

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

In Re: Chicopee Public Schools

BSEA # 1300380

DECISION

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

A hearing was held on November 26 and 27, 2012 in Springfield, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Student's Grandmother ¹	
Allyson Sederland	7 th Grade Math Teacher, Chicopee Public Schools
Katherine Benton	8 th Grade English Teacher, Chicopee Public Schools
Amy Starcun	8 th Grade Math Teacher, Chicopee Public Schools
Jacilyn Berriman	Special Education Teacher, Chicopee Public Schools
Janet Ursino	Special Education Teacher, Chicopee Public Schools
Erin Masse	Special Education Teacher, Chicopee Public Schools
Andrea Stolar	Coordinator of Special Education, Chicopee Public Schools
Judith Souweine	Private Psychologist, Consulting to Chicopee Public Schools
Claire Thompson	Attorney for Chicopee Public Schools

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-A through P-U, except exhibits P-H, P-Mc, and P-P which were not admitted; documents submitted by the Chicopee Public Schools (Chicopee) and marked as exhibits S-1 through S-44; and approximately two days of recorded oral testimony and argument. As agreed by the parties, written closing arguments were due and received on December 19, 2012, and the record closed on that date.

INTRODUCTION AND POSTIONS OF THE PARTIES

This case requires that I determine whether Student, who is in 8th grade and has learning and executive functioning deficits, is appropriately placed in an inclusion educational program

¹ Student's Grandmother represented Parents and Student at the hearing.

within the Chicopee Public Schools, or alternatively whether she should be placed in a substantially-separate, language-based educational program such as the White Oak School in order to make meaningful educational progress.

Parents' position. Parents take the position that for many years, Chicopee has failed to provide a consistent, cohesive and effective educational program for Student, with the result that she is not able to read at an appropriate level, that she does not have full mastery over other academic skills and that, in general, she is four years behind her peers. See Parents' closing argument, 3rd page. Parents are concerned that Chicopee has not (and cannot) provide educational services that will allow Student to be prepared for high school next year. Parents take the position that Chicopee must educate Student on her terms, in ways that she can understand, so that she can make sufficient progress towards her IEP goals. In addition, Parents believe that the current (and previous) IEP goals are vague and do not allow Parents (or others) to evaluate Student's progress, that Student's IEP accommodations are often not implemented consistently (such as access to a working laptop computer), that there has been bullying from other students and belligerent and insensitive remarks by her teachers last year, and that she has been bounced from one program to another by Chicopee. See Parents' closing argument, 6th page.

Parents take the position that Chicopee does not have an appropriate program for Student and that an appropriate public education for Student can only occur through an out-of-district placement to White Oak School or some other language-based educational program outside of the Chicopee Public Schools. As stated in their closing argument, Parents believe that White Oak School, in particular, would offer Student a "structured environment in a small classroom setting with cross curriculum foundation with experts in dyslexia and executive functioning who can give [Student] the intensive remediation to obtain a Free Appropriate Public Education to help her succeed in her life endeavors." Parents argue that this is precisely what Student is not receiving in the Chicopee Public Schools and "has not gotten it for the past seven and one half years." See Parents' closing argument, 2nd page.

Chicopee's position. Chicopee takes the position that Student is appropriately placed in her current inclusion program. Chicopee believes that Student has been making substantial progress this school year, as well as last school year when she was in a comparable program. Chicopee notes that Student's teachers find that she is solidly within the average range in each of her classes, that she is an engaged and interested learner, and that she is accessing and participating in her educational program in all respects except that her homework and assignment completion are uneven. Chicopee argues that placement of Student in an out-of-district, substantially-separate educational program (such as White Oak School) is unnecessary and would be unduly restrictive. Moreover, Chicopee takes the position that Parents did not meet their burden of persuasion by presenting probative evidence on these issues. See Chicopee's closing argument, page 2.

ISSUES

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Chicopee for the period 6/21/12 to 6/20/13 (exhibit S-1) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would placement at White Oak School satisfy this standard?
4. Are Parents entitled to reimbursement of monies expended on attorney fees, advocate fees, consultant/evaluator fees and Mother's lost wages as a result of her taking Student to evaluations and attending IEP Team meetings?

FACTUAL BACKGROUND

Summary of educational profile. Student is a 13 year-old, 8th grader at the Fairview Middle School in Chicopee. She lives with her Parents in Chicopee. Student is interested in pursuing a career as a chef. She testified that she likes school on some days but not on others. Student has been diagnosed with a language learning disability and executive functioning deficits. Her cognitive abilities are solidly in the average range. Testimony of Mother, Student, Souweine; exhibits P-A, S-1.

Currently-proposed IEP. Chicopee's most recently proposed IEP for the period 6/21/12 to 6/20/13 calls for Student to be placed within an inclusion educational program, in which all academic classes are co-taught by a regular education teacher and a special education teacher. More specifically, the IEP proposes the following special education and related services:

- Consultation services of 15 minutes per week from a special education or regular education teacher to address Student's goals in executive functioning.
- Special education services within the inclusion classroom for 45 minutes, five times each day from a special education or regular education teacher to address her written language, English language arts (ELA) and math goals.
- Special education services within the inclusion classroom for ten minutes each day from a special education or regular education teacher to address her goals in executive functioning.
- Executive functioning services outside of the classroom for a half hour each week from a guidance counselor.

The IEP does not propose any summer services or extended day services. Parents have fully rejected the IEP and placement. Exhibits P-V, S-1.

Educational history. Student has a long history of receiving special education services to address her learning and organizational deficits. Academic difficulties were first noted in 1st grade, and Student was placed on an IEP in 2nd grade, providing for pull-out ELA services for 45 minutes each day. In 3rd grade, Student was observed to have difficulties with reading, retrieval memory and executive functioning, and reading pull-out services of 90 minutes per day and academic support for 45 minutes per day were added to Student's IEP. For 4th and

5th grades, Student continued to receive a variety of pull-out services to address her language learning deficits and executive functioning deficits, and summer services were added. Exhibits P-A, P-G, S-17.

In March and April 2010 (the spring of 5th grade), Student was evaluated at Parents' request at the Center for Children with Special Needs in Boston, MA (CCSN). The evaluation included the following assessments: neuropsychological (by Susan Barron, PhD), speech-language (by Kathleen Reilly, MS, CCC-SLP) and educational (by Cathy Mason, MEd). The evaluations revealed a combination of expressive language and retrieval weaknesses, as well as significant executive functioning weaknesses, with her cognitive abilities testing in the average range. Detailed recommendations were made, including placement in a structured academic setting, use of a phonetically-based decoding program, a highly-structured, language-based approach to writing, and an emphasis on multisyllabic word reading. Exhibits P-G, S-17.

For 6th grade (the 2010-2011 school year), Student was placed in an inclusion educational program. The IEP called for inclusion special education services for an hour each day and separately listed inclusion special education services for 45 minutes five times each day. In addition, the IEP called for 1:1 tutoring in ELA for 45 minutes each day to address reading fluency, written expression and decoding skills. The IEP also provided counseling for a half hour twice each week. Exhibit P-E (page 5).

On March 8, 2011, Cathy Mason, MEd, performed a classroom observation to assess how Student was responding to her educational program. (As noted above, Ms. Mason had conducted the educational evaluation that was part of the CCSN evaluation in March and April 2010.) She observed Student's language tutorial, social studies class and math class. In her subsequent report (discussed below), Ms. Mason summarized her observation by stating that Student's "tutorial and social studies classes showed appropriately individualized instruction/accommodations, and [Student] participated in these classes." She further noted in her report that math class "did not fully address some of [Student's] lower level computational skill deficits" but provided "strong overall structure and small group reinforcement." Finally, the report noted that "[c]oncerns were raised about limited access" to a computer for writing and "lack of specificity in IEP benchmarks". Ms. Mason elaborated on these points in her written observation report. Exhibit P-E (pages 5-6), P-F.

On August 17, 2011 (just prior to Student's 7th grade year), Student was seen by Ms. Mason for another formal educational evaluation. Parents had referred Student to Ms. Mason for this evaluation because of their continuing concerns regarding Student's academic difficulties, particularly in written language and organization. In her report, Ms. Mason also noted that Parents perceived their daughter's educational program to be fragmented and that Student's academic struggles were taking a toll on her self-esteem and were increasing her anxiety level. As part of her evaluation, Ms. Mason reviewed previous testing and reports, and she tested Student using the Kaufman Test of Educational Achievement-II and the Gray Oral Reading Test-4 (GORT-4). Exhibit P-E (pages 2, 16).

As noted in her report, Ms. Mason continued to find that Student had a combination of expressive language and retrieval weaknesses, as well as significant weaknesses in executive functioning. Ms. Mason reported more specifically as follows regarding Student's abilities and progress:

[Student] showed a combination of academic gains and stagnation since the previous evaluation. Overall, her academic performance, even in her strongest areas, was suboptimal for grade placement. She showed average reading comprehension and progress in decoding and math, but still showed specific weaknesses in decoding consistency, math concepts and problem-solving skills, and rational numbers.

[Student's] textual reading rate/accuracy scores showed a decline to the below average range, and her written language continues to be very weak for handwriting, sentence structure and organization. [Exhibit P-E (page 8).]

Ms. Mason's report essentially repeated recommendations from the previous CCSN evaluation in 2010 when Student was in 5th grade, and further noted that Student "will require a continuation of current IEP services, with the addition of more intensive instruction in written language, combined with explicit instruction in keyboarding and use of assistive technologies for written language." Exhibit P-E (page 9).

For 7th grade (the 2011-2012 school year), Student continued to be placed in an inclusion educational program. All academic classes were taught by a regular education teacher, a special education teacher and a paraprofessional. Typically, the regular education teacher would teach the entire class of 20 students for the first 45 minutes, with the special education teacher then joining the class for the remainder of the 90 minute class period, and the students would then be divided up into three groups based upon their academic ability. This continued until mid-December 2011 when Student began being pulled out of the second, 45-minute portion of ELA and during this time, she was provided 1:1 tutoring from a special education teacher. During the last ten minutes of the school day, a special education teacher would assist Student with her "agenda"—that is, what Student needed to do in preparation for the next school day. Testimony of Berriman, Ursino; exhibit P-W.

In addition to the special education services within the inclusion classrooms described above, the IEP for 7th grade provided for Student to receive an ELA tutorial for a total of two hours each day to work on language and executive functioning deficits. Student also received pull-out assistance from a guidance counselor for a half hour twice per week to address executive functioning difficulties. Exhibit P-W.

On May 23, 2012, Dr. Souweine observed Student in her classroom during math instruction and she observed Student during her 1:1 pull-out session with Ms. Ursino. Dr. Souweine also discussed Student with her teachers. Dr. Souweine is a private psychologist who was hired by Chicopee as a consultant. Testimony of Souweine.

In May, June and July 2012 (i.e., the end of 7th grade), Student was administered psychological evaluations by Chicopee's psychologist, Gary Bowler, EdD, to assess her

current intellectual and academic achievement levels and her social/emotional functioning. Dr. Bowler's evaluations included the Wechsler Individual Achievement Test (3rd ed.), Test of Written Language (4th ed.), the Comprehensive Test of Phonological Processing (ages seven through 24), Wechsler Intelligence Scale for Children (4th ed.) (WISC-IV), Wide Range Assessment of Memory and Learning (2nd ed.), Gray Oral Reading Tests (4th ed.), and Woodcock Johnson Tests of Achievement (3rd ed.), and several executive functioning and social emotional functioning assessments. Dr. Bowler noted that working memory is an area of relative weakness, and that Student struggles with executive functioning, particularly with the ability to plan and organize, and to attend and concentrate. The evaluations recommended continuing to provide special education and related services to address Student's reading, decoding/fluency and math deficits, as well as her executive functioning difficulties. More specific recommendations were to be made by the IEP Team. The evaluations did not reveal any social/emotional difficulties at school. Exhibits P-A, P-C, S-10, S-12.

Student's final grades in her academic subjects of math, ELA, social studies and science for the 2011-2012 school year ranged from 78 to 82. Exhibit S-18.

During August of 2012, negotiations between Chicopee's attorney and Parents' advocate resulted in an agreement to add pull-out services with a special education teacher for 48 minutes twice per week during the school day (in lieu of an elective class when health, for example, is taught) and for an hour twice per week after school. These services, which are to address Student's language learning deficits and executive functioning difficulties, were not included in Student's IEP. Exhibits S-4, S-5, S-6.

Mother testified that her advocate did not have the authority to resolve her differences with Chicopee by agreeing to these additional services, that any additional services should be reflected within Student's IEP and that she has disavowed the agreement. Chicopee has taken the position at hearing that these additional services are not needed in order that Student make meaningful progress. Nevertheless, Chicopee has been providing these additional services during the current school year. Testimony of Mother.

Neither party took the position that this agreement should govern my determination of whether the currently-proposed IEP is appropriate or, if inappropriate, how it should be changed to become appropriate.

For 8th grade, Student was placed in an inclusion program that consisted of the same instructional elements and structure as her inclusion program for 7th grade. Her 1st quarter mid-term grades for the 2011-2012 school year were 74 in math, 89 in ELA, 85 in science and 94 in social studies. Exhibits S-18.

On November 6, 2012, Ms. Mason conducted a "Record Review and Consultation". An unsigned version of this report marked as "DRAFT COPY" was filed by Parents and admitted into the record. The report explained that Parents had requested this "review of recent school evaluations and interventions to assist in educational programming designed to meet [Student's] unique needs." Exhibit P-A (page 2).

In the November 2012 report, Ms. Mason reviewed Student's academic history, the previous CCSN evaluations, Dr. Bowler's psychological evaluations in May, June and July 2012, teacher and progress reports from the winter and spring of 7th grade, and the most recently proposed IEP. Ms. Mason found that Student has made insufficient progress as a result of what Ms. Mason refers to as often isolated and fragmented instruction and as a result of instruction not being sustained over time. She also expressed concern regarding the adequacy of current testing, noted that Student's significant rapid naming disability requires remediation, pointed out Student's continuing significant executive functioning deficits and questioned Chicopee's claim that Student's academic achievement is "average" (and consistent with her cognitive ability) in light of the fact that "a number of [Student's] academic achievement scores were significantly below her [Verbal Comprehension score of] 102 and [Perceptual Reasoning score of] 108" on the WISC-IV administered by Dr. Bowler in May and June 2012. Exhibit P-A, page 7

Ms. Mason then drew the following conclusions from these observations:

School and testing reports paint a clear picture of a student who has still not mastered basic late elementary school level skills in math, spelling, written expression, reading comprehension and organization, and who continues to show significant learning and executive weaknesses. [Exhibit P-A, pages 6-7.]

Ms. Mason's report expressed concern that as a result, Student "does not have all the requisite skills needed ... [for the] increasingly complex and abstract academic and organizational demands of middle and high school." Ms. Mason then criticized Chicopee's proposed IEP for 8th grade because it does not "sufficiently and cohesively address her learning and organizational needs by providing for explicit, specialized and individualized instruction in small groups, or by providing goals and objectives that flow logically from a careful analysis of her learning profile and current needs." Exhibit P-A, page 7.

Finally, Ms. Mason's report concluded that Student's "insufficient mastery of basic academic and organizational skills suggests weak response to the types of special education interventions provided to date." Her report then makes the following recommendation: "[Student's] needs would be best met in a language-based program for learning disabled students with average\above average cognitive ability who do not have co-existing social, emotional or behavioral disorders." In her report, Ms. Mason then described specifically what her recommended language-based programming should include—for example, instruction and class discussion that are teacher-directed with the teacher modeling language and performing the function of questioner, highly structured group interaction, highly structured and organized class instruction using oral and visual methods, review of all previously-learned material, and reading and written and oral language strategies that are taught and reinforced across the curriculum. The report also recommended speech-language direct services and consultation services. Exhibit P-A, pages 7-8.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”² “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”³ An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.⁴ A student is not entitled to the maximum educational benefit possible.⁵ “FAPE may 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.”⁶ Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”⁷

In the application of the meaningful benefit standard, “levels of progress must be judged with respect to the potential of the particular child”⁸ unless the potential is “unknowable”⁹ because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between”.¹⁰

The IDEA also reflects a preference for mainstreaming disabled students.¹¹ This entails ensuring, “[t]o the maximum extent appropriate,” that disabled children are taught with nondisabled children.¹² “The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs.”¹³

² 20 U.S.C. § 1400 (d)(1)(A).

³ *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

⁴ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be “tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP)”); *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) (“IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1st Cir. 2007) (FAPE includes “specially designed instruction ... [t]o address the unique needs of the child that result from the child's disability”) (quoting 34 C.F.R. § 300.39(b)(3)).

⁵ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n. 21 (1982) (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (“Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.”).

⁶ *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1st Cir. 1991).

⁷ *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, *1 (D.Mass. 2012).

⁸ *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1st Cir. 2008). See also *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

⁹ See *D.B. v. Esposito*, 675 F.3d at 36.

¹⁰ *Rowley*, 458 U.S. at 202.

¹¹ 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

¹² 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i).

¹³ *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1st Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1st Cir. 2002) (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990).

Thus, the IEP must be tailored to the student's unique special education needs so as to confer a meaningful educational benefit (gauged in relation to the potential of the student at issue) within the least restrictive educational environment.

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations¹⁴ and which may exceed the federal floor¹⁵) seek “to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment.”¹⁶

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.¹⁷

The initial issue presented is whether the programming and specialized services embodied in Chicopee's most recently proposed IEP are consistent with these legal standards. Parents have the burden of persuading me that the IEP does not meet these standards and that their proposed educational program at White Oak School is appropriate.¹⁸

I begin with a consideration of the appropriateness of the educational services provided in 7th grade. Although it is only the current (8th grade) IEP that is in dispute, the evidence was persuasive that Student's 7th grade educational program was substantially similar to her 8th grade educational program, and I therefore may consider the appropriateness of the IEP for 7th grade as one indicator of whether the 8th grade IEP is appropriate.¹⁹ See discussion of the 7th and 8th grade educational programs in the *Factual Background* section, above.

Student's 7th grade teachers testified that Student made substantial progress during 7th grade with the possible exception of reading fluency. More specifically, they testified that in written language (which was generally considered to be Student's area of greatest difficulty in ELA), she made at least a year's progress over the course of the school year and by the

¹⁴ See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the “education standards established by statute or established by regulation promulgated by the board of education”).

¹⁵ See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

¹⁶ See 603 CMR 28.01(3) (“purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws”). See also MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities”).

¹⁷ MGL c. 71B.

¹⁸ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

¹⁹ See *D.B. v. Esposito*, 2012 WL 975564 (1st Cir. 2012) (“[An] IEP ... could be reasonably calculated to confer a meaningful educational benefit if it is closely modeled on a previous IEP pursuant to which the child made appreciable progress. Of course, previous success does not guarantee future success. Nevertheless, if the two IEPs are substantially similar in design, that similarity provides a reasonable basis for assessing the likelihood of future progress.”) (Internal citations omitted.)

end of the school year, she was working at grade level. The teachers testified that in reading comprehension, she remained at grade level throughout the year, thereby making progress commensurate with her peers. In math, Student had most difficulty with word problems, but she made substantial gains in this area over the course of the school year and ended the year on grade level in all aspects of math. Student particularly enjoyed science where she did very well academically. Social studies was also a strength for Student, and she performed at grade level. Thus, in general, the 7th grade teachers found Student to be performing solidly within the average of her classroom peers, including both the general education and the special education students. However, the teachers also testified regarding Student's continuing weakness in reading fluency over the course of the school year, with Student's testing generally at one year below grade level. Chicopee's expert (Dr. Souweine) testified that when she observed Student in her classroom on May 23, 2012, she found the instruction to be appropriate for Student. Testimony of Berriman, Ursino, Sederland.

Student began being pulled out for 1:1 instruction in ELA about half-way through the school year. However, her special education pull-out teacher testified that it was unnecessary to do so. She explained that Student would have been able to learn everything that she needed to learn by continuing in the classroom, that Student resented being pulled, and that, as a result, she was less motivated and contributed less effort to learning during the pull-out sessions. Testimony of Ursino.²⁰

When Dr. Souweine observed Student at school during 7th grade in May 2012, she had discussions with Student's teachers. They told Dr. Souweine that homework completion was sporadic and that this was a source of concern and frustration for them. Testimony of Souweine.

Student's 8th grade teachers testified that this school year, Student is making substantial progress in all academic areas within the inclusion model where she is one of seven or eight special needs students in a class of 23 students. They explained that Student's academic work continues to be solidly within the average of the entire class, and she has demonstrated the ability to successfully complete 8th grade work with her IEP accommodations. They noted that through testing administered within the classroom, she continues to demonstrate grade-level reading comprehension. They also noted her continuing weakness in reading fluency as reflected in testing but, at the same time, they explained that she occasionally volunteers to read aloud to the entire class and when she does so, her reading is fluent. They testified that this likely indicates that Student has better reading fluency than is indicated in a timed fluency test. The teachers concluded that Student is appropriately placed within the inclusion program model. They also noted her generally high level of interest and motivation in school work, with the exception of her pull-out instruction discussed below. Testimony of Benton, Masse, Starcun.

²⁰ Student confirmed her dislike of being pulled out of her classroom. She testified that she does not like it when she is identified as a special needs student, such as when she is pulled out of her classroom for specialized instruction. She also explained that she does not like pull-out sessions because she then misses what is being taught to the other students. Testimony of Student.

As with 7th grade, Student's 8th grade teachers have found that she often lacks motivation when pulled out of class for specialized instruction. The teachers agreed that Student's learning needs do not justify the pull-out instruction, that she is missing substantive instruction (for example, during her health class) when pulled out, and pull-out instruction is therefore not appropriate for Student. Chicopee's expert (Dr. Souweine) testified that she, too, believed that pull-out services were not warranted for Student. Dr. Souweine further noted that generally students in this age range do not want to be made to look different than their peers with the result that a student is likely to be embarrassed by (and therefore likely to resist) being pulled out. Testimony of Benton, Masse, Souweine.

Similar to Dr. Souweine's testimony regarding 7th grade, Student's 8th grade teachers noted Student's sporadic completion of homework assignments, and similarly her failure to consistently complete tasks where additional work needed to be done after class. This was Student's teachers' principal concern; they attributed this on-going difficulty, in part, to executive functioning difficulties. (Also, Student's 8th grade special education teacher, who has been explicitly teaching Student executive functioning skills, further testified as to Student's continuing difficulties in this area.) There was also concern expressed by the teachers that communication difficulties between school and Parents may be partly to blame. Testimony of Benton, Starcun, Masse.

Dr. Souweine testified that with respect to the evaluations of Student over a period of years, only one area of standardized testing had been repeated, allowing a comparison of test scores over time. She explained that as part of Ms. Mason's August 17, 2011 evaluation, Ms. Mason tested Student using the Gray Oral Reading Test-4 (GORT-4). The GORT-4 scores reflected that Student was at the 4.7 grade level for reading rate, the 4.4 grade level for reading accuracy and the 4.7 grade level for passage score. One of the assessments used by Dr. Bowler in his psychological evaluation of Student at the end of May or beginning of June 2012 was also the GORT-4. Dr. Bowler's GORT-4 scores reflected that Student was at the 7.0 grade level for reading rate, the 7.0 grade level for reading accuracy, the 6.7 grade level for reading fluency, and the grade 6.2 level for reading comprehension. Exhibits P-C, P-E (page 16), S-12 (page 16). Dr. Souweine testified persuasively that the improvement of test scores from August 2011 to May or June 2012 reflected substantial educational progress.

The evidence provided by Parents to rebut the appropriateness of the most recent IEP is Student's testimony, Mother's testimony, and the written reports of their expert, Ms. Mason. I begin with a consideration of Ms. Mason's reports, which are summarized in the *Educational Background* section above.

Ms. Mason has formally evaluated Student twice—once as part of a comprehensive assessment by CCSN in March and April 2010 and then an educational evaluation in August 2011. In addition, Ms. Mason observed Student's educational program on March 8, 2011 and wrote a report of the observation. Finally, Ms. Mason conducted a November 5, 2012 record review and consultation report for Parents. Of these written reports, it is only the November 5, 2012 record review and consultation report that provides information and opinion directly relevant to the current IEP. The prior reports, which were all completed prior to 7th grade, provide useful historical context but cannot explain how or whether

Student's educational needs were being met during 7th and 8th grades and therefore have no direct relevance to the appropriateness of the current IEP. I therefore focus principally on Ms. Mason's November 5th report.

In considering Ms. Mason's report and its probative value, I note, at the outset, that Ms. Mason's written report is given less weight than if her report had been accompanied by her testimony. Testimony allows for cross-examination as well as clarifying questions from the Hearing Officer, whereas the document does not. Also, testimony would have been helpful to clarify and possibly support various general conclusions and recommendations in Ms. Mason's 2012 report, as discussed in more detail below.²¹

Without the benefit of Ms. Mason's testimony, I have difficulty understanding the bases for her criticisms of Chicopee's most recently proposed IEP. For example, in her November 2012 report, Ms. Mason found that Student has made insufficient progress as a result of what she refers to as often isolated and fragmented instruction or as a result of instruction not being sustained over time. Yet, she does not explain in what ways the instruction was isolated and fragmented or not sustained over time.

Ms. Mason's report summarizes Student's past testing reports. Nevertheless, she does not make clear in her report what specifically she is relying upon within these test reports to support her conclusion that "School and testing reports paint a clear picture of a student who has still not mastered basic late elementary school level skills in math, spelling, written expression, reading comprehension and organization, and who continues to show significant learning and executive weaknesses." Exhibit P-A, pages 6-7. Again, without her testimony, I am unable to determine the bases of her concerns.

Ms. Mason's report criticized Chicopee's proposed IEP for 8th grade because it does not "sufficiently and cohesively address her learning and organizational needs by providing for explicit, specialized and individualized instruction in small groups." Yet, the testimony from Student's teachers was that Student's services are being provided through explicit, specialized and individualized instruction in small groups. Since Ms. Mason did not observe Student's 8th grade program (or the similar 7th grade program) or talk to Chicopee teachers or staff, it is unclear how she would know how the instruction is provided under the IEP.

Also, her report takes the position that the IEP goals and objectives do not "flow logically from a careful analysis of her learning profile and current needs." Exhibit P-A, page 7. Yet, Ms. Mason's report does not discuss specific wording in the goals and objectives, nor does it provide sufficient explanation so that I may understand how her criticism may or may not be relevant to the provision of FAPE to Student.

²¹ By conference call during the week prior to the evidentiary hearing, I advised Mother and Grandmother of the importance of having Ms. Mason testify, and Ms. Mason was subsequently added to Parents' witness list, with her testimony to be taken by telephone. But, at the evidentiary hearing, Grandmother stated that Ms. Mason would not be testifying. Mother and Student were Parents' only witnesses.

Ms. Mason's report concluded that Student's "needs would be best met in a language-based program for learning disabled students." Yet, the relevant legal standards discussed above place no obligation upon Chicopee to provide what is "best" for Student; rather, Chicopee must provide what is reasonably calculated to allow her to make meaningful educational progress commensurate with her educational potential. In addition, the Chicopee witnesses were persuasive that Student's current inclusion program is, in fact, a language-based program that satisfies many, if not all, of the specific requirements of such the language-based program recommended in Ms. Mason's report.²² Testimony of Benton, Starcun, Masse.

As discussed above, Chicopee has a legal mandate to place Student in the least restrictive environment that can appropriately meet her educational needs so that her exposure to regular education students can be maximized. There is virtually nothing in Ms. Mason's report or in the record that would support the necessity of Student's placement in a substantially-separate educational program. Rather, I am persuaded by the evidence that an inclusion program model (where Student is taught by regular and special education teachers with regular and special education students) is the least restrictive program model that is appropriate for Student.

An additional, important impediment to my giving significant probative weight to the opinions found within Ms. Mason's reports is that there is nothing in the record (such as testimony or a curriculum vitae) that would allow me to understand Ms. Mason's relevant professional background. Consequently, I am not able to determine whether she has sufficient qualifications to provide expert opinion regarding Student's special education needs and how they should be met.

For all of these reasons, I do not find Ms. Mason's reports to be persuasive that Chicopee's proposed IEP is inappropriate. I now turn to Student's and Mother's testimony.

Student testified that she likes school on some days but not on others. She stated that she does not understand what is taught in class, but does not like to ask for help because it makes her look "stupid". She testified that she does not like pull-out sessions because she then misses what is being taught to the other students and because she is identified as a special needs student and therefore appears to be "stupid". Testimony of Student.

Mother testified that for many years, Chicopee has failed to provide a consistent, cohesive and effective educational program for Student, with the result that she is not able to read at an appropriate level, that she does not have full mastery over of academic skills and that, in

²² Unrebutted testimony from Chicopee's witnesses indicates that Student's inclusion program likely satisfies the first five (out of six) numbered paragraphs on pages seven and eight of Ms. Mason's November 2012 evaluation where she lists what a language-based program should include for Student. Testimony of Berriman, Benton, Starcun, Masse. Some of this testimony refers to Student's inclusion program last year, but last year's and this year's inclusion programs are essentially the same. Testimony of Stolar. The sixth numbered paragraph on page eight is a recommendation for speech-language services, which Chicopee has not met. Exhibit P-A. However, Ms. There is nothing in the record to indicate that Ms. Mason has credentials regarding speech-language pathology and it is unclear what this recommendation is based upon. Exhibit P-A.

general, she is four years behind her peers. Mother stated that Chicopee has not provided (and cannot provide) educational services that will allow Student to be prepared for high school next year. In addition, Mother testified that the current (and previous) IEP goals are vague and do not allow Parents (or others) to evaluate Student's progress and that Student's IEP accommodations are often not implemented consistently (such as access to a working laptop computer). Mother testified that Chicopee must educate Student on her terms, in ways that she can understand, so that she can make sufficient progress towards her IEP goals; that Chicopee is unable to implement such a program; and that this can only occur through an out-of-district placement at White Oak School. Testimony of Mother.

Mother's and Student's criticisms of the current IEP and educational program are relevant and important to consider. I do not doubt that some of their concerns have merit—for example, that Student's computer at school has not always been operational, that the goals and objectives within the IEP could be improved upon to allow greater accountability, that Student has not always been able to understand the classroom instruction, and that Chicopee has not been completely successful in accommodating or remediating Student's executive functioning deficits. I also do not question that Parents are frustrated by what they believe to be Chicopee's inability to properly and appropriately educate Student over a period of years. Undoubtedly, Student's IEP and its implementation have not been (nor will they likely be) free from flaws.

However, as discussed above, the law does not require that Chicopee maximize Student's educational development or even provide what is best for Student. As the relevant legal standards make clear, Chicopee is under no obligation to provide what Parents or their experts recommend (even if those recommendations would improve Student's educational program) so long as Chicopee proposes an IEP that is reasonably calculated to allow Student to make meaningful progress commensurate with her educational potential. Moreover, Student and Mother are not educational experts. Therefore, their opinion testimony regarding what educational services Student requires in order to make meaningful progress carry little probative weight.

After carefully considering the evidence as a whole, together with the arguments of the parties, I am persuaded that, with one exception discussed immediately below, the most recently proposed IEP (exhibit S-1) is reasonably calculated to provide Student with FAPE in the least restrictive environment. I further find that the currently-provided additional pull-out services (that are described within the August 27, 2012 letter from Ms. Thomson to Ms. McGovern (exhibit S-5) but that are not included within the current IEP) are not required in order for Student to receive FAPE.

The one area where modification of the IEP is called for in order that the IEP be appropriate relates to Student's on-going difficulties in consistently completing homework assignments and other work that needs to be done outside of class time. I am persuaded by the testimony of Chicopee's witnesses that in this area Student continues to have substantial difficulties that require more effective attention. Testimony of Masse, Starcun. To address this issue, Dr. Souweine suggested (and Student's math teacher, Ms. Starcun, agreed) that instead of simply checking in with Student at the end of the school day to determine whether she had

everything (and understood everything) needed to complete her assignments, it would be preferable for a teacher or aide to check in with Student at the end of every academic class for which Student may have been given a homework assignment or for which she may need to complete other work outside of class time. The check-in, which would likely last no more than five minutes, would be for the purpose of helping Student, as needed, to ensure that she knows how to complete what is expected of her after class time and has with her everything that is needed for that purpose. Dr. Souweine was persuasive that this kind of check-in is likely to be most effective since it occurs close in time and place to Student's having any difficulty understanding teachers' expectations of what she is to do after class, and because it can be integrated into Student's curriculum. The current IEP should be amended to reflect this five-minute check-in time at the end of each academic class, in lieu of the ten-minute check-in at the end of each school day.

A related concern is school-home communication. It is reasonable to expect that regardless of the effectiveness of the above-described five-minute check-ins, completion of work at home may not occur consistently unless there is improvement in home-school expectations and communication so that the teachers and Parents are giving Student consistent messages about homework. If Parents agree to participate, Chicopee shall convene an IEP Team meeting (to occur within three weeks of the date of the instant decision) to discuss with Parents how to achieve more consistent completion of Student's homework assignments and other school work done outside of class time, and how to improve school-home communication.

Finally, I will address Parents' November 19, 2012 motion seeking reimbursement of monies expended on attorney fees, advocate fees, consultant/evaluator fees and Mother's lost wages as a result of her taking Student to evaluations and attending IEP Team meetings. Parents seek a total of \$19,922.00 for these purposes.

The IDEA and regulations thereunder provide that a federal district court may award reasonable attorney fees and related costs to parents (of a student with a disability) who are the prevailing party.²³ I am aware of no judicial decision which has indicated that an administrative hearing officer has the authority to award attorney fees. Similarly, the reported decisions of administrative hearing officers in Massachusetts and elsewhere conclude that the hearing officer does not have the authority to award attorney fees under the IDEA.²⁴

The IDEA does not include any provision for the award of advocate fees, and I am aware of no judicial or administrative authority for my doing so.

The United States Supreme Court has held that expert's fees are not recoverable from a school district under the IDEA.²⁵

²³20 USC 1415(i)(3)(A)-(G); 34 CFR 300.513.

²⁴ See, e.g., *Duneland School Corp.*, Indiana State Educational Agency, 31 IDELR 222 (January 19, 2000); *In Re: Wareham Public Schools*, BSEA # 00-0679 (December 6, 1999); *Council Rock School District*, Pennsylvania State Educational Agency, 29 IDELR 758 (October 30, 1998).

²⁵ See *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

I am aware of no authority pursuant to which Parents may be reimbursed for lost wages as a result of Mother's taking Student to evaluations and attending IEP Team meetings.

For these reasons, Parents' November 19, 2012 motion will be denied.

ORDER

With the following modification, the IEP most recently proposed by Chicopee (exhibit S-1) is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Instead of a ten-minute check-in at the end of the school day, Chicopee shall provide a five-minute check-in at the end of each academic class in order to help Student more consistently complete her homework assignments and other work to be done outside of class time. Chicopee shall amend its most recently proposed IEP to reflect this modification.

If Parents agree to participate, Chicopee shall convene an IEP Team meeting (to occur within three weeks of the date of the instant decision) to discuss with Parents how to achieve more consistent completion of Student's homework assignments and other school work done outside of class time, and how to improve school-home communication.

Parents' motion seeking reimbursement of monies expended on attorney fees, advocate fees, consultant/evaluator fees and Mother's lost wages is DENIED.

By the Hearing Officer,

William Crane

Dated: January 3, 2013

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

THE BUREAU'S DECISION, INCLUDING 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 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 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.