analyze any of the proverbs presented and demonstrated weaknesses in her responses regarding academic subjects. Single word vocabulary definition and fund of general information was unevenly developed and falling within the low end of the average range. Perceptual organization skills were an

area of strength including her visual spatial analysis and synthesis skills (Block Design), as were pattern analysis and completion measures (Matrix Reasoning), spatial analysis (Visual Puzzles), sequential reasoning (Figure Weights). Student also scored at the low end of the average range when attempting to detect missing details from line drawings in the Picture Completion subtest. Short-term auditory memory fell somewhat below the average range displaying difficulty when solving multistep problems mentally, which required her to hold on to information in short-term memory. Scores for Processing Speed were scattered between the low end, to the significantly above-average range. In the Picture Arrangement subtest of the Wechsler Adult Intelligence Scale-III Student's performance was uneven and less elevated than other non-verbal scores (PE-2).

15. Student's performance in several of the neuropsychological measures such as the Boston Naming Test (which measure expressive and receptive language, concentration, attention and visual motor integration) evidenced difficulties with word retrieval from memory, but she demonstrated benefit from being provided phonetic cues. On this test, her scores which fell at the mean for ages 11.6 to 12 years, and rote sentence imitation skills fell at the mean for a student 10 years old (PE-2). Student was 16.7 years old at the time of this evaluation.
16. On the Syntactic Comprehension (Menyuk), which involves answering comprehension questions after listening to linguistically complex sentences, Student displayed confusion, misinterpreted the information and offered incorrect answers to one third of the subtest items. She substituted and confused words that had similar sounds but different meaning including mixing "fed" for "bed" and "carousel" for "carriage". Her performance on this test fell more than two standard deviations below average and raised concern about Student's ability to correctly interpret and follow what is being said in a general education classroom. Similarly, Student's performance on the Rey-Auditory Verbal Learning Test was at the mean for ages 10 to 12 years level (substantially below age expectations) after five repetitions, and she displayed incomplete skills in visual recognition and after time delays or when presented with "interference lists". Student also displayed significantly below-average abilities on the Stroop Color-Word Interference Test, attributable to her slower scanning and retrieval abilities. On the Wisconsin Card Sorting Test, which measures executive functioning skills, Student demonstrated great difficulty understanding the task and even feedback from the evaluator was unhelpful, but after given time to think about the task to be performed she was able to complete the remainder of the task demonstrating well-developed organization, problem solving and executive functioning skills (PE-2). Student performed well, that is, solidly within the average range for age or better on the Wide Range Assessment of Memory and Learning -II (94<sup>th</sup> percentile), the Cancellation Tasks, the Bender Gestalt, and the Rey-Osterrieth Complex Figure (50<sup>th</sup> to 75<sup>th</sup> percentiles) tests (PE-2).
17. Dr. Brefach noted great discrepancy<sup>5</sup> in Student's cognitive and neuropsychological functioning, consistent with a substantial language-based learning disability. Dr. Brefach

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<sup>5</sup> "On the Wechsler Adult Intelligence Scale -Fourth Edition, [Student] attained composite IQ scores in four subtest areas. Because these scores differed to a significant degree, in one case by 33 points, a Full-Scale IQ would not be helpful in describing

indicated that Student “struggled with the entire spectrum of language functioning, particularly with her auditory memory span and her working memory skills, as well as non-verbal reasoning and visual sequencing” and showed signs that anxiety appeared to interfere with her performance on non-verbal tasks. (PE-2).

18. Student’s performance on the Test of Word Reading Efficiency–Form B fell at the 2<sup>nd</sup> percentile, and on the Wide Range Achievement Test–IV, Word Reading Subtest, within the 16<sup>th</sup> percentile ( a grade equivalent of 5.4). On this latter test, Student struggled with identification of single words in isolation and word recognition. On the Gates – MacGinitie Silent Reading Comprehension Test, her performance fell at the 16<sup>th</sup> percentile (6.3 grade equivalency), demonstrating difficulty reading high school level passages silently and answering questions. Similarly, Student’s scores on the Gray Oral Reading Test –IV, where she was called to answer comprehension questions read aloud, fell in the 9<sup>th</sup> percentile, that is, a 6.4 grade equivalence, with a 7.2 grade equivalence for accuracy. Her reading was at a slower than average pace. Reading fluency was at the 5<sup>th</sup> percentile (grade equivalence of 6.7), and comprehension at the 16<sup>th</sup> percentile (8.0 grade equivalence). Overall, with a 76 Oral Reading Quotient ,Student’s score was at the 5<sup>th</sup> percentile (PE-2). Dr. Brefach concluded that Student’s fluency level was “barely at functional literacy” level, raising great concern over Student’s ability to access grade–level curriculum through independent reading (PE-2).
19. Student scored in the 23 %ile on the spelling subtest of the Wide Range Achievement Test –IV (6.7 grade equivalency). On the Test of Written Language –III she produced a well–organized single paragraph but made multiple spelling and grammatical errors, and confused homophones such as “meet/meat, their/there”. This performance was consistent with difficulties in reading fluency and comprehension which, according to Dr. Brefach, was characteristic of her developmental dyslexia and indicative of a language learning disability that had not been appropriately addressed (PE-2).
20. On the Math Computation Subtest of the Wide–Range Achievement–IV, Student scored in the 90<sup>th</sup> percentile at the twelfth grade test ceiling level, and she scored at the 39<sup>th</sup> percentile in the area of basic concepts (9.6 grade equivalence). In this latter test, Student’s errors were due to “difficulties with linguistic analysis and working memory”. Overall, math was considered an area of strength for Student (PE-2).
21. Dr. Brefach reviewed several samples of Student’s writing, noting that they contained “significant grammatical and spelling errors as well as a lack of organization and thematic development. The quality of [Student’s] writing was significantly below grade level expectations” (PE-2). Dr. Brefach further noted that on the preliminary SAT’s Student’s critical thinking scores were low, and Student reported that she was struggling

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her functioning and was not computed. In the area of Verbal Comprehension, [Student] attained a composite IQ of 89, at the 23<sup>rd</sup> percentile. In the area of Perceptual Reasoning, she attained a composite IQ 113, at the 81<sup>st</sup> percentile. Short–term Auditory Memory was an area of relative weakness, with a composite IQ of 80 at the 9<sup>th</sup> percentile, while Processing Speed was at the 70<sup>th</sup> percentile with a composite IQ of 108. [Student’s] protocol was marked by significant scatter between subtests, and significant intratest scatter for all four of the verbal subtests. The scatter between subtests was due to areas of relative strength and weakness... due, in this examiner’s experience, to neurological interference with learning” (PE-2).

in her classes and was encountering difficulty understanding and managing academic expectations (PE-2).

22. During the interview portion of the Brefach evaluation, Mother reported that Student was not always a good advocate for herself, which Parent believed was a result of Student's linguistic weaknesses and kind nature. According to Parent, Student had many acquaintances, but only one significant friend, something Parent attributed to Student's language weaknesses (PE-2; Mother). Student testified that she found it difficult to follow conversations and that she often missed a great deal of what her peers were trying to communicate (Student). As a result, she avoided unstructured social situations and often found an excuse to have lunch alone outside the school cafeteria (Student).

23. Regarding Student's emotional development, Dr. Brefach noted that Student was "acutely aware of the extent of her difficulties" which caused her great distress both academically and socially. Specifically, Student

... express[ed] concerns about peer relationships, particularly difficulties that would result from the language weaknesses, such as an inability to "follow" or respond to gossip and chatter, and concerns about "being talked about". [Student] also express[ed] concern about being successful in academic areas and being able to "concentrate" in her classes...[reflecting] significant difficulties with auditory processing and analyzing more complex language within a lecture setting (PE-2).

24. Dr. Brefach stressed the need for Student to receive support within her academic classes. She further recommended that Student receive reading instruction so as to enable her to improve her independent reading comprehension skills and her written language skills. According to Dr. Brefach, these services were critical to Student's ability to make effective progress (PE-2). Specifically, Dr. Brefach recommended: 1) a one hour daily, individual tutorial taught by a reading specialist to address Student's dyslexia, reading fluency, comprehension, vocabulary, phonemic awareness and written language. Student required direct individual remedial instruction in the use of computer software programs such as EmPower and Inspiration. She also required access to programs and materials such as Jamestown Reading, classroom material, Framing Your Thoughts, Great Leaps, Read Naturally, Megawords, and Wordly Wise. It was also recommended that Student work on webbing, brainstorming, outlining and proofreading. Dr. Brefach recommended that all of Student's services be provided on a twelve-month basis and the services focus on helping Student's "ability to extract information from print and communicate her thoughts more accurately in writing" (PE-2).

25. Dr. Brefach further recommended Student's participation in a small group, or tutorial format, English language arts class where Student could receive the individualized attention she required, as well as access to Spark Notes or Cliff's Notes. Because of her struggles with mechanics and the structure of English, Student should be allowed to forgo her foreign language requirement (PE-2).



26. Dr. Brefach recommended numerous accommodations such as provision of study guides and course outlines, classroom notes, access to word banks, extended time for testing, as well as cued test formats such as multiple choice questions or matching to help with retrieval. She further recommended participation in a post-high school program to better equip Student for college, and re-evaluation of Student as she transitioned to a post-high school program to assess her response to interventions and make appropriate recommendations for further interventions that may be needed (PE-2).
27. Dr. Brefach testified that Student was able to function solely through her persistence. Despite a high emotional intelligence, she was worried about peer acceptance, felt stupid and excluded by same age peers. Dr. Brefach opined that Student's longstanding, unmet academic and educational deficits were the underlying cause of Student's emotional worries (Brefach).
28. Ms. Grabowski, M.S.,C.C.C., performed a speech and oral/written language evaluation of Student on January 8, 2013 (PE-21). The focus of Ms. Grabowski's evaluation was Student's "oral and written language skills status (i.e., listening, speaking, reading and writing)" so as to provide further insight into Student's then current needs and learning profile (PE-21). Ms. Grabowski conducted informal and formal assessments, and she clinically observed Student during the evaluation. Test results were deemed reliable as Student was cooperative and exerted good effort. (PE-21).
29. Student's receptive language and verbal memory assessment showed her to possess strengths in language comprehension, but these were mixed with deficits in the areas of "accurate, efficient processing/ comprehension and retention of lengthy, linguistically complex information" and with higher order comprehension skills (PE-21). Ms. Grabowski noted that Student's weaknesses were not always reflected in formal test scores. In measures of receptive vocabulary, Student scored in the average range. However, on measures that assessed her ability to process/understand complex sentences/syntax and semantic relationships, she demonstrated deficits, with her short-term verbal memory performance deteriorating when sentences she was asked to repeat increased in length and linguistic complexity, and she made several errors in responding to questions that required recall of detail and higher order comprehension skills. She also had difficulty with tasks where she was required to interpret ambiguous sentences and those that had multiple meanings. Student's responses tended to be vague, and when clarification or elaboration was elicited she was unable to add more. She also demonstrated difficulty with inferences (PE-21).
30. As with receptive language, Ms. Grabowski explained that Student's deficits with expressive language skills were not always reflected in formal test scores (where she attained a low average score on a measure of expressive vocabulary). She did encounter difficulty with word retrieval and demonstrated errors in semantics, substitutions and associated responses. Ms. Grabowski noted that Student benefitted from being provided with a sound or phonemic cue. Qualitative analysis of Student's responses demonstrated weaknesses in that Student's answers were incomplete or lacking in sufficient relevant

information, her understanding of words was superficial or partial, and even when she knew the meaning of words, she struggled in trying to provide a fluent and clear explanation of her answers. She also scored below the average range on a measure of sentence generation, a task which she completed slowly (PE-21).

31. Ms. Grabowski also assessed Student's phonological processing, coding, awareness and rapid naming abilities using the Comprehensive Test of Phonological Processing. On measures of Phonological awareness, Student scored in well below the average range and her performance deteriorated as the tasks increased in length and complexity, and she demonstrated weaknesses with phonological processing. Student also scored well below the average range on measures addressing phonological memory (rapid naming). According to Ms. Grabowski, children presenting these deficits "are at very high risk for problems in acquiring basic reading skills (i.e., decoding, fluency)" (PE-21).
32. Ms. Grabowski also evaluated Student's written language. In reading, Student demonstrated significant, persistent impairments involving decoding, automaticity/fluency, and she scored well below the average range in reading comprehension. She read words slowly and had difficulty with accuracy, especially when reading multisyllabic words. She struggled applying her knowledge of phonics to read/decode nonsense words and scored well below the average range on untimed measures of single word reading, demonstrating her significant difficulties with automatic word recognition and with quickly and accurately decoding words (PE-21).
33. Student's reading abilities and understanding of connected text was measured through the Gray Oral Reading Test-5 (GORT-5). With a grade equivalent score of 6.0, Student's fluency score fell in the below average range, and reading comprehensions was also below average at a 5.7 grade equivalence (PE-21). Ms. Grabowski noted that Student's performance on the GORT-5 showed that Student  

...did not completely understand the passages that she read, even though they were very short, consisting of single paragraphs. Errors occurred on questions involving recall of detail and higher level comprehension skills (e.g., identification of main idea, the ability to inference, etc.) (PE-21).
34. Student's scores on the Nelson-Denny Reading Test (which assesses comprehension skills) fell at the 4.3 grade equivalence level, despite being allowed extended time. On this test Student displayed significant difficulty with complex, multi-paragraph passages (PE-21).
35. In spelling, even though Student's score fell in the average range, she displayed difficulties spelling multisyllabic words. Student also displayed weaknesses in her written expression, but her overall performance fell within the average to above-average range. Ms. Grabowski noted that Student was asked to develop a three paragraph story, and the story Student produced contained mechanical errors (i.e., punctuation, spelling and

capitalization), lacked a well–developed plot and the depth and elaboration expected of an intelligent 11<sup>th</sup> grader (PE-21).

36. Ms. Grabowski opined that Student’s oral (expressive and receptive) and written language impairments continued to have negative academic implications for Student. She noted that Student’s

... problems with phonological processing /awareness/memory/and rapid naming retrieval are still having a negative impact on her ability to accurately perceive, or “hear” sound in words, her ability to read/decode and spell/encode words and especially multisyllabic words, her automatic word recognition skills, and her reading fluency (PE-21).

37. On measures of basic reading skills, Student’s grade equivalence scores ranged from 7.8 (work recognition) to 3.7 (word attack/decoding) and lower on timed measures of single word reading. Student’s ability to read connected text accurately and fluently was at the 6.0 grade equivalence, well below the average range for her age even when she read slowly. Ms. Grabowski noted that even if Student’s reading skills improved, she would continue to have difficulties with reading comprehension. She expected Student to continue to have problems managing the “increasingly rigorous linguistic, and academic/curricular demands [--] as she advance[d] through 11<sup>th</sup>/ 12<sup>th</sup> grade and beyond” (PE-21).
38. According to Ms. Grabowski, Student’s issues would impact her ability to “take in” information presented in class, understand and remember it; use precise language to express her thoughts clearly and fluently whether in written or oral form; rapidly retrieve specific words when responding to questions in class; independently read/decode and access grade level material; express her thoughts in writing at her cognitive ability level; independently complete complex written assignments; take notes in class; learn a foreign language and complete tests/ exams or homework on time (PE-21).
39. Ms. Grabowski recommended several classroom accommodations including presentation of material in a structured, sequential, multisensory manner; clear directions; check–ins for comprehension; paraphrasing and summarizing material; use of written outlines and graphic organizers; extra time to retrieve, formulate and produce an answer and complete homework; untimed tests; breakdown of assignments into manageable smaller steps; spiraling teaching techniques. She further recommended that Student receive: a) a daily, one hour, individual instruction to address basic reading skills; b) daily individual or small group instruction on strategies to facilitate reading comprehension (focusing on strengthening vocabulary knowledge, teaching basic text structure, previewing of comprehension questions, summarizing and higher level comprehension skills) that can help her improve written language/writing skills and study skills strategies; c) once or twice per week direct speech and language therapy (a total of one hour) to strengthen language skills and acquire strategies to address processing, memory and retrieval; and d) summer services/tutoring in reading and writing. Ms. Grabowski noted that the teachers

and tutors should have a collaborative relationship so that Student's newly acquired skills can be reinforced across settings. Lastly, she recommended that foreign language requirements be waived as emphasis should be on improving Student's English language (reading and writing) skills (PE-21).

40. Parents forwarded their private evaluators' reports to DY on or about March 2013.
41. Teacher reports completed by Student's 11<sup>th</sup> grade teachers in March of 2013 raised concern regarding Student's academic struggles despite her excellent class behavior and effort (PE-11; PE-12; PE-13). Ms. Spada, Student's 11<sup>th</sup> grade honors level English teacher stated that Student's writing mechanics are "extremely weak and interfere with communication" (PE-11). Ms. Spada noted that reading was also very challenging and that Student had difficulty explaining what she read. Similarly, Ms. Spada noted that Student displayed difficulty recalling facts and vocabulary from her readings which was reflected in her quiz scores (PE-11).
42. In her Teacher Report Ms. Ross, Student's Spanish teacher, noted that in Spanish, Student struggled with syntax, tense, articles, adjective agreements, subject-verb agreement when writing and she displayed "very little vocabulary recall from prior knowledge and therefore spends much of her time looking up words or [being] lost". According to her, Student had difficulty understanding and pronouncing words and she had difficulty putting her ideas together when writing a paragraph (PE-14; Ross). Ms. Ross noted that in early October of 2012, she had asked Student if she was dyslexic (PE-13; Ross). Ms. Ross testified that Student put in more effort than most of the other students in her class and that she consistently sought her assistance (Ross).
43. Other teachers noted problems with spelling, grammar, Student's ability to explain things in her own words and with taking notes. (PE-14)
44. On March 21, 2013, DY requested consent to complete a full evaluation of Student, More specifically, DY wanted to conduct reading assessments (SE-9; SE-10). Parents denied consent in writing. (SE-9). In a letter to the Superintendent dated April 23, 2013, Parents explained that they did not consent to the evaluation because they had already obtained independent evaluations<sup>6</sup> and DY staff would have used the same evaluation instruments as the ones used by the private evaluator<sup>7</sup> (e.g., the Nelson Denny Reading Evaluation (PE-5). As a result, DY had no school-based evaluations available at the Team meeting.
45. Having received Parents' private evaluation reports, DY convened a Team meeting on April 10, 2013, to discuss the evaluations of Ms. Grabowski and Dr. Brefach (PE-4; SE-8). Relying on the evaluations of the two private evaluators, in combination with teacher input, the Team agreed that Student presented with a Specific Learning Disability in the area of language (Dyslexia). The Team however determined that Student was not eligible for special education services because she was making effective progress in her general

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<sup>6</sup> While Parents use the term "independent evaluations", they are referring to the private evaluations obtained earlier that year.

<sup>7</sup> Mother testified that at the Team meeting on April 2013, Leslie Carson had stated that DY would have conducted the same tests performed by the private evaluators (Mother).

education courses at DY, some of which were honors level. The Team also considered that Student received typical supports such as being able to e-mail her teachers, staying after school for extra help and preview of homework if she had questions. The school-based members of the Team opined that she did not require specialized instruction to progress effectively in her courses (SE-8). The Team agreed that Student's English teacher would offer Student technology that would help her with written assignments, that Student would be permitted to use her phone for dictation, and that audio books would be made available to assist her with reading. DY issued a Finding of No Eligibility on April 10, 2013 (SE-8).

46. At this Team meeting DY representatives suggested that Student take some non-honors courses instead of all honors courses, but Student did not want to and decided she would rather continue the honors classes and seek help when she needed it. Student consistently sought assistance from her teachers when she needed help whether by staying after-school or via email (Ross, Student).
47. Student testified that she wished to be placed in honor level classes because the students in honor level were serious about their education and motivated to attend college, in contrast to students in the college preparatory level courses. She testified that when she did not understand something in one of her honors level classes, other students in the honors level could explain it to her, whereas it would likely be she who would have to explain things to students in the college preparatory classes (Student).
48. Ms. Ross attended Student's eligibility meeting in 2013. She testified that she did not have many students on IEPs in her Level 3 Spanish class and therefore did not attend many Team meetings. She however was surprised that Student had not been found eligible, but stated that she was not a special education teacher (Ross).
49. Parents disagreed with the finding of no eligibility and on April 23, 2013, wrote to DY's Superintendent, Mr. Woodberry, stating their dissatisfaction with the Team's findings and noting that Student should have been found eligible for special education services based on the evaluations discussed at the Team meeting. Parents also notified the Superintendent that they would be hiring a tutor for Student, and expected DY to reimburse them for the costs. Parents also sent a similar notice requesting funding for tutoring to the members of the School Committee on April 23, 2013 (PE-5; Mother).
50. Parents did not request mediation or a Hearing with the BSEA at any time in 2013 (Mother).
51. On or about May 8, 2013, Parents and their advocate met with Superintendent Woodberry and DY's High School Principal to discuss Parents' concerns and the Team's findings. The group discussed drafting a Section 504 plan to provide Student with accommodations and a plan was drafted for the period covering May 8, 2013 to June 26, 2013 (PE-15). Superintendent Woodberry's meeting notes reflect the parties' agreement that Student would receive services at the Student Support Center starting in September 2013, that she would be provided with audiobooks, that Kurzweil would be made

available, and noted that Sarah Hewitt would provide Wilson Reading starting immediately and through the following school year (Woodberry).

52. The May 2013 Section 504 Plan offered accommodations such as “specific study guides for each test”, “copy of classroom notes”, and “no loss of credit on assignments, tests, or quizzes, due to misspellings.” The Plan also noted that a reading and written language tutorial would be provided by DY but provides no specific information regarding this service (PE-15). According to Kenneth Jenks, DY’s High School Principal, DY hired Sarah Hewitt as the tutor in May of 2013, and later paid for her services (Jenks).
53. Student’s Section 504 plan was renewed on September 4, 2013<sup>8</sup>, and it was drafted to remain in effect through June 27, 2014, the end of Student’s twelfth grade. It notes that her language-based learning disability/Dyslexia is impacting her learning “efficiency and effectiveness” (PE-16; SE-7). The document notes that the Section 504 plan was amended on November 22, 2013 (PE-16; SE-7). Pursuant to this plan Student received tutoring services with Ms. Hewitt and also received accommodations . (PE-16; SE-7).
54. Sarah Hewitt, Hewitt Literacy Consultant, was Student’s reading and written language tutor starting in the summer of 2013 after Student completed 11<sup>th</sup> grade. Ms. Hewitt offered Student three hours per week of individual tutoring during the summer of 2013 and between three and a half and four hours per week during the 2013-2014 school year (PE-7).
55. Ms. Hewitt is a national Project Read Consultant with over 30 years of experience as a reading specialist assisting students. She has also collaborated with schools designing literacy assessments and programs, and co-authored the Systematic Sequential Spelling Program (PE-23).
56. Ms. Hewitt assessed Student’s phonemic awareness through the Rosner Test, Yopp–Singer Test and Wilson Reading System (including the Wilson Assessment of Decoding and Encoding (WADE)), reading fluency was assessed through the Dynamic Indicators

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<sup>8</sup> The amended Section 504 Plan offered Student the following accommodations: allow for extended time on all assignments (tests, quizzes, homework and projects); allow for untimed the tests and quizzes; allow for re-takes as applicable for subject (i.e., Math); specific study guide for each test; cued test formats with work bank for any free recall or open ended questions. No loss of credit/points on assignments, tests, quizzes for misspellings; all of [] tests and quizzes returned to [] after being graded. Detailed course outlines, detailed chapter/topic outlines provided to student; copy of classroom notes; spoken information always accompanied by visual supports; before giving an oral lecture, teachers will provide [Student] with a written outline or graphic organizer that has the main points of the lecture with major headings clearly highlighted in some manner; directions will be clearly stated; teachers will carefully monitor/ reduce their rates of speaking, the amount of information presented at one time and the complexity of language they are using; teachers will frequently paraphrase and summarize material, with particular emphasis on key points and main ideas. Teachers will always provide [Student] sufficient time to retrieve, formulate and produce her answer; break down complex assignments into smaller, more manageable steps; [Student] will be allowed to use a laptop with “Kurzweil” software in all classes; all books, articles, handouts, quizzes, tests, assignments instructions, rubrics etc. will be downloaded to Kurzweil for the student (subject applicable); a reading and written language tutorial will be provided by DY (see guidance for tutor information); home/school communication– parent/student and guidance counselor to be notified via e-mail of all academic concerns. Student and parent will also be responsible for communication with teachers... (PE-16; SE-7).

of Basic Early Literacy Skills–Level 6 (DIBLES), and comprehension and reading fluency was also assessed through the GORT (PE-6). Ms. Hewitt noted that phonemic awareness was an area of weakness for Student (PE-7). Student’s 20% score for accuracy in the area of sound/symbols on the WADE indicated to Ms. Hewitt that Student would need a

“very systematic, sequential, directly taught linguistic program (structure of the English language) to teach her how to decode and encode (read and spell) which directly impacted both her writing and comprehension ability. [Student] had not mastered some of the most basic building blocks of reading skills. She did not know vowel sounds, digraphs, blends or syllable types. Her reading foundation was exceptionally weak (PE-7).

57. The DIBLES showed that Student was reading at an early sixth (6<sup>th</sup>) grade level and at that level she was not able to comprehend what she had read.
58. The Section 504 plans taken in their entirety called for Student to begin receiving tutorials with Ms. Hewitt in early May of 2013 and continue through June 27, 2014. However, this service did not start until the summer of 2013 (PE-15; Mother) and continued only through May of 2014. (PE-16; Mother, Student).
59. Ms. Hewitt’s tutorials focused on phonemic awareness, phonics, vocabulary, reading fluency, comprehension, writing and spelling, all areas in which Student required individualized, intensive instruction (PE-7; Student).
60. Neither Parents nor Student contested either of the Section 504 plans when drafted or renewed in September 2013 (PE-16; SE-7; Mother, Jenks). Mother testified that her advocate had explained that since Student would be going on to college in 2014, she would be better off with a Section 504 plan. Mother was desperate to get services for Student and she did not want to drag things out in court/forum because Student was about to finish 11<sup>th</sup> grade; time was of the essence (Mother).
61. Mother testified that Student was supposed to receive an iPad at the beginning of the 2013-2014 school year, but she did not receive the iPad until November of 2013. The iPad would allow Student to download audio–books, Kurzweil, and download class work ahead of time. When the iPad was received, the school staff was unable to download Kurzweil and only some of her books became available through the iPad (Mother). According to Mother, many of the accommodations in Student’s Section 504 Plan were not consistently implemented (or implemented at all by the math teacher, e.g., she did not let Student take her tests home). Mother testified that she raised her concerns with Student’s guidance counselor, Ms. D’Errico, who in turn spoke with Student’s teacher, and when this did not resolve the issue, Mother brought it to the attention of Mr. Morrison. Student also did not receive copies of classroom notes nor the teachers’ outlines or organizers (Mother).

62. On October 24, 2013, Ms. Ross (Student's 11<sup>th</sup> grade Spanish teacher) wrote a letter of recommendation for college admission on behalf of Student. In the letter Ms. Ross related her concerns regarding Student's difficulties with the material in her class and her suspicion that Student might have dyslexia (PE-10). Ms. Ross testified that after having asked Student if she was dyslexic, she had been in communication with Mother about Student being tested for dyslexia, and the term severe dyslexia which she used in her October 24<sup>th</sup> letter came from Mother. Ms. Ross noted that Student

...received good grades; however, she also puts in far more hours of studying and home preparation than her peers.... [Testing] results indicated that Student indeed has severe dyslexia. [Student] succeeded in my class because of hard work and determination, but I presume her grade would have been much higher had she been diagnosed earlier and if she had received the necessary training to work through her dyslexia prior to this time (PE-10).

63. In the fall of 2013, Student took the ACT boards (not the SAT) and she applied to, and was accepted through early admission, to Assumption College and Worcester State University. Neither school required her to take additional testing or other placement measures prior to admission (Student).

64. Sometime between 2013 and 2014 Student took an Accu-Placer test at the South Shore Community College, and it was determined that she would require at least two un-credited courses in Basic English, starting at a very low level, before she would be considered eligible to take college level English or other content coursework (Student's/Parents' Hearing Request).

65. Student testified that even in her senior year, she was unable to maintain a conversation with same age peers without feeling stupid. She often spent time with her peers' younger siblings because she could not follow what her peers were discussing. In school, Student would try to avoid being in situations that called for long interactions with same age peers and she often had lunch by herself in the yearbook room. Student became increasingly concerned that she was not ready for college and that once there, she would not have the supports she needed. Student shared her fears with Mother and told her that she was not able to do things like her peers and that she was afraid of what would happen in college (Student).

66. In December of 2013 Student finally conveyed to Parents that she would not be going to college the following year (Student, Mother).

67. Upon learning of Student's hesitation about going to college, and given her emotional state, Parents decided that Student should attend a fifth year of schooling prior to college. Student and Parents agreed that Student would attend Brewster Academy for an additional year after graduation from DY (Student; Mother).



68. Parents shared their concerns that Student was not ready for college and their intention to have Student attend Brewster Academy upon graduating from DY High School with DY, and accordingly requested public funding for Student's post-high school year (Mother, Jenks).

69. On March 10, 2014, Parent wrote to Mr. Jenks, seeking confirmation as to the school's decision to fund Student's post-high school year (SE-1).

70. DY's High School Principal responded via email on March 12, 2014, informing Parent that DY would not fund Student's placement because Student

[was] a regular education student who has received accommodations pursuant to a 504 plan. She has passed all sections of MCAS and is on track to meet all local graduation requirements. In light of these accomplishments, she will receive her high school diploma in June and therefore, the district will have met all of its obligations to provide her with her education (PE-17; SE-1).

71. Student/Parents filed their first BSEA Hearing Request (BSEA #1407065) seeking public funding for Student's post-high school year at Brewster Academy, on March 26, 2014. This Hearing Request also called for numerous other remedies including reimbursement to Parents for privately funded evaluations and tutorials (Administrative notice of BSEA #1407065).

72. Student turned 18 years old, the age of majority, in May 2014. By then, she was scheduled to graduate, as she had passed the MCAS and appeared to be meeting all local graduation requirements (PE-17).

73. Sometime in the spring of 2014, Jim Hoar, Director of the Yarmouth Recreation Department sailing program, wrote a letter of commendation on behalf of Student. Student had worked for the previous four years as a sailing instructor under Mr. Hoar's supervision. Mr. Hoar described Student as

...an excellent leader, self-motivated as well as positive role model... At school [Student] is an excellent representative of what a student-athlete should be. She has a quiet confidence and is not afraid to stand up for her beliefs and convictions or to express her opinions. She is respectful, dependable and a team player... As a leader, [Student] has improved each year. Whenever I gave given her a task or a workout to do, I never have to worry if it is going to be completed. [Student] is just a great person, she is always positive, always smiling, and always with a kind word for anyone. She just makes everyone around her feel good about themselves (SE-3).

74. Nicole D'Errico, Student's Guidance Counselor at DY, also wrote a letter of recommendation for Student in the spring of 2014. She described Student as a self-advocate who possessed the maturity to seek resources for support; a role model who was full of energy and carried herself with dignity (SE-3). Ms. D'Errico noted that in

Junior year[Student] discovered she has a language-based learning disability. [Student] knows how to prioritize her learning by staying after school for extra help, emailing her teachers for feedback, and practicing problems until she better understands concepts. She asks insightful questions and is faithful about connecting with her teachers for extra support... she has the habits of mind and strength of character to reach any objective... (SE-3).

75. Mr. Jenks testified that there were four academic levels at DY. Level 1 classes were attended by a small group of students who were not likely ready for college. Level 2 was college preparatory classes. Honors level classes (Level 3) were next. This level represented an increase in class rigor, and an increment in the depth and amount of material covered. Lastly, Advanced Placement (Level 4) courses are college level courses as would be presented in college. Mr. Jenks testified that it would be very challenging and a huge time commitment on a student's part to take more than a couple of Advanced Placement courses at a time (Jenks).
76. While at DYHS, Student was enrolled in regular education honors level and AP courses, including honors level English, History, Science, Spanish, and Math. Her transcript indicates that she received final grades of A's and B's the first two years of high school, and A's, B's, and C's during her 11<sup>th</sup> grade year. Her final grades in 12<sup>th</sup> grade were: B+ in Honors English; B+ in Honors Economics; C in AP Statistics; B in Honors Anatomy/physics; A+ Adapted Physical Education, and she passed all of her specials. In Honors Calculus Student received a D- in the first quarter, F in the second quarter, F in the third quarter, B+ in the fourth quarter, and a C- final grade. (PE-8; PE-9; SE-4; SE-6) Her calculus teacher noted that while Student's test grades were low, she demonstrated good effort (SE-5). According to Parents, Student's calculus teacher reported to Brewster Academy that Student should repeat calculus because she had not mastered this subject at DY.
77. Student testified that calculus was very difficult for her. Three different levels of calculus (Advanced Placement, Honors and College Preparatory) were taught simultaneously by the same teacher. There were 30 students in calculus and one teacher. In calculus Student was allowed to access her notes and text-book during exams (Student).
78. Student testified that while at DY she had always struggled. She constantly asked teachers for help and both she and Mother kept abreast of her homework and performance (Student, Mother, Ross). She testified that writing papers and completing assignments took her longer than it took others and teachers gave her extended time to

complete longer papers. She however was not given extended time on tests even after she was given a Section 504 Plan (Student).

79. Student loved being part of the high school experience despite knowing that she learned differently and that she was slower to learn, even in sports. What others understood and applied quickly took her longer and required that she hear it and practice tasks over and over (Student).
80. Student testified that although she had many acquaintances, at DY she only had one friend. She did not feel that she was accepted the way she wished (Student). During her senior year, Student took her lunch in the Year Book room, because she felt safe there and she did not have to deal with other students (Mother).
81. In addition to verbal reports, Ms. Hewitt, issued two written reports while working with Student. The first written report was issued on August 28, 2013 and the second on June 1, 2014 (PE-6; PE-7). Her reports noted Student's deficits, challenges and tutorial accomplishments (PE-6; PE-7; Jenks). According to Ms. Hewitt, Student worked hard and was able to finally understand mechanics of reading which had previously eluded her<sup>9</sup> (PE-7; Student). Despite the tutorial work done throughout senior year, Ms. Hewitt opined that Student still required additional direct instruction on phonemic awareness, encoding–spelling, comprehension (expository and narrative text) and written expression (PE-6; PE-7). In reading comprehension, Student specifically continued to need “intensive work in literal comprehension, inferential comprehension, and analysis” (PE-7). She also continued to need work on independent organization as she lacked some basic third and fourth grade skills, and she could not complete a graphic organizer effectively. In particular, longer essays and research papers would continue to present challenges (PE-7). Mother testified that Ms. Hewitt had confirmed to her via email that she had forwarded the report to DY's special education department three days prior to forwarding the report to Mother (Mother).
82. Student graduated and accepted her diploma from DYHS in mid–June of 2014. On September 23, 2014, Judith Dion, DY's Director of Pupil Services, confirmed that the tutor had worked with Student from July 2013 to June 2014, and that said services were discontinued when Student accepted her diploma in June of 2014 (SE-2).
83. Student then attended Brewster Academy for an additional year before going on to college. Brewster Academy (Brewster) is a private, college preparatory boarding school located in New Hampshire (PE-18; Yau). The school serves 360 students from 21 countries and 23 states in grades nine through 12 and post–graduation (PE-18).
84. Brewster's focus is to help students develop the academic, social and personal skills that will enable them to succeed in college. The school offers many of its students academic support services in the form of Instructional Support (IS) or English as a Second

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<sup>9</sup> According to Ms. Hewitt, Student “never complained even when presented with activities that could be perceived as juvenile. She embraced the big picture and as a result was a joy to teach and an inspiration to watch as she slowly grasped so many of the basic building blocks of reading” (PE-7).

Language (ESL). Once participation in one of the aforementioned support services is recommended, a student's attendance becomes contingent on participation in IS or ESL. Instructional Support provides students customized program in reading, writing, organization, study skills and time management to help them develop the strategies and skills necessary to become effective, independent learners. Brewster fosters collaborative learning, project-based learning, mastery learning and emotional literacy, while implementing best teaching practices through a differentiated curriculum (PE-18).

85. Dr. Brefach re-evaluated Student on June 23, 2014 (PE-3). Student was 18 years of age at the time of this evaluation. On the Wechsler Adult Intelligence Scale Fourth Edition, Student's test results showed significant scatter within subtests due to her neurologically-based deficits. She continued to struggle with the entire spectrum of language functioning including storing information in long-term memory, retrieval of information (word retrieval and auditory analysis), processing speed and organization of expressive narrative. Student's weaknesses impacted both expressive and receptive language. Dr. Brefach noted improvement in written language, phonological awareness and phonological memory. When reading silently Student's ability to extract information from print was at the early eighthgrade level. Dr. Brefach noted that Student's "ability to independently access a college curriculum [would] depend on further growth in [Student's] skills for independent reading comprehension, linguistic analysis, and written language" (PE-3)
86. Dr. Brefach continued to recommend direct instruction and practice of skills through a daily individual reading tutorial, and individual or small group speech and language services twice or three times per week to address "vocabulary, receptive language strategies, strategies for improving short-term memory, note-taking skills, and improved verbal fluency" (PE-3). Numerous accommodations continued to be recommended as well as delivery of instruction through multi-sensory approaches because of her weaknesses in auditory skills but strong visual skills. Continued direct written language instruction was recommended as this service had been beneficial to Student during her twelfth grade year, and notable improvement was noted in this area. Lastly, Dr. Brefach recommended that Student take a reduced course load once in college (PE-3).
87. Dr. Brefach testified that based on her evaluation of Student in 2014, despite having made growth in some areas, Student continued to required small, structured, language-classes and instruction post-high school (Brefach). Dr. Brefach did not observe Student in school but rather relied on the observations made by Student's advocate, Joanne Robichaud, whose credentials were unknown to Dr. Brefach (Brefach).
88. After Student's/Parents' attorney failed to respond to an Order to Show Cause issued on June 3, 2014, BSEA #1407065 was dismissed without prejudice on July 22, 2014 (SE-16; SE-17).
89. Student attended a post-high school year at Brewster where she repeated calculus, took journalism, history, and a modern essay class. Student also completed a comprehensive skill plan and a project. In addition she received instructional support three times per

week with Kim Yau<sup>10</sup>, to help her acquire learning skills and strategies (including vocabulary development, organizational skills, reading and writing skills) necessary for academic success at Brewster and beyond. Student's (PE-19).

90. Brewster Academy's end of the year reports note that Student was an active and invested participant in the program (PE-19). According to Ms. Yau, the Brewster experience had been beneficial for Student (Yau). Student testified that she had found Brewster very helpful and that for the first time she felt as though everything "clicked" (Student).
91. Student/Parents filed a second Hearing Request on September 18, 2014 (BSEA #1502345). An order to show cause was issued in this matter on November 3, 2014 when Student's/Parents' attorney failed to respond to the Hearing Officer's Order (SE-14). Parents' attorney did not respond during the show cause period and BSEA #1502345 was dismissed without prejudice on December 5, 2014 (SE-15). On December 16, 2014, Student's/Parents' attorney filed a "Motion for Short Reconsideration", but this request was denied by the Hearing Officer on December 22, 2014 (Administrative Notice of BSEA #1502345).
92. In September of 2015 Student began attending college at southern New Hampshire University which has a specialized program and Office of Disability Services through which she receives special accommodations. She testified that she was not experiencing emotional issues in college (Student).
93. On April 6, 2016, a year and four months after the second dismissal, Student/Parents filed the third Hearing Request with the BSEA raising the same issues as in the two prior Hearing Requests.
94. Jaime Curley, Director of Pupil Services at DY since 2015 (the year after Student graduated), did not know Student and did not attend her Team meeting in 2013 (Curley). Ms. Curley testified that she had not received or seen Ms. Hewitt's reports. She further testified that Student's Section 504 Plans would have been kept in the Guidance Department and noted that when a student graduates s/he is given the cumulative file. Student received her cumulative file when she graduated in 2014 (Curley, Mother). Therefore, some of the exhibits she had not seen prior to Hearing could have been in Student's cumulative file given to Student in 2014 (Curley).

## CONCLUSIONS OF LAW:

The Parties in the instant case do not dispute Student's diagnosis. They disagree, however, about almost everything else, including the degree to which Student was impaired by her disability, implementation of the accommodations in Student's 504 Plan, her ability to make effective progress, her readiness to graduate and pursue a post-secondary education, and her entitlement to compensatory education. Additional claims dismissed through a *Ruling on DY's Motion to Dismiss* included child find violations, procedural violations, Student's entitlement to special

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<sup>10</sup> Ms. Yau was also Student's hockey coach (PE-19; Yau).

education under the Individuals with Disabilities Education Act (IDEA)<sup>11</sup> and the state special education statute,<sup>12</sup> claims found to be barred by the statute of limitations,<sup>13</sup> and other claims falling outside the jurisdiction of the BSEA. See *Ruling on DY's Motion to Dismiss*, BSEA #1607923 (June 28, 2016). Those claims remaining for adjudication are made pursuant to Section 504 of the Rehabilitation Act of 1973.

Student argues that DY failed to offer her a free, appropriate public education (FAPE)<sup>14</sup> consistent with Section 504, and as a result she was not prepared to continue on to college. Upon graduating from DY, Student attended a private, non-special education boarding school in New Hampshire, and now seeks retroactive reimbursement for this placement. As the moving party, Student carries the burden of persuasion and must prove her case by a preponderance of the evidence.

In rendering my decision, I rely on the facts recited in the Facts section of this Decision and incorporate them by reference to avoid restating them except where necessary. Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties in the instant case, I conclude that Student has not met her burden of persuasion regarding most of her claims. Student was persuasive that despite access to a Section 504 Plan, at the end of her senior year in high school she had not made effective progress in her areas of disability, however, her remedy is significantly limited by her failure to prosecute her claims in a timely manner. Student however, is not entitled to reimbursement for her fifth year at Brewster. My reasoning follows

This case is compelling in that: 1) Student presented with a significant language-based learning disability which was not diagnosed or properly addressed while she was in school. Until the end of 11<sup>th</sup> grade Student's struggles and parental requests for help were minimized and dismissed. 2) Student was ill-advised by many on whom she and Parents relied. Had Parents/Student filed a Hearing Request regarding the Team's findings of no eligibility in 2013, this case might have yielded a very different result. 3) The proverbial ball was dropped at critical times, as delays in filing, and in timely pursuing claims to final resolution, came at great cost to Student and Parents. All the aforementioned made for a "perfect storm" which in many ways tied the hands of this Hearing Officer, significantly limiting the remedy that can be awarded through this forum. Compensatory education, however, is an equitable remedy, which can be accessed in order to afford Student some of the relief she seeks.

I begin by providing a historical overview of the case. At different points throughout Student's educational career Parents requested that she be evaluated due to her difficulties with reading.

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<sup>11</sup> 20 USC 1400 *et seq.*

<sup>12</sup> MGL c. 71B.

<sup>13</sup> Student's and Parents' Hearing Request raised IDEA and Section 504 claims. Although Section 504 is silent as to the applicable statute of limitations, the two year statute of limitations applicable to IDEA cases is the statute most closely related to Section 504. If Student were to argue that a more lenient three year statute of limitations should be applied, the outcome of this case would be no different. By April 2014, Parents' claims involving reimbursement of undefined private tutorials and reimbursement for independent evaluations predated even a three year statute of limitations. In addition, Student's (and Parents') failed to challenge the accepted Section 504 Plans during their pendency which impacts the relief that can be afforded, as explained later in this Decision. Finally, Brewster did not provide Student specialized services, and this is unaffected by the statute of limitations.

<sup>14</sup> 34 CFR 104.33(b).

Parents' last request for an evaluation was in 2007 when they requested that DY assess Student's reading, writing and spelling abilities. After performing an informal reading assessment (*Level 6 Expository Passage: Computers*) DY determined that despite demonstrating some weaknesses, no additional testing was necessary because Student's skills were commensurate with same-age peers (SE-12).

The record shows that instead of conducting full evaluations as requested, but cognizant of Student's weaknesses through informal assessments, DY offered Student RTI through DECAPs to address her weaknesses. The record does not contain detailed information regarding the DECAPs.

In December of 2012 and January of 2013 Parents had Student privately evaluated by Dr. Brefach and Ms. Grabowski respectively, and soon thereafter presented the reports of those evaluations to DY. Upon receiving the private evaluators' reports diagnosing Student with a significant language learning disability, DY sought Parents' consent to pursue its own evaluations. Because DY previously had refused Parents' requests to conduct evaluations, Parents denied DY consent to conduct its own evaluations at this time, arguing that Student already had been fully evaluated, that DY would have performed the same evaluations as the private evaluators, and that DY had not performed full evaluations previously when asked to do so.

Dr. Brefach's December 2012 evaluation, the first thorough evaluation available on Student, showed that despite superior cognitive abilities, Student presented with a clear language-based learning disability (Dyslexia), with particular deficits in working memory and auditory processing. Both of these impacted Student's academic learning and performance within the general education setting.

Student's test results placed her reading abilities between the fifth and seventh grade equivalency per Dr. Brefach's evaluation. Student scored in a late third grade level in some testing measures performed by Ms. Grabowski. At the time, Student was halfway through 11<sup>th</sup> grade (PE-2; PE-21). The testing by both evaluators showed that Student could not read efficiently, could not process efficiently and did not comprehend what she read.

According to Dr. Brefach, Student "struggle[d] to hold information in short-term memory and to manipulate that information...to retrieve specific words from memory", and mishears a great deal of what is said. (Dr. Brefach opined these deficits were neurologically based.) Student was found to struggle with fluency and accuracy when reading, both of which impacted comprehension. Overall, her written language skills were well developed despite her misspellings and grammatical errors, and her math skills were an area of strength. Student displayed secondary emotional responses related to her long-standing learning disability inclusive of elevated levels of performance anxiety when she faced unstructured or unfamiliar situations. Dr. Brefach noted that Student "expended significant energy trying to bridge" the gap between her intellectual abilities and the level of her academic performance, as well as coping with tasks for which she is ill-equipped (PE-2). Dr. Brefach stressed the need for Student to receive support within her academic classes and to improve her independent reading

comprehension and written language skills, all of which Dr. Brefach found to be critical to Student's ability to make effective progress while working closer to her potential (PE-2).

In 2012, Dr. Brefach stressed the need to provide Student with a year long, "specialized remedial instruction in order [for her to] make effective progress and be fully ready for" college, especially in light of Student's cognitive abilities and her interest in pursuing a career in business, engineering or other fields requiring strong reliance on visual-spatial and interpersonal skills (PE-2). A one hour, daily tutorial, participation in a small-group English language arts class and numerous accommodations were recommended. Dr. Brefach also raised the likelihood of Student requiring a post-high school program before college (PE-2).

In March of 2013, DY requested that Student's teachers complete "teacher reports" regarding Student's functioning in class. These reports spoke about Student's struggles (PE-11; PE-12; PE-13; PE-14). One report in particular, Ms. Ross' report, noted that she had asked Student if she was dyslexic because of her significant struggles in Spanish class (PE-13). In October of 2012, Ms. Ross had asked Student if she had an IEP or Section 504 plan. Ms. Ross was not the only teacher raising concerns and recommending additional assistance for Student (see Ms. Spada's report, PE-11; PE-12; PE-14).

Student's educational difficulties were also impacting her socially and emotionally. She testified that she had only one friend and struggled to maintain conversations with same age peers. Her emotional state was such that Parents provided twice per week private therapy during that school year (Student, Mother). Student persuasively testified about her academic, social and emotional struggles, corroborated by Mother. I found both of them to have offered candid, honest, reliable testimony, which I found to be credible (Student, Mother). Dr. Brefach's opinion that Student's longstanding, unmet academic and educational deficits were the underlying cause of Student's emotional worries, was persuasive (Brefach).

When Student's Team met in April of 2013, the Team had ample information to suggest that Student required special education services, despite her high grades and having passed the MCAS. Student was an eleventh grader reading at a late seventh grade equivalency level.<sup>15</sup>

Parents did not contest the finding of no eligibility. Instead, following a meeting with DY's Superintendent, they accepted a Section 504 Plan.

Student received two Section 504 Plans: one covered the end of eleventh grade and the other twelfth grade (PE-15; PE-16). Between May of 2013 and May 2014, she received accommodations, and in the summer of 2013 and during her senior year, a reading and written language tutorial with Ms. Hewitt (Student, Mother). As noted above this service was supposed to have started in May of 2013 but did not start until the summer of 2013.

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<sup>15</sup> Neither DCAP nor RTI is a substitute for special education for a "handicapped" child/child with disabilities. See, e.g., *Greenwich Board of Education v. G.M. and J.M.*, 68 IDELR 8 (D. CT, June 2016). Therefore, DY's recommendation that Student receive district curriculum accommodations but no direct services to address her significant deficits may well have constituted a violation of the child find mandates under both IDEA and Section 504.



According to Mother, there were also issues surrounding implementation of some accommodations by some teachers, the iPad was not available until November of 2013, and Kurzweil was never available.

By December of 2013, Student became concerned that she was not ready to attend college, and had become overwhelmed with the thought of not having supports in college. She took an Accu-Placer at her district's community college, which informed her that she would have to take an additional year and a half of English before she would be ready for a college level English course.

Parents communicated this information to DY and requested that DY fund a post-high school year at Brewster prior to Student's attending college. The request was denied and on March 26, 2014, Parents filed a first Hearing Request.

Toward the end of Student's twelfth grade Ms. Hewitt completed an end of the year/services report, noting Student's continued deficits and recommending further reading and writing instruction (PE-7). At Hearing the Parties disputed whether DY had received Ms. Hewitt's reports. The evidence is persuasive that DY received verbal reports from Ms. Hewitt, as well as two written reports (August 28, 2013 and June 1, 2014) while she was working with Student. The reports noted Student's deficits, challenges and tutorial accomplishments (PE-6; PE-7; Jenks). Prior to Hearing DY argued that it had not received Ms. Hewitt's reports (Curley). However, this is contrary to the credible evidence offered by Mother. First, Ms. Curley was not the Director of Pupil Services at the time the reports would have been received. Second, she testified that all students received their cumulative report upon graduating from DY, and Student was no exception. It is likely that the reports would have been included in the packet. Moreover, Mother testified that Ms. Hewitt had confirmed to her via email that three days she had sent a copy of the report to the DY special education department 3 days prior. Ms. Hewitt's report is dated June 1, 2014. Therefore, the report would have been received at DY prior to Student's graduation. Lastly, Ms. Hewitt was hired by DY and as such would have been accountable to DY for her work. Moreover, DY would have been responsible to monitor her tutorial sessions and therefore would likely have required her to submit a report.

Assuming, *arguendo*, that Ms. Hewitt had not forwarded the reports (something that is not supported by the credible evidence), DY was responsible to oversee Student's progress under the Section 504 Plan given that the District was funding the tutorial. DY offered no evidence that Mr. Jenks consulted with anyone, teachers or especially Ms. Hewitt, before informing Parent that DY would not fund an additional year. Similarly, DY did not offer to provide Student with services in-district, post-high school, or as part of high school. At a minimum, DY could have offered services through Student's graduation date in mid-June 2014. DY did none of the aforementioned.

Dr. Brefach did not re-evaluate Student until after she had graduated from high school in late June of 2014, and as such, her updated evaluation and recommendations were never available to DY for consideration. DY however did have available teacher reports, Student's report card (reflecting her difficulty in calculus), Ms. Hewitt's reports as well as Parents' concerns available for consideration prior to Student's graduation.

Several parental procedural missteps, however, plague this case, ultimately prejudicing Student's remedies. First, Parents/Student did not contest the finding of no eligibility for special education services in 2013. Their two Hearing Requests in 2014 raised those claims, but those cases were not prosecuted. Student then graduated from high school.

Second, Parents accepted the Section 504 Plans offered by DY, for which Mother testified that she had felt grateful, and which she opined were appropriate as drafted. The evidence shows that most of the accommodations in the Plans were implemented accordingly. One significant exception being failure to initiate Ms. Hewitt's services for approximately 2 months from the effective date of the first 504 Plan. In this regard, the record shows that Ms. Hewitt's tutorial services began in the summer of 2013. Student, who carries the burden of persuasion, did not present any evidence to show that she or Parent had paid for these services out of pocket. Neither the May to June 2013 nor the September 2013 to June 2014 accepted section 504 plans included summer services. Without evidence to the contrary, I can only assume that DY funded Ms. Hewitt's summer of 2013 tutorials thereby curing its failure to serve Student between May and June 2013.

Third, while Parents and Student contested Student's readiness to proceed to college in June of 2014, they did not challenge the plans within the statutory period. I note that Parents'/ Student's two previous Hearing Requests did in fact fall within the statutory timeframe, but both of those were dismissed for failure to prosecute. By the time they returned to the BSEA, Parents' claims were extinguished and only some of Student's claims survived. In essence, claims and remedies available in 2013 were no longer available in 2016, all of Parents'/Student's claims under IDEA were lost and only very limited claims under Section 504 survived.

### **Compensatory Education:**

Student argues that she was not yet ready to attend college at the end of high school and that despite having accepted her diploma, she was entitled to compensatory services: a) due to DY's failure to offer her services earlier; b) because DY did not fully implement the Section 504 plans; and c) because she had not truly mastered calculus.<sup>16</sup> She requested to be reimbursed for her year at Brewster as compensatory education.

It is well accepted in Massachusetts that compensatory education is an equitable remedy available within the context of special education. It is a surrogate for the warranted education that a disabled child may have missed during periods when his or her IEP, or, as in the instant case, Section 504 plan, was so inappropriate that he or she was effectively denied a FAPE. *C.G. ex rel. A.S. v. Five Town Community School Dist*, 513 F.3d 279, 290 (1<sup>st</sup> Cir. 2008). Compensatory education is intended "to remedy past deprivations by a school district. *Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184, 188 (1<sup>st</sup> Cir. 1993). As the Court in *C.G. ex rel. A.S. v. Five Town Community School Dist*. Explained,

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<sup>16</sup> Student's claim that her grades were inflated, including in calculus, were not persuasive, as she failed to present sufficient evidence in this regard.

[C]ompensatory education is not an automatic entitlement, but rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA. *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 290 (1<sup>st</sup> Cir. 2008)

The purpose of the compensatory education remedy is to compensate a disabled child with education that a school district improperly withheld under the IDEA, or a Section 504 plan.

The D.C. Circuit has joined other circuits in determining that compensatory education awards fit within the broad discretion of courts in fashioning and enforcing IDEA remedies. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

Lastly, since Student's claims fall squarely within a Section 504, not an IDEA standard of FAPE, the question in determining whether she is eligible for compensation is whether DY's provision of regular or special education and related aids and services were designed to meet Student's individual educational needs *as adequately as the needs of nonhandicapped persons are met*.

Subpart D of the regulations applicable under Section 504, addressing preschool, elementary and secondary education, defines a free appropriate public education as follows:

... the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35 and 104.36. 34 CFR 104.33(b)(1).

While the evidence suggests that this Section 504 eligible, handicapped student's needs had not been met as adequately as the needs of her non-handicapped peers, acceptance of the two 504 plans, as well as graduation and acceptance of her diploma significantly limit any possible award of compensatory services despite Student's low reading and writing abilities in 2014. In reaching the conclusion that Student's needs had not been met, I rely on the reports and/or testimony offered by Dr. Brefach and Ms. Hewitt, which I will not again repeat here. DY was aware of these facts through Parents' communications, and Ms. Hewitt's verbal and/or written reports. As such, DY's reliance on Student's grades and having passed the MCAS is not persuasive.

The 2013-2014 accepted 504 plan called for reading and writing tutorial services to be offered through the end of June 2014. The record shows that Ms. Hewitt's services stopped in May 2014 and Student then graduated in mid-June 2014. I therefore find that Student is entitled to compensatory education services for the period from May 2014 when Ms. Hewitt's services were interrupted, to the date of Student's graduation in mid-June 2014. Student is entitled to compensatory specialized instruction in reading and writing by a qualified individual such as Ms. Hewitt. As such, DY shall arrange to have Ms. Hewitt, or another similarly qualified individual, provide Student said services delivered at the same frequency/duration they were delivered pursuant to Student's Section 504 Plan during the period of deprivation (the date on which Ms.

Hewitt's services terminated through the date of Student's graduation.) This is not intended to limit the Parties as to any other similar arrangement on which they may agree.

Student seeks reimbursement for her fifth year at Brewster. The evidence does not support reimbursement for any portion of Student's placement at Brewster as a compensatory remedy. Brewster, a private, non-special education college preparatory boarding school, did not provide Student the specialized instruction recommended by Ms. Hewitt and Dr. Brefach. While the experience may have been positive, the program (including the instructional support by Ms. Yau), does not comport with expert recommendations that Student receive individual reading and writing instruction by a qualified/certified instructor (Brefach; PE-7). Ms. Yau lacks training and certification in reading and/or special education and could not offer the type of instruction recommended. Therefore, Student is not entitled to reimbursement for her year at Brewster as compensatory education.

**ORDER:**

DY shall offer Student compensatory education services in the area of reading and writing, delivered at the same frequency/duration they were delivered pursuant to Student's Section 504 Plan during the period of deprivation described above, unless otherwise agreed by the Parties. The curriculum for this tutorial shall be determined by Ms. Hewitt or a similarly qualified provider.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: December 22, 2016