

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

In Re: Newton Public Schools

BSEA # 09-6466

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 October 21, 22, 26 and 28, 2009 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

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| Student's Mother | |
| Student's Father | |
| Gerri Shubow | Private Audiologist |
| Jody Gray | Private Education Consultant |
| Lisa Shaw | Private Neuropsychologist |
| Donna Malliaros | Reading Teacher, Learning Prep School (LPS) |
| Joan Foster | Elementary School IEP Coordinator, LPS |
| Nancy Rosoff | Director, LPS |
| Lynne Georgian-Cohen | Special Education Teacher, Newton Public Schools (Newton) |
| Robin Fabiano | Co-Director of Elementary Student Services, Newton |
| David Gotthelf | Director of Therapeutic Services, Newton |
| Judy Levin-Charns | Assistant Superintendent of Student Services, Newton |
| Sean Goguen | Attorney for Parents and Student |
| Elaine Lord | Advocate for Parents and Student |
| Angela Buchanan Smagula | Attorney for Newton |
| Maura O'Keefe | Legal Intern, Newton |
| Maryellen Coughlin | Court Reporter |

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P-1 through P-41, except P-29 was not admitted; documents submitted by the Newton Public Schools (Newton) and marked as exhibits S-1 through S-54; and approximately four days of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on November 4, 2009, and the record closed on that date.

I. INTRODUCTION

This is a dispute as to whether Newton has proposed appropriate IEPs for Student's 3rd grade and his current 4th grade. During these school years, Student was privately placed by his

Parents at the Learning Prep School (LPS). For the summer of 2009, Parents privately placed Student at Camp Chickami. Parents seek reimbursement for LPS and Camp Chickami. They also seek an order requiring Newton to place Student prospectively at LPS.

For the reasons explained in this Decision, I have denied all of Parents' reimbursement claims, and I have ordered Newton to amend its current IEP to provide for placement at LPS.

II. ISSUES

The following issues to be decided in this case pertain to reimbursement for Parents' out-of-pocket expenses relative to their placement of Student at Learning Prep School:

1. Were the two IEPs in dispute in this case for 3rd and 4th grades reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, did Parents' private placement of Student at Learning Prep School satisfy this standard?
3. If so, are Parents entitled to reimbursement of some or all of their out-of-pocket expenses as a result of their placement of Student at Learning Prep School?

The following additional issues to be decided in this case pertain to reimbursement for Parents' out-of-pocket expenses relative to their placement of Student at Camp Chickami:

4. Did the IEP for the period March 30, 2009 to March 25, 2010 propose appropriate services for Student for the summer of 2009?
5. If not, was Parents' private placement at Camp Chickami appropriate for this purpose?
6. Alternatively, was Student's stay-put placement Camp Chickami?
7. Are Parents entitled to reimbursement of some or all of their out-of-pocket expenses as a result of their placement of Student at Camp Chickami?

The following issues to be decided in this case pertain to prospective services and placement:

8. Is the individualized educational program (IEP) most recently proposed by Newton (covering the period March 30, 2009 to March 25, 2010) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
9. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
10. If not, would placement at Learning Prep School satisfy this standard, with the result that Newton must amend its IEP to provide this placement prospectively?

III. FACTS

Student's Learning Profile

1. Student is nine years old and lives with his Parents in Newton, MA. Student is in the 4th grade at LPS, where he has been privately placed by Parents since August 2008.
2. There is little, if any, substantive disagreement regarding Student's learning profile. Student has many strengths. He is kind, caring, musical, thoughtful, and lovable. He has many interests, particularly sports and United States presidents. He is also inquisitive, with a strong motivation to learn. Student's verbal and non-verbal reasoning abilities are within the average range. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
3. Student has multiple and significant disabilities that individually and in concert have a substantial impact upon his learning. First, Student has a global language impairment. This includes phonological deficits, which impact negatively upon his reading and spelling. Consequently, Student has significant difficulties understanding information that he receives through language, requiring that the information be simplified, clarified, and repeated. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
4. Second, Student has integration deficits, including difficulty integrating visual and spatial information—for example, Student would have difficulty solving a picture puzzle. This deficit also makes it hard for Student to infer a larger meaning from specific facts, to make sense of things when his environment becomes complex, and to understand social cues. Student requires explicit, concrete assistance to understand and retain information. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
5. Third, Student has significant verbal and non-verbal memory deficits. This, too, impacts negatively upon his acquisition of information and his learning new skills—for example, decoding multiple syllable words where he must remember the first syllable while he decodes the second syllable. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
6. Fourth, Student has focusing and attention difficulties, including executive functioning deficits. This results in Student's being impulsive, giving up too quickly, and having difficulty sustaining his focus on a particular topic, particularly where there are distractions (such as a loud noise or other activity) within the environment. Within a large room, Student has a very difficult time focusing, and because he is so inquisitive, he wants to know what everyone is doing in the room. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
7. Fifth and related to the previous deficits, Student has very substantial auditory processing difficulties. This includes an exceptionally slow rate of processing

auditory information as well as significant difficulty integrating auditory information, particularly where there are competing auditory signals or information. For example, Student has limited ability to learn or understand something when there is background noise, he has a general tendency to mishear auditory information, and if the pace of speaking is not sufficiently slowed down for him, he is able to obtain and retain only bits and pieces of the auditory information. Information must be presented at the appropriate pace, it must be simplified and given in small chunks, the information often must be repeated and re-phrased, and there should be monitoring to determine whether Student is actually understanding the information. Testimony of Mother, Gray, Shaw, Shubow; exhibits P-1, P-2, P-3.

8. Sixth, Student has a history of seizures. When a seizure occurs, it may result in his temporarily losing certain learning skills that he has mastered. Testimony of Mother, Gray, Shaw; exhibits P-1, P-2.
9. When all of these deficits are combined, they have a very substantial, negative impact upon Student's ability to obtain and retain information, to understand his world, and to function at age level in a wide variety of circumstances. As a practical matter, Student's disabilities impact negatively on almost everything that he does, including, for example, having a conversation, playing a game, socializing, acquiring and retaining knowledge, and learning skills. In addition, Student is aware of his deficits and difficulties and how he compares with other children. At the same time, he is inquisitive and highly motivated to learn. Testimony of Mother, Gray, Shaw, Shubow; exhibits P-1, P-2, P-3.
10. When Student becomes frustrated by his inability to learn or by his inability to learn as well as his peers, he tends either to "shut down" and stop learning or to regress into becoming silly, which also limits his ability to learn. This is compounded by what has, historically, been Student's low self-esteem when he has not been able to learn in school. Testimony of Mother, Shaw, Gray; exhibits P-1, P-2.

IEPs and Newton's Proposed Educational Placement

11. The two IEPs in dispute cover the period 4/7/08 to 3/25/10. The parts of these IEPs at issue are for 3rd grade (2008-2009) and 4th grade (2009-2010). With respect to 3rd and 4th grades, each IEP calls for Student to be placed in Newton's Reach program, with services and placement substantially the same for 3rd and 4th grades. Testimony of Fabiano; exhibits P-9, P-10.
12. The Reach program is a substantially-separate educational program designed for children with language-based learning difficulties, who are attending the 3rd, 4th, and 5th grades. Reach is located within Newton's Franklin Elementary School. Within the Reach program, special needs students are taught math and literacy in a small group. Science and social studies are taught in an integrated model, with the Reach special needs children joined by a group of typical peers. These integrated classes are

co-taught by a Reach special education teacher and a regular education teacher. The Reach program also includes an aide who assists in all classes and who accompanies the children when they attend mainstream specials—for example, art, music and library. Testimony of Fabiano, Georgian-Cohen; exhibit S-1. See pars. 36-46, below, for further description of the Reach program.

13. Student's IEPs for 3rd and 4th grades reflect the above-described configuration of services within the Reach program. In addition, Student's IEPs call for the following services outside of the regular education classroom: speech-language services for a half hour, twice each week; occupational therapy for a half hour, once per week; adaptive physical education for a half hour, once per week; and organizational and study skills for a half hour each day. Within the general education classroom, the 4th grade IEP also calls for social pragmatics instruction by a speech-language pathologist for a half hour, twice per week. Finally, the IEPs call for consultation in the areas of physical therapy, speech-language therapy, social/emotional services, and occupational therapy. Exhibits P-9, P-10.
14. Student's IEP for 2nd, 3rd and 4th grades also include proposed services for the summers of 2007, 2008, and 2009, respectively. Each of the IEPs states that Student "is enrolled in the Extended Year Program" because of his special needs (or, that "he will receive an extended year program due to substantial regression"). Specifically, these IEPs call for an unspecified amount and duration of speech-language services for the summer of 2007 and speech-language services for a half hour, once per week, during the summers of 2008 and 2009 (6/30/08 to 8/8/08, and 7/6/09 to 8/14/09); and academic services by a special education teacher for seven weeks for each of the three summers (for 300 minutes each day from 7/05/08 to 8/20/08; for 360 minutes each day from 6/23/08 to 8/8/08; and for 180 minutes, four times per week, from 7/6/09 to 7/29/09). Exhibits P-8, P-9, P-10, S-51.

Educational History

15. **2006-2007 school year (1st grade):** By 1st grade, Student, who was enrolled in the Newton Public Schools, had been receiving special education services pursuant to an IEP for several years. As he had done in the several previous school years, Student struggled at school, and during 1st grade his struggles with learning became more pronounced. Mother testified that Student had difficulty focusing, processing oral information, learning new information, and retaining what he learned. She believed that he was struggling to learn how to read and generally was not able to keep pace regarding his learning academic skills. Testimony of Mother.
16. Mother found that when his educational experience became too frustrating for Student, he tended to shut down, thus further limiting his ability to learn. He also had difficulty understanding social cues. By this time, Student was aware of many of his deficits and his general inability to keep up with his peers (as well as with his younger sister) in many areas. As a result, Student's self-esteem plummeted. During 1st

grade, Newton provided Student with a 1:1 aide, as compared to a shared aide during the previous school year. Testimony of Mother.

17. In the spring of Student's 1st grade year (2007), Newton conducted a comprehensive, three-year evaluation of Student which documented and discussed many of his learning deficits. Exhibit P-12.
18. During the summer following the 1st grade school year (summer of 2007), Student attended Camp Chickami. Newton paid for this camp and also provided a 1:1 aide for Student while he was at camp. Mother testified that Camp Chickami, which is run by the YMCA, includes mostly typically-developing students, but also some special needs students, such as her son. At Camp Chickami, Student received speech-language services and academic instruction with other special needs children, separate from his typical peers. Student also participated in recreational summer camp activities with typical peers. Mother testified that the principal purposes of the camp experience were to provide academic and social opportunities to avoid any substantial regression. Student enjoyed the opportunity to pursue physical activities with typical peers. Testimony of Mother.
19. The Newton members of the IEP Team had not recommended Camp Chickami. They proposed an academic-based camp, with direct instruction in reading, language arts, and math in a classroom. However, apparently because no nurse was available to be with Student in Newton's proposed summer services and because of Student's need to have a nurse nearby owing to his history of seizures, Newton agreed to fund Parents' choice of Camp Chickami, with an aide for Student. Testimony of Fabiano.
20. **2007-2008 school year (2nd grade):** Prior to the beginning of this school year, Parents were sufficiently concerned about their son (in particular, his continuing academic difficulties and his worsening self-esteem) that they sought to enroll their son in the Learning Prep School (LPS), a private, special education school in Newton for the 2nd grade school year. LPS found Student to be appropriate for its school but did not have space for him for 2nd grade, and Parents were advised to re-apply for 3rd grade. Testimony of Mother.
21. During 2nd grade, Student continued to be educated in the mainstream at Newton's Memorial Spaulding Elementary School. However, during this school year, Newton provided Student with additional "pull-out" special education and related services to seek to address his multi-faceted educational deficits. These services included a 1:1 aide, social/emotional services, speech-language services, occupational therapy, adaptive physical education, and reading services. Testimony of Mother; exhibits P-8, S-51.
22. There was no testimony from anyone who taught Student during 2nd grade. The written progress reports from 2nd grade indicate that Student made progress in certain areas, but on the basis of these reports alone, it is not possible to determine the extent

of Student's overall progress over the course of the school year. Examples of noted progress are the following. The progress reports explain that Student made "good" progress regarding fine motor skills, including learning how to use zippers, buttons, and snaps, and improving his handwriting, but more work needed to be done to solidify these skills. He made progress following two-step directions and using pronouns accurately in connected speech, and he made progress regarding his phonological awareness skills. He was successful in using a "tapping out" strategy to decode consonant-vowel-consonant words, he increased his sight vocabulary, and he was reading books that were "highly phonetic". He was able to solve addition facts up to ten independently and was able to tell time to the hour independently. His motor skills no longer limited his access to the school environment or curriculum. Overall, he made progress regarding his de-coding skills, increased his sight vocabulary, improved his social skills, and made progress regarding his listening and communication skills. Exhibits S-20, S-21, S-54, P-31.

23. Mother testified that from her perspective, during 2nd grade, Student's educational difficulties continued notwithstanding any academic gains that he may have made. She explained, for example, that her son was not able to perform academic work independently and was not able to read for meaning. As with 1st grade, Mother found that even when her son was able to learn at school, he had a very difficult time retaining this information and often was not able to demonstrate his knowledge in environments outside of school. Mother also testified that Student continued to have significant difficulties relating socially with his peers, with the result that he seldom had meaningful opportunities for play with his peers after school. Student related more easily to adults (whom he referred to as his "friends") than his peers. Testimony of Mother.
24. Mother testified that Student's frustration with his learning seemed to worsen during this school year, he would come home from school each day exhausted, and his self-esteem continued to decline, with the result that he often tried to refuse to go to school in the mornings and his overall happiness declined significantly. In short, Student felt "stupid" and extremely frustrated by school. The home-school communication log supports Mother's testimony. Testimony of Mother; exhibit P-41.
25. Mother testified that approximately two weeks after receiving the proposed IEP for 2nd grade (for the period October 2007 to October 2008), she rejected it during conversations with Newton personnel. The only documentary evidence of Parents' rejection of this IEP is a letter, dated August 14, 2008 from Parents' advocate (Elaine Lord) to Newton's Director of Special Education (Ms. Levin-Charns). This letter also notified Newton that Parents would be placing their son at LPS and would be seeking funding to reimburse Parents for their expenses associated with this placement. Testimony of Mother; exhibits P-8, P-25.
26. In December 2007, there was an IEP Team meeting that resulted in a proposed, partial-year IEP for the period 1/8/08 to 5/25/08. On January 7, 2008, Mother

accepted this IEP but added the following note: “I accept this IEP although I don’t feel it addresses the full scope of [Student’s] needs.” She also noted that she believed that that summer program for the previous summer (2007) was appropriate “and therefore I am accepting that part of the IEP.” Exhibit S-51, P-38.

27. During the summer following the 2nd grade school year (summer of 2008), Student attended Camp Chickami. Pursuant to Student’s IEP, Newton proposed an academic-based camp, as it had for the summer of 2008, but apparently because of concerns by Newton that technically it was required to continue funding of Camp Chickami (apparently Newton believed it was required to do so either because of stay put or because of something written incorrectly within the IEP), it again paid for this camp and also provided a 1:1 aide for Student while he was at camp. Newton funded Camp Chickami even though Newton did not believe it was an appropriate summer placement for Student. Testimony of Mother, Fabiano.
28. **Private evaluations in 2007 and 2008:** On May 7, 2007 during the spring of Student’s 1st grade year, Parents had a private speech-language evaluation conducted at Children’s Hospital, Boston. The evaluation noted Student’s multiple learning deficits that are described earlier in this Decision. The evaluators recommended that Student be placed in a language-based program that includes a low student-teacher ratio, modification of the language of instruction in all content areas, instruction to compensate for Student’s auditory memory weaknesses, and multiple teaching strategies and accommodations tailored to allow Student to access the curriculum and make effective educational progress. Exhibit P-5.
29. During the fall of the 2nd grade year (2007-2008), because of their continuing concern regarding Student’s educational progress and well-being, Parents arranged for Student to be further evaluated privately by a neuropsychologist, educational consultant, and audiologist. The educational evaluation, which occurred on October 12, 2007, was conducted by Jody Gray, who holds a M.Ed. in special education. Ms. Gray has conducted a large number of educational evaluations and has provided a significant amount of educational consultation to both parents and school districts since 1999. Her evaluation was for the purpose of determining Student’s strengths and weaknesses in phonological processing, fluency, decoding, encoding, reading and listening comprehension, vocabulary, writing, and math, and for the purpose of making recommendations for academic remediation. Testimony of Mother; exhibits P-1, P-2, P-3.
30. In sum, Ms. Gray found that Student had significant and pervasive deficits in basic literacy skills. Ms. Gray explained that these deficits occur within the context of Student’s overarching difficulties with language, integration, memory, and pace of information processing and work production. Ms. Gray also opined that Student had not responded to prior academic remediation. In light of this constellation of significant deficits and history, Ms. Gray’s report recommended that Student be placed in a fully-integrated, language-based, small group setting. She noted that the

small group should consist of students who have similar academic, cognitive, emotional, and social profiles. Ms. Gray further explained that full integration across the curriculum is essential—that is, each teacher who instructs Student should be familiar with not only the “strategies he learns in his reading, spelling, and writing programs,” but each teacher also needs “to be able to weave taught learning strategies into instruction to facilitate the application of taught skills.” Exhibit P-1.

31. In her report, Ms. Gray included the following recommendations: (1) learning new material in a hands-on, experiential fashion, (2) use of a multi-modal teaching approach where information is presented auditorily while being supported with visual, kinesthetic, and hands-on exercises, (3) review and integration of previously-learned material with more recently presented material, and (4) consistent classroom and lesson routines, and clear expectations. Ms. Gray further proposed a number of learning accommodations, including untimed tests, reduced or eliminated oral reading in the classroom, reduced amount of reading and spelling on tasks, opportunity to provide oral answers on homework, quizzes and tests, and avoidance of any remarks or interventions that would make Student feel different, less adequate or singled out. Exhibit P-1.
32. The neuropsychological evaluation, also arranged privately by Parents, was conducted by Lisa Shaw on February 12 and 19, 2007 and March 6, 2007. Dr. Shaw holds a Ph.D. in developmental psychology and has extensive experience conducting neuropsychological assessments of children since 1983. The purpose of her assessment was to provide a comprehensive assessment of Student’s cognitive abilities and to define the neurobehavioral contributors to Student’s learning difficulties. Exhibit P-2.
33. In her report, Dr. Shaw found that Student has multiple and significant disabilities that individually and in concert have a substantial impact upon his learning, as described in more detail in the Educational Profile section (above) of this Decision. Dr. Shaw noted, specifically, that Student’s difficulties retaining information and his very slow pace in acquiring academic skills is accounted for by his combination of language impairment, problems integrating information, and reductions in memory. Dr. Shaw’s report made the following recommendations with respect to appropriately addressing Student’s deficits:
 - A specialized, full-year academic placement where his learning and adaptive difficulties can be addressed in a comprehensive and integrated fashion and where he can feel hopeful and confident regarding his ability to learn and be successful in school.
 - Small-size classes, with academic instruction provided by teacher trained or certified in special education.
 - Accommodations of learning difficulties in all academic areas, including verbal instructions and directions presented in small segments and in a highly organized fashion, repetition and clarification of verbal information, additional

time and organizational assistance to formulate thoughts and ideas, and additional time to complete class work and tests.

- Direct speech-language intervention to address development of listening skills, phonological awareness, oral and written language formulation, and social/pragmatic skills.
- Consistency of goals and interventions in all settings, with Student's learning goals addressed in a coordinated fashion.
- Preview of class lessons, highlighting of key concepts, slow presentation, and a significant amount of repetition, as well as on-going review throughout the year.
- Continuation of occupational therapy, physical therapy, and adaptive physical education.

Exhibit P-2.

34. The audiological evaluation, also arranged privately by Parents, was conducted by Gerri Shubow, MS, CCC-A, on October 6, 2007. Ms. Shubow has been a practicing, licensed audiologist since 1984 and since 1988 her private practice has focused on auditory processing disorders. Ms. Shubow's evaluation report concluded that Student has normal peripheral hearing, but he had difficulty with the accuracy of what he heard. Ms. Shubow found that he misheard many of the words, he needed extra time to process the information, and he demonstrated significant difficulty processing complex auditory information. Exhibit P-3
35. In her report, Ms. Shubow recommended that Student attend a small, language-based classroom where the curriculum is taught by teachers who have special training to teach students with specific language impairment and auditory processing difficulty. Direct and uncomplicated classroom instruction should be given, with repetition of each step of the instruction, and time provided between each step to process the information. Ms. Shubow also recommended teaching Student strategies for listening and organizational skills and noted that Student would benefit from a structured, stable and predictable educational environment where goals, expectations, and time frames are clear. Exhibit P-3.
36. **Newton's Reach program proposed for 3rd grade:** On April 7, 2008 (during the spring of Student's 2nd grade year), an IEP Team meeting was held to review Parents' three private evaluations (neuropsychology, education, and audiology, discussed above) and prepare a new IEP for the remainder of 2nd grade and for 3rd grade. Testimony of Mother.
37. Newton proposed an IEP for 3rd grade that would continue many of the related services (for example, speech-language services, occupational therapy services) from 2nd grade but that would place Student in Newton's substantially separate program, called the Reach program. Exhibit P-9.

38. Within the Reach program, the group of children can change from year to year. However, all of the children in the program have an underlying language and communication disorder, and each child brings his or her additional deficits, such as central auditory processing deficits, memory and attention weaknesses, integration difficulties, and executive functioning deficits. The Reach program is set up to work with children with this range of learning deficits, including children with multiple and complex learning needs. Testimony of Georgian-Cohen, Fabiano; exhibit S-1.
39. Within the Reach program, there is a substantial amount of consistency and structure, all material is previewed and throughout the day, there is spiraling back over (to review) previous material. Occupational therapy and speech-language therapy are provided within the Reach Program weekly schedule. Instruction regarding social pragmatics is emphasized in various parts of the weekly schedule, including during speech-language therapy. Thinking maps are used throughout the curriculum, and organizational skills are taught to all students. The same teaching structure is provided for all children, but additional support and instruction can be provided as needed for any child. For example, a particular student might be placed with one or two other children or might even receive 1:1 instruction as necessary for a short period of time in order to work on the student's skills. Testimony of Georgian-Cohen; exhibit S-1.
40. A single, relatively large classroom is shared by the 3rd and 4th grade students who are in the Reach program, with a much smaller, break-out room available for these students throughout the day. The 3rd and 4th graders are together within the large classroom only during the beginning of the day, including instruction on fluency, and at the end of the day. Testimony of Georgian-Cohen.
41. The Reach children are taught by a full-time special education teacher and a full-time aide. There is a full-time regular education teacher who teaches the regular education children who are integrated with the Reach children for social studies and science. In the Reach program, a special needs child receives literacy and math instruction with other special needs children only, and this would occur within a small classroom. The remainder of a special education student's academic instruction occurs within an integrated classroom that would be co-taught by a regular education teacher and a special education teacher, with the assistance of a special education aide. Testimony of Georgian-Cohen, Fabiano.
42. Science and social studies are taught by the Reach special education teacher and aide, together with the regular education teacher. The Reach special education children typically have scattered skills that they can demonstrate with typical peers during these integrated classes. The entire class is taught as a whole group at the beginning of the class and then typically broken up into three small groups, with a teacher or aide assigned to each group. Each group is integrated with Reach children and regular education children so the groups are heterogeneous, but the children's learning needs are taken into consideration for purposes of grouping. The special

education teacher is typically assigned to the small group with the children who have the most complex learning needs. Prior to these integrated periods of instruction, the teachers have previewed the concepts to be taught in sessions with only the Reach children, thereby assisting them to learn with the regular education students.
Testimony of Georgian-Cohen, Fabiano.

43. When there is reading aloud, it is voluntary since there may be substantial differences in reading ability within a group. Teachers seek to monitor children; when a child feels overwhelmed, the child gives a private signal (known only to the teacher) indicating that he or she feels overwhelmed. Ms. Georgian-Cohen follows the Reach program students throughout the day, except for the specials (for example, art and music) when they are accompanied by the special education aide. This allows for continuity of instruction and monitoring of the children in the Reach program. Ms. Georgian-Cohen testified that the 4th grade Reach program (taught by Ms. Lovekin) is taught using the identical structure as she described for 3rd grade. Testimony of Georgian-Cohen.
44. Ms. Georgian-Cohen testified that last year, during the 2008-2009 school year, there were six children in the 3rd grade Reach program and a total of 15 or 16 additional regular education students who were integrated with the Reach children during science and social studies. This 3rd grade class included children with communication deficits, memory deficits, and integration deficits. She opined that Student would have had learning struggles similar to other children in the classroom, and that she would have had the strategies to address his learning needs. On average, children entering her 3rd grade are functioning in both reading and math between one and one-half and two and one-half years below grade level. Testimony of Georgian-Cohen.
45. Ms. Georgian-Cohen testified that she was familiar with Student through her reading his IEPs, attending IEP Team meetings (and listening to others talk about Student), and listening to small parts of the evidentiary hearing in the present dispute, but she has not reviewed any of Student's evaluations. She explained that she is aware that Student has central auditory processing deficits but is not aware of the extent of these deficits. Ms. Georgian-Cohen opined that Student would have been appropriately placed within her 3rd grade classroom at the Reach Program. Testimony of Georgian-Cohen.
46. The special education teachers for 3rd and 4th grades at the Reach program, Ms. Georgian-Cohen and Ms. Lufkin, respectively, are both highly experienced, skilled and certified special education teachers. The structure and manner of instruction for 4th grade is substantially the same as for 3rd grade. Testimony of Fabiano, Georgian-Cohen; exhibits S-41, S-42.
47. **2008-2009 school year (3rd grade):** Near the end of Student's 2nd grade year in May of 2008 following the April 2008 Team meeting, Mother visited Reach and concluded

that the classes would be too large (and therefore too distracting) and too chaotic for her son. At this time, she observed a 3rd class with approximately 21 children. She also noted that the 3rd graders were using text books that her son could not read. Testimony of Mother.

48. As a result of their concerns regarding the proposed Reach program, Parents rejected Newton's proposed IEP for 3rd grade and privately placed their son at LPS for 3rd grade, starting in August 2008. Testimony of Mother.
49. Mother testified that Student loved 3rd grade at LPS. She explained that what her son has learned at LPS he has been able to retain and to demonstrate what he has learned in other environments. She believes that LPS is able to address satisfactorily all of her son's disabilities. She explained that her son is engaged and is happy again. Testimony of Mother. Student's progress at LPS is discussed in part IV E of this Decision.
50. For the summer following the 3rd grade school year (summer of 2009), Newton proposed an academic program pursuant to the IEP for the period March 2009 to March 2010. Newton proposed this program on the basis of its determination that intensive academic instruction was needed to maintain Student's skills. With the proposed summer services, there is direct instruction by a special educator, and the children are taught within small groups. The proposed summer services would have provided Student with month-long academic instruction, plus speech-language services to work on Student's social pragmatic deficits. Testimony of Fabiano; exhibit P-10.
51. Parents declined to send their son to Newton's proposed summer services and, instead, privately placed Student at Camp Chickami after claiming, through a May 12, 2009 letter to Newton, that Parents were exercising their "stay put" rights to have Newton fund Camp Chickami, as Newton had done over the past two summers. Newton responded by letter of May 22, 2009, taking the position that "stay put" rights applied only to Student's services and not to the particular vendor that would provide those services, and that none of Student's IEPs specify a particular vendor or setting where the services are to be delivered. As compared to previous summers where there had also been a disagreement regarding summer services, Newton declined to pay for Camp Chickami for the summer of 2009. Mother testified that Parents believed that Newton's proposed summer program was not appropriate because it did not address Student's need to work on his socialization skills. Testimony of Mother; exhibits P-27, S-31.
52. **2009-2010 school year (4th grade):** During a March 2009 IEP Team meeting, Newton proposed essentially the same services and placement for 4th grade as it had proposed for 3rd grade. Parents rejected this IEP and continued to place Student privately at LPS for 4th grade. Mother testified that LPS continues to be an appropriate and highly successful placement for her son. LPS found that Student had

retained the skills that he had learned through the end of 3rd grade at LPS. Testimony of Mother; exhibit P-10.

Recent re-assessments and observations by Parents' experts

53. Parents' private neuropsychologist (Dr. Shaw) re-evaluated Student in September 2009 in anticipation of the hearing in the present dispute. She has not prepared a written report reflecting this re-evaluation. Dr. Shaw testified that although in general, her test results were consistent with those in 2007, she found that Student's IQ scores had fallen by ten points in both verbal reasoning and perceptual reasoning, indicating that he may be falling further behind his peers. She explained that her more recent testing did not change her thinking in terms of what she recommended in her 2007 report to address Student's educational needs. Testimony of Shaw.
54. Dr. Shaw observed the 4th grade Reach program in June 2009 and then again in October 2009. Ms. Fabiano testified that, particularly in October, Dr. Shaw saw an accurate representation of the 4th grade Reach program that Student would have attended. Testimony of Shaw, Fabiano.
55. During the October observation, Dr. Shaw observed a social studies class after the children had been broken down into three small groups, and she observed a math class. She opined that this program would not be appropriate for Student because in social studies, Student would not be able to utilize the text (which was at the 4th grade level), and because Student would have had difficulty understanding the concepts and instruction given by the teacher during math class. Dr. Shaw testified that the relatively large class of children during portions of social studies and science (as well as during his specials of art and music) would also make it difficult for Student to learn because of his attention and distraction issues. She did note, however, that the pacing in the math class seemed "reasonable" for Student. Testimony of Shaw.
56. Dr. Shaw concluded that in order to learn, Student should be provided small group instruction, using the same mode of instruction, throughout the curriculum, rather than only within math and literacy at the Reach program. She expressed concern that within the Reach program, Student's peers would be inappropriate for him because they would have significantly better abilities regarding reading, rate of auditory processing, and memory, and that within the large group instruction, the pacing of instruction would be too fast for Student. She opined that the result would likely be that it would be too difficult for Student to succeed, he would become frustrated, and this in turn would negatively impact his ability to be engaged and learn. Testimony of Shaw.
57. Dr. Shaw observed Student at LPS in two classes in June 2009 (the end of 3rd grade). Dr. Shaw testified that Student was very attentive, he participated, and he was engaged in the lesson. She found the slow pacing and the teaching methods to be appropriate for Student. She also noted the appropriate size of all of Student's classes

and the consistent structure (for example, use of thinking maps) during his classes. Testimony of Shaw.

58. Parents' private audiologist (Ms. Shubow) testified that she re-tested Student on October 16, 2009 and found that his standard scores on this testing and her 2007 testing remained the same, indicating that Student was making progress but essentially staying the same relevant to his peers and therefore not closing the gap between him and his peers. She explained that her recent testing did not change her recommendations from her 2007 report regarding how Student's educational services should be provided. Testimony of Shubow.
59. Ms. Shubow observed the 4th grade Reach program on October 16, 2009. She saw a social studies class of regular and special education students that first met as a whole group and then split up into three small groups. She observed that the children seemed to have different learning abilities, with some of the children reading easily and others lacking fluency, and she observed children coming and going into the large classroom. Ms. Shubow testified that during social studies class there was a substantial amount of information presented within a relatively short period of time. Ms. Shubow also observed a literacy class, which was taught only to special needs 4th graders. She found that there was teaching of a complex lesson, with information rapidly provided to the children.
60. Ms. Shubow testified that if he had been in these classes, Student would have missed much of what was taught, and that he would have likely understood only bits and pieces of information. She explained that even with preview and review of the material, it would be difficult for Student to learn within this educational environment because of his extreme difficulty accessing auditory information. She explained that while preview and review can assist a student who is in a classroom where the instruction and content are at too fast a pace, the preview and review are, only "band aides" to assist with understanding and retention, and should not be considered a substitute for appropriate pacing and content of instruction. Testimony of Shubow.
61. Ms. Shubow observed Student at LPS on October 20, 2009. She noted that the pace of instruction was much slower than at the Reach program and that he was placed in a group of children whose learning needs were more similar than what she observed at the Reach program. She found Student to be very engaged and attentive throughout the lesson. She opined that this educational setting was much more appropriate for Student than the Reach program that she observed because of Student's substantial auditory processing and integration deficits, which are compounded by his other learning difficulties. Testimony of Shubow.
62. Parents' private education consultant (Ms. Gray) re-evaluated Student in October 2009. She found that Student's standardized test scores remained the same or dropped slightly, indicating that, in general, Student is making progress but he is not closing the gap between himself and his typical peers. As with Dr. Shaw's and Ms.

Shubow's recent testing, Ms. Gray's recent testing of Student did not alter her recommendations as to how Student's learning needs should be addressed. Ms. Gray testified that what has changed however, is that in her 2007 evaluation and report, she "recommended" certain specialized services and educational structure, but in 2009 after re-testing and observing Student within the classroom, Student now "needs" what she recommended in 2007—that is, the importance of providing these services and structure has increased and become more clear over time. Testimony of Shubow.

63. In her testimony, Ms. Gray emphasized Student's combination of substantial learning deficits (particularly, auditory processing deficits) which result in his learning at a very slow pace. She explained that in order for education to be effective for Student, the pace of instruction and the amount of material being taught needs to be driven by how well Student obtains and retains instructional information. Ms. Gray emphasized that for Student, the class size always needs to be small and all of the children in all of his classes need to have similar learning profiles. Because of the severity of Student's multiple learning deficits (including, in particular, the combination of exceedingly slow processing speed and memory deficits), only this educational environment can deliver instruction at an appropriately slow pace with an appropriately small amount of content for Student, and it is only within this educational environment that the teacher is able to monitor and adjust the teaching in order to ensure that Student remains on task and continues to understand what is taught. Testimony of Gray.
64. Ms. Gray observed the Reach 3rd grade program in June 2009. Ms. Gray observed the literacy class of only special education Reach children and also the social studies class that is integrated with typical peers. Ms. Gray also observed the Reach program in October 2009 with Ms. Shubow. Ms. Fabiano testified that in October, Ms. Gray saw an accurate representation of the 4th grade Reach program that Student would have attended. Testimony of Gray, Fabiano.
65. Ms. Gray testified that she also reviewed sanitized IEPs of the children with whom Student would have been placed for 3rd and 4th grade. What was striking to Ms. Gray was that Student's language processing speed is at the 1% level compared to same-aged peers, while none of the children with whom Student would have been placed had any noted deficiencies regarding processing speed, likely indicating that their processing speed was within the average range or higher. Ms. Gray testified that the pace and content of the classes that she observed in June 2009 and October 2009 were at too high a level to be appropriate for Student—that is, there would have been too much information provided too quickly for Student to have good understanding. Ms. Gray also testified that Reach was not appropriate for Student because of the occasional large class size (part of the time for science and social studies, and all of the time for music and art) and being placed with regular education peers when he was taught these subjects. Ms. Gray testified that the recommended instructional level of text used by Student, where he would be expected to read and extract meaning from the text, would be between the 1st and 2nd grade levels. Testimony of Gray.

66. Ms. Gray observed Student at LPS in June 2009 and again on October 13, 2009. She found that the pace and content of the instruction in the LPS classes to be significantly different than at Reach and to be appropriate for Student. She found that Student kept pace with the class, was engaged, and had command of the concepts. She also noted that Student has a learning profile typical of the children whom she has referred to LPS. Testimony of Gray.

IV. DISCUSSION

A. Introduction

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)¹ and the Massachusetts special education statute.² The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."³ FAPE must be provided in the least restrictive environment.⁴

In addition to the federal standards included within the IDEA, FAPE is defined by the IDEA to include state educational standards, which may exceed the federal floor.⁵ The Massachusetts educational standards are found within state statute and state education regulations and includes a FAPE requirement.⁶

The IDEA does not require that the school district provide what is "best" for a student or what will maximize his educational potential.⁷ Rather, FAPE is intended to provide special

¹ 20 USC 1400 *et seq.*

² MGL c. 71B.

³ 20 USC 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A).

⁴ The phrase "least restrictive environment" means that, to the maximum extent appropriate for the particular student, the educational services are to be provided with other students who do not have a disability. 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); 20 USC 1412(a)(5)(A); MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

⁵ 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 127 S.Ct. 1994, 2000-2001 (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]"); *Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir. 1984) (states are "free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children"). *See also* Philip T.K. Daniel & Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education?*, 222 Educ. L. Rep. 515 (2007) (language of the 2004 Reauthorization of the IDEA as well as the implementing Regulations "likely implies that FAPE now requires more than mere access to a basic floor of opportunity and should be aligned with the high expectations in state educational standards").

⁶ MGL c. 71B, ss. 1, 2, 3.

⁷ *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."); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school

education and related services that allow a student to access public education.⁸ The Supreme Court has made clear that a student's access to public education must be "meaningful".⁹ State and federal special education laws and regulations further require that special education and related services be designed to result in progress that is "effective"¹⁰ and that develop a student's educational potential.¹¹ A student's progress is considered within the context of his own, particular potential or capacity to learn since "[i]t is clear that the 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."¹²

A student's right to FAPE is assured through the development and implementation of an individualized education program (IEP).¹³ The school district's IEP must be "custom tailored to address the handicapped child's unique needs in a way reasonably calculated to enable the child to receive [the requisite] educational benefits."¹⁴

to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.").

⁸ *Rowley*, 458 U.S. at 192 (1982) ("intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside").

⁹ *Rowley*, 458 U.S. at 192 ("in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"). See also *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 364 (2nd Cir. 2006) (IDEA requires a student to be provided with "meaningful access" to education); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) ("state must provide children with 'meaningful access' to public education"); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984) ("federal basic floor of meaningful, beneficial educational opportunity"), *aff'd* 471 U.S. 359 (1985); *DB v. Sutton*, 07-cv-40191-FDS (D.Mass. 2009): "meaningful progress ... is the hallmark of educational benefit under the [federal] statute").

¹⁰ *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F.Supp.2d 479, 489 (D.Mass. 2007) (educational program "must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs"), quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1090 (1st Cir. 1993) and *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); 603 CMR 28.05(4)(b) (IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) (defining *Progress effectively in the general education program*). See also 20 USC 1400(d)(4) (purposes of this title are . . . to assess, and ensure the effectiveness of, efforts to educate children with disabilities" (emphasis added). Similarly, Newton's proposed IEPs for Student are framed in terms of his receiving specially designed instruction and accommodations "necessary for the student to make effective progress." Exhibits P-8, P-9, P-10.

¹¹ 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."); 603 CMR 28.01(3) (purpose of regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential.").

¹² *Rowley*, 458 U.S. at 202. See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 2008 WL 484042 (1st Cir. 2008) ("levels of progress must be judged with respect to the potential of the particular child. So here: while the reported progress is modest by most standards, it is reasonable in the context of Stephanie's manifold disabilities and low IQ").

¹³ 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305, 311-12 (1988); *Rowley*, 458 U.S. at 182.

¹⁴ *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (internal quotations and citations omitted). See also 20 USC 1400(d)(1)(A) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); 20 USC 1401(9), (29) ("free appropriate public education" encompasses "special education and related services," including "specially designed instruction, at no cost to Parents, to meet the unique needs of a child with a disability"); *Honig v. DOE*, 484 U.S.

In sum, the issues presented in the instant dispute are whether Newton’s proposed IEPs are sufficiently tailored to address Student’s unique needs so that the proposed services and placement will likely result in meaningful access to public education and effective educational progress in the least restrictive environment; and if not, whether reimbursement of Parents’ expenses or prospective placement at LPS is warranted. As the moving party regarding all claims, Parents have the burden of persuading me regarding each of these issues.¹⁵

B. Reimbursement Regarding 3rd and 4th Grades

Parents have unilaterally placed Student at LPS for 3rd and 4th grades, and now seek reimbursement from Newton for their out-of-pocket expenses attributable to this placement. The essential, initial question when considering Parents’ claims for reimbursement pertaining to 3rd grade and part of the current 4th grade is whether Newton’s IEPs for this time period were reasonably calculated to provide Student with FAPE.

The vantage point from which the appropriateness of the IEPs is considered is central to the inquiry. An IEP is a “snapshot, not a retrospective.”¹⁶ Accordingly, when considering the appropriateness of an IEP, Newton’s actions are not to be “judged exclusively in hindsight.”¹⁷ The “IEP must take into account what was, and was not, objectively reasonable when the ... IEP was promulgated.”¹⁸ This does not preclude the admission of evidence acquired after the creation of the IEP—for example, information regarding Student’s subsequent progress or further evaluation of Student—provided that the evidence is used only to evaluate whether Newton’s IEP decisions were objectively reasonable at the time they were made.¹⁹

Student’s progress or further evaluations may also be relevant when determining the appropriateness of prospective special services and placement, and when determining the

305, 311 (1988) (FAPE must be tailored “to each child’s unique needs”); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 2008 WL 484042 (1st Cir. 2008) (noting the school district’s “obligation to devise a custom-tailored IEP”).

¹⁵ *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).

¹⁶ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (internal quotations omitted).

¹⁷ *Id.*

¹⁸ *Id.* See also *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir.1993).

¹⁹ *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 383 (2^d Cir.2003) (grades and test scores may qualify as objective evidence to evaluate the adequacy of an IEP that has purportedly failed to address a prior IEP’s alleged shortcomings); *Roland M.*, 910 F.2d at 991 (“actual educational results are relevant to determining the efficacy of educators’ policy choices”); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3rd Cir. 1995) (“Such [after-acquired] evidence may be considered only with respect to the *reasonableness* of the district’s decision at the time it was made.”). See also *Town of Burlington v. Department of Educ. for Com. of Mass.*, 736 F.2d 773, 790 (1st Cir. 1984), *aff’d* 471 U.S. 359 (1985) (“additional evidence” submitted subsequent to the close of the administrative hearing may include expert testimony for the purpose of “bringing the court up to date on the child’s progress from the time of the hearing to the trial”).

appropriateness of Parents' privately-obtained services. These issues will be addressed later in this Decision in parts IV D and E.

Student's IEP for 3rd grade was developed pursuant to an IEP Team meeting on April 7, 2008 (the spring of Student's 2nd grade year). The IEP Team meeting was held to review Parents' three private evaluations (neuropsychology, education, and audiology, discussed above) and to prepare a new IEP for 3rd grade. Previously, Parents had completed a fourth private evaluation—a speech-language evaluation conducted at Children's Hospital, Boston.

The recommendations from Parents' four private evaluations are described separately above in Facts, pars. 28-35 of this Decision. When these four evaluations are read together, they may be understood as recommending the following essential services and placement in order to appropriately address Student's special educational needs:

1. Student should be placed in a full-year, language-based program.²⁰
2. All instruction should be provided within small groups of students who have similar academic, cognitive, emotional, and social profiles.
3. Teachers in all subject areas should teach consistently with and reinforce the learning strategies used to develop Student's language skills, with the result that there is consistent, fully-integrated instruction across the curriculum.
4. There should be previewing of class lessons, highlighting of key concepts, slow presentation, and a significant amount of repetition, as well as on-going review throughout the year.
5. A multi-modal teaching approach should be used so that information is presented auditorily while being supported with visual, kinesthetic, and hands-on exercises.
6. Additional accommodations should include verbal instructions and directions presented in small segments and in a highly organized fashion, reduced or eliminated oral reading in the classroom, opportunity to provide oral answers, additional time and organizational assistance to formulate thoughts and ideas, and additional time to complete class work and tests.
7. Direct speech-language intervention should be provided to address development of listening skills, phonological awareness, oral and written language formulation, and social/pragmatic skills. There should also be a continuation of occupational therapy, physical therapy, and adaptive physical education.
8. Student's social skills deficits should be addressed through his educational program.
9. Academic instruction should be provided by teachers trained or certified in special education.

Exhibits P-1, P-2, P-3, P-5.

²⁰ In her testimony, Dr. Shaw insisted she was not recommending a language-based program. Nevertheless, it is not disputed by the parties that the components of the program that she recommended typically occur within a language-based program, and the placement that Dr. Shaw supported for Student (at LPS) is a language-based program.

At the time of the IEP meeting in April 2008, the IEP Team could reasonably conclude that the Reach program would likely be able to meet each of the above recommendations from Parents' four experts, except for the second-enumerated point—that is, the recommendation that all of Student's instruction would occur in small groups made up only of children with similar academic, cognitive, emotional, and social profiles. This recommendation would be met by Reach with respect to math and literacy instruction since this instruction would be provided only in a small group of Reach special education children, but the recommendation would not be met with respect to Student's other classes (social studies, science, art, music and library) where Student would be in a classroom of approximately 21 special education and regular education children.

At the outset, it is relevant to note that none of the written evaluation reports of Parents' four experts makes clear the relative importance of their many recommendations. The particular recommendation regarding small classes of similarly-situated peers simply appears as one of many recommendations as to how Student should be educated in order to address appropriately his special education needs. Thus, for example, the experts' reports do not explain what would be the educational implications of implementing all of the recommendations except this one—that is, whether Student would be unable to access the curriculum in a meaningful manner or would be unable to make effective progress if only this one particular recommendation were not followed. In addition, none of Parents' experts observed the Reach program until June 2009, and none of the experts provided any input to the IEP Team with respect to the appropriateness of the proposed Reach placement. Testimony of Gray, Shaw, Shubow; exhibits P-1, P-2, P-3, P-5.

As noted above in part IV A of this Decision, Newton need not provide the “best” educational program or even the program recommended by an expert, but rather only one that is reasonably calculated to allow Student to have meaningful access to public education so that Student can make effective educational progress.

In seeking to answer the question of whether placement at Reach would meet this standard notwithstanding that parts of the academic curriculum would be taught with regular education children, the IEP Team was able to draw upon Student's learning experiences within the then-current school year of 2nd grade. Although there was no live testimony from any of Student's 2nd grade educators, there are relatively comprehensive written reports explaining Student's educational progress and academic level. What can be gleaned from these reports is that Student made progress within certain areas of instruction, although Student continued to function at a relatively low academic level. At the same time, it is apparent from Mother's testimony, that Student found 2nd grade to be frustrating and difficult, with the result that he felt “stupid” and often did not want to go to school. Student's progress and difficulties during 2nd grade are described in greater detail, above, in Facts, pars. 22-24.

As compared to his 2nd grade services and placement, Student would receive significantly more support and structure at Reach, and, taken as a whole, the Reach program would be tailored to address his language-based learning deficits. At Reach, as compared to 2nd grade,

Student would receive literacy and math instruction within a small classroom with other special needs children only, and he would receive the remainder of his academic instruction in an integrated classroom that would be co-taught by a regular education teacher and aide, and a special education teacher. These relatively large groups for social studies and science instruction would often be broken down into three smaller, integrated groups of special education and regular education children, typically with the special education teacher working with the small group that includes the more involved special needs children. Importantly, all academic instruction at Reach would be provided through an entirely integrated program—that is, the special education instruction is integrated and reinforced throughout the entire curriculum—with all academic instruction taught or co-taught by special educators. The program has been designed for children with Student’s language-based learning deficits, and all of the children in the Reach program have language deficits, often combined with other learning difficulties. Children in the Reach program typically are one and one-half to two and one-half years behind their peers academically, as was Student. The proposed services and placement at Reach are described in greater detail above in Facts, pars. 36-46.

Within this context, I find that it was objectively reasonable for the IEP Team to conclude in April 2008 that Student would likely be able to gain meaningful access to the curriculum taught within the 3rd grade Reach program and that, as a result, he would likely make effective educational progress, thereby providing Student with FAPE.

When the IEP Team met again in March 2009 to consider Student’s IEP for the 4th grade, Student had been placed by Parents at LPS for his 3rd grade year. The Team had essentially no new information regarding Student’s needs and how they should be met. For the same reasons that the IEP developed in April 2008 may be considered, at that time, to have been reasonably calculated to provide FAPE, I find that it was objectively reasonable for the IEP Team to conclude in April 2009 that Student would likely be able to gain meaningful access to the curriculum and, as a result, he would likely make effective progress in 4th grade within the Reach program, and therefore this program would provide Student with FAPE.

Because I have found that, when written, the IEPs for 3rd and 4th grade were appropriate, Parents are not entitled to reimbursement for their expenses relevant to their unilateral placement of their son at LPS, regardless of whether LPS was an appropriate placement.

C. Reimbursement Regarding the Summer of 2009

Student’s IEP for 2nd, 3rd and 4th grades included proposed services for the summers of 2007, 2008, and 2009. Each of these IEPs stated that he would receive an extended year program due to substantial regression and all but one of the IEPs also stated that Student is enrolled in the Extended Year Program because of his special needs. For the summer of 2007, the IEP calls for an unspecified amount and duration of speech-language services. For the summers of 2008 and 2009, the IEPs called for speech-language services for a half hour, once per week for the following periods, respectively: 6/30/08 to 8/8/08, and 7/6/09 to 8/14/09). Speech-language services was intended to address Student’s social pragmatic deficits. For

each of the summers, the IEPs also called for academic services by a special education teacher for seven weeks as follows: 300 minutes each day from 7/05/08 to 8/20/08; 360 minutes each day from 6/23/08 to 8/8/08; and 180 minutes, four times per week, from 7/6/09 to 7/29/09. Testimony of Fabiano; exhibits P-8, P-9, P-10, S-51.

None of the IEPs in evidence specifically referenced Camp Chickami as the location of Student's summer placement. For the summers of 2007 and 2008, Newton had proposed that Student attend its own extended year program (which is an academic-based camp with direct instruction in reading, language arts, and math in a classroom) rather than Camp Chickami. Nevertheless, Newton agreed to fund a summer placement at Camp Chickami for each of these two summers.

Newton agreed to Camp Chickami for the summer of 2007 because no nurse was available to be with Student in its own extended year program. Because of Student's history of seizures, he needed to have a nurse nearby at camp. Parents' choice of Camp Chickami included a nurse. Testimony of Fabiano, Mother.

Newton again agreed to fund Camp Chickami for the summer of 2008. Apparently Newton believed it was required to fund this camp because of stay put or because of Newton's administrative error. However, Newton did not believe that Camp Chickami was an appropriate summer placement for Student. Testimony of Mother, Fabiano.

For the summer of 2009, Newton proposed through the IEP process and its IEP the Newton extended year program, as it had for the previous two summers. Parents declined to send their son to Newton's proposed summer services and, instead, privately placed Student at Camp Chickami after claiming, through a May 12, 2009 letter to Newton, that Parents were exercising their stay put rights to have Newton fund Camp Chickami, as Newton had done over the past two summers. Newton responded by letter of May 22, 2009, taking the position that stay put rights applied only to Student's services and not to the particular vendor that would provide those services, and that none of Student's IEPs specify a particular vendor or setting where the services are to be delivered. Testimony of Mother; exhibits P-27, S-31.

At the evidentiary hearing in the instant dispute, Parents provided no probative evidence that would demonstrate that Newton's proposed extended year services for the summer of 2009, as reflected within its IEP, were inappropriate. Parents' only argument in favor of a right to reimbursement is that Newton was required to place Student at Camp Chickami because of the law regarding stay put.²¹

The federal statute provides the following language, setting forth Parents' stay put rights:

²¹ Parents rely on stay put principles within state special education regulations (603 CMR 28.08(7)) and under federal special education law (20 USC 1415(j)). The language within each requirement is substantially the same, and I will therefore discuss this issue within the context of the federal requirement. I note that the federal stay put requirement has been interpreted by the federal courts, as compared to the state regulatory requirement, which has not been interpreted by the courts.

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.²²

The essential phrase, “then current placement”, is not explained within federal law or regulation and has been defined by courts in different ways.²³ But, it seems clear that the purpose of this phrase, and the law in general, is “to preserve the status quo pending resolution of challenge proceedings under the IDEA.”²⁴

Parents’ argument is that since Newton agreed to place Student at Camp Chickami for the previous two summers, because this was done pursuant to Student’s right to summer services under an IEP, and because Camp Chickami is clearly a “placement”, Camp Chickami is the status quo placement, which stay put protects.

An initial question is whether rights under stay put extend only to the services themselves, or also to the location within which those services are provided. Newton takes the position that because the dispute regards the *location* of the summer services (that is, the location of Camp Chickami as compared to the location of Newton’s own extended year services), stay put does not apply.

As a general rule, Newton is correct that a change in location is not, by itself, considered a change in placement and accordingly, does not implicate stay put rights.²⁵ However, there may be circumstances when a change in location will, effectively, change the Student’s placement (and therefore be precluded by stay put) because the change would substantively dilute the quality of a student’s education.²⁶ To establish that a change in location is also a

²² 20 USC § 1415 (j). See also 34 CFR §300.518 (“Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.”).

²³ *Mackey ex rel. Thomas M. v. Board of Educ. For Arlington Central School Dist.*, 386 F.3d 158, 163 (2nd Cir. 2004) and cases cited therein.

²⁴ *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3 (1st Cir. 1999).

²⁵ In its comments to the 2004 special education regulations, the federal Department of Education explained its view that placement should be distinguished from the actual location where services are to be provided. 71 Federal Register no. 156, p. 46588 (August 14, 2006). See also, e.g., *Sherri A.D. v. Kirby*, 975 F.2d 193, 199 n.5 and 206 (5th Cir. 1992) (“educational placement” not a place but a program of services); *Weil v. Board of Elementary and Secondary Educ.*, 931 F.2d 1069, 1072 (5th Cir. 1991) (change of schools under the circumstances presented in this case not a change in “educational placement”).

²⁶ The 4th Circuit provided the following useful explanation in *AW v. Fairfax County School Board*, 372 F.3d 674, 682 (4th Cir. 2004):

Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term “educational placement” is not the location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student’s original assignment and is consistent with the principles of “mainstreaming” and affording access to a

change of placement for purposes of stay put, factual evidence must be presented relative to the differences in services as a result of a change of location and the educational implications of those differences.

Within each setting in the instant dispute (Newton's own extended year program and Camp Chickami), Student would receive special education academic instruction, as well as assistance with his social pragmatic deficits. There was no probative evidence addressing the question of what, if any, diminution of educational services or benefits would occur by Student's being placed within Newton's own extended year program as compared to Camp Chickami. (None of Parents' three experts addressed this question.)

Arguably, Student would receive certain benefits from being with typical peers during the recreational portions of Camp Chickami and those benefits may not occur within Newton's own program which did not include a recreational component and did not include typical peers. However, none of the special education and related services at Camp Chickami would occur with typical peers, and there was no probative evidence regarding the educational benefits, if any, of Student's attending a recreational camp with typical children. I also note that recreational services, without more, are not considered an educational extended year program.²⁷

In the instant dispute, Parents have the burden of persuasion regarding reimbursement for summer services. They have not met this burden because they have provided no probative evidence to support their argument that a change in location from Camp Chickami to Newton's extended year program was a change of placement for purposes of stay put law. For these reasons, Parents are not entitled to reimbursement for their expenses relative to Camp Chickami.

D. Current and Prospective Placement

I have determined above in part IV B that Newton's proposed IEPs for 3rd and 4th grades, when written, were reasonably calculated to provide Student with a free appropriate public education. This determination was made on the basis of what the IEP Team considered or

FAPE, the goal of protecting the student's "educational placement" served by the "stay-put" provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.

See also *In re: Educ. Assignment of Joseph R.*, 318 F. App'x 113, 119 (3rd Cir. 2009) (what constitutes a "change in educational placement" is fact specific and depends upon whether the change is "likely to affect in some significant way the child's learning experience"), quoting *DeLeon v. Susquehanna Community Sch. Dist.*, 747 F.2d 148, 153 (3^d Cir.1984); *Madison Metropolitan School Dist. v. P.R. ex rel. Teresa R.*, 598 F.Supp.2d 938 (W.D. Wisc. 2009) ("Because the location determination can be a critical element in determining whether an individualized education program is an adequate offer of a free appropriate public education, ... the administrative law judge correctly addressed P.R.'s physical placement or location as a critical element of his overall educational placement determination.").

²⁷ 603 CMR 28.05(4)(d)4 ("recreation programs provided solely for recreational purposes and with no corresponding IEP goals or specially designed instruction shall not be considered extended year programs").

objectively should have considered in April of 2008 and March of 2009 when the proposed IEPs for 3rd and 4th grades, respectively, were promulgated.

In October 2009 (that is, more than six months after the March 2009 Team meeting) when this case went to hearing, there was substantial, new information regarding Student's educational needs and whether those needs could be appropriately met within Newton's Reach program. This information had not come to Newton through updated evaluation reports or other written documents, but rather was presented, for the first time, at hearing through testimony of Parents' three expert witnesses. Their re-evaluations, observations, and testimony are summarized above in Facts, pars. 53-66, and will be referenced below where relevant to the discussion.

Parents' three experts had each conducted a comprehensive evaluation of Student in the fall of 2007 or winter of 2008, and written evaluation reports were submitted to and considered by Newton, as discussed above, when Newton proposed the 3rd grade IEP in April 2008. None of these experts observed Student within an educational environment, observed Reach, or re-evaluated Student until well after the March 2009 IEP Team. In June 2009, two of Parents' experts (Shaw, Gray) observed the Reach program and then in October 2009, all three of Parents' experts observed the Reach 4th grade program. Each of the experts also re-evaluated Student in September or October 2009 in anticipation of the hearing. The three experts also observed Student at LPS in October 2009. By the date of the hearing in the instant dispute, none of Parents' experts had produced a written evaluation or observation report reflecting these recent re-evaluations and observations. Testimony of Shaw, Gray, Shubow. See also Facts, pars. 29, 53-66.

In their testimony, Parents' experts noted difficulties with the structure of the Reach program as it would pertain to Student. None of these experts doubted that Reach is an excellent program, that its teachers are skilled and experienced, and that it can successfully educate many children with language-based learning deficits. However, a principal concern of Parents' experts was that, for Student and his unique combination of learning needs, the Reach program would not be appropriate because parts of every day would include large classes integrated with regular and special education children. These classes (which include science, social studies, and the specials) are typically comprised of approximately 21 children and are sometimes taught in a very large classroom. Even when these classes are broken down into small groups, they may be taught within a large room where others are occasionally coming and goings of other children, and the small group instruction continues to include regular education children. Testimony of Shaw, Gray, Shubow. See also Facts, pars. 55, 56, 59, 60, 63, 65.

The testimony of Dr. Shaw, Ms. Gray, and Ms. Shubow was persuasive that Student would have substantial difficulty accessing instruction provided within the above-described structure of the 4th grade placement at Reach. The mix of regular and special education children would result in Student's being taught with children who are far superior to him academically. For example, Dr. Shaw testified persuasively that the difference between Student's reading level and the reading level of some of the general education students would

make the learning environment very challenging for Student. In addition and most importantly, because of the severity and complexity of Student's learning needs (including his exceptionally slow learning speed and his memory deficits), Student's learning abilities and needs would be substantially different than many of his peers. Testimony of Shaw, Gray, Shubow. See also Facts, pars. 55, 56, 59, 60, 63, 65.

This concern was expressed particularly with the integrated classes of science and social studies by all three of Parents' experts, but Parents' experts also doubted Student's ability to access the curriculum even in those classes composed only of special education students. Ms. Gray reviewed sanitized IEPs of the children who would be Student's special education peers within the 4th grade at Reach. She noted that these IEPs indicated that none of the special needs children currently in the 4th grade Reach program had a deficit regarding auditory processing (Newton did not rebut this testimony), while Student's auditory processing skills were extremely poor—at approximately the 1% level, as compared to peers of his age. Ms. Gray, who is an education consultant, testified persuasively that the Reach 4th grade was being taught at a pace and content that Student would not be able to access in a meaningful way, even during those classes when Student would be taught only with other special education children. Testimony of Gray. See also Facts, pars. 55, 56, 59, 60, 63, 65.

Dr. Shaw also testified persuasively that even where Student would be placed only with special education children, for example in math (where Dr. Shaw found the pacing of instruction to be appropriate), the level of the material being taught exceeded Student's ability to understand. As a result, Student would not be able to meaningfully access the curriculum being taught to special needs children. Testimony of Shaw. See also Facts, par. 55.

Ms. Shubow, who specializes in auditory processing deficits, testified persuasively that the social studies lesson she observed at Reach provided an "enormous" amount of information that was presented quickly to the children. Even within the literacy class of only special needs children, Ms. Shubow found that the teacher was rapidly teaching a complex lesson. Ms. Shubow testified that Student would likely be able to understand only bits and pieces of the instruction within the Reach 4th grade because of his extreme difficulty accessing information as a result of his auditory processing deficits. When asked whether it would make a difference if Student were to receive substantial amounts of previewing and reviewing of material, Ms. Shubow explained that although previewing and reviewing were essential components of an appropriate educational program for Student, they should be understood as "band aides" rather than a way for Student to understand the instruction. She therefore concluded that even with appropriate accommodations and supports, Student would likely miss a substantial amount of information taught in the 4th grade at the Reach program. Testimony of Shubow. See also Facts, pars. 59, 60.

Parents' experts have also observed Student at LPS. They found that in Student's LPS classes, the pace and content of instruction (which they believed to be appropriate for Student and resulted in his being engaged in his learning) was substantially different than what they observed at the Reach program. All three experts concluded that the learning

differences between Student and his Reach regular and special education classmates were simply too great to comport with an essential recommendation—that is, that there be appropriate grouping of similarly-learning children so that the instruction will be appropriate for Student and can be accessed by Student in a meaningful manner. Testimony of Shaw, Gray, Shubow. See also Facts, pars. 55, 56, 59, 60, 63, 65.

Ms. Gray and Dr. Shaw also testified as to the importance of Student's receiving educational services that allow him to be and feel successful. Dr. Shaw testified persuasively that given Student's acute sensitivity to becoming frustrated in school (and frustration in learning leads to Student's shutting down or becoming inappropriately silly), he needs to be placed only with other children who learn in a manner consistent with his. Student's literacy teacher at LPS during 3rd and 4th grades (Ms. Malliaros) also testified persuasively that it was essential that Student be placed with other children who were at his skill level and who required teaching at the same slow pace so that Student would not actually be (or feel) singled out as inferior to the other children. She found this to be essential to building his self-esteem and confidence, which in turn are important ingredients to his being engaged and motivated in learning. Testimony of Malliaros, Shaw, Gray, Mother. See also Facts, pars. 10, 16, 56.

LPS staff found that when Student arrived at LPS for 3rd grade, after learning with regular education children during 2nd grade, he was essentially a passive participant who was afraid to answer a question in the classroom because he felt that he was "stupid". Testimony of Foster, Malliaros. Similarly, in the Reach program, Student would be comparing himself to his regular education classmates who are far superior to him academically. Testimony of Shaw, Gray. I find that Student would likely feel frustrated and inadequate, which in turn would likely result in his becoming disengaged from the learning process, as occurred by the end of 2nd grade within the Newton schools. Student is highly inquisitive, and he loves to learn. Testimony of Shaw, Gray, Malliaros, Mother. See also Facts, pars. 2, 6, 9. I find that Student's becoming disengaged in the learning process would likely reduce substantially his potential to learn.

In addition, the relatively large size of the classes (both the large numbers of students and the large classroom space with comings and goings of others) and the fact that there would, at times, be different lessons being taught to different groups within the same classroom, would likely be far too distracting for Student. Student is highly inquisitive, wanting to know what others are doing, and he is also easily distracted by people or activities that are unrelated to what he is supposed to be doing. Parents' experts testified persuasively, and I so find, that Student would not likely make effective progress within this educational structure. Testimony of Shaw, Gray, Shubow, Mother. See also Facts, pars. 55, 59, 60, 63, 65.

Finally, I note the urgency of providing Student with appropriate services at this time. Dr. Shaw's and Ms. Gray's re-evaluations in 2009 demonstrated that in certain test areas, Student actually declined compared to 2007. Ms. Gray testified that what she proposed for Student in her 2007 evaluation may be considered only "recommendations" regarding his educational services and placement, but what she proposed for Student in her 2009 re-evaluation (which were essentially the same as those from 2009) have greater urgency and a

higher need because of Student's failure to gain ground, and in some instances his losing ground, since 2007. Newton does not dispute that Student's learning needs have increased over time. Testimony of Fabiano, Gray, Shaw. See also Facts, pars. 53, 62.

Student's educational experience to date, together with the evaluations and testimony of Parents' experts, demonstrates that Student's special education and related services need to be more closely tailored to his unique educational needs than would be possible within the Reach program. The clear weight of the testimony in this dispute was that the Reach program, as constituted, is simply not an appropriate fit for Student. To become appropriate, there would have to be fundamental changes to the instruction and structure of the Reach 4th grade program, and Newton has not argued that such changes could or should be made. Simply stated, the pace and content of instruction, which presumably are appropriate for the current 4th grade Reach students, are far above Student's abilities to access the instruction, and the basic structure of integrated and large classes would place too high a hurdle for Student to gain meaningful access to his education, regardless of what additional supports might be provided.

Newton provided two witnesses who took the position that Reach currently is appropriate for Student. However for reasons explained below, I find their testimony to be less persuasive than the testimony of Parents' experts.

One of the two Newton witnesses was Ms. Georgian-Cohen, who is a Reach 3rd grade teacher. Ms. Georgian-Cohen has an extensive understanding of the Reach program, and she is a highly experienced teacher. However, she had not observed or evaluated Student, nor had she read any of Student's evaluations. She testified that although she was aware that Student has central auditory processing deficits, she was not aware of the extent of these deficits. Testimony of Georgian-Cohen. As discussed above, the extent of Student's auditory processing deficits is central to the question of whether the pace and content of instruction within the Reach program are appropriate for Student. I find that Ms. Georgian-Cohen did not have sufficient basis for rendering an informed opinion on the appropriateness of Reach as a placement for Student.

The other Newton witness who testified that Reach would be an appropriate program for Student was Ms. Fabiano, a Newton Co-Director of Elementary Student Services. Ms. Fabiano is familiar with Reach through her supervision and occasional observations of this program, and she has gained an understanding of Student through her observation of him at LPS and her review of records, including his evaluations. Testimony of Fabiano. Ms. Fabiano was a well-informed, articulate, bright, and credible witness. But, Ms. Fabiano has not evaluated or taught Student, and her experience is substantially less (in terms of number of years evaluating children and recommending services, as well as the breadth of her experience) as compared to the combined experience of Parents' experts. Importantly, Ms. Fabiano did not effectively rebut the serious and substantial concerns of each of Parents' experts that Student would be unable to access the Reach-taught curriculum in a meaningful manner because of the severity and complexity of his learning profile. For these reasons, I found Ms. Fabiano's testimony to be credible but less persuasive than that of Parents' experts

regarding the question of the appropriateness of Reach as a current and prospective placement for Student. Testimony of Fabiano, Gray, Shaw, Shubow; exhibits P-1, P-2, P-3, S-39 (resumes).

As discussed above in part IV A of this Decision, Student's IEP must be custom-tailored to address his unique needs so as to allow him to gain meaningful access to public education, with the result that he would likely be able to make effective educational progress. The clear weight of current evidence makes it apparent that Newton's currently-proposed IEP does not now meet this standard and cannot be modified to meet this standard. Accordingly, the Reach program is not an appropriate current or prospective placement for Student.

For these reasons, I find that Newton's currently proposed IEP for 4th grade is not reasonably calculated to provide Student with FAPE, and that adjustments or modifications cannot be made to the IEP to make it appropriate.

E. Learning Prep School

Having concluded that Newton's current IEP for the 4th grade is no longer appropriate and cannot be made appropriate, I consider the question of whether LPS is an appropriate current and prospective placement for Student.

All students at LPS have learning and language disabilities, and they often have additional deficits that impact upon their learning, including for example, seizures, dyslexia, and social skills deficits. Throughout its curriculum, LPS utilizes multi-modal instruction that is structured and repetitive (through preview and review). Learning through these strategies is integrated throughout the school day. LPS's mission is to make children independent learners and become part of the community. Testimony of Foster, Fabiano; exhibits P-15, S-34.

Every day, each LPS student receives two periods of reading instruction, which follows systematic structure with scope and sequencing, utilizing a controlled text. Teachers are continually monitoring the students to ensure that each student understands what he or she is reading. The content of social studies and science follows Massachusetts Curriculum Frameworks, with the amount and presentation of content modified so it is appropriate for the students in the particular classroom. Testimony of Foster, Fabiano; exhibits P-15, S-34.

All LPS teachers are trained in the use of thinking maps. Thinking maps are used in all LPS classes to assist students to organize, understand, integrate and retrieve what they are learning. Thinking maps, which also are used throughout the Reach program, are visual tools for understanding and mastering various ways of thinking (for example, defining, describing, comparing/contrasting, and establishing relationships). Wilson Reading program and Touch Math programs have been used with Student. Testimony of Foster, Fabiano; exhibits P-15, S-34.

All teachers at LPS are trained in assisting children with their social skills. There is an emphasis on helping all children to develop their self-esteem and to not give up or feel defeated. To foster this, all children are placed with other students who have similar learning needs, so that no child feels singled out as a poor student. All teachers are trained in Crisis Prevention Intervention techniques. There is on-going training for all LPS teachers in language processing and decoding so that even the social studies and science teachers are aware of the reading methodology that is taught at LPS. This allows there to be consistency across the curriculum regarding knowledge of the learning difficulties of the students and the reading methodologies that are being taught to all children. Testimony of Foster.

During the current school year, all of Student's teachers at LPS are certified, except for two teachers. Student's reading/language arts teacher (Ms. Malliaros) is one course away from certification (she expects to complete this course in December 2009), and she has received a waiver of certification from the Massachusetts Department of Elementary and Secondary Education (DESE). Ms. Malliaros has a master's degree in education and has received a three-day course of instruction in the Wilson Reading program. Student's math teacher has a master's degree in special education but is not certified. All of Student's teachers are observed and supervised by Gail O'Mara who is certified and has approximately 40 years teaching experience. Testimony of Foster, Malliaros; exhibits P-23, P-24, S-47, S-48, S-52.

The Massachusetts Department of Elementary and Secondary Education has certified LPS as a private special education school in Massachusetts. Approximately 80% of LPS students are funded publicly through placement by a school district. One such school district that has placed and funded students at LPS (and that continues to do so) is the Newton Public Schools. Testimony of Foster, Fabiano.

At the beginning of Student's 3rd grade at LPS (August 2008 when Student first entered the school), LPS staff administered to Student the WADE assessment to determine his phonological awareness and de-coding skills. The assessment found that Student could de-code isolated sounds of consonants and vowels, but he had difficulty with blending sounds—for example, a consonant, vowel, consonant. Consequently, Student needed to start at the very beginning of the Wilson Reading program (step 1.1). Wilson is a program that has 12 steps, which a student progresses through for purposes of learning de-coding skills. By the end of the 3rd grade year, Student was working at step 2.1 of the Wilson Reading program and was beginning to read connected texts, indicating meaningful gains made in de-coding skills. Testimony of Malliaros.

At the beginning of 3rd grade, Student was reading below 1st grade instructional level, while by the end of the school year, he was reading at the instructional level of grade 2.5. At the beginning of the 3rd grade school year, Student could not even copy information from the white board at the front of the classroom; he learned to do this over the course of the school year. Student also made progress in math last year. He began the year at the kindergarten level, with no concept of numbers, but gained significant understanding of numbers over the course of the 3rd grade school year. Student also made progress regarding social pragmatics.

The LPS written progress reports indicated that, in general, Student has been making slow, steady progress. Testimony of Malliaros, Foster; exhibits P-16, P-17, P-18, S-29, S-30.

At the beginning of this school year (4th grade), Ms. Malliaros re-administered the WADE assessment, and she found that Student had retained all of his skills from the end of 3rd grade, and there had therefore not been regression over the summer. For example, Student continued to be able to read at the instruction level of grade 2.5 (or slightly higher), and he was at step 2.1 in the Wilson Reading program. Testimony of Malliaros.

Student's progress so far this year in 4th grade is consistent with the progress he made at LPS during 3rd grade. Testimony of Malliaros.

At the beginning of 3rd grade, Student had poor self-esteem and was reluctant to participate in school. He had a very negative attitude towards himself, believing that he was "stupid" and "no good". Essentially, Student was a passive participant who was afraid to answer a question in the classroom. He needed a great deal of support and encouragement. Testimony of Malliaros, Foster.

Slowly, these attitudes have changed while he has been at LPS. Over the course of the 3rd grade school year, Student grew more enthusiastic about learning and participating, and this year (4th grade), he is even more so. He is now an enthusiastic and active participant in the classroom and at school. He is engaged and not distracted in the classroom. Student is also now beginning to ask for help when he needs it—something that he had not done when he arrived at LPS. Mother testified that, for the first time, Student enjoys reading because reading allows him to learn. Student is highly motivated to learn and is slowly becoming an independent learner. Testimony of Malliaros, Foster, Mother.

Parents' three experts (Gray, Shaw, Shubow) observed Student at LPS in June 2009 or October 13, 2009. They found the pace and content of the instruction in the LPS classes to be appropriate for Student; they noted that Student kept pace with the class, was engaged, and had command of the concepts. They testified as to the appropriate size of all of Student's classes and the consistent structure (for example, use of thinking maps) during his classes. Ms. Gray also testified that Student has a learning profile typical of the children whom she has referred to LPS. Testimony of Gray, Shaw, Shubow.

In sum, the undisputed testimony of Parents' three experts and the two LPS staff was that Student was accessing the curriculum in a meaningful manner. I further find, on the basis of the testimony of the two LPS staff and written progress reports, that, as a result, Student has made and is continuing to make effective educational progress at LPS. Testimony of Malliaros, Foster; exhibits P-16, P-17, P-18, S-29, S-30.

Through the testimony of Ms. Fabiano, Newton criticized Student's 4th grade program at LPS, finding that it lacked many of the essential components of an appropriate educational placement for Student. Ms. Fabiano based her criticisms on her observation of Student at LPS on October 8, 2009, as well as her review of documents from LPS. Ms. Fabiano also

compared what she observed and reviewed regarding Student's 4th grade at LPS with teaching done at Reach. Testimony of Fabiano.

During Student's reading class (with Ms. Malliaros) that Ms. Fabiano observed, Ms. Fabiano noted that Student participated and that the teacher used a thinking map, but Ms. Fabiano testified that the teacher did not provide any reading (or other) specialized instruction during the class. Similarly with English language arts, Ms. Fabiano testified that during the class that she observed there was no attempt to provide specialized instruction or to apply reading strategies. Ms. Fabiano testified that she also observed Student's social studies class at LPS and found the teacher to be very passive, no language or reading strategies were taught or reinforced, and the instruction was teacher-focused. In contrast, Ms. Fabiano observed a Reach 4th grade social studies class that used a similar text and was much more interactive and organized, and during the class the students used decoding strategies. Ms. Fabiano expressed an overall concern that application of decoding strategies must be integrated into reading in different contexts in order to solidify Student's skills in this area, but she saw no indication that this was being done at LPS within any context. Testimony of Fabiano; exhibit S-10.

Ms. Fabiano also testified that she compared Student's work from 2nd grade, when Student was in the Newton schools, with his work in 3rd grade at LPS. She expressed concern that Student's 3rd grade work at LPS was at the same or lower level than his work during the previous school year. Ms. Fabiano also explained that a comparison of the work done indicated that LPS teachers were not using appropriate instruction techniques for Student. Finally, Ms. Fabiano testified that she found Student's 3rd and 4th grade teachers at LPS to be lacking sufficient academic training and work experience to be considered highly qualified special education teachers who would be able to work effectively with a child with Student's combination of significant learning deficits. Testimony of Fabiano; exhibits S-4, S-5, S-6, S-25, S-26, S-27, S-47, S-48, S-49, S-50, P-23, P-24.

Through Ms. Fabiano's testimony, Newton has presented serious concerns regarding the quality of instruction at LPS. Ms. Fabiano compared the teachers and instruction at Reach and those at LPS. It may be, as Ms. Fabiano testified and as Newton has argued, that the teachers and the specialized instruction within the Reach program are superior to that provided at LPS in 4th grade and that there is substantial room for improvement at LPS. Testimony of Fabiano; exhibits S-41, S-42, S-43.

However, even if I were to accept all of these criticisms to be accurate, I am persuaded that LPS is an appropriate placement for Student at this time. My inquiry is focused less on either the quality of the instruction or the qualifications of the teachers, and more on whether LPS provides Student with an appropriate educational model, whether Student's LPS peers have similar learning needs, whether his teachers are able to provide the specialized instruction called for by Parents' experts, and whether Student is receiving relevant instruction that he is able to access in a meaningful manner.

LPS has been established solely for the purpose of educating children with language-based learning disabilities, combined with other learning deficits. Student has been placed with peers who have similar learning deficits so that the pace and content of instruction within the classroom is appropriate for Student. All classes are small, and there is consistency of instruction and support throughout the curriculum. It is undisputed that Student is accessing the LPS curriculum in a meaningful manner. And, to a very substantial degree, LPS satisfies the essential recommendations of Parents' three experts—each of these experts observed Student at LPS and testified in favor of Student's continued placement there. Testimony of Foster, Malliaros, Gray, Shaw, Shubow.

Perhaps most important to this analysis is the progress that Student has made during the course of 3rd grade, which progress continues in 4th grade, as discussed in detail above. I find that at LPS, Student has been making effective progress commensurate with his learning potential, and this progress is likely to continue. Testimony of Foster, Malliaros, Gray, Shaw; exhibits P-16, P-17, P-18, S-29, S-30.

This finding of effective progress at LPS is not effectively rebutted by Ms. Fabiano's testimony (that in 3rd grade at LPS, Student was working at the same or lower level as he was working in 2nd grade at Newton) since Student often failed to retain what he was taught while attending the Newton schools. In contrast, testing by LPS demonstrated that Student retained what he had learned during 3rd grade at LPS when he entered 4th grade. I find that for Student in particular, retention of learned material is an important benchmark of success at LPS. Testimony of Foster, Malliaros, Gray, Shaw, Mother. See Facts, par. 23.

At LPS, Student is an engaged and enthusiastic learner, which was not the case in 2nd grade within the Newton schools. Parents' experts were persuasive, and I so find, that this learning attitude is of central importance for Student to make effective progress and to continue to improve his potential to learn, particularly because, by nature, Student is highly inquisitive and loves to learn. Testimony of Foster, Malliaros, Gray, Shaw.

In sum, the evidence is persuasive that Student is accessing the LPS curriculum in a meaningful manner, with the result that he is making effective progress and is likely to continue doing so. Whether this progress could be greater with different teachers or different instruction is irrelevant.

For these reasons, I find LPS to be an appropriate current and prospective placement for Student.²⁸

²⁸ Newton also criticized LPS for not having an extended year program. Newton has correctly noted that Parents' experts have opined that Student should be provided extended year services and LPS does not have such services. The current IEP extends only to March 2010. Exhibits P-1, P-2, P-10. The IEP Team will need to re-convene in the late winter or early spring of 2010 to determine Student's need, if any, for extended year services for the summer of 2010, and how any such need should be addressed. There was no evidence that would support the conclusion that extended year services, if needed for 2010, must be provided by the same school that provides the academic year services. For these reasons, I find Newton's criticism to be misplaced.

ORDER

The two IEPs in dispute in this case for 3rd and 4th grades were, when promulgated, reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

The IEP for the period March 30, 2009 to March 25, 2010 proposed appropriate services for Student for the summer of 2009. Student's stay-put summer placement does not include Camp Chickami.

Accordingly, Newton has no obligation to reimburse Parents for their expenses relative to their placement of Student at LPS to date, or at Camp Chickami for the summer of 2009.

The IEP currently proposed by Newton (covering the period March 30, 2009 to March 25, 2010) is no longer reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment, and additions or other modifications cannot be made to the IEP in order to satisfy this standard. Placement at Learning Prep School (LPS) satisfies this standard.

Accordingly, Newton shall immediately amend its current IEP to provide for placement of Student at LPS and shall fund Student's LPS placement from the date of this Decision.

By the Hearing Officer,

William Crane
Dated: November 20, 2009

**COMMONWEALTH OF MASSACHUSETTS
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.