December 2, 2023

 **COMMONWEALTH OF MASSACHUSETTS**

***Division of Administrative Law Appeals***

**Bureau of Special Education Appeals**

**DECISION**

**BSEA # 2401035**

**BEFORE**

**MARGUERITE M. MITCHELL**

**HEARING OFFICER**

**CAROL ANN GAUTHIER, ADVOCATE FOR PARENTS AND STUDENT**

**ALISIA ST. FLORIAN, ATTORNEY FOR SCHOOL**

**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student and Westfield Public Schools BSEA# 2401035**

# DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC 1400 *et seq*.), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

On August 2, 2023, Parents filed a *Hearing Request* against Westfield Public Schools (“District” or “WPS”). A Pre-Hearing Conference was held on September 1, 2023. At the joint request of the Parties, the Hearing was thrice rescheduled for good cause to November 1, 2023, and thereafter for good cause, continued to November 2, and November 17, 2023. The Hearing was held via a virtual platform, also jointly requested by the Parties.

The official record of the Hearing consists of documents submitted by the Parents and marked as Exhibits P-1 through and inclusive of P-10[[1]](#footnote-1); documents submitted by the District and marked as Exhibits S-1 through and inclusive of S-5, S-5R, S-6 through and inclusive of S-8, S-8R, S-9, S-9R and S-10 through and inclusive of S-16[[2]](#footnote-2); and approximately 5 hours of stenographically recorded oral testimony by five witnesses resulting in a 3-volume transcript.

Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother

Carol Ann Gauthier Advocate for Parents and Student

Alisia St. Florian, Esquire Attorney for WPS

Debra Ecker Special Education Director – WPS

Jonathan Scagel Principal – Fort Meadow Early Childhood Center (ECC) - WPS

Nicole Turgeon Early Childhood Teacher – Fort Meadow ECC - WPS

Meredith Lewis Educational Team Leader and School Psychologist – WPS

Michelle Pomeroy Outpatient Speech Language Pathologist – Mercy Medical Center

Kelly Griffith Outpatient Occupational Therapist – Mercy Medical Center

Hannah Saleeba Court Reporter – Advanced Court Reporting

Melissa Lupo Court Reporter – Advanced Court Reporting

Marguerite M. Mitchell Hearing Officer

At the conclusion of the testimony, on November 17, 2023, the Parties submitted oral closing arguments and the record closed on that date.

# ISSUE IN DISPUTE:

The issue for hearing in this matter as contained in the *Hearing Request*, is as follows:

1. Whether the proposed Individualized Educational Program (IEP) calling for a proposed placement in a full inclusion kindergarten program will provide Student with a free, appropriate public education (FAPE), or whether she instead requires continued placement in the inclusive early childhood program in order to receive a FAPE?

# POSITIONS OF THE PARTIES:

**Parents’ Position**

Parents submit that given her social-emotional, verbal articulation, comprehension and academic needs, Student requires retention at the Fort Meadow ECC to receive a FAPE. According to Parents, the proposed kindergarten program is the most, rather than the least, restrictive environment in which Student can make effective progress. Parents are concerned that in kindergarten, Student will both struggle to keep up with the other students academically, and emotionally manage the increased time in school from a 2.5-hour pre-school day to a 6-hour kindergarten day, as she lacks the expressive language skills and comprehension to effectively communicate her wants and needs and to advocate for herself. Requiring Student to attend kindergarten this year will also prohibit her from receiving continued 1:1 private speech and language and occupational therapy services that Parents contend are “crucial” to Student’s development. In light of Student’s communication, emotional regulation and anxiety needs, Student’s outside service providers as well as Student’s pediatrician all support her retention at the pre-school program for the 2023-2024 school year.

**District’s Position**

The District asserts that Student, who has been receiving special education and related services in accordance with fully accepted IEPs since she turned 3 years old, does not require retention in the pre-school program in order to receive a FAPE. Student was very successful in both her pre-school years at Fort Meadow ECC, as well as during her extended school year program this past summer. Student’s communication and emotional anxiety needs are not unusual for kindergarten students. Nothing about Student’s profile indicates that retention is necessary for her special education needs to be met. Student is ready to be promoted to kindergarten with the proposed IEP services and supports. Student will receive a FAPE in the proposed kindergarten classroom and Parents have not met their burden of persuasion in this matter. The private expert opinions that Parents rely upon all indicate their “belief” that Student would benefit from retention this school year, but that is not the standard of review to determine whether Student’s proposed IEP provides her with a FAPE. None of Parents’ experts observed Student in the school setting, attended any team meeting, reviewed her IEPs or communicated with District staff about Student. In contrast, District staff who testified had the benefit of observing Student in the school setting and attending Team meetings and they were clear in the opinion that with the proposed IEP services and supports, Student will effectively access the general education kindergarten curriculum.

# FACTUAL FINDINGS[[3]](#footnote-3):

1. Student is a “friendly, self-directed, sweet” five-year-old who first received early intervention services at eighteen months old. She has been provided with special education and related services to address a developmental delay in the areas of communication and social/emotional skills pursuant to an IEP from the District since age three. Student turned five in June 2023. (P-6; P-7; P-9; S-1; S-3; Mother, VI-41, 54).
2. Socially, Student is “shy” “timid” and “standoffish”, particularly around people she is unfamiliar with. Sometimes she participates in social interactions but will also just as often stand and watch. Student typically engages in parallel play but can also share and take turns appropriately and engage in cooperative play. Student tends to speak less than other children her age, and when she does talk in school, she often uses a very low volume that requires prompting to speak louder. (S-3; S-6; Mother, VI-45-46, 51; Turgeon, VI-156-57).
3. Student received early interventions (EI) services consisting of monthly speech and language support, weekly support with a developmental specialist and weekly co-treatment support with a developmental specialist and occupational therapist to assist with expanding Student’s vocabulary, increasing her articulation and speech clarity, and supporting her emotional regulation around sharing adult attention with a sibling and tolerating limits. According to the Mother, at the end of EI services, Students articulation and comprehension needs made it hard to understand her if she was not talking to someone standing very close to her. (S-6; Mother, VI-42).
4. Student underwent an initial evaluation for special education in May and June of 2021. The initial evaluation was conducted by the District’s speech and language pathologist, Diana Paskal[[4]](#footnote-4), and the school psychologist, Meredith Lewis[[5]](#footnote-5). The results of the District’s testing concluded that Student had a moderate receptive and expressive language delay characterized by limited association of words with meaning, limited vocabulary knowledge, and a nonfunctional expressive mode of communication. Student’s speech was notable for her use of jargon and for increasing her rate of speech as the length of the message increased. As a result of the initial evaluation, direct speech and language services were recommended. (S-6; Lewis, VI-88-89).
5. On June 2, 2021, Student was initially found eligible for special education in the category of developmental delay in the primary developmental domain area of communication with a secondary domain area of social emotional skills. An IEP was developed dated June 17, 2021 to June 1, 2022 proposing accommodations and goals in the areas of “Pre-Academic” and “Communication”, focusing on improving Student’s active participation in the classroom and her expressive language and articulation (21-22 IEP). The Service Delivery Grid called for 1 x 15 minutes/month of Grid A consultation services, 4 x 135 minutes/week of Grid B pre-academic support and 2 x 30 minutes/week of Grid C speech and language support. Extended school year services were not proposed. Placement was proposed in the Fort Meadow ECC inclusive early childhood program. Parents accepted this IEP in full and consented to the placement. (S-9; S-9R; Mother, VI-59; Lewis, VI-92-93, 97-98).
6. Student attended Fort Meadow ECC for the 2021-2022 and 2022-2023 school years. Her teacher both years was Ms. Nicole Turgeon. Ms. Turgeon is certified by the Department of Elementary and Secondary Education (DESE) to teach Early Childhood Education With and Without Special Needs. She holds a bachelor’s and master’s degree with additional credits in early childhood education, with and without special needs from Westfield College. Ms. Turgeon has been a Pre-Kindergarten teacher at Fort Meadow ECC for her entire 24-year career. (Turgeon, VI-151-152).
7. According to Ms. Turgeon, during the first year of pre-school, Student was in a class with seven other three-year-old students, five of whom, including Student, had IEPs. Student separated easily from her parents upon arrival, independently completed book and puzzle work, participated without any problems in all gross motor activities, independently moved through centers and chose her own activities. Student engaged in age-appropriate parallel play with her peers and accepted them in her space. Student required some additional support to participate in and attend at circle time. She typically sat on the outside of the circle where she could access adult support. Student also required additional support with her verbal expression and articulation, and she relied on visuals and gestures to express herself. (Turgeon, VI-152-53, 155-58).
8. The Team reconvened on May 16, 2022, for Student’s annual review and developed an IEP dated May 16, 2022 to May 15, 2023 (22-23 IEP) with goals in the same areas and with the same general focus as the prior IEP; however, the first goal was re-named “Pre-School Skills” and individual objectives were updated. The Service Delivery Grid was similar to that of the prior IEP but was updated to reflect that pre-school skills support would increase to 5 x 150 minutes/week when the new school year started as the Fort Meadow ECC program that year increased from 4 half days per week to 5 half days per week. No extended school year services were proposed. Placement continued to be proposed in the Fort Meadow ECC inclusive early childhood program. On May 25, 2022, Parents accepted this IEP in full and consented to the placement. (S-6; S-7; Mother, VI-59; Lewis, VI-101-102).
9. According to Student’s June 10, 2022 year end progress report, Student missed 20 school days in the winter and 6 school days in the spring. She received grades of “S” for “successful” in almost all areas by the spring, with the exception of “can snip paper with scissors” that was graded as a “P” for “progressing slowly” and “can use language to communicate” that was graded as an “M” for “making steady progress”. (S-10).
10. The 22-23 IEP provided for Student to work on various objectives including improving her interactions with her peers, initiating conversations, and following multi-step directions. Ms. Turgeon believed these objectives were appropriate for Student given her disabilities and areas of needed support. Specifically, Ms. Turgeon testified that Student’s struggles with delays in receptive language impacts her comprehension and ability to follow directions. Student requires extra prompting particularly with novel or complex directions. Although Student entered her second year of pre-school with more self-confidence; this decreased as a result of a large number of absences due to illness in the fall. Once the health issues were resolved and Student returned to consistent attendance, Ms. Turgeon saw her self-confidence return and she became even a little silly at times. Student never initiated any conversations with Ms. Turgeon directly, but by the end of this school year, Student was initiating conversation with peers at least two to three times a day during free play or on the playground. Additionally, in February or March of 2023 Student connected with and began to independently approach an adult paraprofessional who was working as a one-to-one assistant with another student in the class[[6]](#footnote-6), if the student whom the paraprofessional was supporting and Student were working at the same centers. During this school year, Student also independently sat and attended at circle time for increased amounts of time. Given this developmental progress, Ms. Turgeon opined that Student is ready to move on to kindergarten with the special education and related services and accommodations proposed in her IEP. (Turgeon, VI-160-166, 170-71, VII-37-40).
11. Student’s IEP progress reports for the 22-23 IEP were issued in January 2023 and June 2023. Student was determined to be “partially proficient” with both goals on both progress reports. In January, Ms. Turgeon reported that Student had met one of her four objectives for her “Pre-School Skills” goal and was working on the other objectives. In June, Ms. Turgeon reported that Student had made progress on these three objectives but had not yet met them[[7]](#footnote-7). These objectives included that Student would “engage in cooperative play with peers”, which she was able to do in 2 out of 5 opportunities in both January and June but not the desired 4 out of 5 opportunities. Additionally, Student was able to “use verbal language with an appropriate voice volume to express wants/needs, share experiences and to interact with adults and peers” in 3 out of 5 opportunities by June, not 4 out of 5 opportunities. (P-6; S-1).
12. In January, Student’s speech and language pathologist, Ms. Asley Cami[[8]](#footnote-8), reported that Student had met 4 of the 5 “Communication” goal objectives and was partially proficient with the remaining objective. In June, Student met the remaining objective, but was now reported to be making progress on one of the 4 objectives previously reported as “met” in January 2023. This objective called for Student to “produce early developing consonant target sounds in words via imitation at the word level with 80 % accuracy across three therapy sessions with no more than one visual or verbal cue”. It is unclear whether the consonant sounds being worked on in January were different than those being worked on in June. Student was also noted to have “demonstrated effortless transitions to and from the speech room” for both progress reports. (P-6; S-1).
13. Mother attended Student’s Parent Teacher Conference in the winter of the 2022-2023 school year. At that time Ms. Turgeon informed Mother that Student’s benchmark testing showed regression in math. Mother and Ms. Turgeon discussed that this regression may have been due to the numerous absences in the fall due to illness. Specifically, her benchmark scores in the Math screening tool decreased from 11/20 correct in September 2022 to 7/20 correct in January 2023. Note however, the score then increased to 14/20 correct in June 2023[[9]](#footnote-9). In response, Mother asked Ms. Turgeon if students were ever retained in pre-school rather than promoted to kindergarten and was told that retention was not typical. Ms. Turgeon has never recommended any student for retention in pre-school. (S-15; Mother, VI-42-43, 61-62: Turgeon, VI-162-64).
14. Student’s benchmark scores in the reading screening tool increased from 11/20 correct in September 2022 to 13/20 correct in January 2023 to 14/20 correct in May 2023 (S-15).
15. The Team reconvened on April 6, 2023, for Student’s annual review and an IEP was developed dated April 6, 2023, to April 5, 2024 (23-24 IEP). Accommodations and the annual goal statements were updated; however, the goal areas remained the same. The goal objectives that were not yet met were continued and new objectives were added. The Service Delivery Grid was revised to account for Student starting kindergarten in the 2023-2024 school year. Grid A continued to provide 15 minutes/month of consultation for the entire IEP period, however, Grid B support of 5 x 150 minutes/week of pre-school skills ended at the conclusion of the 2022-2023 school year. Grid C also continued to provide 2 x 30 minutes per week of speech and language services for the entire IEP period. Starting with the 2023-2024 school year, 30 minutes/week of Grid B academic support by both the general education and special education teacher was proposed and 30 minutes/week of Grid C counseling by a school adjustment counselor was proposed to address the first goal area, so as to provide more focused opportunities for the social and play objectives for that goal. Additionally, given the math benchmark score regression that Student had demonstrated as a result of her illness-based absences and over school breaks, an extended school year program was proposed. (P-9; S-3; Lewis, VI-102-103, 148-49; Turgeon, VI-164).
16. Placement was proposed in the Fort Meadow ECC inclusive early childhood program through the end of the 2022-2023 school year and in a full inclusion kindergarten program for the 2023-2024 school year. At no time did the Team discuss Student being retained in pre-school for another year. Retention was never raised by Mother or the Advocate at any Team meeting for Student and no school-based Team member felt it was warranted. Additionally, no recommendations for retention were before the Team from any person who had evaluated Student or worked directly with Student, either in or out of the District. (P-9; S-3; Lewis, VI-104-105, 107).
17. In June 2023, Student underwent her kindergarten screening[[10]](#footnote-10). Kindergarten screenings are not intended to be a prerequisite to attending kindergarten; rather they allow the receiving school to gather more information about the student. At the conclusion of the screening, the screener spoke with Mother and informed her that Student had done well, but asked if Student was receiving any educational services, specifically if she was working on comprehension support. Mother testified that this conversation was a “red flag” for her, particularly since these questions were being raised by someone who had only just met and worked with Student for the first time. As a result, Parents began to seriously consider and explore the need to retain Student. The District does not have any records of Student’s kindergarten screening results. (S-16; Mother, VI-44-45; Lewis, VI-106).
18. According to Student’s June 13, 2023 year end progress report, Student missed 18 school days in the winter and 1 school day in the spring. She received grades of “S” in almost all areas except “initiates social interactions” and “identifies the initial sound of objects” that were graded “M”. Of relevance, Ms. Turgeon’s spring comments noted Student had “… not yet initiat[ed] social interactions[[11]](#footnote-11) but [wa]s able to play cooperatively with her peers … her pre-academic skills ha[d] emerged nicely”. (P-6; S-4).
19. Outside of school, Student participates in a dance class but is generally noted to be a step or two behind the other children in the class and often requires individual prompting even if they are working on a known skill. Emotionally, Student gets easily frustrated, especially when she is unable to verbally articulate her wants and needs. She will usually say “no can do”. If pressed, Student will shut down and refuse to talk at all, sometimes verbalizing “I no want to talk”, but often just becomes silent or attempts to leave the room, or engages in tantrum behavior (consisting of yelling, crying, kicking feet, slamming doors, pinching and hitting family members). The tantrum behavior tends to last 10 to 15 minutes and occurs daily or more often at home. However, Student has never engaged in any tantrum behavior in school. According to Mother, during last school year Student often “f[e]ll apart” on the car ride home from school, as Student appeared to have been working very hard to “hold herself together” during the 2.5-hour school day. Although Ms. Turgeon was aware of Student’s behavioral dysregulations at home, the only time Ms. Turgeon ever observed any outbursts was in 2021 on the day she first visited Fort Meadow ECC with her parents before starting pre-school. Ms. Turgeon explained this type of behavior is typical for young students particularly in a new environment with their parents. (Mother, VI-47-49, 57, 65-66, 77-79, 81-82; Lewis, VI-96, 108; Turgeon, VI-157-59).
20. The District’s policy (IKE), adopted on August 10, 2020, entitled “Promotion and Retention of Students” states, in relevant part that “Students will normally progress annually from grade to grade. Exceptions may be made when, in the judgment of the professional staff, such exceptions are in the best educational interest of the students involved…. [T]he final decision will rest with the building Principal.” (P-10; S-11).
21. On May 30, 2023, Student’s private Occupational Therapist, Ms. Kelly Griffith drafted a “to whom it may concern” letter recommending Student be retained in pre-school for another school year. Ms. Griffith has been employed as an Occupational Therapist at Mercy Hospital since September 2012 and has a master’s degree from Bay Path University. She first started working with Student in the fall of 2022 until Student was discharged in April 2023. She resumed working with Student in September 2023. These sessions occurred weekly for an hour at her office at Mercy Medical Center, one-on-one in the treatment room. Mother was also present for the duration of these sessions. Ms. Griffith sees Student to support her emotional regulation. (Griffith, VII-10-11, 22).

In her May 30, 2023, letter, Ms. Griffith advised that given Student’s “continued emotional immaturity and young age in comparison to peers (e.g., just turning 5 at the start of kindergarten) it would be highly recommended that she continue in pre-school for one more year before starting kindergarten”. She noted that she had been working with Student in an outpatient clinical setting from September 7, 2022 through April 18, 2023, providing services to improve Student’s “overall emotional regulation, ability to manage anxiety and ability to more effectively process sensory input from the environment”. While progress had occurred in all areas, Student continued to have “difficulty managing big emotions and can easily become overwhelmed”. (P-8).

Ms. Griffith testified that this letter was written at Parents’ request when seeking her opinion as to whether it would be beneficial for Student to repeat pre-school. Ms. Griffith has never observed Student in school, attended any Team meetings for Student, spoken to any District staff member, reviewed any of Student’s educational records, including any of her IEPs, or had any knowledge about whether Student was able to access the curriculum or make effective progress in pre-school during the 2022-2023 school year. Ms. Griffith also agreed that Student’s teachers, who are with her in school, are better able to assess Student’s readiness to move on to kindergarten than she is, as her information is based solely on her observations in the outpatient setting which is different from a school setting. (Mother, VI-73; Griffith, VII-19, 24-25, 27-28).

1. According to Ms. Griffith, Student is easily frustrated during their sessions by simple demands, particularly with non-preferred requests. Student will shut down, become silent and “frozen”, or refuse to talk, interact or participate. She is sometimes unable to be redirected back to task. Student also engages in “rigid thinking”, and a “test of wills” ensues to return to a task. Ms. Griffith has observed Student speak in baby talk and purposefully act immaturely and silly to avoid participating. Student has a hard time verbalizing her emotions. However, although Student exhibited irrational fears in the past that immobilized her, Ms. Griffith has not observed any this fall. Ms. Griffith further acknowledged Student has not regressed in any skills this fall, either, although she has also not seen a significant progression of skills since the spring. This witness further indicated that while she observed some minor, limited, redirectable tantrum behavior this past spring (consisting of yelling, sitting on the floor refusing to get up and minor aggression towards Mother), Student’s primary emotional dysregulation response when working with her is to shut down. Overall, Ms. Griffith found Student to be immature for her age and was concerned with how she will respond emotionally to a six-hour school day. However, she also testified that being in a school setting, either pre-school or kindergarten, is best for Student. (Griffith, VII-11-15, 17, 19-20, 22, 29-30).
2. On May 31, 2023, in accordance with Policy IKE, Mother sent a letter to Fort Meadow ECC’s principal, Mr. Jonathan Scagel, attaching Ms. Griffith’s letter and requesting that he consider retaining Student in pre-school for the 2023-2024 school year. According to Mother Student was not performing at age level in all areas despite having received early intervention services since the age of 2 and IEP services since turning 3, as well as on-going private speech services. She noted that Parents were planning to have Student participate in the extended school year program at Fort Meadow ECC as proposed in the 23-24 IEP. Specifically, Mother advised that Student has issues with her fine motor skills (in the areas of writing, drawing and coloring), lacks the confidence that her peers display, does not ask for help or express her lack of understanding, is shy due to her articulation challenges, and “sometimes needs help with her big emotions and self-regulating” at home, although not in school. Mother also advised that given Student’s birth date she will be one of the younger students in kindergarten, and that another year of pre-school will enable Student’s confidence, maturity and speech skills to improve. Mother explained that in light of the above factors, she is concerned that Student will struggle in kindergarten and noted that her pre-school teacher observed regression in Student when she was absent owing to illness. Parents’ request was subsequently denied by Principal Scagel. (P-3; P-7).
3. On June 6, 2023, Parents partially rejected the 23-24 IEP specifically rejecting “the omission of retention at Fort Meadow for the next school year. See attached documents[[12]](#footnote-12)”. They also refused the proposed placements and requested a meeting to discuss the rejected portions and refused placements. During testimony, Mother confirmed that the only portion of the IEP that Parents were rejecting was placement. All other aspects of the 23-24 IEP were accepted, including all services contained therein. (P-5; S-3; Mother, VI-59-60).
4. Student successfully attended the three-week extended year program at Fort Meadow ECC, three hours per day for four days a week in July, 2023. She did not struggle with the increased half hour of school time. (Mother, VI-62, 79).
5. On July 3, 2023, Student’s pediatrician, Dr. Karen Conway, MD, wrote a letter advising that Student has moderate to severe expressive language delay and difficulty with emotional regulation, anxiety and sensory processing issues for which she receives individual outpatient speech and occupational therapy as well as group speech therapy in school in accordance with her IEP. Dr. Conway noted Student was making progress given all these services but advised that Student is “not emotionally or academically prepared to meet the challenges of kindergarten.” Her concern was that due to Student’s “current level of maturity” she would become “frustrated and discouraged” in kindergarten and supported “the family in their wishes to retain [Student] in pre-school at Fort Meadow for the 2023-2024 academic year”. Dr. Conway never attended any IEP Team meetings, nor observed Student at school or spoke with any school staff. Dr. Conway did not testify at the hearing. (P-4; Mother, VI-69).
6. On July 25, 2023, a mediation with the BSEA was held, with no agreement. (P-3).
7. On August 2, 2023, Parents filed the underlying Hearing Request dated July 31, 2023. (P-3).
8. Student’s private Speech Language Pathologist, Ms. Michelle Pomeroy, is an outpatient speech language pathologist at Mercy Medical Center. She has a master’s degree in speech language pathology from Emerson College. She has worked as a speech language pathologist at Shriners Hospital, another outpatient setting and for a specialized school supporting students with autism spectrum disorder. Ms. Pomeroy works with Student weekly one-on-one at the outpatient center. She has seen Student for a total of 8-9 sessions. Mother is also present at each session. She works with Student on articulation, social communication and expressive-receptive language. (Pomeroy, VI-114, 127-30).
9. Ms. Pomeroy authored an August 22, 2023 letter recommending that Student “continues in pre-school for one more year before starting kindergarten” given Student’s struggles with articulation and receptive language, specifically, struggles following directions, responding to verbal prompts and holding conversations. Ms. Pomeroy explained these struggles cause Student to have difficulty socially and challenges with participating in a classroom setting without substantial anxiety. Ms. Pomeroy testified that Student’s feelings of anxiety and self-awareness create a fear of feeling different and may impact Student engaging socially with others or initiating conversations. Ms. Pomeroy noted that Student is aware of her articulation challenges, and this impacts her “communicative effectiveness”, and “desire to communicate with those around her”. The letter indicates that an extra year of pre-school will assist Student to “develop the maturity and emotional regulation skills” needed to be “more successful” and will provide more time for speech and language services to improve expressive and receptive skills. (P-2; Pomeroy, VI-115-119).
10. Ms. Pomeroy testified that she does not believe Student is performing appropriately for her age during their therapy sessions as Student requires maximal cueing and repetition to follow single or two-step, familiar directions, and at her age she should be able to follow complex, multi-step (3+) directions independently without any cues. Ms. Pomeroy observed Student to demonstrate significant signs of anxiety, including shutting down, melting down, withdrawing, receding into a corner, lying on the floor and sometimes moaning, due to awareness of her errors or when prompted to correct them. As a result, Student is unable to fully participate independently in her speech sessions without significant support from Ms. Pomeroy or Mother. Student cannot independently maintain attention to tasks during her sessions. She requires maximal (four to five) prompts including verbal, visual, or gestural redirections for every task even working one on one. While Student expresses her desires during speech sessions, she is unable to express her wants or needs even to familiar people. Ms. Pomeroy opined that “extending [Student’s] time in an academic setting is likely going to negatively impact her”. (P-1; P-2; Pomeroy, VI-116-117, 119-120, 122, 123-25, 127).
11. On October 24, 2023, Ms. Pomeroy prepared a second letter regarding “Recommendation for Least Restrictive Environment in Pre-school Setting”[[13]](#footnote-13). In this letter, Ms. Pomeroy outlined Student’s struggles with self-regulation, anxiety, expressing wants/needs, expressing dissent/self-advocacy, understanding verbal information, following directions, and articulation. Ms. Pomeroy opined that these struggles “make it evident that a pre-school classroom is the least restrictive environment to support [Student’s] development”. (P-1).
12. According to Ms. Pomeroy both letters were written on behalf of the family to share what she was observing during her treatment sessions and to demonstrate her agreement with Parents’ desire to retain Student. Ms. Pomeroy has no knowledge of any speech and language educational supports Student receives in school. Her letters and testimony were based solely on her interactions with Student during their weekly outpatient sessions, and her review of Student’s prior outpatient speech language therapists’ notes. Specifically, Ms. Pomeroy does not recall ever reviewing Student’s IEPs, and does not know what accommodations Student has in school, nor is she aware of the direct speech and language services Student receives in school. Ms. Pomeroy has never attended any IEP Team meetings for Student, has never spoken with any District staff member about Student, and does not have any opinion as to whether the IEPs for Student are appropriate. Ms. Pomeroy also agrees that she is not in the position of Student’s teachers with regard to making a determination as to Student’s preparedness to move from pre-kindergarten to kindergarten given that she has no knowledge of Student in the school setting. Further, Ms. Pomeroy has only worked with Student since early August 2023. (Mother, VI-71-72, 74-76; Pomeroy, VI-126, 132-36).
13. Parents chose not to send Student to kindergarten in the fall of 2023, and, instead, she is being homeschooled and receiving outpatient speech and language services once a week for 45 minutes with Ms. Pomeroy and occupational therapy services focused on emotional regulation once a week for 45 minutes with Ms. Griffith. (These services will continue for a total of 12 weeks, whereupon there will be a break in services for insurance reasons.) Student was on a waitlist for outpatient counseling services but this had not yet started as of the Hearing. Mother has noticed that while Student’s academic skills seem to be maintained, her emotional dysregulation has increased recently, especially as Student does not understand why her brother (who attends Fort Meadow ECC) is going to school and she is not. (Mother, VI-62-63, 65).
14. Parents feel that Student will be “best served being able to repeat Pre-K” particularly given her young age, her social and emotional immaturity and her communication needs. (Parent Closing Argument).

# LEGAL ANALYSIS:

1. Free Appropriate Public Education in the Least Restrictive Environment

The right to a free appropriate public education (FAPE) for all students with a disability is guaranteed by both federal and state law[[14]](#footnote-14). A FAPE is “special education and related services [consisting of] both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘support services’ to permit the child to benefit from that instruction[[15]](#footnote-15).” The services that comprise a FAPE must be provided in the "least restrictive environment[[16]](#footnote-16)” or LRE. Massachusetts special education laws define the “least restrictive environment” to mean the,

… educational placement that assures that, to the maximum extent appropriate, students with disabilities … are educated with students who are not disabled, and that special classes, separate schooling, or other removal of students with disabilities from the general education environment occurs only when the nature or severity of the student’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily[[17]](#footnote-17).

Provided the proposed educational program in an IEP is “reasonably calculated” to deliver “educational benefits”, “to enable the child to make progress appropriate in light of the child’s circumstances” school districts have met their IDEA obligation with respect to an IEP[[18]](#footnote-18). An IEP must be “custom tailored” and “individually designed” to be “reasonably calculated to confer a meaningful educational benefit” to a student[[19]](#footnote-19). To constitute a FAPE, a student’s educational program must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances[[20]](#footnote-20).” The examination of effective progress shall be made in the context of the educational potential of the student[[21]](#footnote-21). In *Endrew F. ex. re. Joseph F. v Douglas County Sch. Dist.*, the United States SupremeCourt held that to meet the “unique needs” of students who are fully integrated in the regular classroom, the IEP must typically,

…provid[e] a level of instruction reasonably calculated to permit advancement through the general curriculum[[22]](#footnote-22)…. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives[[23]](#footnote-23).

“… [A]n IEP is designed as a package. It must target ‘*all* of a child’s special needs’, whether they be academic, physical, emotional or social”[[24]](#footnote-24). Evaluating an IEP requires viewing it as “… a snapshot, not a retrospective. In striving for 'appropriateness’, an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated”[[25]](#footnote-25). IEP Team proposals must meet the individual needs of eligible students, based on the information known to the Team at the time the IEP is developed[[26]](#footnote-26). However, judicial review of an IEP’s appropriateness is not tantamount to “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review”, either[[27]](#footnote-27). When undertaking such a review, “deference is based on the application of expertise and the exercise of judgment by school authorities”[[28]](#footnote-28).

Although an IEP’s educational services need not be “the only appropriate choice or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice[[29]](#footnote-29)”, student progress must be “effective”, and a student must show “‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs’” to receive a FAPE[[30]](#footnote-30). School districts are not compelled to afford a disabled child an ideal or optimal education, though[[31]](#footnote-31). Under IDEA, students are entitled to an “appropriate” education and “adequate” IEP.

However, the educational program delivered through the IEP must be “markedly more demanding” than providing for “‘merely more than *de minimis’* progress from year to year”[[32]](#footnote-32).As the *Endrew F.* Court explained, “[i]t cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom but is satisfied with barely more than *de minimis* progress for those who cannot”[[33]](#footnote-33). Perfection is not essential, though, and as the First Circuit has recognized,

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities …. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential[[34]](#footnote-34).

1. BSEA Jurisdiction over Retention/Promotion

While generally, decisions on retention or promotion of students are general education decisions outside the jurisdiction of the BSEA, the federal Office of Special Education Programs (OSEP) has long recognized that “FAPE issues that have a direct impact upon retention and promotion decisions … can be the basis for a hearing request”[[35]](#footnote-35). In applying OSEP’s guidance, the BSEA has similarly recognized the jurisdiction of due process hearing officers over claims involving a retention or a promotion decision that is alleged to impact a student’s receipt of a FAPE[[36]](#footnote-36). Further, while, advancement in a grade, even in cases relating to promotion from pre-school to kindergarten, is generally not considered a placement decision within the purview of the IEP Team, there are situations where the “decision to retain [a s]tudent … [is] part of a placement decision by the Team”[[37]](#footnote-37). In such cases a hearing officer has the authority to require “as a remedial order” reconsideration of the retention or promotion decision[[38]](#footnote-38).

1. Burden of Persuasion.

In a special education due process proceeding, the burden of proof is on the moving party.[[39]](#footnote-39) If the evidence is closely balanced, the moving party will not prevail.[[40]](#footnote-40)

# DISCUSSION[[41]](#footnote-41):

Student’s eligibility for special education based on a developmental delay in the primary domain of communication with a secondary domain of social emotional skills is not in dispute in this matter. The Parties also do not dispute the BSEA’s jurisdiction over this matter, despite it involving a question of retention or promotion, as they agree that the issue of what Student requires in order to receive a FAPE has a direct impact on whether Student requires retention at Fort Meadow ECC. Upon consideration of the documentary and testimonial evidence presented by the Parties, the applicable law, and the Parties’ arguments, I conclude that Parents have not met their burden to show that Student requires continued placement in an inclusive early childhood program in order to receive a FAPE. Rather, I find that the 23-24 IEP calling for her placement in a full inclusion kindergarten program with support services was reasonably calculated to provide Student with a meaningful educational benefit in the least restrictive environment in light of her circumstances.

Parents claim that Student is not socially or emotionally ready to attend kindergarten and that her continued significant communication deficits will impede her from making effective progress in kindergarten. Parents’ concerns focus on Student’s young age, her immaturity, her emotional dysregulation when unable to successfully express herself or when asked to transition to a non-preferred activity, and her self-awareness of her communication struggles that result in anxiety and cause Student to be hesitant to initiate and participate in social interactions with peers and adults. Parents also emphasized Student’s struggles after the pre-school day ended, causing concern that she would not be able to handle the longer six-hour kindergarten school day.

Parents’ experts, Ms. Pomeroy and Ms. Griffith, reinforced Parents’ concerns through their testimony and letters. Further, Parents rely on Dr. Conway’s letter and Mother’s letter to Principal Scagel. However, while I have no reason to doubt that Student, who is clearly loved and wholly supported by family and caring outside services providers, does exhibit continued disabilities and challenges, the record does not demonstrate that Student required retention at Fort Meadow ECC in order to receive a FAPE. This is particularly so, given the testimony of Ms. Lewis and Ms. Turgeon as to Student’s successful performance during her two years of pre-school, and her lack of any emotional dysregulation during the school day. Further, as the only objection Parents have to the 23-24 IEP is the placement in kindergarten this school year, I must conclude that the rest of this IEP, i.e., its accommodations, goals and services, as it has been accepted by Parents, is appropriate to meet Student’s special education needs.

Although I find all witnesses who testified in the instant matter to have been credible, I afford more evidentiary weight to the testimony of Ms. Lewis and Ms. Turgeon with respect to Student’s needs and progress in school. I credit and believe Ms. Pomeroy and Ms. Griffith’s testimony as to Student’s needs and presentation during their outpatient services sessions, as well as their concerns and conclusions related to Student’s challenges during these sessions. However, neither therapist has observed Student in school, directly, communicated with any school personnel about Student, attended any Team meetings or even reviewed Student’s IEPs. Thus, their opinions as to what Student needs in a school setting carry less weight than the opinions of the school staff who testified. Both providers acknowledged being unaware of what special education supports or services Student received in school or whether the IEPs were appropriate for Student to make effective progress in that environment.

On cross examination Ms. Griffith confirmed that she would defer to Student’s teachers as to whether Student was ready to move on to kindergarten and Ms. Pomeroy agreed she would not put herself in the position of making a recommendation as to Student’s readiness to move on to kindergarten given her lack of knowledge of Student in the school setting. Further, both Ms. Pomeroy and Ms. Griffith confirmed that their opinions and recommendations were based solely on their observations of Student outside the school setting. Similarly, Dr. Conway, never observed Student in school, attended any Team meetings for her, or communicated with any school staff members. Moreover, she did not testify at the hearing, and thus was not able to be cross-examined with regard to her letter. Further, none of Parents outside experts’ opinions or recommendations were ever reviewed by the Team as they were all provided to the District after the April 6, 2023 Team meeting that developed the 23-24 IEP. As such, Ms. Griffith’s Ms. Pomeroy’s and Dr. Conway’s opinions and recommendations are less convincing with respect to Student’s school needs than those of the school witnesses, Ms. Turgeon and Ms. Lewis, both of whom testified as to their direct observations, interactions and knowledge of Student’s participation and performance at school and their involvement in the Team process.

According to Ms. Turgeon and Ms. Lewis, Student met, was making progress or was partially proficient on all of her IEP goals and objectives in the 21-22 IEP and 22-23 IEP. By May 2023, Student’s benchmark scores in reading and math were 14/20 correct for each subject, which was above the threshold to warrant additional support. Student also had successfully acquired all of the requisite pre-school academic skills by the end of the 2022-2023 school year except “initiates social interactions” and “identifies the initial sound of objects” in which she was “making steady progress”. Ms. Turgeon noted in her final comments to her June 12, 2023 year-end progress report[[42]](#footnote-42) that although Student was not yet initiating social interactions she was able to play cooperatively with her peers.

Parents point to Student’s skill deficits with respect to initiating interactions as justification to retain her. However, I find that this skill deficit was recognized by the Team and appropriately supported in Student’s IEPs. Under the “Pre-School Skills” goal in the 22-23 IEP, Student had an objective to “respond to and maintain a conversation with at least 2 conversational exchanges in 4 out of 5 opportunities”. A second objective under this goal called for Student to “engage in cooperative play with her peers in 4 out of 5 opportunities”. According to Student’s IEP progress reports, Student had met the first objective, and partially met the second, as she was engaging in cooperative play with peers in 2 out of 5 opportunities by June 2023. The new objectives proposed for this goal in the 23-24 IEP continued forward the requirement for Student to “initiate and engage in cooperative play in 4 out of 5 opportunities”. It also added a new objective for Student to “respond to the play initiatives of her peers in 4 out of 5 opportunities”. However, as Parents did not accept this new goal until June 6, 2023, it is understandable that Student was not yet initiating social interactions a week later when the year-end progress report was issued[[43]](#footnote-43).

Parents also point to Student’s regression during last school year during her illness-related absences as a further reason for retention[[44]](#footnote-44). This, too, is appropriately addressed in the 23-24 IEP through the provision of an extended school year program, that Student attended successfully. Further, although Parents raise concerns around the increased length of the kindergarten school day, Mother confirmed that Student did not have any struggles with the increased time for the extended school year day from the two and a half hours of the pre-school program to the three hours of the extended school year program.

With regard to Student’s communication needs, to which all witnesses consistently testified, I also find the 23-24 IEP will appropriately address her ongoing expressive and receptive language and articulation concerns. Student met all of her 22-23 IEP communication goal objectives except for one articulation-focused objective, for which she was “making progress” as of June 2023[[45]](#footnote-45). However, as with the social skills objective Student had not yet met, this objective (relating to producing developing consonant sounds) was updated and carried forward in the 23-24 IEP’s communication goal. Moreover, new objectives focusing on articulation and expressive and receptive language skill building were added. Further, no changes are proposed to Student’s speech and language services from the Fort Meadow ECC program to the kindergarten program. Thus, Student will continue to receive the same amount of speech and language service support in kindergarten as she did in pre-school.

While Parent’s position and reasons for wanting to retain Student are understandable, the evidence presented by Parents and their experts was speculative, consisting of their “beliefs” and “concerns” about how Student may respond to kindergarten, rather than based on Student’s actual school performance, or any specific deficiencies with the proposed accommodations, goals and services proposed in the 23-24 IEP, or the proposed kindergarten placement[[46]](#footnote-46). Such evidence is insufficient to meet Parents’ burden to prove that Student requires retention for special education reasons. Although I sympathize with Parents’ concerns, without substantive evidence specific to the 23-24 IEP, its proposed accommodations, goals or services, or the kindergarten placement, itself, I am unable to conclude that the 23-24 IEP including promotion to and placement in kindergarten, with support services, is not reasonably calculated to provide Student with a FAPE in the least restrictive environment[[47]](#footnote-47).

This conclusion does not mean, that the District can require Student to attend the proposed kindergarten program. As Parents noted in their Closing Argument, Student is not yet of mandatory school attendance age[[48]](#footnote-48), and thus, regardless of my determination, Parents retain the final decision as to whether to send Student to school this year.

I note that Student has not attended any school program this year to date. I agree with Ms. Griffith that Student is better served by being in a school program than not being in one at all. Student’s outside services are limited by insurance to 12 sessions, so there will likely be several months where she will not receive any services at all unless she attends a school program.

Nothing prohibits the District from reconsidering its promotion/retention decision, under its general education authority for the remainder of this year, either; however, from a special education standpoint, the 23-24 IEP, calling for placement in a full inclusion kindergarten program, with support services, was and remains, reasonably calculated to enable Student to make effective progress in light of her circumstances.

# ORDER:

The 2023-2024 IEP calling for a proposed placement in a full inclusion kindergarten program with support services is reasonably calculated to provide Student with a FAPE. Student does not require continued placement in the inclusive early childhood program in order to be provided a FAPE.

Respectfully submitted,

By the Hearing Officer,

/s/ Marguerite M. Mitchell

Marguerite M. Mitchell

December 2, 2023

1. Exhibit P-4 was admitted over the objection of the District. [↑](#footnote-ref-1)
2. Exhibits S-12, S-13 and S-14 were admitted over the objection of the Parents. [↑](#footnote-ref-2)
3. I have carefully considered all the evidence and testimony presented in this matter. I make findings of fact, however, only as necessary to resolve the issue(s) presented. Consequently, all evidence and all aspects of each witness’ testimony, although considered, is not included if it was not needed to resolve said issues. [↑](#footnote-ref-3)
4. Ms. Paskal did not testify. [↑](#footnote-ref-4)
5. Ms. Lewis has been employed as a school psychologist for 19 years, working for the District as the School Psychologist and Educational Team Leader at Fort Meadow ECC for the past 11 years. She has a master’s and a Certificate of Advanced Graduate Studies (CAGS) from UMASS Amherst School of Psychology. She assesses and evaluates students, manages and coordinates the evaluative process, chairs Team meetings, supports the drafting of IEPs and handles all special education referrals for incoming pre-school children. (Lewis, VI-88-89). [↑](#footnote-ref-5)
6. As this paraprofessional was a one-to-one support for another student she did not provide any direct instruction or academic or social support to Student. (Turgeon, VII-40). [↑](#footnote-ref-6)
7. The IEP developed at the April 6, 2023, Team meeting, discussed below, incorrectly noted Student to have met 2 of the 4 objectives of her Pre-School Skills goal. [↑](#footnote-ref-7)
8. Ms. Cami did not testify and is no longer employed with the District. [↑](#footnote-ref-8)
9. Ms. Turgeon explained that any benchmark score under a 10 warrants exploration of additional supports for a Student. (Turgeon, VI-170). [↑](#footnote-ref-9)
10. Mother did not know the name of the screener. (Mother, VI-76). [↑](#footnote-ref-10)
11. This contradiction to Ms. Turgeon’s testimony, that by the end of the 22-23 school year, Student was initiating conversation with peers at least two to three times a day during free play or on the playground, was not explained. [↑](#footnote-ref-11)
12. The “attached documents” were the placement pages for the IEP wherein Parents signed noting their refusals of the placements. [↑](#footnote-ref-12)
13. This letter was not dated by Ms. Pomeroy; however, in preparing it as an exhibit for hearing, Mother added the date of the letter by hand at the top. (Parent VI-70). [↑](#footnote-ref-13)
14. 20 USC 1400, *et seq*.; M.G.L. c. 71B; 34 CFR 300.000, *et seq*.; 603 CMR 28.00 *et seq*; see 20 U.S.C. §1400 (d)(1)(A) (The first purpose of the IDEA is "to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"). [↑](#footnote-ref-14)
15. 20 USC 1401(9), (26), (29); C.D. v. Natick Public School District, et al., 924 F.3d 621, 624 (1st Cir. 2019), quoting Fry v. Napoleon Community Schools, 580 US 154, 158 (2017). [↑](#footnote-ref-15)
16. 20 U.S.C § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c). [↑](#footnote-ref-16)
17. 603 CMR 28.01; see 20 USC 1412(a)(5)(A) (requiring that for a state to meet its LRE obligation,

To the maximum extent appropriate, children with disabilities, … are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [↑](#footnote-ref-17)
18. *C.G. and B.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 284 (1st Cir. 2008) quoting *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982); see *Endrew F. ex. re. Joseph F. v Douglas County Sch. Dist., RE-1*, 580 US 386, 399-403 (2017). [↑](#footnote-ref-18)
19. Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). [↑](#footnote-ref-19)
20. *Endrew F.*, 580 US at 399-400, 403; see *Johnson v. Boston Pub. Schs.*, 906 F.3d 182, 194-95 (1st Cir. 2018) (holding that Massachusetts’ “meaningful educational benefit” standard adopted by the 1st Circuit in *Esposito*, comports with this standard in *Endrew F.)* [↑](#footnote-ref-20)
21. See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008). [↑](#footnote-ref-21)
22. 580 US at 402 (however, in Ftnt 2, the Court recognizes that this does not mean that “every handicapped child who is advancing from grade to grade ... is automatically receiving a [FAPE]” quoting *Rowley* 458 US at 203 n. 25). [↑](#footnote-ref-22)
23. 580 US at 402. [↑](#footnote-ref-23)
24. *Lenn,* 998 F. 2d at 1089-90; quoting *Burlington v. Dept. of Ed.,* 736 F. 2d 773, 788 (1st Cir. 1984) *aff’d* 471 US 359 (1985); see *Roland M. v. Concord Sch. Comm.*, 910 F. 2d 983, 992 (1st Cir. 1990) (“… purely academic progress … is not the only indicia of educational benefit implicated either by the Act or by state law”). [↑](#footnote-ref-24)
25. *Roland M.*, 910 F. 2d at 992. [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. *Endrew F.* 580 US at 404 quoting *Rowley*, 458 US at 206. [↑](#footnote-ref-27)
28. *Id.* at 404. [↑](#footnote-ref-28)
29. *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir., 1991) [↑](#footnote-ref-29)
30. *Lenn,* 998 F. 2d at 1089-90; see *Sebastian M.,* 685 F. 3d 79, 84 (“… an IEP need not be designed to furnish a disabled child with the maximum educational benefit possible”). [↑](#footnote-ref-30)
31. *C.G.*, 513 F.3d at 284; see *Lenn*, 998 F.2d at 1086. [↑](#footnote-ref-31)
32. *Endrew F.* 580 US at 402-403. [↑](#footnote-ref-32)
33. *Id.* at 402. [↑](#footnote-ref-33)
34. *Lenn*, 998 F.2d at 1086 citing *Rowley*, 458 U.S. at 198; *Roland M.*, 910 F.2d at 992; see *E.T., a minor, by his parents v. Bureau of Special Educ. Appeals of the Div. of Admin. L. Appeals*, 169 F. Supp. 3d 221, 229 (D. Mass. 2016). [↑](#footnote-ref-34)
35. *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000). [↑](#footnote-ref-35)
36. See *In Re: Boston PS* BSEA #2112292 27 MSER 327 (Ruling, Kantor Nir, 2021) (declining to dismiss a retention/promotion claim reasoning that the “claim regarding retention … directly implicates a dispute regarding denial of FAPE”); *In Re: Boston PS and Laura* BSEA # 03-1154, 9 MSER 210 (Ruling, Crane, 2003) (finding BSEA jurisdiction over the retention/promotion issues raised as “… Boston’s decision to retain Student cannot be considered as separate from a placement decision and … its decision to retain Student has significant implications with respect to Student’s receipt of FAPE”; *In Re: Wachusett PS and Miles* BSEA # 03-5677, 9 MSER 172 (Ruling, Beron, 2003) (Parent’s claims that Student required “retention in kindergarten specifically because of his disabilities-developmental delay and speech impairment … [and that i]t would be a disserv[ice] to [Student] to place him in first grade where his disabilities will prevent him from progressing effectively” were sufficient to proceed to hearing as they involved “FAPE issue[s] that may have a direct impact upon the retention and promotion decisions”; compare *In Re: Greater Fall River Regional Vocational School District* BSEA # 01-3218, 7 MSER 275 (Figueroa*,* 2001) (concluding that a decision whether to promote a Student who had not completed summer courses needed to obtain requisite course credits was a general education decision outside the jurisdiction of the BSEA). [↑](#footnote-ref-36)
37. *In Re: Boston PS and Laura* BSEA # 03-1154, 9 MSER 210 (Ruling, Crane, 2003) (finding that a decision to retain the Student in grade 8 thereby resulting in the Student remaining within elementary school which does not go past grade 8, was “not separate from the placement decision that Student would be appropriately served at the [elementary school] for an additional year); but see *In Re: Burlington City Board of Education*, 123 LRP 32055 (2023) (declining to issue a “stay put” ruling allowing the Student to remain in pre-school as the promotion to kindergarten from pre-school was not found to be a “change in placement” on its own). [↑](#footnote-ref-37)
38. *Letter to Anonymous*, 35 IDELR 35 (OSEP 2000); See *In Re: Boston PS* BSEA #2112292 27 MSER 327 (Ruling, Kantor Nir, 2021) (“Although the IDEA does not specifically address whether hearing officers may order promotion or retention as a relief in IDEA proceedings, the IDEA empowers courts and hearing officers to grant the relief that they determine to be appropriate.” (citations omitted).) [↑](#footnote-ref-38)
39. *Schaffer v. Weast*, 546 US 49, 56-57, 62 (2005). [↑](#footnote-ref-39)
40. *Id*. (placing the burden of proof in an administrative hearing on the party seeking relief). [↑](#footnote-ref-40)
41. In making my determinations, I rely on the facts I have found as set forth in the Findings of Facts, above, and incorporate them by reference to avoid restating them except where necessary. [↑](#footnote-ref-41)
42. I note that in her testimony, Ms. Turgeon also stated that Student did initiate social conversations with peers approximately two or three times a day on the playground or during free play and that this is seemingly inconsistent with her year-end progress report. However, given the otherwise consistent nature of Ms. Turgeon’s testimony and the length limitation inherent to the year-end progress report comment section, I did not find this apparent contradiction to impair Ms. Turgeon’s credibility. [↑](#footnote-ref-42)
43. Further, the 23-24 IEP adds a weekly B-Grid academic support service by both the general education and special education teacher and a weekly C-Grid counseling support service by a school adjustment counselor to provide more focused opportunities for the social and play objectives of this goal when Student attends the kindergarten program. [↑](#footnote-ref-43)
44. Interestingly, Student had more absences in the 2021-2022 school year than the 2022-2023 school year, although the only testimony as to regression was related to the 2022-2023 school year. [↑](#footnote-ref-44)
45. It appears that this progress change may, however, have been due to the speech language pathologist working on new sounds with Student as the year progressed. [↑](#footnote-ref-45)
46. Parents also raise in their Closing Argument that the District failed to have a speech language pathologist testify, however, in this matter the burden is on the Parents and nothing prohibited Parents from subpoenaing this witness. Ms. Turgeon did testify as to Student’s communications skills in the school setting. [↑](#footnote-ref-46)
47. *Schaffer v. Weast*, 546 US at 62; see *In Re:* *Burlington City Board of Education*, 123 LRP 32055 (N.J., 2023); *In Re:* *Atlanta Independent School System*, 77 IDELR 297, 120 LRP 36816 (GA., 2020) (rejecting the claim that the district denied a student with an emotional disturbance a FAPE by promoting him to 9th grade); *In Re:* *Scotch Plains-Fanwood Board of Education* 115 LRP 30215 (N.J., 2014) (finding a 5 year old student with a speech-only IEP to have been appropriately advanced to kindergarten); *In Re: Ashford Board of Education*, 107 LRP 53853 (CT., 2007) (finding the proposed IEP in question to provide a FAPE although it promoted the Student to 9th grade, despite the private school Parents had unilaterally placed him at retaining him in 8th grade, reasoning that “[w]hile the parents may have been motivated by determining what they thought was best for their son, the Board does not have to provide everything that might be thought desirable by loving parents” citing *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2nd Cir. 1989)). [↑](#footnote-ref-47)
48. 603 CMR 8.02 requires that “[e]ach child must attend school beginning in September of the calendar year in which he or she attains the age of six”. [↑](#footnote-ref-48)