

JANUARY 24, 2020

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

DECISION

TOPSFIELD PUBLIC SCHOOLS

BSEA #1909367

BEFORE

HEARING OFFICER

SARA BERMAN

**THOMAS NUTTALL, ATTORNEY FOR THE SCHOOL
KATHLEEN BREKKA, ATTORNEY FOR THE PARENTS**

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

In Re: Student v. Topsfield Public Schools

BSEA No. 1909367

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or "Chapter 766" (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

The Student in the instant case is a nine year old boy with a complex neurodevelopmental profile affecting many areas of functioning, including cognition, learning, socializing, behavior, communication, and adaptive skills. Student currently is a fourth-grader at an elementary school in Topsfield. On April 29, 2019, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) seeking an order directing Topsfield to place Student in a highly specialized, substantially separate educational program for children with developmental and learning challenges, such as Hopeful Journeys in Beverly, MA, for the remainder of the 2018-2019 school year as well as the 2019-2020 school year.

Upon receipt of Parents' hearing request, the BSEA scheduled an initial hearing date of June 6, 2019. At the joint request of the parties, the hearing was postponed for good cause until July 8, 9, and 10, 2019. Prior to the scheduled hearing, the School offered Parents a substantially-separate program within Student's elementary school in Topsfield, and Parents accepted this offer. Accordingly, the parties requested and were granted, for good cause, a postponement of the July 2019 hearing until November 13, 14, and 15, 2019 to allow a trial of the newly-proposed placement. After Student began attending this program, Parents came to believe that it was inappropriate, and the parties proceeded to hearing on the previously-scheduled dates of November 13, 14, and 15, 2019 at the office of the BSEA in Malden, MA. Both parties were represented by counsel and had an opportunity to examine and cross-examine witnesses as well as to submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until December 16, 2019 to submit written closing arguments. The BSEA received the parties' written arguments and closed the record on that date.

The record in this case consists of Parents' Exhibits P-1 through P-46, School's Exhibits S-1 through S-48, as well as stenographically-recorded witness testimony. Those present for all or part of the proceeding were the following:

Parents

Melissa Diodati	Inclusion Coordinator, Topsfield Public Schools
Kellie Harries	Contracted BCBA, Topsfield Public Schools
Lisa Draper-Small	Speech/Language Therapist, Topsfield Public Schools
Pamela Melvin Lane	Special Education Teacher, Topsfield Public Schools
Timothy Hogan	School Psychologist, Topsfield Public Schools
Matthew LaCava	Asst. Supt. Student Services, Topsfield Public Schools
Brian Willoughby, Ph.D.	Private Neuropsychologist
Nicole Coman, Ed. S.	Private Educational Specialist
Jeffrey Sankey, Esq.	Counsel for Parents
Kathleen Brekka, Esq.	Counsel for Parents
Thomas Nuttall, Esq.	Counsel for School
Sara Berman	BSEA Hearing Officer
Jane Williamson	Court Reporter

ISSUES PRESENTED

The issues for hearing are the following:

1. Whether the IEP covering March 15, 2019 to March 14, 2020, as revised and reissued on July 17, 2019, and as implemented during the 2019-2020 school year, are reasonably calculated to provide Student with FAPE;
2. If not, whether the IEP can be revised to make it appropriate;
3. If not, whether Topsfield must provide Student with a public or private out of district day placement in order to provide him with FAPE.

POSITION OF PARENTS

Student has a complex medical and neurodevelopmental profile with associated cognitive and language delays. While Student is friendly and socially interested, his social skills are significantly deficient, and he historically has struggled to form and maintain peer relationships. In order to provide FAPE, Student's educational program must provide him with instruction, facilitation, and meaningful opportunities to practice social skills with peers throughout the school day. In his current placement, a substantially separate classroom within his local elementary school, Student receives all of his academic instruction in a one-to-one setting with a special education teacher, not because his IEP requires it—it does not—but because Topsfield cannot provide an appropriate peer group. Student's placement deprives him of FAPE because it does not appropriately address his need to develop his social skills. Student needs to be placed in a public or private school setting that can provide him with an appropriate peer group and social opportunities.

POSITION OF SCHOOL

Student has experienced significant growth, academically, behaviorally, and socially during his years in Topsfield, particularly in light of his complex and pervasive disabilities. With respect to the current IEP and placement, Student has benefited from one-to-one instruction by a qualified, experienced special education teacher. Student is not isolated within that classroom because his teacher has facilitated structured interactions with a peer on a daily basis. Additionally, outside of his substantially separate classroom, Student receives daily supported inclusion opportunities during non-academic activities and specials. Topsfield educators and providers, who have had regular daily contact with Student since kindergarten, testified to Student's progress in all areas of need during his educational career in Topsfield.

Parents did not present persuasive evidence in support of their position. Parents' private neuropsychologists based their opinions solely on the results of office-based testing, had no interaction with Student outside of testing sessions, and had no direct knowledge of Topsfield's programming. Parents' private observer did not formally evaluate Student and misunderstood some of the interventions that she observed in the classroom. Parents have not met their burden of showing that Student's IEP is inappropriate, and that Student needs to attend an un-named program with an unspecified peer group to make effective progress.

SUMMARY OF THE EVIDENCE

1. Student is a nine-year-old child with disabilities who is a resident of Topsfield. His eligibility for special education and related services from the Topsfield Public Schools pursuant to the IDEA and MGL c. 71B is not in dispute. Student has attended the Topsfield Public Schools since preschool. He currently is a fourth-grader at the Proctor Elementary School where he attends a substantially-separate classroom for English Language Arts (ELA), math, science and social studies and is included in his fourth grade general education class, supported by a paraprofessional, for arrival/dismissal, lunch, recess, and specials. Student also receives speech/language therapy, four days per week and occupational therapy, 2 days per week. (Diodati, Lane, Draper-Small)
2. Student is an active, curious, adventurous, affectionate, and friendly child. He loves the outdoors, music, animals, books, and playing with various toys. (Parent, Willoughby, Lane)
3. Student has a genetic mutation that manifests in multiple, physical, neurological, and developmental challenges, including microcephaly, focal seizures, and hearing loss, as well as cognitive and language delays. He also has diagnoses of ADHD and a tic disorder. Student's disabilities impact many areas of his functioning, including learning, communication, fine motor skills, socialization, attention, behavior, and

adaptive skills. Student has had behavioral concerns in school, at home and in the community, which have implicated both his safety and his ability to participate in daily activities. These behaviors, which the parties agree have improved considerably, included bolting, aggression, disruptive behaviors, and work refusal in school, as well as impulsivity and bolting (*e.g.*, leaving his house unannounced, attempting to use the stove, running into the street, woods, or parking lots, and jumping into pools) at home and in public settings. (Parent, Willoughby, Harries, P-8, S-6)

4. Student is socially motivated, enjoys interacting with peers, and desires friendships. As a result of his difficulties with cognition, communication, and impulsivity, however, Student has struggled to pick up on social cues as well as to establish and maintain social relationships. When presented with opportunities to play, (*e.g.*, at recess or on playdates) he has often isolated himself with toys, or tried to play with adults or younger children. (Willoughby, Comans, Parent, P-1)
5. Student transitioned into the Topsfield Public Schools from Early Intervention at the age of 3 and attended the District's preschool program. Student's IEP for kindergarten (2015-2016 school year) initially called for a full-inclusion placement. After one week, however, Student was moved out of the inclusion classroom and placed on one-to-one instruction because of behavior problems and developmental delays. The School re-introduced limited inclusion opportunities in approximately spring of Student's kindergarten year. (Parent, Draper-Small, P-10)
6. In May 2016, towards the end of kindergarten, Student underwent a private neuropsychological evaluation at the L.E.A.P.¹ program at Massachusetts General Hospital. The evaluation, which was conducted by a clinical psychology fellow under the supervision of Brian Willoughby, Ph.D., and Ellen Braaten, Ph.D., indicated that Student had relative strengths in fluid reasoning but significantly below average scores in language, visual-spatial and visual motor abilities. Specifically, the WPPSY-IV test of intellectual functioning yielded the following standard scores: verbal comprehension, 71; visual-spatial, 78; fluid reasoning, 100; working memory, 7; and processing speed, 64. He also had significant weaknesses in receptive language, visual-motor integration, attention, and executive functioning. His behavioral regulation, emotional recognition and social understanding, as well as his school readiness skills were delayed. Parents reported hyperactive and impulsive behavior which, coupled with his inability to recognize danger, posed a safety risk (bolting). (Willoughby, P-10)
7. In the social domain, the NEPSY-II tests of social cognitive functioning yielded scores of 5 in both affect recognition and theory of mind. (P-10)

¹ Learning and Emotional Assessment Program

8. The evaluation recommended placement in a full-day, substantially-separate kindergarten and first grade setting with a 3:1 student/teacher ratio as well as a 1:1 aide at all times. There were multiple recommendations related to development of Student's social skills, including aide-supported inclusion opportunities for non-academics, structured activities with peers in an integrated setting, weekly participation in a social skills group with similar peers, individual social skills intervention with a behavior specialist or counselor to work on reciprocal play skills and recognition of others' emotions, and a structured classroom behavior plan. Dr. Willoughby testified that he recommended the 3:1 student-teacher ratio "to facilitate his social development," and that he believed that Student's 1:1 instructional setting was overly restrictive because it provided too few social opportunities. (Willoughby, P-10)
9. Student entered first grade in the Steward Elementary School in Topsfield in or about September 2016 pursuant to a fully-accepted IEP covering March 2016-March 2017, spanning mid-kindergarten to mid-first grade. Student was in a substantially separate classroom serving 3 to 4 students for academics. He had a 1:1 aide, and he received 1:1 instruction in ELA and math. Student was included with his first grade class for morning work, recess, art, music, gym and snack. (P-7, S-43)
10. Student's IEP contained goals in speech-language, school behavior, social skills, math, fine motor, gross motor, and reading. A progress report issued in December 2016 (mid-first grade) indicated that his speech intelligibility had improved and he was spontaneously using 4-6 word sentences and adjectives, and was learning strategies for following multi-step directions. In the area of behavior, Student continued to struggle with work refusal, listening, and unsafe or "unexpected" behaviors including property destruction and aggression towards adults (throwing objects, hitting, kicking). Regarding the social goal, Student was approaching benchmarks in greetings and peer play. In math, Student appeared to be meeting most benchmarks in counting, 1:1 correspondence, and identification of positions of objects in space. Student appeared to also be meeting or approaching benchmarks in reading, where he was learning to identify elements in stories read aloud as well as to identify letters. (S-45)
11. On March 3, 2017, the Team convened for Student's annual review and on March 13, Topsfield issued an IEP covering March 30, 2017 to March 29, 2018. This IEP contained goals in speech/language, school behavior, social skills, math, motor skills, and ELA. The service delivery grid provided as follows: Grid A, 2x15 minutes/month of consultation among providers (special educator, related service providers and behavior specialist); Grid B, 5x148 minutes (approximately 2.5 hours)/week of academic/social/behavioral support by a special educator or aide in the general education classroom; Grid C, 4x30 minutes/week of speech/language therapy; 1x30 minutes/week of social skills instruction; 1x30 minutes/month of physical therapy (PT); and 1x30 minutes/week of occupational therapy (OT), and 5

weeks of extended school year services (ESY) in speech/language and academics/social pragmatics. In the Additional Information section, the IEP stated that therapies could be provided in or outside of the general education classroom as appropriate, and that inclusion support would include arrival, dismissal, lunch, recess and math as appropriate for “social interaction and appropriate peer modeling” of behavior and communication skills. Parents accepted this IEP and placement in full on April 4, 2017. (S-42)

12. Student’s placement in first grade pursuant to the accepted IEP was in a substantially separate classroom called the Early Learning Center with a special education teacher, 4 paraprofessionals (including Student’s 1:1 aide), and a consulting Board Certified Behavior Analyst (BCBA). There were approximately 3 or 4 students in the classroom, but Student received ELA and math instruction in a 1:1 format. His inclusion opportunities were limited to arrival. At least initially, staff attempted to include Student for specials, but he became overly excited and overwhelmed by large numbers of children (Parent, P-36) By the end of the school year, he also was included for snack, recess, “lunch bunch,” and specials, although the first lunch bunch session did not take place until June 6, 2017. (Coman, Parent, P-12, S-36)
13. A quarterly progress report issued on April 3, 2017, indicated that Student was making measurable progress in most goal areas, and was meeting many benchmarks; however, his behavioral issues persisted. (S-40)
14. In May 2017, at the request of Student’s neurologist, Dr. Amanda Ward of the MGH L.E.A.P. Program, conducted a neuropsychological evaluation of Student in order to update his profile as well as to address whether his school placement was meeting his needs. Dr. Ward’s evaluation consisted of a Parent interview, behavioral observations, and standardized testing. In the interview, Parent expressed concern that Student’s impulsivity, hyperactivity, and “underdeveloped sense of danger” led him to exhibit unsafe behaviors such as running into the street. She also was concerned that Student had limited peer access in school. Parent felt that as a result, Student had made limited academic and social progress. (P-9)
15. Dr. Ward administered an extensive battery of standardized tests to Student and had Parents and teachers complete several checklists and rating scales. Testing revealed that Student showed significant improvement since the evaluation of 2016 in aspects of his verbal and language skills (e.g., his verbal comprehension improved from the “very low” to the “low average” range. Additionally, he scored in the “low average” range on the Test of Non-Verbal Intelligence (TONI). On the other hand, he continued to have delays in language processing, expressive/receptive vocabulary, visual-motor integration, and fine-motor dexterity, as well as in some of his adaptive skills, and his fluid reasoning abilities had dropped from the 50th percentile to the second percentile, over the course of one year. Additional weaknesses were noted in behavioral regulation and executive functioning. Dr. Ward opined that Student’s

behavioral challenges reduced his opportunities to be with, and learn social skills from, peers. As a result of these lagging social skills, he became overwhelmed and dysregulated in larger classroom settings for specials. Dr. Ward's educational testing yielded "low average" early learning skills, but weaknesses in foundational skills . (P-9)

16. Dr. Ward recommended that Student be placed in a year-round program for students with similar profiles, where he would be taught in a substantially separate, "small and nurturing" classroom environment for all academics and specials, "focusing on social-behavioral functioning, academics, and functional living skills." She recommended specific services within this model including direct access to a BCBA aide in the classroom to work on frustration tolerance, daily small group instruction in reading, writing, math and specials, speech/language and occupational therapy and an extended school year. To support Student's growth in social skills, Dr. Ward recommended a social skills goal in his IEP, weekly meetings with a school counselor to develop emotional regulation skills, and a school "lunch bunch" or social skills group. (P-9)
17. On June 6, 2017, Nicole Coman, Ed.S., an educational consultant retained by Parents, conducted a three-hour observation of Student at his elementary school. At this point in the school year, Student was in the Early Learning Center for core academics, and was included, with a 1:1 aide, for snack, recess, and specials. Student's first "lunch bunch" meeting of the year took place on the day of the observation. (Coman)
18. Ms. Coman observed Student at arrival time, during his 1:1 speech/language pull-out session, snack in the general education classroom, a reading and writing tutorial in the special education classroom, "lunch bunch" with the special education teacher and another first-grader, motor break, and a 1:1 science lesson in the special education classroom. Ms. Coman also met briefly with the consulting BCBA and the special education teacher. (Coman, P-12)
19. Ms. Coman testified that Student's social opportunities were limited because there were not many peers available in the Early Learning Center. She elaborated that a few peers came in and out of the room during her observation. Neither peer was similar to Student, who did not engage with either one during the class. Student did not interact with general education peers during snack in the first grade classroom but would not be expected to because the teacher was reading to the class. The only peer interaction that Ms. Coman observed was between Student and his lunch bunch peer, with prompting and facilitation by his 1:1 aide. Student appeared to enjoy the interaction. (Coman)
20. Staff reported to Ms. Coman that Student's behavior had been worsening. Ms. Coman actually observed a behavioral incident in the Early Learning Center classroom. The teacher had requested Student to stop moving his chair around.

Student refused, became agitated, and continued to escalate. Ms. Coman testified that the teacher seemed not to have behavioral strategies for stopping the escalation. She felt that the ABA strategies used during the incident seemed inflexible and not individually tailored to Student's needs, and was concerned that Student did not have direct access to a BCBA (at that time, the BCBA consulted with staff 1.5 hours, twice per month). (Coman)

21. In her report, Ms. Coman stated that while Student's program had many areas of strength, including use of visuals, small classroom size, supported inclusion opportunities, and use of ABA principles across most aspects of the school day, it did not conform with the recommendations made in prior neuropsychological evaluations. More specifically, Ms. Coman stated that Student's aide needed to hold BCBA credentials, and not merely be trained in ABA techniques and supervised by a BCBA, that the amount of BCBA consultation time was insufficient, that his behavior plan needed to be adjusted in light of an increase in problematic behaviors, and that Student needed more opportunities to practice social skills with students having a similar profile. Ms. Coman concluded that Student needed to be placed in "a highly specialized therapeutic placement." (P-12)
22. Ms. Coman testified that she felt Student's program did not, at that time, provide him sufficient opportunities to interact with peers who were cognitively and developmentally similar to him so that he could form meaningful relationships and practice social skills with an appropriate cohort. (Coman)
23. In July and August 2017, after Student's first grade school year had concluded, he attended Topsfield's ESY program, which was geared towards reinforcing social pragmatic and academic skill acquisition, and consisted of small group instruction and activities in social skills, ELA, math, and behavior. Student experienced significant behavioral problems throughout the summer, including aggression (hitting, kicking, biting), property destruction, and bolting. He was most successful if he worked in an alternative space, either away from peers or with one or two preferred friends, supported by one or two staff. He was able to demonstrate learned social skills with adults, but was typically unable to join in small group experiences. (S-35)
24. The Team convened on September 20, 2017, at the start of Student's second grade year, to consider the reports of Dr. Ward and Ms. Coman. On September 25, 2017, the Team proposed an amendment to Student's then-current IEP to provide the special education teacher with 1x30 minutes/week of consultation time with the BCBA as well as 2x15 minutes per week of consultation time with the school psychologist. Additionally, the Team proposed a functional behavioral assessment (FBA) of Student. (S-34)
25. In a letter dated October 9, 2017, Parents accepted the additional services proposed in the IEP amendment "because those are all that have been offered." The letter

further stated that “our acceptance of the additional services should not be interpreted as our agreement that the program....is appropriate. To the contrary, we believe that the proposed program fails to adequately address [Student’s] academic, social, emotional and behavioral needs.” Parents also rejected the characterization of their concerns in the Parent Concern Statement of the IEP and submitted an updated statement which noted their concerns about Student’s safety at school in light of his regularly escaping the school building despite supervision, that he was not receiving “the requisite amount of behavioral services from a BCBA,” and that socially, they “remain[ed] concerned about [Student’s] program’s lack of appropriate peers and the limited appropriate social opportunities....that [Student was] not receiving academic instruction in a small group setting across his curriculum, including specials, and that [Student] is not receiving reading instruction using a multisensory approach.” (P-30)

26. On October 10 and 11, 2017, a BCBA employed by the District conducted a FBA and determined that Student’s most problematic behaviors, work refusal, aggression, property destruction, and bolting, were generally preceded by a demand or request. The functions of the behaviors were escape and access to tangibles. Based on the FBA, Topsfield developed a behavior support plan, which it began implementing on October 17, 2017 (S-32, 31, 29)
27. On November 29, 2017, the Team met to review the FBA report and effectiveness of the behavior support plan, and found that Student had made progress. According to the data gathered during the preceding month, maladaptive behavior had decreased, and Student’s functional communication had improved. At that same meeting, Parent indicated that she wanted Student to be “included as much as possible.” The Team proposed amending Student’s IEP to increase the BCBA consultation time from 30 minutes per week to up to 3 hours per week, depending on Student’s presentation. (S-29, 31)
28. Student’s quarterly progress report issued on December 5, 2017 indicated that Student had met or exceeded most benchmarks in each of his goal areas. For example, in speech/language, Student was using strategies to improve articulation, was beginning to retell events, and had made significant progress in asking questions about events. In math, he had met or approached meeting benchmarks in demonstrating adding with manipulatives, identifying numbers up to 10, rote counting, understanding positions of objects in space, and comprehending “more” and “less.” He was continuing to make steady progress with gross motor skills, improving his balance, flexibility and strength. In ELA, Student had met or exceeded benchmarks in answering questions about a grade level story that was read aloud, identifying at least 10 consonant sounds, creating narrative stories with at least three sentences, and identifying familiar names. (S-30)
29. Student had made progress as well in both his social and behavioral goals but the report did not reflect updated data gathered after the new behavior support plan was

implemented in mid-October 2017. Based on data gathered before the new plan was in place, in the area of behavior, Student had progressed in transitioning from preferred to non-preferred activities, participation in teacher-led experiences for up to 30 minutes, following directions, and maintaining a “safe body.” Socially, Student was meeting or nearly meeting benchmarks for asking peers to play (with prompting), turn-taking, and engaging in at least 2 verbal exchanges with a peer, with prompting and cues. (S-30)

30. On March 21, 2018, the Team convened for Student’s annual review. Team meeting notes reflect that Student was progressing. Staff members reported that Student “always [was] happy” upon entering school. His speech/language therapist, Lisa Draper-Small, commented that Student had met his speech benchmarks, had a great imagination, and “really great language” during his therapy sessions. Student’s behavior had improved. Even though his schoolwork had become more intense and challenging, Student’s work refusal had significantly decreased, and he was “participating and being challenged much more.” (S-28)
31. On March 27, 2018, Topsfield proposed an IEP covering March 30, 2018 to March 29, 2019, corresponding to the remaining three months of second grade and the first six months of third grade. (S-27) The N-1 form accompanying the IEP noted that Student had “made amazing progress over the past year and has met his current goals and objectives.” (S-26) The IEP contained goals in speech/language, school behavior, social, math, ELA, and gross and fine motor skills. The service delivery grid significantly increased the amount of consultation time in Grid A as follows: up to 180 minutes per week of BCBA consult time with the special education teacher; 2x15 minutes per month of consultation among the behavioral specialist, special education teacher, related service providers and school psychologist; 1x15 minutes per week of consultation among the general and special education teachers and aide; and 2x15 minutes per month of consultation between the special education teacher and school psychologist. Grid B reflected the same amount of supported inclusion time as the prior IEP, 5x148 minutes per week. Grid C indicated that Student would continue to receive ELA and math instruction in a substantially separate classroom. Additionally listed in Grid C were a social skills group led by a behavior specialist as well as speech/language therapy, OT and PT. The IEP also provided for six weeks of ESY services in speech/language and “summer academics/social pragmatics.” (S-27)
32. Under “Nonparticipation Justification,” the IEP stated that Student “requires small group instruction...[in]...English Language Arts and Math skills in order to provide intensive, discrete teaching with minimal distractions...”
33. In contrast to the prior IEP, which stipulated a “substantially separate program,” this IEP proposed a “partial inclusion” model. Accordingly, under “Additional Information,” the IEP specified inclusion opportunities, stating that Student’s therapies could be provided “in or out of...general education as appropriate,” and that

“[i]nclusion support will include arrival/dismissal, specials: art, gym, music, library, lunch/recess, science, or WIN periods, as deemed appropriate for...social interaction and appropriate peer modeling (*i.e.*, expected behavior, communication skills, etc.)” (S-27)

34. The “Additional Information” section further stated that the “BCBA will consult with [Student’s] team for up to 3 hours a week. This consultation may include analyzing data, changing behavior plan/intervention, training staff on behavior techniques, observations, and consulting to staff.” (S-27)
35. Parents accepted the IEP and placement in full on March 29, 2018 but indicated that Student would not be attending the ESY program. (S-27)
36. Student completed second grade served by the recently-accepted IEP referred to above. The progress report issued in June 2018 indicated that Student had made progress in all goal areas since March 2018. For example, he now was able to make inferences after hearing a story and retell a short story (speech), incidents of aggression and bolting had diminished to fewer than one per hour (behavior), Student was increasingly able to play in a small group setting, say hello to peers, and engage in verbal exchanges, all with one or two prompts (social). Additionally, Student was continuing to make progress in math, ELA, and motor skills. (S-25).
37. Student entered third grade on or about August 29, 2018 while the above referenced IEP was still in effect. Pursuant to that IEP, Student’s schedule comprised academic support in the general education classroom, where he was included for science and social studies, and pullouts for math (5x60 minutes/week) and ELA (5x90 minutes/week) as well as speech/language (4x30 minutes/week), social skills (1x30), PT (1x30), and OT (1x30). (P-5, 6) Student’s special education teacher was qualified as a BCBA, and while she functioned as a teacher, much of Student’s instruction was based on ABA principles, including discrete trials and data-gathering. (Harries) The record does not indicate the number or profiles of peers in Student’s pull-out classrooms, or whether he was taught individually or in small groups.
38. A progress report issued on November 30, 2018 stated that Student was continuing to make steady progress in all goal areas. Behaviorally, Student’s aggressions had diminished to zero between the beginning of the school year and the date of the report, and work refusals had decreased by 12.5%. Socially, Student was able to engage in small group play, greet a peer, and engage in two-part verbal exchanges between 90% and 98% of presented opportunities. (S-22) This represented a significant increase since June 2018, when Student was able to perform these activities in approximately 60% of presented opportunities. (Harries, S-25)
39. On January 17, 2019, Dr. Brian Willoughby conducted an updated neuropsychological evaluation of Student consisting of an interview with Parent, a

review of Student's prior testing with Dr. Ward, review of Student's IEP, behavioral observations of Student at the test site, and administration of a battery of standardized tests, as well as several checklists and rating scales to Parents and two of Student's teachers. (P-8, Willoughby)

40. When interviewed by Dr. Willoughby, Parent reported that for fourth grade (2019-2020) Student would be transferring to a different school building (the Proctor School, which serves grades 4, 5 and 6). She was concerned that he would be overwhelmed in the new building and that his safety would be jeopardized by his bolting behavior and also reported that Student's progress had been very slow in all domains. (Willoughby, P-8)
41. Dr. Willoughby observed that Student showed "marked difficulties regulating his attention and activity level during the evaluation." Student left his seat and the testing office often, had difficulty maintaining attention to the test materials, and required much 1:1 attention. Student was 8 years and 9 months old at the time of testing, but on observation, his speech and language skills were comparable to those of a 5 or 6 year old child. (P-8)
42. Formal testing of Student's cognitive abilities via the WISC-V revealed skills in the "very low" to "borderline" range, with relative strengths in visual-spatial skills and fluid reasoning, which both were classified as "borderline," and relative weaknesses in verbal comprehension, working memory and processing speed, which were "very low." Further cognitive testing with the Test of Non-Verbal Intelligence-Fourth Edition (TONI-4) yielded a standard score in the 9th percentile, which was classified as "borderline." (P-8)
43. On language testing with the Receptive and Expressive One Word Picture vocabulary Tests (ROWPVT and EOWPVT), Student achieved scores in the 7th and 5th percentile, respectively, corresponding to an age equivalent of 6 years, 1 month for receptive vocabulary and 5 years, 8 months for expressive vocabulary. Student's visual motor functioning fell in the very low range, below the 1st percentile. Memory and attention as measured by the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2) was in the "very low" to "borderline" range, showing that Student had difficulty with encoding and attending to visual or verbal information. In sum, Student continued to have weaknesses in receptive and expressive language and communication, affecting sentence structure, vocabulary, functional communication and pragmatic language, with overall skills at the level of a 5 or 6 year old child. (P-8)
44. Dr. Willoughby assessed Student's academic skills with subtests of the WIAT-III. Student's skills in early reading, math problem solving, alphabet writing fluency, word reading, pseudoword decoding, numerical operations and spelling all were "very low," below the 1st percentile, between a pre-kindergarten to kindergarten level.

(P-8) Dr. Willoughby found Student's very low scores on academic achievement testing to be "moderately surprising" in light of his cognitive abilities, including a non-verbal intelligence score in the 9th percentile on the TONI. In his opinion, Student had the potential to perform at a higher academic level than he had demonstrated in testing. (Willoughby)

45. To measure Student's daily functioning, Parent completed the Adaptive behavior Assessment System, Second Edition (ABAS-2).² Parent's answers to the ABAS-2 questionnaire showed that Student had very low skills in most areas assessed. Parent and two of Student's teachers also completed the Behavior Assessment for Children, Third Edition (BASC-3), and the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2). Their responses indicated that Student had difficulties in multiple areas of adaptive behavior and executive functioning. Dr. Willoughby summarized that Student continued to struggle with inattention, impulsivity, and executive functioning concerns, behavioral issues such as bolting, disruptive behavior and hyperactivity, and poor adaptive skills.
46. Socially, Student had difficulty picking up on social cues and with making social connections. (P-8) Dr. Willoughby elaborated that Student wanted to be around other children and had social motivation. He also had foundational skills such as eye contact and was able to develop relationships. On the other hand, his weaknesses in cognition, impulsivity and communication "impact[ed] his ability to establish and maintain social connections." (Willoughby, TR-I, p. 63)
47. To improve Student's social skills, Dr. Willoughby opined that Student needed scaffolding and direct support, which should be intense and infused "across everything that he does as part of his day...rather than this pull-out model or a piecemeal model of trying to work on his social skills." For example, in a small group class, the teacher would provide in-the-moment social skills instruction and support during ordinary interactions such as a student borrowing a pencil. (Willoughby)
48. After comparing the 2019 evaluation with testing done in 2017, Dr. Willoughby concluded that Student's progress had been "remarkably slow." His early learning skills had fallen from the 9th percentile to below the 1st percentile, and his adaptive living skills, including verbal comprehension, had fallen from the 4th to the 2nd percentile, indicating that the "gap between [Student's] developmental skills and the skills of his peers has continued to widen over time. (P-8) Dr. Willoughby hypothesized that this decline in skills could have been caused by recently diagnosed

² The ABAS-2 measures a person's mastery of personal and social demands that are generally expected at that person's age. The areas assessed for a child of Student's age include communication, functional pre-academics, self-direction, leisure, social, community use, home living, health and safety, and self-care.

seizures, by the fact that the test instruments became more challenging as Student got older, or by inadequacy of Student's educational programming. (Willoughby)

49. Dr. Willoughby recommended "an intensive, substantially separate educational placement for students with developmental and learning challenges," as had previously been recommended by Dr. Ward and Ms. Coman. Such a program should be "wrap around" and "cohesive," and should feature the following: small, supportive classes with no more than a 6:1 student to teacher ratio; infusion of social, skills, speech/language skills, and executive functioning supports through the curriculum; direct learning skills intervention with individualized multisensory approaches; peers with similar profiles to Student but not marked behavioral concerns; direct support from a BCBA³ and application of ABA principles across the curriculum, both for behavioral and teaching purposes; and individualized speech/language, occupational and physical therapy. The purpose of the 6:1 ratio would be to enable group instruction and allow for social opportunities while also providing for direct instruction, either individually or in smaller groups, in academics, where appropriate. The student group should be homogeneous to allow for social interaction within the group. (P-8, Willoughby)
50. Based on a review of his own and Dr. Wards's evaluations between 2016 and 2019, Dr. Willoughby did not believe that Student was showing "a general trend of effective progress," but, rather, a "widening of the gap" between his skills in areas of concern and those of same-aged peers. (Willoughby)
51. Dr. Willoughby did not observe Student in his program or interview any of his teachers in Topsfield. He reached his conclusions regarding Student's progress on the basis of Student's successive neuropsychological evaluations as well as Ms. Comans' observation of 201
52. During late January and May 2019, Topsfield conducted Student's three-year re-evaluation, consisting of psychoeducational, academic, educational, speech-language, occupational and physical therapy and assistive technology assessments. The psychoeducational evaluation comprised classroom observation, review of records, and a battery of standardized tests as well as parent and teacher questionnaires addressing Student's cognitive skills, memory, and social/behavioral functioning. The results of testing indicated that Student continued to function well below same-aged peers in each of these categories. The evaluator made general recommendations for clear expectations, use of visuals, behavioral strategies, and reduced complexity of academic demands and language. The evaluator recommended explicit social skills instruction both in a small group and throughout the day as well as opportunities to practice skills in small group settings and with same-aged peers. (P-15)

³ Dr. Willoughby believed that Student should receive at least 4 hours per week of direct support from a BCBA as opposed to an aide supervised by a BCBA.

53. The academic evaluation was performed by Student's special education teacher and consisted of the Brigance Comprehensive Inventory of Basic Skills, Second Edition. (CIBS-II).⁴ According to the CIBS-II, Student was close to mastery of many "readiness skills," i.e., skills expected of kindergartners or early first-graders, including stating his name, age, and street address, putting on clothing and shoes, using the bathroom, and caring for his belongings. He had also mastered some early reading skills, including identifying colors, discriminating letters and words, and was close to mastering recognition of upper and lower case letters. He could glean information from looking at book illustrations and listening to stories, could read a few words in the environment, but could not yet decode or sight read. In the area of writing, Student was able to generate sentences and ideas in response to a prompt. In math, Student could count, write numbers 1 – 19 with support, and compare numbers of objects in sets. He knew addition facts through 18. The evaluation made multiple recommendations, including continual repetition and review and both whole-word and phonics-based reading instruction. (P-14)
54. Student's third-grade classroom teacher conducted an assessment of Student's functioning in the general education classroom. She noted that Student had had a successful year in third grade, with increased work output and decreased avoidant or silly behaviors as compared to prior years. He was occasionally raising his hand, and was increasingly independent. He worked successfully one-to-one or in small groups, and benefited from explicit instruction and discrete trial support. Student was progressing in reading, writing, and math skills. Socially, he participated in adult-supported "lunch bunch," and was developing interpersonal skills with adult support. (P-13)
55. On the speech-language evaluation, which consisted of the Peabody Picture Vocabulary Test-VA (PPVT-VA), the Expressive Vocabulary Test-3 (EVT-3), and subtests of the Clinical Evaluation of Language Fundamentals-5th Edition (CELF-5), Student's scores ranged from mildly to severely below average; however, his language skills had grown significantly since his 2016 school-based evaluation. The evaluation concluded that in light of Student's continued difficulties in pragmatic language, a [h]ighly structured small group interaction is essential." (P-19, Draper-Small).
56. Student's OT evaluation indicated that Student still experienced fine motor difficulties. The PT evaluation report stated that many of Student's gross motor skills were at or near age level, and that he no longer needed school-based PT. (P-16; 17)
57. On March 25, 2019, the Team convened to review both the school-based assessments and Dr. Willoughby's neuropsychological evaluation of January 2019. Additionally,

⁴ The CIBS-II is a criterion-referenced instrument that is used to measure academic skills and school-related skills of students with disabilities.

the consulting BCBA, Kellie Harries, shared that Student's behavior had significantly improved during his third grade year. Specifically, aggression averaged zero incidents per day for the first two trimesters of third grade, as opposed to an average of 9 per day in second grade. Similarly, property destruction was fewer than one and zero incidents, respectively, for the first and second trimesters, respectively, down from 1.7 incidents per day in second grade. Work refusal averaged 3.6 incidents per day for the first trimester and 2.1 per day for the second, while the average for second grade was 17 incidents per day. Bolting averaged fewer than one incident per day for both trimesters, which was the same as in second grade. (P-5, Harries)

58. The Team proposed an IEP March 15, 2019 to March 14, 2020, corresponding to the remainder of third grade and the first six months of fourth grade. As in previous years, this IEP contained goals in speech/language, self-regulation, social skills, math, reading, functional motor skills, and written language. Goals and benchmarks were based on the most recent evaluations, and progress was to be measured with observation and data collection. The IEP contained multiple, detailed accommodations, including opportunities for interaction with typical peers and pairing with a peer model. The pace and complexity of instruction was to be reduced. "Methodology/Delivery of Instruction" included sequential, multisensory instruction in math, whole word reading and phonics, a reward system, close facilitation of play skills, clear discrete teaching, close supervision outside of the classroom, and a behavior support plan. (P-5)
59. Under the general goal of "Social," Student's "Current Performance Level" stated that Student had made gains in increasing social interactions with peers, in that he would play a preferred activity such as Beyblades in a small group with no more than one adult prompt, would sit with a small group of familiar peers in a separate space during recess and lunch, would greet peers at least 71% of measured opportunities, and would engage in at least 2 verbal exchanges with a peer in 80% of opportunities. Student responded and engaged with peers when prompted, was observant of peers, and often followed their lead with activities such as lining up. Student's benchmarks called for him to participate in greeting activities and to initiate a comment or question to a peer in 4 of 5 opportunities within a small group setting; to respond verbally or non-verbally to a peer's initiation in 80% of opportunities across 3 consecutive sessions, within the general education setting; and to recognize others' emotions in a real or imagined scenario, displayed in various formats. (P-1)
60. The proposed placement was continuation in a substantially separate classroom for ELA and math, with supported inclusion for science, social studies, non-academic activities and specials. The service delivery grid provided as follows: Grid A, an unspecified amount of BCBA consultation time, 2x15 minutes per week of "Team Members" consultation, and 1x15 minutes/week of consultation among the general and special education teachers and aide; Grid B, 5x146 minutes per week of academic and behavioral support and 1x20 minutes per week of OT in the general education

setting; Grid C, 4x30 minutes per week of speech therapy, 2x30 minutes per week of social skills instruction with the behavior specialist/school psychologist, 5x60 and 5x90 minutes per week, respectively of math and ELA with the special education teacher/aide, and 1x20 minutes of OT. As with the prior IEP, the Additional Information section stated that inclusion support would include arrival/dismissal, specials, lunch/recess, as well as science and social studies. The IEP proposed 6 weeks of ESY services, as had prior IEPs. (P-5)

61. On April 2, 2019, Parents accepted the services in the above-described IEP, but rejected the proposed placements for third and fourth grades as well as for the ESY services, on the grounds that it did not comport with Dr. Willoughby's recommendations for "placement in an intensive, substantially separate educational placement for students with developmental and learning challenges that contains a small class size and like peers, that infuses ABA principles, social skills, speech/language skills, and executive functioning supports across the curriculum, and that provides direct support and programming from a [BCBA]." Additionally, Parents rejected certain omissions from Grid A, the elimination of PT services, and the reduction of OT services.
62. On April 12, 2019, in response to Parents' partial rejection of the above IEP, Topsfield revised Grid A to specify 180 minutes per week of BCBA consult time as well as to make other changes to Grid A requested by Parents, and noted that OT time actually had been increased by 10 minutes. The School declined to change Student's placement, and stating, in the N-1 form of April 12, 2019, that the proposed placement would address all of Student's needs and "infuses ABA principles, social skills, speech/language, executive functioning support across the curriculum, and is supported by a BCBA." The School also declined to restore PT services, stating that Student no longer required them in the school setting. (P-4) On April 17, 2019, Topsfield reissued the IEP incorporating the above changes to which it had agreed. (P-3)
63. On April 12, 2019, Nicole Coman observed Student in his inclusion social studies class and concluded that this setting was inappropriate for Student because he was not accessing the day's lesson and was not interacting with his peers in a meaningful way, despite much prompting and support from his special education teacher and high-quality instruction from the general education teacher. Ms. Coman also observed a substantially separate math class taught by Ms. Pamela Lane, who was to be Student's special education teacher for fourth grade. At the time of the observation, this class comprised two fifth-grade students. While Ms. Coman felt that this class met some of Dr. Willoughby's recommendations for Student, in that the class size was small and the teacher used multi-sensory methods, she noted that the students she observed functioned at a higher level of academic ability and independence than Student. Ms. Coman concluded that for this reason, the proposed placement would be inappropriate for Student.

64. Melissa Diodati, Topsfield's inclusion coordinator, accompanied Ms. Coman on her observation of April 12. Ms. Diodati felt that during the inclusion social studies lesson, Student was benefiting from being surrounded by language models from peers and did, in fact interact with peers in a meaningful way despite the brevity of his responses to them. (Coman, Diodati, P-11)
65. On April 29, 2019, Parents filed their request for a due process hearing in the above-entitled matter. On July 17, 2019, Topsfield issued a revised IEP covering March 15, 2019-March 14, 2020 under which Student would be served in a substantially separate classroom for all academic subjects, including science and social studies. (P-1) In a letter dated August 14, 2019, Parents, as they had done previously, accepted the proposed services in the IEP but rejected the placement because it did not conform to Dr. Willoughby's recommendation. Parents also agreed, however, to a trial of the revised program, and the parties requested and were granted a postponement of the hearing. (Parent, S-5)
66. Student began fourth grade in September 2019 pursuant to the most-recently revised IEP, which provided that all academic instruction would take place in a substantially separate classroom. Prior to the start of the school year, Parents were under the impression that this classroom would serve a small group of students. As it turned out, there were no appropriate peers available for grouping with Student, so all of his instruction was, and continues to be, primarily on a 1:1 basis with a special education teacher, Pamela Lane. (Lane)
67. Ms. Lane's responsibilities regarding Student include separate consultations with the BCBA, general education teacher, aide, school psychologist, and occupational and speech/language therapists; 5x100 minutes per week of inclusion support for arrival, dismissal, lunch, recess, and specials; and providing instruction in ELA, math, social studies and science. (Lane)
68. Student's daily scheduled consisted of approximately 3.5 hours of 1:1 academic instruction from Ms. Lane, 2.5 hours of inclusion time with the fourth grade class (specials, lunch, arrival/dismissal, recess/snack), and one hour of related services.
69. Ms. Lane testified about Student's daily routine in both inclusion settings and in her substantially separate classroom. Regarding his participation in inclusion, she stated that he interacted with general education fourth graders during lineup and arrival by "huddling" with a group of three or four other students and participated in showing each other toys they had with them. She felt he was very successful in art class, where he "talked continually" with three peers with whom he shared a table, and also performed the assigned art activity. In gym class he had progressed from standing on the sidelines to joining in with the games being played. (Lane)

70. Within Ms. Lane's classroom, Student received 1:1 instruction in blocks of 30 to 45 minutes, interspersed with inclusion activities or related services. There was a second fourth grader ("Student D") who was placed in the substantially separate classroom for part of the day, and received 1:1 instruction from an intern. Student D was on a different academic level than Student and Ms. Lane felt he would not be an appropriate match for him for ELA or math. She did group them together for morning break (about 10 minutes) and "calendar math" (about 15 minutes), and facilitated brief conversations between them during those times. (Lane)
71. Ms. Lane provided detailed testimony about Student's academic progress. She felt that he might benefit from instruction with a peer in science or social studies, but felt strongly that 1:1 instruction was appropriate for him in ELA and math, both because the reading program she was using was designed for the 1:1 format, and because she was able to individualize her teaching to Student's needs to an extent that would not be possible if she were working with additional students. She testified that Student was experiencing tremendous success with 1:1 teaching, that his confidence was growing, and that his increased confidence would boost his social skills. (Lane)
72. Ms. Diodati, Topsfield's inclusion coordinator, testified that Student would benefit from being educated alongside an appropriate peer, if one became available, and that generally, 1:1 instruction is a "last resort" for students who are not progressing in a large or small group setting. (Diodati)
73. On October 28, 2019, Ms. Coman observed Student in his current setting, together with Ms. Diodati. Ms. Coman observed his substantially-separate ELA lesson as well as inclusion library class and lunch. She also observed an OT session which took place during part of the lunch period. Ms. Coman testified that the ELA instruction was excellent, but that Student had no interaction with Student D (who was in the classroom engaged in another activity with a teacher), or with any other child. During the inclusion library class, Student worked alone operating a scanner to check in books, and colored a picture during a group lesson on internet safety. Ms. Coman observed that Student had little or no interaction with peers, and that the lesson was above his comprehension level. (Coman, P-22)
74. At lunch, Student was very upset about a different food wrapper than the one he was used to, and had to be coaxed into the cafeteria after hiding behind a door. He did not interact with other students in the cafeteria, which was crowded and noisy. Ms. Coman felt that it was not appropriate to have the OT session in that setting; however, Ms. Diodati testified that Student was working on skills related to eating. (Coman, Diodati)
75. During recess, Student played with a toy truck by himself, and said "no" to Ms. Diodati's suggestion that he ask a friend to join him. Ms. Diodati testified that

Student had interacted with peers at an earlier recess, so that staff would respect his wish to play alone in this instance. (Coman, Diodati, P-22)

76. Ms. Coman concluded that Student's current program has many strengths, including the quality of Ms. Lane's instruction, however it is inappropriate because it does not conform to Dr. Willoughby's recommendations. More specifically, the 1:1 format of Ms. Lane's class cannot provide Student with opportunities to interact with peers in the instructional setting. On the other hand, in the inclusion settings, he is socially excluded. The groupings are too large, the peers are too different from Student, and the lessons are too advanced to enable Student to derive social or academic benefit. Finally, specific social skills and language instruction was not being implemented across all settings. Thus, in both the inclusion and substantially separate portions of his program, Student "had limited interaction with peers," and lacked "the social opportunity to develop meaningful relationships and socialize with peers..." (Coman, P-22)

DISCUSSION

There is no dispute that Student is a school-aged child with a disability who at all relevant times was eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B ("Chapter 766"). Student was and is entitled, therefore, to a free appropriate public education (FAPE), which "comprises 'special education and related services'--both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).⁵ Student's IEP, which is "the primary vehicle for delivery of FAPE, *C.D. v. Natick*, 18-1794 at 4, quoting *D. B. v. Esposito*, 675 F. 3d 26, 34 (1st Cir. 2012), must be "reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances." *C.D. v. Natick*, 18-1794 at 4, quoting *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but "meaningful" educational benefit. *C.D. v. Natick*, 18-1794 at 12-13; *D.B. v. Esposito*, 675 F.3d at 34-35; *Johnson v. Boston Public Schools*, 906 F.3d 182 (1st Cir. 2018). See also, *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982); *Town of Burlington v. Dept. of Education ("Burlington II")*, 736 F.2d 773, 789 (1st Cir. 1984). Whether educational benefit is "meaningful" must be

⁵ In *C.D.*, the First Circuit reiterated its formulation of FAPE set forth in earlier cases, *i.e.*, educational programming that is tailored to a child's unique needs and potential, and designed to provide "'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." 34 C.F.R. 300.300(3)(ii); *Burlington II, supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012)

determined in the context of a student's potential to learn. *Endrew F.* 137 S. Ct. at 1000, *Rowley*, 458 US at 202; *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1st Cir. 2008); *D.B. v. Esposito*, 675 F.3d at 34-35. Within the context of each child's unique profile, a disabled child's goals should be "appropriately ambitious in light of [the child's] circumstances, *Endrew F.* 137 S. Ct. at 1001; *C.D. v. Natick*, 18-1794 at 14.

Finally, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child's disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement." *C.D. v. Natick*, 18-1794 at 5-6, quoting *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. Here, as the moving party challenging Student's current IEP as implemented, Parents bear this burden. That is, in order to prevail, Parents must prove, by a preponderance of the evidence, the current IEP as implemented does not provide Student with FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005).

In the instant case, the parties agree on Student's profile as a child with a genetically-based medical and neurological profile resulting in significant developmental, language, learning, behavioral, and social challenges. There also is no dispute that he has made significant, documented progress in many academic, behavioral, and adaptive living skills. The parties' sole dispute centers on whether his current placement, which combines 1:1 instruction with inclusion in the mainstream 4th grade, is appropriate in light of his needs. After a careful review of the evidence produced at hearing as well as the arguments of the parties, I conclude that the IEP at issue, as implemented, is not appropriate, but could potentially be made appropriate, with certain changes. My reasoning follows.

As the record amply demonstrates, Student is a child who is socially interested and motivated. He wants to interact with other children, and possesses some foundational social skills such as eye contact, but his social relationships are compromised by his lagging social communication skills, as well as his language and cognitive delays. Student's social weaknesses have been documented by Topsfield throughout Student's career in the District, as well as by Parents' private evaluators, and have been addressed by social goals and benchmarks in his IEPs.

In light of these weaknesses, both Topsfield's providers and Parents' private evaluators have consistently emphasized the importance of Student's receiving social skills interventions in a small group setting as well as opportunities to practice those skills throughout the school day. Virtually every witness testified, and every evaluation noted, that Student benefited from peer contact, and needed both instruction and

facilitated practice in peer relationships. On the other hand, no evaluator or provider has recommended, and in fact the current IEP does not dictate, 1:1 instruction for all academics. Notably, Topsfield's own inclusion coordinator, Melissa Diodati, testified that a 1:1 placement is a "last resort" for children who cannot make progress in a small group setting. It is undisputed that Student is receiving individual programming for most core academics⁶ only because there are no appropriate peer matches available. Both Parents' consultant, Nicole Coman, and Topsfield's consulting BCBA, Kellie Harries, testified, without contradiction, that the 1:1 placement does not target social skills (Harries) and deprives Student of the opportunity to practice social skills and develop relationships with peers who have similar cognitive and communication needs.

The inherent limitations in the 1:1 instructional format are not overcome either by Ms. Lane's efforts to have Student engage in some activities with Student D, who happens to be in the same classroom, or by Student's time in the general education setting. With regard to the former, Student's learning profile is not similar enough to Student's to allow them to be taught together. Ms. Lane has created opportunities for the two students to interact during the day, but this interaction is for approximately 15 or 20 minutes, and is not a substitute for small group instruction. Further, the limitations with the 1:1 instruction are not counteracted by the time Student spends in general education programming. The record shows that Student's participation in inclusion activity is marginal, given the gap between his social communication skills and those of his typical peers, although Ms. Lane testified that he communicates with other fourth graders at arrival time, and that his participation has grown in art and gym. It is reasonable to infer that Student's participation in inclusion is made more difficult by reduced opportunities to develop skills in a smaller group, which skills he could then apply in the inclusion setting.

Finally, the fact that Student has made impressive progress in many domains does not cure the inadequacies of the 1:1 setting for all academics. As stated above, FAPE entails programming that is designed to produce "'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). In this case, the Team has identified and prioritized Student's social skills for "demonstrable improvement." Student's placement must be capable of fully addressing these "educational and personal skills identified as special needs." *Id.* I am persuaded by the record that Student's spending over three hours per day in 1:1 instruction does not satisfy this requirement.

Although Topsfield's IEP is inappropriate as implemented for the reasons discussed above, it can be made appropriate with the addition of an appropriate cohort. If Topsfield cannot identify compatible peers within the District, it could consider inviting other districts to place suitable peers in Student's program. Topsfield's IEP for Student as written is comprehensive and responsive to his needs, has effectuated notable progress in many domains, and the School witnesses who testified at the hearing were impressively

⁶ Ms. Lane testified without contradiction that Student's reading program, by design, is and should be delivered in a 1:1 format.

skilled and dedicated. It is therefore hoped that the Team can make this necessary adjustment in the implementation of Student's IEP. If this cannot be done within a reasonable time, however, Topsfield must locate a public or private out of district placement for Student with an appropriate peer cohort which can fully implement his IEP.

CONCLUSION AND ORDER

The IEP covering March 15, 2019 to March 14, 2020 as implemented, does not provide Student with FAPE for the reasons discussed above. The IEP can be made appropriate, however, by providing Student with opportunities for small group learning with an appropriate cohort for his core academic subjects other than ELA.

Within thirty (30) calendar days from the date of this Decision, the Team shall develop a placement consistent with this Order. If the Team cannot do so, it shall locate a placement which can fully implement Student's IEP as discussed above.

By the Hearing Officer,



Sara Berman

Dated: January 24, 2020

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.