

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

**In Re:** Student v.  
Westford Public Schools

**BSEA # 11-0373**

**DECISION**

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

Parents requested a Hearing in the above-referenced matter on July 13, 2010. A Pre-Hearing Conference was held on September 8, 2010, and proceeded to Hearing on November 17, 18 and 19, 2010, at the Bureau of Special Education Appeals, 75 Pleasant St., Malden, Massachusetts. Those present for all or part of the proceedings were:

Student's mother	
Student's father	
Sean Goguen, Esq.	Attorney for Parent/Student
Thomas Nuttall, Esq.	Attorney for Westford Public Schools
Kathryn Garcia	Team Chairperson, Westford Public Schools
Honore Weiner	Educational Consultant, Westford Public Schools
Margaret Rich	Special Education Teacher, Westford Public Schools
Beverly Zambarano	Special Education Teacher, Westford Public Schools
Dianna Fulreader	Adjustment Counselor, Westford Public Schools
Mindy Peters	General Education Teacher, Westford Public Schools
Elaine A. Lord	Educational Advocate
Susan M. Brefach, Ed.D.	Psychologist, Independent Evaluator
Gerri Feuer Shubow, M.S., CCC-A	Audiologist
Dianne Pelletier	Director of Pupil Services, Westford Public Schools
Lisa McManus	Learning Skills Academy
Sean Kotkowski	Learning Skills Academy

The official record of the hearing consists of documents submitted by Parents, and marked as exhibits PE-1 through PE-16 and PE-18 to PE-36, and Westford Public

Schools, marked as exhibits SE-1 through SE-53; recorded oral testimony and written closing arguments<sup>1</sup>. The record closed on December 6, 2010.

### **HEARING ISSUES:**

1. Whether the IEP promulgated by Westford Public Schools (Westford) in December 2009, and amended in June 2010, covering the period December 2009-December 2010, was reasonably calculated to offer Student a free and appropriate public education (FAPE) consistent with state and federal law? If not;
2. Whether Parents are entitled to reimbursement for their unilateral placement of Student at Learning Skills Academy, with transportation and associated expenses, for the period from August 2010 to December 2010?

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

#### **Parents' Position:**

Parents seek reimbursement for their unilateral placement of Student at the Learning Skills Academy for the period from August 2010 to December 2010. They state that Student presents with a complex profile and profound learning disabilities that affect the way she thinks and learns. Parents state that Student's December 2009-2010 IEP failed to offer a FAPE and did not provide her with the intensive specialized programming required to address her math, organization, comprehension and social pragmatics deficits. According to Parents, Student sat in silent confusion, failing to make effective progress, and falling further behind. She was becoming increasingly anxious and more socially isolated in the mainstream setting where she became the subject of bullying. Believing that Student required a more intensive and specialized educational program, Parents rejected the proposed IEP and placed Student at Learning Skills Academy (LSA) starting in August 2010. According to Parents, in contrast to the experience at Westford, Student has there demonstrated notable improvement in her current, small group placement with increased individualized attention. LSA is a language-based, private school in New Hampshire.

Parents seek reimbursement for all out-of-pocket expenses associated with Student's placement at LSA from the date of her unilateral placement in August 2010 through December 2010, the expiration date of her current IEP.

#### **Westford's Position:**

Westford does not dispute Student's eligibility to receive special education services due to her Non-Verbal Learning Disorder, Central Auditory Processing Disorder, and

---

<sup>1</sup> At the hearing, the Parties agreed to file their written closing arguments on December 3, 2010. Thereafter, they agreed to postpone the filing until December 6, 2010.

seizure disorder, which impact her reading comprehension, organization, math and social pragmatics skills. Similarly, Westford does not dispute the levels of Student's academic performance or areas of weaknesses. Westford however, denies Parents' allegations of lack of progress and instead asserts that Student, who is of solid average intelligence, made effective progress in her sixth grade inclusion program. Westford relies on Student's grades, progress reports and teacher reports regarding Student's involvement and participation in class to support its position. As such, Westford asserts that Student's deficits have been and can continue to be properly addressed in Westford through the IEP covering the period from December 2009 to December 2010.

Westford further argues that the proposed program at Westford Middle School comports with the recommendations made by Parents' expert witness and thus, would have continued to offer Student a FAPE had she remained in Westford. It further states that the program at LSA is overly restrictive and insufficiently challenging for Student. Additionally, it states that the lack of exposure to typically developing peers is a detriment to Student. Furthermore, Westford challenges the staff's credentials, training and certification to address Student's needs.

#### **FINDINGS OF FACT:**

1. Student is a thirteen-year-old seventh grader who resides with her parents in Westford, Massachusetts. She has been diagnosed with Non-Verbal Learning Disability (NVLD), Central Auditory Processing Disorder (CAPD) and autosomal dominant nocturnal frontal lobe epilepsy, which causes nocturnal seizures (PE-20; PE-1A; PE-2A; PE-3A). Student also has thyroid problems and seasonal allergies. She takes multiple medications which only partially control her medical issues (PE-1A; testimony of Mother, Brefach). According to Mother, Dr. Takeoka (Student's neurologist) explained that frontal lobe epilepsy is one of the most difficult forms of seizure to control as it occurs deep in the brain. Student has seizures every night but with the current medication she no longer has the twenty to forty episodes per night that she used to have. During the past year, she has had two grand mal seizures and Parent has noted that during the day she may be working with Student and Student stares into space for twenty or so seconds and afterwards does not remember the episode. Student takes approximately twenty six pills per day to address her seizure disorder, asthma and allergies. She is described as a quiet, loving, caring, hard-working, respectful, obedient, easy-going adolescent who very much wants to establish relationships and have friends (testimony of Mother, Brefach, Rich, Zambarano).
2. Student presents with a complex profile with strengths and weaknesses in various areas. Her math and language skills are below average for age and grade, with great difficulties with language processing, order, and note-taking. Her reading decoding skills and spelling skills are, however, a strength. She also presents deficits in basic life skills such as telling time by reading a regular clock, or understanding the concept of time. She is unable to count money or make change and at stores will give the attendant

all of the money in her pocket hoping that it is enough to cover the expense, and walks away not knowing whether change is due to her (testimony of Mother).

3. Mother testified that Student does not understand what having a friend means and will refer to acquaintances as friends. According to Mother, outside school, Student has only one friend, a girl whose sibling has Asperger's Syndrome. Mother testified that she observed Student at a fifth grade school dance where Student spent the entire evening walking around the room in circles without knowing how to interact with other students appropriately, while some peers would run behind her, tap her in the shoulder and run away (testimony of Mother). In sixth grade, she was teased at parties and was injured once when another classmate (a girl whom Westford describes as one of Student's in-school friends) jumped on her back. On another occasion, Student called Mother to pick her up from a party but refused to talk about what happened. Play-dates arranged by Parents while Student was in sixth grade were cut short because Student would become anxious and call to come home (Id.).
4. Under an IEP Amendment developed at a meeting on September 5, 2008, Student would receive math in a pull-out setting five times per week for sixty minutes. (Reading services were changed because she was reading at grade level.) Her IEP further offered fifteen minute weekly consultation among service providers, as well as communication services by a speech pathologist, occupational therapy and counseling, each once per week for thirty minutes, outside the general education setting, during the first semester of her fifth grade (SE-42).
5. For the second part of this school year, pursuant to an IEP promulgated following a November 21, 2008 meeting, Student received five times sixty minutes direct services in a substantially separate classroom for math, five times forty five minutes direct services in a substantially separate classroom for academic support and one thirty minute counseling session per week which focused on anxiety management strategies for the classroom. Additionally the IEPs covering that school year offered once per week fifteen minute consultation among the special education teacher, the regular education teachers and the counselor. The IEPs also provided several accommodations to address test-taking and test support, reading and math issues, homework, and class work modifications.
6. The IEP mentions Student's three year re-evaluation<sup>2</sup> having taken place earlier in the semester and notes her results, which were average and or age appropriate in most areas except for math, writing, and visual perceptual weaknesses which the occupational therapist described as significant<sup>3</sup> (PE-20; SE-36; SE-39; SE-40; SE-41). The

---

<sup>2</sup> These included an educational assessment, an occupational therapy assessment and a speech and language assessment (SE-39; SE-40; SE-41).

<sup>3</sup> Jane Anderson, OTR/L in Westford, who conducted Student's three year re-evaluation in OT noted that Student had demonstrated great growth in functional persistence in the classroom and reported that Student's classroom teacher had described Student as one of her hardest working students, and that she wished she had a classroom full of children like Student because of her general demeanor and level of effort (SE-39).

educational assessment found Student to perform in the average range and noted weaknesses in math reasoning, processing speed and memory for numbers and inductive reasoning (SE-41). Parents accepted this IEP as developed on January 12, 2009 (PE-20).

7. In January 2009 Student was seen at Children's Hospital as a result of increased nocturnal seizures, greater emotional instability, and somatic symptoms displayed mostly in the home (PE-1A). During the 2008-2009 school year, Student had thirty-nine visits to the nurse's office for relatively minor issues. In sixth grade (2009-2010) she visited the nurse's office twenty-nine times. Most of those times she stayed in the nurse's office for five or ten minutes (PE-35).
8. On January 13, and February 24, 2009, Katrina M. Boyer, Ph.D., Children's Hospital neurology department, performed a neuropsychological evaluation at Parents' request (PE-2A; PE-2B; SE-34). Dr. Boyer reviewed the report of a previous neuropsychological evaluation conducted by Dr. Mautz in March 2007, which yielded similar findings to Dr. Boyer's regarding limited math skills and deficits in visual-spatial function, executive control processes and fine motor speed, with strengths in reading and spelling (PE-5; PE-2A). In addition to testing Student, she interviewed Parents and sought teacher input through the BASC-II and the BRIEF. The report is remarkable for Student's desire yet inability to develop relationships with peers and make friends especially out of school, and an increase in sensitivity, anxiety and confusion since 2009, contemporaneous with an increase in seizures and a change in medications. Dr. Boyer found discrepant cognitive abilities, depending on what was measured, fluctuating within the average (verbal knowledge), low average (processing speed and working memory), and the very low average (non-verbal reasoning skills) ranges. Dr. Boyer found that Student was at risk for problems in school, specifically with

... complex and novel tasks because of her poor nonverbal skills, organizational and planning weaknesses, inflexible and linear style of processing. She is likely to have difficulties working in a systematic and efficient manner. Instead, her work is likely to be slow, and disorganized. The development of concepts and the ability to relate what she learns in one setting to another is an area of challenge. She is likely to become overwhelmed by complexity and will have problems integrating details in an effort to appreciate the overall structure and organization of the concepts she is learning in school, particularly in the areas of mathematics and science. Memory retrieval difficulties may further limit her learning and application of skills. [Student's] limited fine-motor skills will make it challenging for her to manage writing demands in class. The risks associated with [Student's] neuro-psychological profile extend to her psychosocial adjustment. She has

difficulties developing age appropriate peer relationships despite her friendly social style and desire to have friendship (PE-2A; SE-34).

Dr. Boyer recommended that in order to support learning and social adaptation, Student required a great deal of specialized instruction, specific services and significant modifications to curriculum and instructional style. She recommended numerous specific accommodations to be implemented in an educational setting with

well trained special education teachers experienced in working with students with NVLD, a small teacher to student ratio to maximize individualized instruction, multiple alternative learning opportunities, and an environment where her social development is a priority along with learning (PE-2A; SE-34).

9. Dr. Boyer noted that if substantial individual modifications could not be made to Student's curriculum in the public school setting, then an out-of-district setting should be considered. She noted that Student would benefit from integration into her curriculum of life-skills and vocational education, particularly in the area of mathematics, as well as to plan for after-school educational pursuits. Dr. Boyer also noted that integration of a social skills curriculum<sup>4</sup> into her academic plan was crucial to ensure developmental advancement in this area. She also recommended provision of occupational therapy to address Student's substantial, bilateral, fine-motor deficits with speed and dexterity, which negatively impact her writing. Lastly, Dr. Boyer recommended that Student undergo another neuropsychological evaluation in three years (PE-2A; SE-34). Westford received Dr. Boyer's report on June 4, 2009 (Id.; testimony of Garcia).
10. On or about March 9, 2009, Elaine Lord, Advocate, notified Ms. Pelletier, Director of Pupil Services, that she had been retained by Parents to represent Student and requested to review Student's records (SE-31).
11. On April 6, 2009, Student underwent a Brain Electric Activity Mapping (BEAM) test by Frank Duffy, MD (PE-4A; PE-4B; PE-4C; SE-27; SE-30). The study yielded an abnormal result consistent with seizures and encephalopathy<sup>5</sup> and beyond what is typically seen with otherwise uncomplicated learning disabilities (PE-4A; SE-27; SE-30). Dr. Duffy noted that his findings were consistent with Dr. Boyer's diagnosis of a NVLD (PE-4B; SE-27; SE-30).

---

<sup>4</sup> "... among other things, instruction in how to interpret subtle social cues such as gesture, figurative language, body language, and vocal intonation, as well as provide instruction in general socially appropriate behavior, such as eye contact, personal space, greeting, conversation skills, and so on" (PE-2A).

<sup>5</sup> "A BEAM study... demonstrated an unusual EEG pattern, in waking, of high amplitude, independent, left and right atypical bilateral mid-temporal sharp waves, bordering on fast notched spike waves. These appeared at different times but were quite clear. These findings would raise the possibility of epileptiform activity in the left and right temporal lobes in addition to what may have been found in the frontal areas" (PE-4B; SE-27).

12. Because of her Hearing impediment, Student does not hear tone in voice and is unable to understand, for example, if someone is yelling at her, that they may be upset. She also misunderstands social cues as she is unable to read them (testimony of Mother). According to Mother, Parents waited to take a more aggressive stance regarding Student's education because they relied on Westford personnel's statements that Student's issues were mild, and it was not until they arranged for Dr. Boyer, a neuropsychologist at Children's Hospital to evaluate Student, that they realized the severity of Student's needs and the repercussion of not addressing them appropriately. Dr. Boyer warned Parents that failure to address Student's social-emotional difficulties in time could result in Student becoming depressed and potentially suicidal (testimony of Mother).
13. Gerri Feuer Shubow is an audiologist with thirty eight-years experience testing youngsters' hearing (PE-3B). Ms. Shubow conducts approximately six hundred tests per year. She tested Student at her practice in Newton, Massachusetts on May 18, 2009 at the request of Elaine Lord, Student's advocate. The results and report of her evaluation were forwarded to Westford in June 2010, a year after the evaluation was conducted (SE-3A; SE-28; testimony of Garcia, Mother). Ms. Shubow found that the rate at which Student processed information was slow, requiring her to turn the tape off during the examination to allow for additional time for Student to process the information. Student also had difficulty with temporal processing, obtaining very reduced scores for her age. Most significantly, according to Ms. Shubow, was Student's difficulty with temporal processing. In the aforementioned tests Student could not hear certain tonal information impacting on the prosody of speech inflection. The expectation for someone Student's age was that she would obtain eighty percent and she obtained five or fifteen percent in this area. The implications for listening in the classroom would be that Student would have difficulty picking out key ideas and understanding directions, she would pick up bits and pieces, and then show delays at the rate at which she can sort the information. Because of her difficulties with prosody (that is the inflection, duration, timing, where stress in speech is) in social communication situations, Student would miss important aspects of pragmatic language, making it difficult to build friendships and/or relate to other students (PE-3A; SE-28; testimony of Shubow).
14. Ms. Shubow explained that CAPD difficulties relate to deficits with the pathways to the brain as opposed to hearing impairments. In the former, examiners look for what children can hear and what they do with the information they hear (testimony of Shubow).
15. Ms. Shubow made numerous recommendations for Student including: delivery of services in a small-structured classroom; evaluation of acoustics to reduce noise; preferential sitting near the primary sound source and away from competing or distracting noises; use of daily routines to help Student stay organized and focused; instructions to be delivered and repeated in a structured concise manner; careful peer

grouping; contextual cues and extra time to process complex auditory information; attention to information that may have been misheard; extended time for testing to be administered in a quiet environment; explicit instruction of strategies to foster organizational and listening skills; preview, review and summarizing of materials; provision of outlines, study guides and graphic organizers; encouraging self-monitoring and self-advocacy; speech therapy to focus on discrimination and prosody of speech; access to computer programs such as *Fast Forward*; and provision of a written version of homework (PE-3A; SE-28).

16. Ms. Shubow observed Student at her Westford program in the Stony Brook School on May 21, 2010. She noted that the school was new and opined that classroom noise was not a substantial issue. Ms. Shubow observed Student in her language arts class with approximately nine students, and noted that the teacher spoke so quickly that Ms. Shubow could not understand what she was doing with respect to prefixes, vocabulary or fluency. Ms. Shubow was unable to obtain an understanding of the social studies class (the second class she observed) because students took a test the first half-hour and then worked on filling in a map (testimony of Shubow).
17. In 2009, Student was also evaluated by Jody Gray, however, by the time of the Hearing in November 2010, Ms. Gray had not yet written the report of her evaluation (testimony of Mother).
18. Student's Team convened on June 15, 2009, eleven days following Westford's receipt of Dr. Duffy's and Dr. Boyer's reports. However, the Team notes do not indicate that either Dr. Boyer's or Dr. Duffy's reports were discussed at that Team meeting and available testimony supports that there was no discussion of the reports. Student's progress for the year and transition into sixth grade (middle school) were discussed. An amendment was proposed, adding inclusion services for social studies and science, and for skeletal notes to be provided to help student with note-taking in those classes (PE-29; SE-25; SE-26; testimony of Mother, Garcia).
19. On or about June 22, 2009, Student started to see Dr. Gary Rose (a psychologist recommended to Parents by Student's advocate) to help address her anxiety. Student has met with him every two weeks since. On September 8, 2009, Parents signed a consent form so that Westford staff could exchange information with Dr. Rose (PE-24; testimony of Mother).
20. Student's Team reconvened on September 8, 2009 at Parents' Advocate's request (via letter dated August 12, 2009 and email dated August 17, 2009, as well as Parents' request via email), to discuss their concerns regarding services to Student. Parents' specific concerns involved reading, math, Student's ability to recall information, feeling anxious and confused regarding directions, note-taking and vocabulary in her social studies and science classes, and previous patterns of showing regression after the December holiday break (PE-20; PE-21; PE-23; PE-33; SE-22). As a result of this Team meeting, the IEP dated December 21, 2008 to December 11, 2009 was amended,



as proposed in June, to reflect that Student would receive inclusion instruction for social studies and science and be provided with skeletal notes to assist her with note-taking in those courses .(PE-20; SE-22; testimony of Garcia). The reason provided was

[Student] is experiencing difficulty within the content area subjects. She is not able to keep up with the pace of the classroom. She may need skeletal notes and check-ins from the special needs staff to make sure she understands the content being taught (PE-20; SE-22).

A second amendment dated September 2009 calls for addition of small group, substantially-separate Language Arts and Reading services under section C of the grid. The amendment further reflects that the minutes for the substantially-separate math class would also be amended to reflect the middle school schedule for mathematics (PE-20; SE-19; SE-22). Pursuant to the Amendment, Parts A and B of the grid were revised as follows: fifteen minute consultation services, once per six day cycle among Student’s teachers and counselor; and under Part B, content area support would be provided by the special education staff (teacher or an aide) ten times, forty five minutes each, per six day cycle. Under the C section of the Grid: Academic Support five times, forty-five minutes by the special education staff; Reading services five times, forty-five minutes by the special education staff; Language Arts five times, forty-five minutes by the special education staff; mathematics five times, forty-five minutes by the special education staff; and counseling once for thirty minutes by the counselor, all pursuant to a six day cycle. Student’s social pragmatics difficulties and the need for integration of vocational and life skills training are not mentioned, and no services are proposed in the IEP amendment to address these areas, as recommended by Dr. Boyer (Id.). On September 28, 2009, Westford received Parents acceptance of the IEP/ Amendment in full, dated September 24, 2009, contingent on Westford’s replacing the word “may” for “will” regarding provision of skeletal notes in the inclusion area classes, and further noting that the check-in at the end of the day<sup>6</sup> described in the narrative description of School District Proposal had not yet been initiated by the date of acceptance (PE-20; SE-20; SE-21).

21. The Team meeting notes for the September 2009 Team meeting make no mention of any discussion regarding Dr. Boyer’s or Dr. Duffy’s reports received by Westford in early June 2009. Similarly, they do not mention Student’s deficits in social pragmatics or understanding prosody of speech, consistent with the reports of Dr. Duffy and Dr. Boyer (PE-2A; PE-4A; PE-4B; SE-22; testimony of Garcia). The meeting notes state that the reports by Dr. Gray and Ms. Shubow will be discussed when they are received (PE-21).

---

<sup>6</sup> “It was also agreed that a check-in will occur at the end of each day to assist [Student] in developing the organizational skills needed to prepare supplies needed to complete work at home” (PE-20).

22. On September 23, 2009, Parents emailed Peter Cohen, Stony Brook's Principal, asking him to address several issues regarding Student, including bullying by another student. The email stated

We want to make you aware of a problem our daughter [Student] has brought to our attention. There is a classmate named [--] who has been poking at [Student] and she has asked her to stop, and [--] has not stopped. Normally we would say maybe she just wants to be friends so be nice and say hi but this also happened last year at Abbot and nothing was resolved then. We would like you to address this issue. [Student] has increased anxiety this year as it is over her classes and locker and not remembering to bring home [sic] she doesn't need to add bullying to the mix. Due to [Student's] increased anxiety she has started biting her bottom lip. We are hoping we can decrease some of her anxiety so we don't need to add another medicine to her already large daily quantity (PE-30).

Mr. Cohen immediately emailed Student's teachers inquiring about the situation and assured Parents that Stony Brook was committed to providing an environment which fostered academic excellence and intellectual curiosity while building character within a diverse and collaborative community, but he did not acknowledge Parents' concerns (PE-30).

23. Margaret M. Rich<sup>7</sup> was Student's sixth grade small group reading and language arts teacher. She is a special education teacher who holds Massachusetts certification in special needs grades k through six and six through twelve, and elementary education grades one through six. There were ten students with a variety of disabilities and low average to average cognitive levels in her sixth grade small group reading class. Delivery of instruction was the same for the entire group, that is, multisensory, structured, routine-based methodology. She also used the Read Naturally computer-based program for fluency and comprehension. According to Ms. Rich, in September 2009, Student's reading ability was at or near grade level and she was a good speller in writing (testimony of Rich).
24. There were nine students in Ms. Rich's sixth grade English language arts class. All nine were also in the reading class. This class used the Language Exclamation Program which involves six steps of which the first three were used in reading and the last three, used in language arts, addressed speaking, writing, grammar and vocabulary. Ms. Rich used a mix between the material used in regular education sixth grade language arts class and her own materials modified for her students. She used graphic organizers and aspects of the Empower writing program. Her agenda, which was placed on the board, stated "language Exclamation, Megawords (which she described as a reinforcement of

---

<sup>7</sup> Ms. Rich spoke so fast when providing testimony that she had to be orally instructed to slow down several times during her testimony, in addition to both the School's attorney and the Hearing Officer's numerous gestural reminders to slow down.

decoding and encoding skills), Reading for Meaning and or cognitive reading strategies” (testimony of Rich).

25. Ms. Rich testified that at the beginning of the school year, Student was timid and shy, she kept her head down, and she did not participate much in class. By December 2009, Ms. Rich noted improvement as Student became more engaged and participated comfortably in class. In writing, it was noted that by the end of sixth grade, Student was able to edit her work, and with guided practice in planning, she could plan her work. She testified that she implemented most of the recommendations listed in Dr. Boyer’s and Dr. Brefach’s reports. Ms. Rich opined that by the end of sixth grade, Student did not need specialized instruction in reading because she was at grade level, and she also opined that Student did not need to receive small–group instruction to make progress. Ms. Rich testified that Student needs to learn appropriate scripts to assist her in initiating, establishing and maintaining friendships with peers and also needs to learn “practical, effective communication with adults and behaviors for a variety of social situations in the community,” which skills were not covered in her class although she did reinforce them (testimony of Rich).
26. Ms. Rich testified that she was in attendance at the September 2009 Team meeting. Ms. Rich was Ms. Zambarano’s mentor and she also met regularly with Ms. Fulreader. Ms. Rich also collaborated with Ms. Fulreader in the social skills drama club (testimony of Rich).
27. The sixth grade small group math class was taught by Beverly Zambarano. Student’s grouping in this class was eight of the same students as in her group for English language arts, and there was a paraprofessional in the classroom. Ms. Zambarano was also Student’s liaison and the academic support service provider. She holds a professional license in elementary education and in special education. She had a summer program in Universal Design Learning which focuses on co–teaching between regular and special education teachers, a forty–five hour math training with Andrew Chen, and one–week training in Orton–Gillingham. She testified that the class followed the same routine when they met using a variety of tools, such as Brain Pop; the schedule is posted on the board, a paper with a problem or a blank piece of paper would be on the desks, and they might discuss what had been previously taught before moving on to that day’s lesson. Students also had multiplication charts on every desk, whiteboards and graphic organizers in the room (testimony of Zambarano).
28. Ms. Zambarano initiated the year covering number sense and operations, data analysis, relations and algebra, patterns and geometry, among other topics. She provided the Math Massachusetts Frameworks curriculum at the entry level so that her students are at least exposed to it. She noted improvement regarding Student’s self–confidence and her willingness to try math (testimony of Zambarano).
29. Student’s academic support period was also taught by Ms. Zambarano. During this period, students worked on long–term projects, difficult concepts, writing assignments,

paragraph composition, test preparation, review or reinforcement of concepts. On seldom occasions, the period is used to do homework; however, each session began with a review of the homework to ensure that students had written the homework into their agendas. There were eight students in this class, six of which were the same as in math. She testified that Parents had raised concerns that at home, Student could not remember how to do the math she had just done in class that day (testimony of Zambarano).

30. Ms. Zambarano testified that in sixth grade she developed a checklist to address parental concerns that Student was anxious because she came home without the right materials (testimony of Zambarano). Parents also reported that, once at home, Student did not remember how to go about solving math problems even when she might have just worked on them that same day in school (testimony of Mother).
31. Mindy Peters was Student's regular education, sixth grade science teacher. Ms. Peters holds a Master's degree in general science and is certified in earth science grades five through eight. There were twenty-four students in her class, six of whom were on IEPs, and a teacher aide. The cognitive levels of all of the children in her class were average to below average. She testified that she used a multi-sensory, hands-on approach with check-ins, and is responsible for implementation of the accommodations in students' IEPs. According to Ms. Peters, Student progressed throughout the year, ending in the top fifteen percent of the class and winning the most improved award (testimony of Peters).
32. Dianna Fulreader was Student's adjustment counselor at Stony Brook during the 2009-2010 (sixth grade) school year (testimony of Fulreader). Ms. Fulreader is a licensed social worker in Massachusetts. She testified that Student was part of the twenty-five minute long social skills/coping skills group Ms. Fulreader ran at lunch. The group worked on physical relaxation techniques, social skills instruction, cognitive behavioral therapy<sup>8</sup>, and helped with self-advocacy skills. Approximately five to six students participated in the group, one of whom carried a diagnosis of Asperger's Syndrome. According to Ms. Fulreader, the primary focus of the group was to address Student's anxiety, but she testified that she was always giving direct coaching in social pragmatics. She testified that Student brought up concerns regarding a cousin during the group meetings and also discussed not wanting to move, which Ms. Fulreader stated, meant that Student did not want to go to LSA in New Hampshire. Ms. Fulreader testified that Student felt very comfortable with her lunch group, but she never discussed bullying and did not share experiences that caused her anxiety, although she was, according to this witness, an active participant (testimony of Fulreader).
33. Ms. Fulreader met with Student twice for individual counseling during the 2009-2010 school year, the first time to get to know Student and the second time to walk around

---

<sup>8</sup> Cognitive behavior therapy teaches students to be aware of how they think about an event and how those thoughts affect their feelings and beliefs impacting on their behaviors (testimony of Fulreader).

the school with Student to show her the different clubs available. Student never spontaneously asked to meet (or met with) Ms. Fulreader. Ms. Fulreader also attended Student's academic support class once per six day cycle (testimony of Fulreader).

34. Ms. Fulreader was responsible for the counseling and the fifteen minute consultation goals in Student's December 2009 to December 2010 IEP. She testified that she was supportive of Student's continuing with the counseling and the group into seventh grade so that she would maintain gains and continue to work on coping strategies. Ms. Fulreader stated that at the beginning of the school year and through at least November 2009, Student had been quiet, shy, more fidgety, anxious and not engaging as much in the group. She noted a difference in Student's level of comfort thereafter and through the end of the school year although she did not have any specific recollections regarding Student's participation (Id.).
35. On or about September 8, 2009, Ms. Fulreader communicated with Peter Cohen, the principal at Stony Brook, to discuss reports that Student was throwing up at home from anxiety and that others misread her conduct a great deal. When anxious, Student picked her nails, chewed on her lips and went off topic during conversation. (An earlier transition meeting note dated June 15, 2009 raises concerns about Student's ability to manage her anxiety and suggests that adults be proactive in helping Student during challenging situations.) Other relevant portions of the note dated September 8, 2009 state that Student is on medication for epilepsy, that she sees an outside counselor, that she had a good connection with another girl (Ms. Fulreader was unaware that the youngsters' relationship was actually not good), and states that Student needs scripting. The note further states Student's diagnosis to be Non-Verbal Learning Disability and Central Auditory Processing Disability. The aforementioned diagnoses had been discussed during the Team meeting of June 2009, during which one of Student's evaluators had shared concerns regarding Student's comprehension skills, and was worried that the accommodations could be masking Student's weaknesses (PE-29).
36. Student's Team reconvened on December 8, 2009 to conduct the annual review. According to Ms. Garcia, the school-based Team reported that Student had a smooth transition into middle school and that she had made progress (SE-15; SE-16; testimony of Garcia). The Team meeting notes reflect Parents' concerns regarding Student's ability to recall information, her numerous visits to the nurse's office, her lack of friendships and socialization outside school, and her increasing isolation (SE-16; testimony of Garcia, Mother).
37. As a result of the December 2009 Team meeting, Westford offered Student participation in a partial inclusion program at Stony Brook for the remainder of Student's sixth grade and the beginning of seventh grade (PE-6; SE-16). This IEP, proffered on December 18, covered the period December 9, 2009 to December 8, 2010. The Student's Strengths and Key Evaluation Results Summary in this IEP contains one sentence regarding Dr. Boyer's 2009 evaluation results regarding Student's diagnosis of a non-verbal learning disability and discusses none of her findings or

recommendations. It however contains two paragraphs of the findings on the Woodcock Johnson III test and CELF-IV performed by Westford in November 2008. Student's progress with teacher assistance, supervision and support is discussed as well as social/emotional<sup>9</sup> status. Under Present Levels of Educational Performance the IEP notes that according to the 2009 Children's Hospital neuropsychological evaluation, Student's neuropsychological profile has not changed when compared with the neuropsychological evaluation performed in 2007, and her diagnosis remains NVLD. This IEP provides goals in written language, academics, social/emotional and mathematics. Part A of the service delivery grid called for a fifteen minute consultation, once per six day cycle including Student's teachers and counselor, and under Part B offered content area support by the special education staff twelve times, forty-five minutes each. Part C of the IEP called for direct services in mathematics at a rate of six times forty-five minutes; counseling once for thirty minutes per six day cycle; reading by the special education teacher six times forty-five minutes; language arts by the special education staff six times forty-five minutes; and academic support by the special education staff six times forty-five minutes each (SE-16).

38. The accommodations in this IEP were:

- encourage use of number charts, facts tables, manipulatives, visuals, teacher made materials for math, multiplication charts, calculator.
- allow slower pace, modified volume of math work, extra time for written output.
- breakdown complex/lengthy information into smaller chunks, and provide clear, concise, step by step instruction.
- restate/rephrase new information as needed.
- ask [Student] to repeat presented directions to check comprehension, clarify directions as needed.
- establish eye contact.
- provide access to word processor when needed.
- monitor placement of Scanton bubbles on tests.
- may read aloud.
- allow for movement breaks.
- encourage requests for repetition/clarification
- skeletal notes for content area subjects as needed.
- monitor use of daily planner.
- identify key points of importance in material.
- link all learning to a purpose.
- pair visual with verbal information.
- offer concrete verbal explanations whenever instruction involves charts, graphs, or other pictorial material.

---

<sup>9</sup> The report states: "[Student] has made a smooth adjustment to the middle school. She appears to have a group of students that she is comfortable with. [Student] continues to hide her anxiety however and is reticent to share any difficulties she may be having in school. [Student] was recently uncomfortable with how another student was treating her and was unable to share this information with staff or her parents" (SE-16).

-accommodations for assessments: calculator, test directions clarified, small group, familiar test administrator (SE-16).

39. Additional accommodations under Present Levels of Educational Performance provide for:

Hands-on, manipulative learning experiences are best for understanding abstract concepts.

Encourage [Student] to verbalize ideas and concepts to ensure understanding.

Repetition and clarifying of directions.

Model and cue [Student] to use coping strategies when faced with a challenging academic situation.

Allow for slower pace and /or modified quantity of work.

Encourage [Student] to communicate her frustration and anxiety in a positive manner (SE-16).

40. The December 2009 Team also agreed to encourage Student to stay after school and look at after-school programs that may be of interest to her with Ms. Fulreader. Parents agreed to contact Dr. Rose to communicate with Ms. Fulreader, monitor Student's pre- and post vacation breaks for possible regression, and sharing the anxiety reducing strategies taught to Student with Parents (SE-17).

41. A note written by Ms. Fulreader on December 28, 2009 states that according to Dr. Rose, Student's private psychologist, Student holds it together at school and then releases her tension at home. Student was also reported to feel overwhelmed with academics. In January 2010, Ms. Fulreader spoke with Student's mother and suggested that Student be shown clubs that she could be interested in after school. On January 12, 2010, Student showed interest in the Newspaper Club because she knew some of the girls that participated in the club, but she stop attending shortly after starting because she found that "it was boring" (PE-29; testimony of Fulreader, Mother). According to Ms. Garcia, Student's participation in Newspaper Club conflicted with Student's ability to participate in after-school MCAS support (testimony of Garcia).

42. Student's sixth grade social studies class included twenty-one students, six or seven of whom were on IEPs for a variety of difficulties. The students were similar in age, gender and all were from the neighborhood community in which Student lives. The class offered opportunities for small group work and access to technology and visual aids on the board. According to Ms. Garcia, the textbook was used more like "a dictionary on the shelf, something you would take off if you wanted to highlight a point" (testimony of Garcia).

43 Parents first visited LSA in 2009 as they were exploring this program as an option for Student. Student however, was not enrolled at LSA until August 2010. Mother testified that despite the wealth of information obtained by Parents suggesting that they remove Student to a different special education program, Parents wanted to give

Westford an opportunity to implement the recommendations of the independent evaluators and design the right program for Student so that she could stay in her community, a community with which Parents have had long-term involvement. In addition to LSA, at their advocate's suggestion, Parents visited Learning Prep but concluded that driving there in the morning would take too long.

43. In early 2010, Student was sick as a result of side effects associated with some of the medications taken. Her medications were changed and her overall health improved (testimony of Mother). During this period, two of Student's teachers, Ms. Rich and Ms. Zambarano, emailed Sue Hanley expressing concerns regarding Student's ability to concentrate, pay attention and recall information in class (PE-25). Ms. Rich testified that Student appeared tired, and that when she asked, Student commented on having to wake up early to take her medication (testimony of Rich). The email by Ms. Zambarano stated:

I spoke with Peg Rich this morning and we have both noticed a significant decline in [Student's] attention, concentration, ability to recall previously taught material. Parents are really pushing for an outside placement next year, so any concerns that we voice (as teachers) will just fuel the fire. Is there any way that you can look into her medications and contact the parents because YOU are concerned (maybe you noticed her looking a little glassy eyed at lunch??) Does this make sense? We feel that she might be over medicated and that it is really affecting her performance. I'm happy to discuss this with you before we do anything. Thank you (PE-25).

44. On April 12, 2010, Dr. Susan Brefach, Ed.D., evaluated Student at Parents' request to ascertain whether Student was making academic progress and whether Westford's program was meeting her needs (PE-1A; PE-1B; SE-11). Dr. Brefach is a self-employed, licensed psychologist and certified school psychologist in MA, and has conducted approximately 1,400 evaluations of children and young adults (PE-1, V).
45. As part of the evaluation Dr. Brefach reviewed previous evaluations/records and administered the Wechsler Intelligence Scale for Children-Integrated (WISC-IV), the Wechsler Intelligence Scale for Children-III) (object Assembly, Picture Arrangement)<sup>10</sup>; the Boston Naming Test; NCCEA Sentence Imitation; Syntactic Comprehension (Menyuk); Rey-Auditory Verbal Learning Test; Trailmaking Tests; Cancellation Tasks; Stroop Color Word Interference Test; Wisconsin Card Sorting Test; the Wide Range Assessment of Memory and Learning-II (WRAML-2)(Visual

---

<sup>10</sup> Dr. Brefach noted in her report that "on the WISC-III [Student] would have attained a performance IQ of 64, significantly below her performance in the area of Verbal Comprehension. In practice, this meant that she would often be confused and overwhelmed within a standard academic setting in which she would need to integrate what she saw with what she heard, and also to analyze more complex and lengthy auditory input. The limitations of her auditory memory span and her processing speed would significantly compromise her ability to learn and perform within a standard academic classroom" (PE-1A).



Memory), Bender Gestalt Test; the Rey Osterrieth Complex Figure; Test of Word Reading Efficiency–Form B; Wide range Achievement Test –IV; Reading, Spelling, Arithmetic subtests; Gray Oral Reading Test–IV, Form A; Gates McGinities Silent Reading Comprehension Test–Level 5/6; Test of Written Language–III; Key Math Diagnostic Arithmetic Test–III; Human Figure Drawings; Sentence Completion Test; and conducted a Diagnostic Interview (PE-1A).

She found that Student was of average cognitive ability, but presented with significant non-verbal disabilities that affected her visual-spatial motor skills. Student was also substantially weak in auditory memory. During the evaluation, Student was more willing to attempt verbal tasks and was able to provide the best answer when given follow-up questions than she was in non-verbal tasks where she gave up more readily and evidenced anxiety (e.g., she twisted her hair, fidgeted, and appeared physically uncomfortable, not knowing what to do with the task presented). Student was unable to understand more complex sentences because of her auditory processing weaknesses and her memory span was shorter than average with verbally presented information. Student missed the “big picture” as she had difficulty integrating the information she read, and also had difficulty with tasks that required higher level language skills. Student also lacked a good understanding of the sequential nature of numbers. She remained a linear thinker, unable to analyze multiple components simultaneously. According to Dr. Brefach, Student had difficulties analyzing visual input such as maps and graphs and difficulty copying what she saw. Falling within the second and seventh percentile on math skills, Student was found to display many of the symptoms of dyscalculia. Student had trouble telling time and adding coins, could not do any multiplication or division and struggled to analyze math problems. She also had difficulty making sense of body language which could impact Student’s ability to make and maintain friends (SE-11; testimony of Brefach).

46. On the WISC–IV, Student obtained a composite IQ of 98 in Verbal Comprehension, in the area of Perceptual Reasoning a composite IQ of 77, in Short–Term Auditory Memory a composite score of 80, and a composite IQ score of 78 for Processing Speed. She found significant scatter in the scores between and within the subtest administered. Dr. Brefach noted that due to the discrepancy between the Verbal Comprehension and Perceptual Reasoning IQ scores, it would not be helpful to compute a Full Scale Score IQ because it would be inadequate in describing Student’s actual functioning. She interpreted the results of the WISC–IV, explaining that when there were more than two standard score deviations between two separate scores, this was indicative of a neurological problem. Student presented with a twenty–two point differential, demonstrating problems with rote memory and auditory flexibility, suggesting that she would have difficulties processing instructions in the classroom, listening to lectures and storing the auditory information into long–term memory. Her slow processing speed would make it difficult for Student to listen to a lecture and take notes simultaneously. She however, opined that there were signs of better cognitive potential in a number of areas and saw strengths in Student’s fund of vocabulary and in her verbal reasoning skills (PE-1A; SE-11; testimony of Brefach). Dr. Brefach also

administered subtests of the WISC–III eliminated from the WISC–IV that targeted sequencing, object assembly and efficiency in all of which Student was unable to complete the tasks and displayed inaccuracy in half of them (PE-1A; testimony of Brefach). Regarding Student’s weaknesses in non-verbal and language skills, she stated in her report that

[Student] struggles with visual spatial analysis and synthesis, part/whole construction, visual scanning and directionality. She is a linear thinker for the most part, and has difficulty with more abstract, inferential and integrative tasks. She also displays a small auditory memory span and struggles with mental computations, auditory processing and word retrieval. Her skills for language processing are particularly limited, raising concerns about her ability to function within a standard academic setting. [Student] also displays a much slower processing speed for language analysis and paper and pencil tasks... has greater difficulty when she needs to store information in memory, analyze what she hears, scan visual field accurately or maintain a certain cognitive “set” for more complicated tasks. On a task of executive functioning, she is unable to employ flexible problem solving strategies and requires more explicit instructions. Skills for visual memory are generally adequate at the low end of the average range, although [Student] struggles with eye/hand coordination and visual motor integration for copying. These skills are significantly depressed for age (PE-1A; SE-11).

47. Regarding executive functioning, Dr. Brefach found that Student was unable to figure out rules on tasks on her own and stated that Student needs very clear external organization and structure (testimony of Brefach). She noted that Student was aware that school was confusing for her and explained that when Student says that she is bored in school or with a task, it is equivalent to saying that she is sad or depressed because she wants to understand, wants to be engaged and have relationships but does not know how to engage (testimony of Brefach). Dr. Brefach explained that in a large group setting it would be easy to overlook Student and stated that Student would not be able to pick up social cues simply by being in those situations. She explained that someone would have to model what Student should do, she would need to practice and someone would then need to give her feedback (testimony of Brefach).
48. Dr. Brefach noted Student’s strengths in reading decoding and fluency, and in areas of abstract reasoning for vocabulary and single word definition. Student was able to read single sight words, could identify single words in isolation, could read passages within the lower range of average and was a very good speller. She also has a general sense of what to do in social situations although difficulties in this area seemed to be increasing as the information was becoming more abstract (PE-1; SE-11; testimony of Brefach).
49. In math, Student’s scores were significantly below age and grade expectations with scores scattered from a late second to a mid-third grade level, with deficits in: basic

number sense, memory for processes, sequencing, and problem solving. Student made errors such as subtracting a smaller number from a larger number regardless of position, she used her fingers to count and do basic computations, and she displayed great difficulties solving mental computations and analyzing math language. Dr. Brefach opined that Student would require a highly specialized and adapted math program in order to acquire a functional level in pragmatic math skills and arithmetic, (PE-1A; SE-11).

50. Regarding the relationship between Student's seizure disorder and memory consolidation, Dr. Brefach testified that memory consolidation occurs during sleep. While sleeping, information is transferred from medium-term memory into long-term memory, but if seizures interfere with sleep, they would interfere with memory consolidation. She explained that Student's nocturnal seizures interfered with her memory consolidation, with the result that she has displayed greater difficulty recalling information at times when the nocturnal seizures increased (testimony of Brefach).
51. In general, the learning environment should be adapted to meet Student's needs, according to Dr. Brefach. Student requires a much smaller group size, and adapted academic setting designed to meet the needs of children with NVLD and social limitations. Student should be grouped with students who are at her same academic skill level. Information should be presented in the same fashion throughout the day. That is, in short, clear language, with little background information and frequent check-ins for comprehension, and repetition and review. She requires a highly structured, substantially-separate, small setting with no more than eight children, where information is presented through a language-based approach, in a sequential manner, with a multi-sensory teaching approach, and with pragmatic and concrete language and instruction that emphasizes mastery and hands-on learning. Homework should also be modified. Dr. Brefach recommended attention to language pragmatics focused on improving interpretation of communication skills, with opportunities to practice in small group situations, in addition to receiving individual instruction and scripting. Student has to learn to analyze inferential language, figures of speech, concepts such as irony, satire and allegory, as well as words with numerous atypical meanings. The math program should be extremely hands-on with a focus on solidifying number sense, the four basic operations and the ability to use technology to retrieve math facts. Her language arts class should focus on reading comprehension (PE-1A; SE-11; testimony of Brefach). In writing Student required daily practice using a "writing process approach with a high degree of structure, repetition and practice" (PE-1A; SE-11). Dr. Brefach also recommended participation in a summer program to prevent regression, reinforce skills and have an opportunity for structured interactions with peers during the summer. Lastly, she recommended a re-evaluation in two years (Id.).
52. In late April 2010, Parents emailed Ms. Zambarano to notify her that Student would no longer be attending after-school MCAS prep with Ms. Waltz because Student was not deriving any benefit as she did not understand the teacher, and her anxiety was starting to increase since starting the prep class. Parents inquired if Ms. Zambarano could

instead meet with Student after school to work on MCAS as they thought this arrangement would be more productive. Apparently, Ms. Zambarano had offered to do this (PE-34).

53. Dr. Brefach observed Student in her program at Westford in May (social studies, science and math) and June (reading and English language arts) 2010 (testimony of Brefach). Student's social studies and science classes occurred in the mainstream in classrooms with approximately twenty-four students where the level of background noise was high. Student appeared marginally involved in a small group discussion with two other girls in social studies while working on a poster. Regarding the textbook for that class, Dr. Brefach opined that it was too dense, lacking in white space and chapter summaries. In science, Student was paired with another girl and both worked on the computer, although the rest of the class seemed to be further along than Student on the template they followed. This class was taught by a regular education teacher and a paraprofessional who went around the class to check on the groups. Dr. Brefach noted that Student seemed confused, and she did not seem to be engaged in what was going on. It appeared to Dr. Brefach that Student was not getting all of the concepts presented. She also noted that there was a great deal of auditory interference in this class. Math was a special education class with fewer students, a teacher and a paraprofessional. In this class, the group worked on solving word problems which, according to Dr. Brefach, dealt with concepts significantly beyond Student's level of understanding. Dr. Brefach opined that this class was not appropriate for Student who did not know or understand the material. The English language arts class included approximately seven or eight students, a teacher and a paraprofessional. The teacher read the book *The Giver* to the class, a very allegorical and abstract reading which regular education students had read earlier in the year. According to Student's special education teacher Ms. Rich, the book was read to the students as a reward but was not part of the curriculum in academic support (testimony of Brefach, Rich, Garcia). Student was observed to respond to one question asked by the teacher but she did not participate otherwise and similarly did not do any writing when others were writing. Dr. Brefach noted that while the size of this class was appropriate for Student, the instruction should have been broken down more, and she also noted that the book was too abstract for Student. There should have been more discussion of the story and more engaging of students in the discussion, according to Dr. Brefach (testimony of Brefach).
54. Ms. Garcia testified that Dr. Brefach had indicated that she had observed social studies class but in reality it was Pride Time which was held in the social studies room. The testimony was unclear as to whether the distinction between the two classes was clarified for Dr. Brefach (testimony of Garcia).
55. Ms. Garcia, who accompanied Dr. Brefach on her observation at Westford, testified that students had been participating in a variety of reading genre throughout the year and at the end of the year the students asked the teacher to read *The Giver* to them, a book that had been read in the regular education language arts class. She testified that the teacher was reading it aloud because she recognized that it was not appropriate for her class.

Student did not raise her hand or offer to speak during the eighteen separate opportunities presented by the teacher for her to participate in the discussion but when called upon by the teacher twice, Student looked at the textbook and responded correctly. Student was observed to play with her hair during the lesson and she appeared not to be engaged in what was occurring in the class at certain points (testimony of Garcia).

56. Dr. Brefach testified that she has had over thirty years experience evaluating students and stated that she bases her opinions on her own findings. Although most of her evaluations are requested by Parents, she has been asked to consult for at least five school districts in Massachusetts. Of the approximately 1500 evaluations she has conducted, Dr. Brefach has almost always recommended services that are available in public schools. She opined that it was not essential for teachers to be certified in special education if they were able to implement the right teaching methodologies or techniques, can present information in a clear and concise manner, and are good at what they teach. During her first meeting with Parents following her testing, they did not discuss LSA (testimony of Brefach).
57. Mother described Student's sixth grade experience as a very difficult one. When she attempted to help Student with homework, Student would not open her book at first, often complained that she did not understand the material or what was required of her, and stated to Mother that the approach to solving something had not been explained to her. While it was expected that other students learn all of the material, the curriculum for Student was modified and she was only expected to learn the highlighted portions of the material (PE-26; PE-8; testimony of Mother). Student would often wake up with a stomachache and state that she was nauseous. She would refuse to get out of bed and resisted going to school. According to Mother, getting her out the door was "pure torture." Once she got to school, Student put on her "mask or happy face" (testimony of Mother).
58. Student's end of the year report card for sixth grade indicates that she received A- in English language arts, A- in social studies, B in math, B in science and A- in reading. In art, health, physical education, technology education, and general music, her grades ranged from A to A+ (SE-5).<sup>11</sup>
59. Student obtained a 212, which is a Warning score, on her math MCAS, which she took with accommodations, including the use of a calculator (SE-4). The English Language Arts (ELA) MCAS report reflects a score of 242, which is equivalent to proficient and is a passing score. Over the past three years, Student's MCAS English language arts scores have increased at about the same rate per year while her math scores have consistently decreased, most drastically between 2008 and 2009 (SE-4). Ms. Garcia explained that when students get a warning score on the MCAS, they have until tenth grade to retake the test (multiple times if they need to do so). To help students pass,

---

<sup>11</sup> Student's fifth grade report card shows straight As (SE-25).

additional supports would also be offered. If they pass their tenth grade MCAS they are eligible to graduate (testimony of Garcia).

60. During the 2009-2010 school year, Student visited the nurse's office twenty five times. Five of those were in one day because she had difficulty keeping a band-aid on a cut on her knee, and four other visits were to put Vaseline on her chapped lips. Sue Hanley, the nurse at Stony Brook, notes that when Student visited the clinic complaining of stomachaches, they talked about Student's stress level and strategies regarding how to cope with anxiety in the classroom (PE-35; testimony of Fulreader).
61. Student's Team convened again on June 17, 2010 to discuss the evaluations by Dr. Brefach and Ms. Shubow (PE-6; SE-6; SE-7; SE-9; SE-10; testimony of Garcia). Westford's teachers commented on Student's progress during sixth grade (SE-8). Following the Team meeting, Westford proposed to amend Student's IEP by adding: (1) implementation of a "tool box" to address communication issues between school and home, including specific strategies to help Student with homework; and (2) adding one sixty minute consultation per with Honore Weiner. At the meeting, Parents requested funding for Student's participation in LSA's Summer Program, but their request was denied. Instead, Westford offered participation in its Drama Club/Social Skills Development Program, which met for five Tuesdays between June and July 2010 (PE-6; SE-6; SE-7).
62. Westford's 2010 Drama Club/Social Skills Development Program was a once per week, five-week drama program run by Ms. Fulreader in cooperation with other teachers such as Ms. Zambarano and Ms. Rich. This program was designed mostly for children on the autism spectrum and focused on social skills and social pragmatics, conflict resolution, making friends and reading others' body language (testimony of Fulreader, Garcia). Parents rejected this offer as Student was not interested in drama and they believed that a once per week program was not enough for Student to understand and get used to the routine of the drama program, that is, by the time Student began to feel comfortable in the program given her difficulties with transitions and anxiety issues, the program would be over. Dr. Rose was not in support of Student's participation in the summer program (testimony of Fulreader, Mother).
63. Also at this meeting, because of Student's issues with prosody of speech, the school-based team recommended additional testing by Kristin White, school psychologist in Westford, including affect recognition to ascertain if Student was picking up on social nuances, and a theory of mind assessment to ascertain Student's ability to process what she was hearing and how she understood the information. Ms. Garcia testified that the school-based team also recommended that Honore Weiner, a Westford consultant, be included in the determination of what services might be needed for Student (testimony of Garcia). Parents rejected the IEP and Amendment through their attorney in July 2010, and later placed Student unilaterally at LSA (PE-6; PE-27).

64. Dr. Weiner holds a masters degree in speech pathology and audiology<sup>12</sup>, and a doctorate in special education. Since retiring from the Case Collaborative, she has worked as a consultant and in-service trainer to public school districts, including Westford, for over ten years. She was contacted in May 2010 regarding Student. She testified that Ms. Rich contacted her to observe Student, in anticipation of getting a report diagnosing Student with CAPD. She reviewed Dr. Boyer's and Dr. Brefach's reports prior to observing Student at Stony Brook on June 2, 2010. In science, Student was observed to participate in a group activity with three other students. In math, she noted that the room was quiet and that the class was well structured. She attended the Team meeting on June 2010 and recommended eliminating background noise and the use of an FM system. The latter had not been included in Ms. Shubow's report. Dr. Weiner opined that Student's anxiety would be reduced if she had "more access to her teacher and classmates' speech", that is, be better able to hear them. Pursuant to the IEP promulgated as a result of the Team meeting, Ms. Weiner would have consulted to the staff one hour per month (testimony of Weiner).
65. On or about June 19, 2010, Ms. Shubow spoke with Dr. Weiner about her testing, report and recommendations. Ms. Shubow had not initially recommended using an FM system (a system whereby the teacher uses a microphone and transmits information via speakers in the room or a device on the child so that the information is transmitted to that child directly). It reduces reverberation in the room, noise level and teaching distance. The FM system reduces background noise in the room but its major purpose is not to address rate of speech or temporal issues. According to Ms. Weiner, the omission of the FM system had been an oversight by Ms. Shubow (testimony of Shubow, Weiner).
66. Regarding the proposed IEP and Amendment of June 2010 (PE-6-; SE-6), Dr. Brefach opined that it was not appropriate for Student because it offered participation in two regular education courses; the special education math class was completely inappropriate; the IEP did not offer participation in speech and language with a focus on pragmatic language and, referring to her observation of the English language arts class where the teacher was reading the *The Giver* out loud, she found this material inappropriate for Student. Dr. Brefach instead recommended participation in classrooms with a small student to teacher ratio where the student population was more homogeneous and where spiraling of information, preview and review and the accommodations required by Student could be implemented. The science goal was not detailed enough and the three academic goals encompassed too much, making it impossible for Student to attain. Dr. Brefach expressed similar objections regarding the social studies class. Neither the social studies nor the science classes were language-based, something she recommended. She suggested that the goals be broken down further with less information presented over longer periods of time. She opined that

---

<sup>12</sup> Dr. Weiner had not administered an audiology evaluation since she was in graduate school between 1968 and 1970. She is described and listed in the June 2010 IEP as an audiologist but she testified that she is not (testimony of Weiner).

Student's social/emotional goal would not be addressed through individual counseling sessions because of the isolation. Student, in her opinion, required opportunities to practice the strategies she learned with input from a speech and language professional. While she found the list of accommodations appearing in the IEP to be appropriate, she did not observe the accommodations being implemented in the regular education classrooms, and further testified that it would be very difficult for a special education teacher to do all of these in a regular education classroom. The accommodations appearing in the IEP are appropriate but insufficient to meet Student's needs. The only way Student would internalize the skills and information she must learn would be in a small group setting, with a homogeneous group of students and presentation of appropriate material, according to Dr. Brefach. She also opined that the first five accommodations in the social emotional needs area of the IEP were instructional in nature (PE-6; testimony of Brefach).

67. On July 13, 2010, Diane Pelletier, Westford's Director of Pupil Services, received Student's/Parents' attorney's letter of the previous day, containing: a Request for Hearing before the BSEA; Parents' letter of rejection of the IEP covering the period December 9, 2009 to December 8, 2010 and Amendments; as well as rejection of any previous IEP and Amendments on which Parents had not previously acted (PE-27). Student's advocate, Ms. Lord, forwarded a second letter, dated August 9, 2010, received on August 17, 2010, restating Parents rejection of the IEP, decision to unilaterally place Student at LSA and intention to seek full funding for all related expenses including tuition and transportation (PE-31).
68. Ms. Garcia testified that had Student stayed in Westford , in addition to the support she would have received in special education and regular education classes, she would have been able to participate in an integrated arts class. This was described as an opportunity to experience music, art, physical education and a guidance cluster, all of which are broken into specific parts in which students can participate during the year. The guidance cluster focuses on social skills development, and a separate section focuses on research and technology (testimony of Garcia). Student's seventh grade class in Westford would have included twenty four students with approximately six or seven students on IEPs, a teacher and a teacher assistant. Her guidance counselor in seventh grade for the guidance class would have been Mr. Nielsen, while Ms. Fulreader would have continued Student's goals and expectations regarding the thirty minute counseling services under the IEP (testimony of Garcia). Student's small-group math class included seven students, substantially the same group as in sixth grade, and the class, taught by Ms. Barsel, would have been similar to the sixth grade class but would follow the seventh grade Massachusetts Frameworks curriculum for math (starting with integers and functions, and then cover equations, factors and fractions, rational numbers, ratio, proportion and percent, and lastly, two-dimensional figures.) (PE-36; testimony of Zambarano.) Ms. Zambarano would have been Student's teacher for English language arts and academic support in seventh grade, with eight other students in each (testimony of Zambarano). Student's proposed schedule for the 2010-2011



school year reflected that she would have also taken tech education, general music and research 7 in mainstream settings (PE-28).

69. LSA is a Massachusetts and New Hampshire approved private special education school that caters to students with language-based learning disabilities (PE-10). Teachers at LSA participate in a practical, one hour workshop four days per week after school offered by LSA staff and outside speakers. The staff also meets three times per week to discuss students' issues and progress. This year, they have focused on the functions of the brain for children with ADHD and ADD as well as NVLD. There are thirty-nine students and twenty-two staff members at the school, most of them primarily with verbal and non-verbal learning disabilities. (Seven out of the nineteen middle school students at LSA present with non-verbal learning disabilities.) The school follows a kind of virtual economy that allows students, for example, to gain experiences in earning and handling money, and balancing checkbooks (PE-13; testimony of Kotkowski, McManus). Fridays at the school are variable, offering students three possible schedules depending on whether they are on or off campus. Off campus, students engage in adventure-based counseling through the Adventure Lore Organization<sup>13</sup> which partners with LSA, or participate in field studies which support science or social studies which help reinforce and build connections and generalize what is learned in the classroom. When in school, students spend Fridays participate in a variety of forty-five minute long classes that focus on art, health and fitness, practical arts and pragmatics. In pragmatics for instance, the speech pathologists have grouped students to work on plays that illustrate the proper and improper manner to do things. Student participates in all of the aforementioned opportunities. Additionally, development of social pragmatics is something that the school does throughout the day (PE-13; testimony of McManus). All of the staff at LSA is trained in Project Read (except for Bill Bellantone) as well as with Lindamood-Bell visualizing and verbalizing to assist with reading comprehension. There is no full time nurse position in the school but the intervention coordinator had EMT training and the staff has been instructed on how to deal with a *grand mal* seizure if Student had one (testimony of McManus).
70. Student participated in a speech and language evaluation conducted by Jennifer Mitchell, M.S., SLP, of LSA, on November 5 and 8, 2010 in order to obtain additional information regarding her needs in this area (PE-11). Ms. Mitchell administered the

---

<sup>13</sup> "Adventure Lore is an opportunity for students to participate in high-interest activities that allow them to get exercise, improve their self-esteem, practice those social pragmatics, learn how to persevere and how to take the lessons they have learned in that context and bring it back into the classroom. Really to extend it through the rest of their lives... in [Student's] case in particular, for her to face some of the challenges, the anxieties that she brings to the school, it helps her to --for instance, they go kayaking. They go ocean kayaking and the kids had to deal with the challenge of that kind of situation. Some kids need to just get into the kayak and sit on the sand. Other kids can get into the kayak and go out to the island, which is their destination. Each one of them is working at his or her level and pushing themselves just a little bit more, taking that lesson about perseverance and how to deal with challenge. They bring that back into the classroom. If you can be successful with ocean kayaking, do you think you can be successful with doing math, for instance. Is it any harder, is it any more scary? Can you take those same lessons and apply them? It is very successful" (testimony of McManus).

Clinical Evaluation of Language Fundamentals (CELF–IV), selected subtests of the Comprehensive Assessment of Spoken Language (CASL) and FAS Word Fluency Test. The results demonstrated weaknesses in working memory, word retrieval, syntactic flexibility, and in precise language memory for sentences. Ms. Mitchell recommended twice per week, thirty minute each, speech and language therapy to address: (1) working memory issues; (2) social language (pragmatics) to help her learn and develop independence in initiating and maintaining friendships with peers; and (3) to receive help in transferring the speech and language skills she learns into the classroom (PE-11).

71. Lisa McManus is the educational director at LSA responsible for teacher supervision, IEP preparation and program development. She is certified by the state of New Hampshire as a special education teacher, learning disabilities specialist, and special education administrator. She was responsible for drafting most of LSA’s school description found at PE-10, although she was not involved in the update (testimony of McManus).
72. Ms. McManus testified that at the beginning of her time at LSA, Student displayed a fair amount of anxiety. She was tense, quiet, jittery, a little high strung and a bit on the periphery of things, although willing to participate and mentally present in activities. However, she became more engaged in the course of a few weeks.
73. Sean P. Kotkowski is certified in elementary education in Massachusetts and New Hampshire, and possesses a statement of eligibility from the State of New Hampshire for full certification in special education and math (testimony of Kotkowski, McManus). He has had experience working with special education students in New Hampshire, and has been a teacher at LSA for the past five years. He is the director of the LSA math laboratory. Rachael McManus (holds a degree in computer science and is a substitute teacher until December 2010) and Carla Vanderhoff Budd also work with Student in math (PE-16; testimony of Kotkowski).
74. Using the Ames Web curriculum, Mr. Kotkowski assessed Student’s skills at the beginning of the 2010-2011 school year and found that in math she performed within the third grade level. Student was able to add with accuracy, subtract without borrowing, and measure to the nearest inch and centimeter. She could also perform multiplication, but could not count forward or backwards by anything greater than one. He explained that by fourth grade, students are expected to have mastered the basic math skills and stated that without a foundation, they would not be able to master more abstract ideas. He described Student as a polite, quiet, compliant student who was not participating in conversation with other students or producing language on her own (PE-9; testimony of Kotkowski).
75. Mr. Kotkowski explained that the math lab at LSA was a one and a half hour session divided into four blocks. One block develops number sense, exploring language of mathematics, fact working/computational skills, another block works on math

automaticity to internalize facts, and another block focuses on every day math skills. The last block is used to check Student's LSA economy account for accuracy. Mr. Kotkowski explained that at LSA students are part of a school-based economy whereby they interview for and hold jobs for which they are paid in the school's economy currency, and then they can use their money to pay for things they want, as well as pay for virtual utilities, rent and other in-school expenses. According to Mr. Kotkowski, in math, students learn the language of math and talk about having the math knowledge available to solve problems. Also, students review the math vocabulary used in the MCAS and other testing so as to familiarize themselves with this language. As part of the lunch bunch activities at LSA, students may leave the building but they have to see how much money they have available, for example, to purchase snacks, and determine if they can afford it. He explained that he has attended lunch bunch group and that there was an average of eight students in the lunch bunch (testimony of Kotkowski).

76. Mr. Kotkowski testified that Student's scores in the areas worked on since August 2010 had improved. Student was able to answer more items on the assessments because her speed and fluidity were better. She can now count backwards by multiples of two five and tens. She also uses fractions and decimals. She is willing to participate and is engaged in class. She asks questions, offers answers and displays no signs of anxiety. He also testified that Student had no problems concentrating during math lab (testimony of Kotkowski).
77. Ari Towah Nathans is the language lab director, the summer academy director and the afterschool community program director at LSA. Ms. Nathans holds a Master's degree in special education and has been working with learning disabled students since 1979. She holds special education certification in Maine, New Hampshire and Massachusetts and is also certified to teach elementary education. Her specialties are learning disabilities and mental retardation. She explained that the focus of the language lab was to provide students with instruction in reading, writing and spelling. Ms. Nathan testified that Student's issues were with the more critical aspects of reading comprehension and the organization of thought processes, including writing, as indicated by the reading fluency, comprehension screening of the Test of Reading Comprehension III<sup>14</sup> she performed in October 2010, as well as tests relating to sound/symbol relationships. She noted Student's highly developed sight word vocabulary skills but also noted Student's difficulty inferring, being able to respond to questions that sought either inferential intention or that required discerning temporal determination. For example, Student was unable to respond to questions that had the words "immediately" or "meanwhile" embedded in the text because she did not understand the meaning of those words. Using Bloom's Taxonomy, Student was found to be at the basic level, that is, she could discern straightforward details in a text. Student is seen by a reading tutorial specialist on a one-to-one basis to address her deficits with reading comprehension using QARs strategies (PE-14; testimony of

---

<sup>14</sup> Ms. Nathans explained that the sixteen and seven scores under the Paragraph Reading category were incorrect and that the correct scores were nine and six respectively (testimony of Nathans).

Nathans). Ms. Nathans explained that Student is a good speller. Her spelling class focuses on the morphology and etymology of words, prefixes and suffixes, and how these impact the meaning of words. The lab also works on the organization inherent in writing and expansion of Student's writing. Note-taking is another skill covered in the language lab through the use of the Cornell two-step organizer, which calls for dividing a paper into two columns when reading a passage and placing the main idea or the topic heading on the left side while using the right side to place the details that align with the particular heading (testimony of Nathans).

78. Ms. Nathans noted great change in Student's attitude and behavior since the beginning of the school year, and commented on her observations during unstructured times (such as arrival and departure in the common area outside the language lab). In the beginning of the school year, Student was shy, quiet and distant from other students, e.g., she would wait for others to put away their things before looking for a spot to place her things. Student barely interacted with others and did not even respond when someone said hello. By November 2010, she was observed to "come flying" down the stairs talking with other students, or she called out to someone to wait for her, getting into the mix of students putting away their things and appearing much more integrated (testimony of Nathan).

79. Student was observed at LSA by three of Westford's staff. Ms. McManus testified that they sat behind Student and observed the lessons. She thought that they would have been "more delicate in their observations" so as not to overcrowd and overwhelm the students with a larger number of adults than students in the room. Ms. McManus testified that the teachers commented that Student had "clammed-up" reverting to some of the behaviors that they had observed in the beginning of the year (testimony of McManus).

80. Ms. Garcia testified that she, Ms. Rich and Ms. Zambarano observed Student at LSA in late September 2010. The Westford observers met in Westford and the drive was over one hour. They observed Student in her math lab, an L shaped room with a separate room in the corner for the first of a three-section lesson. The student with whom Student was paired for math lab was out that day so the instruction was one-to-one with Student who was working on the four times table. Student then moved to a separate room to work on a computer program during which time Student appeared to self-direct. During part of the time that Student was working on the computer, there was another lesson going on in the same room which the observers found distracting. Student worked on multiplication tables, graphs, measurements, coin values, and later with Mr. Kotkowski on a domino lesson and on odd and even numbers. According to Ms. Garcia, Student made a mistake early in one of the exercises in the last section of the math lab without realizing that she had set the problem in the wrong way until the teacher brought it to her attention at the end of the lesson and corrected it. Ms. Garcia testified that Student was being given an opportunity to develop rote memorization skills and basic math facts which correspond to her ability which is at a third grade level. When entering LSA, Student was demonstrating difficulty understanding number

sense, and her math calculation skill level was at a third grade level. She opined that provided with accommodations, modifications and supports, Student would be able to understand higher level concepts covered in seventh grade, which include algebraic equations, integers, rational numbers, ratio, proportions and percentages. Given Student's cognitive level, she should have the ability to approach higher level topics at the entry level for the Massachusetts Curriculum Frameworks. Ms. Rich testified that she did not observe much repetition and clarification by the teachers (PE-36; testimony of Garcia).

81. The observers then went into a different building for Student's science class which included another student. The teacher turned on a rainforest sound tape, introduced the topic they would be discussing and talked about upcoming projects. The students then went over their homework, after which they opened a box that contained parts of a cell, and while the other student read the pamphlet that came with the box, Student looked at the parts in the box with little guidance or instruction from the teacher, according to Ms. Garcia. There was no transition from one topic to the next in science. Lastly, they observed the language arts class in which Student and the other student used split notes while the teacher used an outline format to discuss topic sentences. Student was observed to use the split notes appropriately by placing the main idea on one side and looking for details and writing in phrases. According to Ms. Garcia, there was some movement of students in the hall which became loud and she closed the door to make the room quieter. Overall, Ms. Garcia opined that the level of instruction was not challenging for Student (testimony of Garcia).
  
82. Dr. Brefach also observed Student in her English language arts (ELA), math and during lunch at LSA.. She testified that the ELA class was divided into three sessions during each of which Student was paired with one other student, although it was not the same student for each session. One session focused on extracting information when reading (comprehension), retrieval of information, and another on writing. The room was subdivided into small rooms and a central language lab room. Dr. Brefach noted that Student appeared to be in a lighter mood and she initiated conversation with other students. She was focused and engaged as she worked with the teacher. The class was structured, and the information presented was concrete, rendering it appropriate for Student although her peer during the second session appeared to spell two to three years below Student's level, as spelling is an area of strength for Student. Math involved four different instructional groupings. In the first one, Student was grouped with three other students all of whom were having difficulty solving the work problem on which they were working. She was also observed to work hard to complete a page of math facts in under thirty seconds, and then the group moved on to working on addition and subtraction cards. The students received a great deal of practice on basic math and computation skills, which is what Student, whose computational skills are at the third grade level, needs. Another group of three students walked into the L shaped room to work in the far side of the room, but they settled down quickly when Student's teacher was ready to work with her students. Dr. Brefach did not notice much auditory interference. The group also worked on time, money, the calendar and the seasons of

the year. According to Dr. Brefach, Student was appropriately grouped and the class was also appropriate as it focused on mastery of mathematical skills at Student's level. At lunch, Student was observed to engage in conversation with another student and proceed to a table with numerous other peers. Dr. Brefach opined that Student's program at LSA was appropriate because it presented goals at the level at which Student is currently functioning and broke them down to help her access them. She testified that Student's teachers at LSA appeared to be knowledgeable in the subjects they were teaching and were appropriate. Numerous accommodations relevant to Student's learning style were also being implemented (testimony of Brefach).

83. During the week of November 9, 2010, Dr. Brefach observed the proposed math and academic support classes for seventh grade (testimony of Brefach). In math the class (composed of five boys and two girls, the special education teacher and an aide) worked on the distributing law, which is an algebraic law to solve equations. The teacher presented the information on the board using purchases that the students would like to make at the mall as an example. The teacher asked students to round the estimated cost of the items, but Dr. Brefach did not observe any instruction on how to round up numbers. According to Dr. Brefach, the class presented and worked on concepts far beyond Student's third grade level of understanding. The academic support class included the same group of students as in math with one additional girl. The class worked on an earth science packet dealing with earthquakes. Dr. Brefach found the vocabulary and concepts presented at a level of complexity that Student would not have been able to understand. She was also concerned with the number of concepts addressed since, given Student's memory issues, it would have been difficult for her to remember all of them. Dr. Brefach noted that Student would have required an adapted, modified curriculum in this class (testimony of Brefach).

84. Ms. Garcia opined that the proposed math class would be appropriate because the grouping was appropriate and included many of the same students with whom Student was grouped in sixth grade. There was an agenda on the board and some problems for the students to solve along with a central question and a "to-do" list. Ms. Garcia testified that students knew what the routine was because they arrived, took out their homework and began to review it. Students then moved on to a lesson involving estimation and money, using as an example going to the mall after preparing a list of things to shop for and estimating the prices. Students were required to add up the actual values for which they had access to a calculator. The teacher also used Brain Pop software and later changed the routine of the class, which typically involved a quiz, to another simulation involving going to the movie theatre, which was similar to the mall version. The math room was quiet (testimony of Garcia).

85. Regarding the academic support class that was observed by Dr. Brefach and Ms. Garcia, this was a review lesson for a science assessment. Students used study guides created in the science class and reviewed the vocabulary. There were visuals on the board regarding the movements of the earth, and the teacher used preview, review and redundancy during the lesson. In addition to the students in the academic support room,

the teacher and the aide, there was another student taking a math test. Ms. Fulreader came into the room for part of the lesson (testimony of Garcia).

86. Mother has been transporting Student to LSA, which she states takes approximately fifty–eight minutes each way. Student arrives at LSA at approximately 7:40 a.m. and Mother picks her up at approximately 2:45 p.m. Student does not mind the length of time it takes her to get back and forth to LSA and spends her time in the car reading. She has not resisted going to school or made excuses in the morning, and she displays a less anxious more relaxed affect since starting there. Mother remarked that Student was a different child and that Student has stated that LSA “makes it fun so that I like to learn” (testimony of Mother).

## CONCLUSIONS OF LAW

The Parties do not dispute that Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act<sup>15</sup> (IDEA) and the state special education statute.<sup>16</sup> As such, Student is entitled to a free, appropriate public education (FAPE).<sup>17</sup> The Parties also agree that Student presents with a non–verbal learning disability, CAPD, and epilepsy.

The dispute in the instant case is centered on the appropriateness of the IEP and services offered by Westford for the period from December 2009 through December 2010 (part of Student’s sixth and seventh grades), and whether Parents were justified in placing Student at LSA for the 2010-2011 school year. If the IEP was inappropriate and Parents were justified in placing student at LSA, Westford would be responsible to reimburse Parents for their unilateral placement from the date of the placement (August 2010) through December 2010, the end date of the IEP under review. In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student’s individualized education program (IEP) be tailored to address the student’s unique needs<sup>18</sup> in a way reasonably calculated to enable the student to make meaningful<sup>19</sup> and effective<sup>20</sup> educational progress. Additionally,

---

<sup>15</sup> 20 USC 1400 *et seq.*

<sup>16</sup> MGL c. 71B.

<sup>17</sup> MGL c. 71B, ss. 1 (definition of FAPE), 2, 3.

<sup>18</sup> E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that “emphasizes special education and related services designed to meet their unique needs . . . .”); 20 USC 1401(29) (“special education” defined to mean “specially designed instruction . . . to meet the unique needs of a child with a disability . . .”); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored “to each child’s unique needs”).

<sup>19</sup> *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982) (goal of Congress in passing IDEA was to make access to education “meaningful”); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); (“IDEA requires an IEP to confer a ‘meaningful

said program and services must be delivered in the least restrictive environment appropriate to meet the student's needs.<sup>21</sup> Under the aforementioned standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.<sup>22</sup> Educational progress is then measured in relation to the potential of the particular student.<sup>23</sup> School districts are responsible to offer students programs and services that will allow them to make meaningful, effective progress.<sup>24</sup>

---

educational benefit' gauged in relation to the potential of the child at issue"); *G. by R.G. and A.G. v. Fort Bragg Dependent Schs*, 40 IDELR 4 (4th Cir. 2003) (issue is whether the IEP was reasonably calculated to provide student meaningful educational benefit); *Weixel v. Board of Education of the City of New York*, 287 F.3d 138 (2<sup>nd</sup> Cir. 2002) (placement must be "reasonably calculated" to ensure that [student] received a meaningful educational benefit"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (educational benefit must be "meaningful"); *Ridgewood Board of Education v. NE for ME*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) (IDEA requires IEP to provide "significant learning" and confer "meaningful benefit").<sup>20</sup> *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

<sup>21</sup> See generally *In re: Arlington*, 37 IDELR 119, 8 MSER 187, 193-195 (SEA MA 2002) (collecting cases and other authorities).

<sup>22</sup> MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential..."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential..."). See also Mass. Department of Education's Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE"), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at [www.doe.mass.edu/sped](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

<sup>23</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student); *Deal v. Hamilton County Board of Education*, 104 LRP 59544 (6<sup>th</sup> Cir. 2004); ("IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); *HW and JW v. Highland Park Board of Education*, 104 LRP 40799 (3<sup>rd</sup> Cir. 2004) ("benefit must be gauged in relation to the child's potential"); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) (progress should be measured with respect to the individual student, not with respect to others); *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (appropriate education assessed in light of "individual needs and potential"); *Ridgewood Board of Education v. NE*, 172 F.3d 238 (3<sup>rd</sup> Cir. 1999) ("quantum of educational benefit necessary to satisfy IDEA . . . requires a court to consider the potential of the particular disabled student"); *Mrs. B. v. Milford Board of Ed.*, 103 F.3d 1114, 1122 (2d Cir. 1997) ("child's academic progress must be viewed in light of the limitations imposed by the child's disability"); *MC v.*



As the party challenging the adequacy of Student's IEP and seeking public funding for their unilateral placement, Parents carry the burden of persuasion and must prove their case by a preponderance of the evidence. Also, if the evidence is closely balanced, the moving party, that is Parents, lose. *Schaffer v. Weast*, 126 S.Ct. 528 (2005)<sup>25</sup>.

In the instant case the evidence is persuasive that while Westford is a fine school district with a dedicated staff, the program and services offered Student for the period from December 2009 through December 2010 failed to address Student's unique disabilities effectively. As such, Parents were justified in unilaterally placing Student at LSA. Furthermore, the evidence is persuasive that given Student's deficits, LSA offered her an appropriate program that has allowed her to make effective progress and has helped her demonstrate skills independently.

As discussed below, the evidence supports Parents' position and therefore, I find that Parents have met their burden of persuasion pursuant to *Schaffer*, and are entitled to reimbursement for their unilateral placement of Student at LSA from August 2010 through December 2010. My reasoning follows:

#### **I. Westford's December 2009 through December 2010 IEP:**

To ascertain whether Parents are entitled to reimbursement for their unilateral placement of Student, I first evaluate the information available to the Team in December 2009 and again in June 2010 (when the IEP was amended). The appropriateness of the IEP must be assessed by "what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *In Re: Southwick-Tolland Regional School District*, 12 MSER 279, 289 (Crane, 2006), citing *Roland M. and Concord Sch. Comm.*, 910 F. 2d. 983, 992 (1<sup>st</sup> Cir. 1990). In assessing the "snap shot", the personalized instruction and support services need not maximize Student's potential to assure her a FAPE. That is, "the public school district is not responsible to offer Student a "Cadillac" but rather a serviceable Chevrolet that allows Student to get around effectively." *In Re: Arlington Public Schools*, 8 MSER 187 (Crane, 2002); *In Re: Middleborough Public Schools*, 12 MSER 310, 328 (Figuroa, 2006). Westford is therefore, not required to offer Student the best program possible; rather, it was responsible to provide Student a program tailored to meet her

---

*Central Regional School District*, 81 F.3d 389 (3<sup>rd</sup> Cir. 1996), *cert. denied* 519 US 866 (1996) (child's untapped potential was appropriate basis for residential placement); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("academic potential is one factor to be considered"); *Kevin T. v. Elmhurst*, 36 IDELR 153 (N.D. Ill. 2002) ("Court must assess [student's] intellectual potential, given his disability, and then determine the academic progress [student] made under the IEPs designed and implemented by the District").

<sup>24</sup> E.g. *Lt. T.B. ex re. I.N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1<sup>st</sup> Cir. 2004) ("IDEA does not require a public school 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.")

<sup>25</sup> *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

unique needs so as to enable her to make effective educational progress with respect to the statutory goal of allowing students to become independent productive adults.

The Parties agree that Student possesses solidly average cognitive ability as demonstrated through the numerous evaluations performed over the years. She is a complex individual who, in spite of her disabilities and medical issues, presents with strengths, especially in spelling and reading speed and accuracy, due to her strong encoding and decoding skills. Her weaknesses lie in comprehension of more abstract information (or inferential demands), math, and social pragmatics (testimony of Brefach). Moreover, because she is an extremely polite, delightful, hard-working individual who puts all of her effort into everything she attempts, it would be easy to miss what she is truly capable of doing independently as opposed to with adult assistance, guidance and supervision (SE-38).

Ms. Zambarano and Ms. Rich agreed with the recommendations made by Dr. Boyer that Student would require significant modifications to the curriculum and instructional style while being adequately challenged and while accommodating her disabilities. Ms. Zambarano further agreed with the recommendations for small group with small student-to-teacher ratios, especially for math and language arts where Student required direct instruction (in math at a basic level), delivered by well-trained and experienced special education teachers. Ms. Zambarano could account for having worked with a student with NVLD for one year, presumably the year she taught Student at Stony Brook. They also agreed that instruction must be multi-modal with opportunities to practice across all settings, repetition, preview and review of material, and that Student would need the instruction and concepts broken down into manageable units, presented at a controlled pace. Additionally, it was agreed that in order to address Student's executive functioning issues, she would require advanced study skills, organization and time management (PE-2A; SE-34; testimony of Zambarano, Rich). The aforementioned recommendations were included in Dr. Brefach and Ms. Shubow's recommendations. Ms. Zambarano agreed with Dr. Brefach's recommendation that all of the instruction within Student's classes should be simplified, adapted and presented in a multimodal format, and reinforced across all settings with repetition and consistency (testimony of Zambarano).

Westford argued that the information available to the Team in June 2009, supported continuation of the partial inclusion program and argues that Parents are responsible for not having been forthcoming with Ms. Shubow's report. However, the evidence shows that Westford's June 2009 (end of fifth grade) and September 2009 (beginning of sixth grade) Teams had available relevant information, which neither Team discussed or considered, this in contravention of state and federal law. Specifically, neither Team presented, discussed, or considered Dr. Boyer's findings or any of her recommendations, e.g., Student's need for small-group programming and specialized instruction, including social pragmatics, owing to Student's NVLD. Dr. Duffy's findings regarding additional seizure activity during wake time were also not discussed (PE-2A; PE-4A; PE-4B; SE-27; SE-30). Instead, Westford relied on its teachers'

observations and the limited information obtained through its three-year evaluation. This information should have been one piece of the puzzle, but not the sole basis for the Teams' recommendations and ultimate service delivery offer. In June/September 2009, Westford in fact modified Student's program, reducing small group instruction and offering increased opportunities for inclusion in social studies and science. In these courses, Student was one of over twenty children in a room. The June and September 2009 Teams offered partial inclusion with substantially separate services for math, language arts, academic support and reading (at Parents' request). Reading would end by the end of the 2009-2010 school year (SE-16).

Similarly, at the December 2009 Team, Westford's personnel did not present, discuss or consider Dr. Boyer's and Dr. Duffy's findings. Once again, these evaluations were ignored. The December 2009 Team instead relied again on the 2008 three-year re-evaluation and teacher reports, adding that the reports of two other independent evaluators would be reviewed when received. While Westford is correct that Parents should have forwarded Ms. Shubow's evaluation when it was received in 2009, this was a privately obtained evaluation. Furthermore, there is no indication that Westford would have offered anything different than what it offered when it finally received the report in 2010. (I note that consideration of Ms. Shubow's report at the June 2010 Team meeting resulted in no real changes to Student's program or placement.) In June 2010, Westford recommended continuation of the same services it had offered for sixth grade in December 2009, and offered to bring in a consultant, Dr. Weiner, and implement a communication "tool box".

By June 2010, Westford had sufficient additional information at its disposal, including Dr. Brefach's and Ms. Shubow's reports, to understand Student's skill levels and serious needs. The Team also had the MCAS scores, Parents' reports and Dr. Rose's perspective, which he had shared with Ms. Fulreader. Given Student's deficits (resulting from her NVLD and CAPD), considered in tandem with her cognitive ability, Westford's program did not provide Student FAPE. The program and services should have been more individualized to address her deficits in the areas of mathematics, reading comprehension, and social pragmatics, including a focus on prosody of speech. Westford had ample information regarding Student's needs in the social/emotional domain, especially as to social pragmatics and anxiety. Parents had raised their concerns in terms of Student's difficulties establishing relationships, her misunderstanding of the meaning of a friendship, her lack of friends and her reluctance to discuss what was happening with school staff, including Ms. Fulreader (the school adjustment counselor) and Parents. Student only raised issues regarding bullying and interpersonal relationships with her private psychologist, and never sought out Ms. Fulreader of her own initiative. Student agreed to participate willingly in the group sessions but this is not surprising given her nature and character. As Mother testified, this is not a child who will challenge authority or be difficult. Regardless of the challenges, once in school Student puts on her "happy mask". As teachers and evaluators unanimously testified, Student always put all of her effort into everything she did (Mother, Zambarano, Rich, Brefach).

The fact remains that while a student in Westford she had no friends; Student may have had acquaintances in school but there is no evidence that she had friends. Once she left school, she was consistently unsuccessful at every play–date (mostly arranged by Mother), and only discussed this with her psychologist. Notably, Parents had given Westford consent to discuss Student’s issues with Dr. Rose since 2009. Dr. Boyer, Dr. Brefach and Ms. Shubow provided thorough, persuasive information as to the connection between Student’s disabilities (difficulties hearing/ understanding prosody of speech due to her CAPD and NVLD) and her compromised ability to establish relationships, especially with peers. She misses too much of the conversation and more importantly the intentions communicated by others through speech. Her CAPD and NVLD also impacted what she was able to access in the classroom. Ms. Shubow recommended speech and language therapy to address this, but this service was not provided under the December 2009 IEP or the June 2010 Amendment. Dr. Brefach recommended social pragmatics instruction with scripting, and recommended that these be addressed across all settings. Other than the half hour group counseling session every six days, which seemed to focus on dealing with stress and anxiety, Student’s issues with prosody of speech were not directly addressed by Westford.

On cross–examination, Ms. Garcia was asked to clarify her statements regarding Student’s issues with prosody of speech. Prosody of speech was described as the way in which one uses inflection on words when one speaks to give it meaning, which in turn impacts the way in which the listener understands what the speaker is trying to say (testimony of Garcia, Shubow, Brefach). Ms. Garcia testified that this was important information to know regarding a child with an auditory processing disorder because it impacted the way in which that student needed to be taught. She testified that the word prosody was “news” to her because she had not encountered this term before. (This is inconsistent with the evidence that Dr. Boyer and Dr. Duffy used this term in their evaluation reports, which discussed Student’s difficulties with the appreciation and use of speech prosody (PE-4B; PE-2A), which reports had been available to Westford since June 2009.) Ms. Garcia testified to having been aware of Student’s issues regarding prosody of speech prior to receiving Ms. Shubow’s report, which she interpreted to mean that Student had difficulties approaching peers and initiating relationships, that is, social pragmatics and social skills deficits. She was also aware of Dr. Boyer’s report stating that it was crucial to integrate a social skills curriculum into Student’s academic plan, as well as the need for integration of a vocational and life skills curriculum (PE-2A). Even after receiving Dr. Brefach’s report, and Ms. Shubow’s report, which recommended speech and language therapy specifically to address this issue, no changes were made to Student’s IEP for seventh grade except to comply with Parents’ request for a communication “toolbox” for the home (Westford’s response to parental concerns regarding the use of social pragmatics throughout the day), and adding consultation with Dr. Weiner (testimony of Garcia). The toolbox was the label used by Westford for the sharing with Parents specific strategies regarding communication, such as cueing and prompting used in school, for consistency in the home (testimony of Garcia).

Westford recognized Student's issues with anxiety, although this was not reported as a major problem, and Westford teachers as well as Ms. Fulreader testified that the problem had subsided by mid-year during the 2009-2010 school year. The evidence shows that Student visited the nurse's office for minor issues twenty-nine times during the 2009-2010 school year. While this reflects a decrease in visits from the previous year's thirty-six, it is still a great number of times (PE-35). Ms. Fulreader worked on anxiety strategies but Parents reported continued issues in the home. Westford relied on Student's medical records to demonstrate that her stomach issues were the side effects of medications, while Parents argued that they were due to anxiety. The records referenced by Westford discuss the side effects of Rufinamide, one of Student's medications, which could cause stomach problems, nausea, and vomiting. However, the records submitted cover the period from June to November of 2009, but Mother testified that these issues persisted throughout the 2009-2010 school year (SE-44; SE-47; SE-48; SE-49; SE-50; SE-52).

The IEPs at issue contain over twenty-five accommodations to be implemented in the regular education settings. While many of these constitute good teaching practices, even with the assistance of an aide, it would have been difficult to provide Student the individualized attention that had been recommended within the regular education classroom (testimony of Brefach).

In math, Student had not only consistently failed to pass the MCAS, but her scores worsened from year to year (SE-4). Ms. Zambarano testified that Student was able to access sixth grade level math Massachusetts Frameworks curriculum, something that as a public school teacher in Massachusetts, she is responsible to provide. Credible testimony showed Student's real abilities in math to be at a third grade level at the beginning of seventh grade. Student did not have number sense, could not count by twos or fives, and could not tell time or make change when handling money, all important skills necessary for an independent life post high school (testimony of Brefach, Kostowski).

Parent provided credible, persuasive testimony, corroborated by LSA personnel and Dr. Brefach that Student was unable to count money. She has difficulty recognizing and distinguishing coins and when at a store, simply hands the clerk all the money in her pockets, hoping it is enough to cover her purchase, and does not wait for change (Mother, Brefach, Kostowski). This is an important life and math skill that must be more intensively addressed.

Ms. Zambarano disagreed that Student's instructional program in math should be limited to mastering a single approach to solving required math topics, and that was a reason why Student had a calculator as an accommodation in her IEP. According to this witness, Student should not waste her brain power in learning addition facts or multiplication facts; instead she could use the calculator for that and use her brain power to solve the "story problems". If she learned that twenty percent (20%) was

equivalent to “.2” on the calculator, she would not need to spend time thinking about it. Ms. Zambarano opined that

[Student] should solidify her understanding of number sense, the four basic operations [addition, subtraction, multiplication, division] and the ability to use technology to help her retrieve her math facts. That was one of the goals that I had for her last year... to become more comfortable with using a calculator, to learn when to use it and how to use it... also emphasis on telling time, making change, using units for measurement, solving simple word problems (testimony of Zambarano).

Ms. Zambarano’s proposition that Student be taught to rely on a calculator for basic, every day mathematical problems, or rely on a digital clock<sup>26</sup> to tell time, was not persuasive given the fact that Student is of solid average cognitive abilities. Similarly, her solution that if Student did not have her calculator when in the community she could use her cellular phone was concerning. This would only foster greater dependence on technology and could leave Student paralyzed and unable to function if and when the technology were not available to her. The evidence is persuasive that broken down enough and introduced at a slow pace, as recommended by Dr. Boyer and Dr. Brefach, Student possesses the ability to do substantially more math independently than Ms. Zambarano and Westford would have her do.

The credible evidence shows that when Student entered LSA she still had not mastered the most basic of math skills (testimony of Kotkowski). In 2009, Dr. Boyer had found that Student “struggled to grasp the most basic mathematic concepts relating to calculation, time and money” (PE-1A; SE-34). In mid 2010, Dr. Brefach noted similar findings (testimony of Brefach). Student’s progress reports, dated June 2010, contain little information regarding the math skills that Student had actually mastered without teacher support during that school year (PE-7GG). Ms. Zambarano defined mastery of a skill for Student as knowing how to set up problems with reminders, not as being able to set up and solve a problem independently (testimony of Zambarano). Student obtained a 212/Warning score on her 2010 Math MCAS, even with implementation of accommodations (SE-4). Furthermore, Mother had raised concern at Team meetings that at home, Student did not know how to approach math problems and could not remember what she had just worked on in school the same day, and also that Student had stated she was getting help on her tests<sup>27</sup> (testimony of Mother). Ms. Zambarano explained that under the IEP, Student received accommodations and assistance during test-taking but that the answers were Student’s. Regarding the math MCAS, Ms.

---

<sup>26</sup> “I think that we have to think about things like a calculator or a digital watch. They said she can tell time using a digital watch. Maybe telling time --looking at a clock and telling time isn’t a skill that she needs to be using her brain power on. Maybe using a digital watch and using a calculator are things that she can use to help her get there...” (testimony of Zambarano).

<sup>27</sup> Student told Mother that if she did not know the answer to a test question, she could ask the teacher questions and receive help during the test. Ms. Zambarano testified that Student’s IEP called for Student to receive assistance during classes and assessments, but they did not give Student the answer (testimony of Zambarano).

Zambarano explained that Student would have additional opportunities to pass it in eleventh and twelfth grades if she did not pass in tenth grade. She further explained that the top ten percent of questions that students do not answer correctly are removed from the test to “make it that much more accessible to those students” (testimony of Zambarano).

Westford’s explanations regarding the meaning of “mastery” of a skill *vis a vis* what was expected of Student in light of the goals and objectives in her IEP, was equally troublesome. According to Westford, with teacher guidance and assistance to identify the proper equation and set up a problem, and later using the calculator to solve the equation, Student could get to the correct answer, such as calculating percentages for math, and she was then considered to have “mastered” the skill. Similarly, if Student could tell time by looking at a digital clock instead of a regular clock, then this would be sufficient. According to Ms. Zambarano, this would be the equivalent of having mastered the skill for purposes of fulfilling the school’s responsibility with respect to reaching a math goal (testimony of Zambarano). There are problems with this view. There is a difference between a) being able to ascertain what it is that a math problem requires in order to solve, knowing how to carry out that skill and be able to carry it out independently, at minimum with regard to addition, subtraction, multiplication, division, and other basic skills, and using to use a calculator to reach the conclusion faster than one would on one’s own to accommodate slow processing deficits, and b) getting help to identify what the problem calls for and then using the calculator because one does not know how and cannot solve it independently. The former would be appropriate use of an accommodation, while the latter is using a technological tool as a crutch. The latter would leave Student without any recourse if for some reason she found herself in a situation without assistive technology. The latter could hardly signify that Student had mastered a skill, let alone mastered it independently. More importantly, the testimony is persuasive that given her cognitive abilities, interest, motivation and positive attitude toward learning, Student is capable of mastering basic skills independently if the instruction is slowed down and delivered in a manner she can access (testimony of Brefach, Shubow, Kotkowski, Nathans).

The evidence is persuasive that Student was not making effective progress in math. Westford had ample evidence regarding Student’s serious deficits in math and its solution was to teach Student how to use a calculator, and if one was not available, Student could use her cellular phone (testimony of Zambarano). More independent skills should be expected of a student with average cognitive abilities. Student may have been accessing seventh grade math with much teacher support and guidance, but in a subject where the ability to perform higher level skills is based on having solid foundational skills, Student was not passing the MCAS, and could not perform age–expected mathematical computation independently (SE-4; testimony of Kostokwski, Zambarano).

In terms of delivery of instruction at a slow pace and in small group settings for all Students classes, she did not receive this in her inclusion programs. Westford’s staff and Dr. Weiner were very critical of the class set up at LSA. They took issue with there

being another group of three individuals in the same classroom where Student was receiving one of the four small group math blocks. They further commented on the noise level in the room caused by the environmental sound making machine, and other noises outside the classrooms which caused Ms. Garcia to close the door. However, Westford customarily breaks students up into small groups in the regular education classes. Dr. Weiner did not support breaking classes up into working groups as occurred in the science class she observed in which Student's group remained in the classroom with at least one other group while other groups left the classroom. On the day of her observation, in addition to Student's group of three, there was a group of approximately five other students in the classroom working on a cooperative project, and additional groups left the room. Given that there were over twenty students in the science and social studies classes, there would have been at least four or five groups, with each group having between three and five students, when the classes were broken up into small working groups. Dr. Weiner conceded that having the various groups working simultaneously in the same classroom was a problem that she would have identified for Westford. Dr. Weiner testified that competing noise from different groupings was counter-indicated for Student in light of her CAPD, as Ms. Shubow had previously testified. Ms. Weiner would have recommended that Student's group leave the room and go to a separate quieter area. She would have also recommended the use of a sound field system and underscoring techniques that good teachers use and would also look at teacher styles to address prosody of speech (testimony of Weiner). These concerns had been raised by Ms. Shubow, the only audiologist who testified at hearing. While they were quick to judge noise levels at LSA, Westford's witnesses appeared oblivious to the noise level created by the multiple groupings in their own regular education classrooms or its impact on Student (testimony of Garcia, Zambarano, Rich).

Dr. Weiner offered little additional insight regarding issues she may have observed which would have required modification. She also did not comment on Ms. Rich's speed of speech, which Ms. Shubow identified as a problem with respect to Student's ability to hear, understand and follow instructions, as well as access the content information orally presented in her English language arts class. While she came across as a caring, knowledgeable, well-intentioned individual, during Ms. Rich's testimony I verbally instructed her to slow down because the speed at which she spoke made it extremely difficult to follow what she was saying, let alone to take notes. Additionally, she required multiple gestural reminders to slow down from Westford's attorney and this hearing officer. Ms. Shubow remarked on the speed of Ms. Rich's speech during her observation as she had great difficulty understanding and following what Ms. Rich was saying/doing (testimony of Shubow). Even in the context of direct services outside the general education environment, as the language arts teacher, it would have been very difficult for Student to follow Ms. Rich's pace and speed of speech given her CAPD and NVLD diagnoses. (testimony of Shubow). However, Ms. Rich testified that Student was accessing information in language arts class and she passed the English language arts MCAS, an area in which she demonstrated effective growth with accommodations from one year to the next. I credit Ms. Rich's testimony in this regard.



Ms. Zambrano's responses during cross-examination regarding her email to the school nurse in February 2010 and the email to the social studies teacher, Catherine Ryan, seeking "positive" information on Student's performance<sup>28</sup>, were not candid, forthcoming or for that matter credible and reliable when compared to her actual email. By trying to provide explanations that flew in the face of common sense, her credibility was seriously compromised. While it is understandable that a school district that is aware of a parent's intention to unilaterally place his/her child out of district will try to support that Student's placement in district, the teachers and service providers' focus must continue to be on meeting the child's needs appropriately, and not focus on the impending litigation. Ms. Zambrano's testimony that she did not know that Student was not returning to Stony Brooke in September 2010 (intimating that it was a surprise) until Student did not show up in September was not credible when viewed in light of the record and her own previous testimony. Furthermore, if her testimony regarding this were credible, it would raise concerns regarding the quality of the communication among Student's teachers and service providers. At a minimum, she had an inclination that Student would not be returning as a result of her conversations with Ms. Fulreader who, since the beginning of the school year, had allegedly discussed this with Student individually and at other times during the year in her group sessions (testimony of Zambrano, Fulreader).

Pursuant to the IEP and Amendment for seventh grade, Ms. Garcia and Ms. Zambrano testified that the model of instruction offered Student would have been similar to the sixth grade model for special education and inclusion classes (testimony of Garcia, Zambrano). Ms. Zambrano and Ms. Rich disagreed that Student would have required small group instruction in science and social studies, as long as she received teacher support and there was an aide in the classroom (testimony of Zambrano, Rich). Currently, Ms. Zambrano is in the seventh grade science class every other day. She recommended the use of true/false and multiple choice questions in tests rather than requiring Student to provide short answer essays (testimony of Zambrano). Ms. Rich and Ms. Zambrano testified that Student was getting everything she required including attention to social pragmatics in Westford (testimony of Zambrano, Rich). Ms. Zambrano further disagreed with Dr. Brefach's recommendation that Student required scripting (testimony of Zambrano).

As explained earlier, the IDEA was 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."<sup>29</sup> The Supreme Court has

---

<sup>28</sup> "... when you get a chance can you shoot me an email about how fantastically successful [Student] is performing in your class[?] Thanks" (testimony of Zambrano read into the record from an exhibit marked for identification).

<sup>29</sup> 20 USC § 1400(d)(1)(A). *See also* 20 USC 1412(a)(1)(A); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 12 (1<sup>st</sup> Cir. 2007) (referencing "broad purpose behind the IDEA: 'to ensure that all children with disabilities have available to them a free and 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'" citing to 20 USC § 1400(d)(1)(A)).

noted that in enacting the IDEA, Congress endeavored to enable disabled students to “achieve a reasonable degree of self-sufficiency” and “become productive citizens, contributing to society instead of being forced to remain burdens.”<sup>30</sup> In this context, Westford’s program was inconsistent with IDEA’s central purpose and was not setting the solid foundation that would have allowed Student to develop the math, life and social pragmatics skills necessary to help her become self-sufficient and a productive, contributing member of society at the end of her entitlement.

Ms. Zambarano’s analysis of Student’s mastery of concepts, her reliance on the use of calculators, cell phones or digital watches as equivalent to mastery of concepts and the inconsistencies in her testimony raised questions about its reliability generally. She came across as a committed, competent professional, however, in her zealotry to defend Westford’s position, she compromised her credibility. Regarding Ms. Garcia, she has never been Student’s teacher, she has not conducted any evaluations, and her classroom observations specifically as to Student were quite limited. Her only observations of Student at LSA were in the context of litigation and the impending hearing. Therefore, I do not find their opinions to be as reliable or credible as the evidence presented by Parents.

In contrast, I found Dr. Brefach’s and Ms. Shubow’s testimony to be credible and reliable. They both evaluated Student, observed her in her program at Westford. Dr. Brefach also observed Student at LSA and observed the proposed seventh grade program in Westford. They reviewed past and current records, interviewed Student and Parents. Ms. Shubow was the only audiologist who testified at Hearing. Both she and Dr. Brefach emerged as extremely experienced and knowledgeable in their respective fields. As such, their recommendations were reasonable, appropriate and reliable.

Having found the program offered by Westford for seventh grade was inappropriate to meet Student’s needs and offer her a FAPE, I turn to LSA’s program to ascertain whether that program is appropriate for Student, thereby entitling Parents to reimbursement.

## **II. LSA program:**

The Supreme Court held in *Burlington*, “the Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible.” *School Comm. of Burlington v. Dept. of Ed.*, 471 US 359, 369 (1985).

---

<sup>30</sup> *Rowley*, 458 U.S. at 201, n.23. See also *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (“At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child.”).

As stated by Dr. Brefach, Student requires instruction in an integrated program where skills are taught and carried over from one setting to the next. Student's instruction must be delivered in small group settings. She needs direct instruction in math, language arts and social pragmatics with assistance in prosody of speech, and opportunities to practice with similar peers, at a slower pace. LSA is precisely this type of program. It is an approved private school specializing in language-based issues, offering a small group program, one-to-one opportunities, and a supportive environment. At LSA, Student was a willing and engaged participant in class, asking questions, offering answers and displaying no signs of anxiety. Also, she was able to answer more items on the assessments because her speed and fluidity had improved. (testimony of Kotkowski).

Westford's observers took issue with one of Student's teachers using an outline approach during one of Student's language arts classes while Student was using the Cornell two-step approach. While they are correct that lack of consistency in approaches is contraindicated, Student was independently implementing the Cornell two-step approach appropriately.

LSA's school economy is also an excellent tool to assist Student to generalize practical life and math skills to every day life, and she is invested in the system (Kotkowski, McManus, Nathans). More importantly, Student has responded very positively to the structure and instruction provided at LSA both from a personal as well as an interpersonal standpoint (Kotkowski, McManus, Nathans). Ms. Nathans noted positive strides in Student's attitude and behavior since the beginning of the school year, as observed during structured and unstructured activities (testimony of Nathan). Mother testified as to how eager Student is to get to school in the mornings and how she uses the time in the car productively to read (testimony of Mother).

When a school district fails in its obligation to provide FAPE to a student with a disability, parents may enroll their child in a private school and seek retroactive reimbursement for the cost of the private school. If a BSEA Hearing Officer finds that the school district did not make FAPE available to the student in a timely manner and finds that the private school placement selected by the parents was appropriate, the Hearing Officer may require the school district to reimburse the parents for the reasonable out-of-pocket costs associated with the parents unilateral placement, including tuition and transportation.<sup>31</sup> Parents are only entitled to reimbursement for the private school if it offered Student "an education otherwise proper under [the] IDEA"<sup>32</sup>, that is if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits".<sup>33</sup>

---

<sup>31</sup> 20 USC 1412 (a)(10)(C)(ii); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11-13 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370, 373-74 (1985); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1<sup>st</sup> Cir. 2006).

<sup>32</sup> *Id.* at 12-13.

<sup>33</sup> *Id.* at 11. See also *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, n.22 (1<sup>st</sup> Cir. 2007); *Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26 (1<sup>st</sup> Cir.2002).

The First Circuit Court of Appeals clarified in *Mr. I. v. Maine School Administrative District No. 55*, the necessary elements for reimbursement of a private placement, stating:

In *Burlington*, the Supreme Court reasoned that because parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be appropriate or pay for what they consider to be the appropriate placement, they are entitled to reimbursement of the expenses of that placement if it turns out they were right in choosing it. Implicit in this reasoning is the notion that parents rightfully decide on a private placement when it addresses, at least in part, their child's special educational requirements, while the IEP does not. . . .

As we have recognized, a private placement need provide only *some element* of the special education services missing from the public alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit. Nor must the placement meet every last one of the child's special education needs. But the reasonableness of the private placement necessarily depends on the nexus between the special education required and the special education provided.<sup>34</sup>

The First Circuit focused more on the appropriateness of the services provided to the student in light of the recommendations of the educational experts,<sup>35</sup> than on the educational progress attained by the student in that placement, when considering the appropriateness of the private school.<sup>36</sup> Furthermore, within the context of the IDEA, parents are not bound by the same statutory requirements of FAPE that apply to public schools when considering the appropriateness of the private educational placement and services selected by the parents.<sup>37</sup>

The evidence in the case at bar is persuasive that the program offered by Westford through December 2010 was not likely to allow Student the opportunity to receive a FAPE and Parents were therefore, justified in seeking alternative educational placement

---

<sup>34</sup> *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 24, 25 (1<sup>st</sup> Cir. 2007) (internal quotations and citations omitted; emphasis in original).

<sup>35</sup> See *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 25 (1<sup>st</sup> Cir. 2007) (private school was not appropriate since this school, "where [student] has remained for more than two full academic years, simply does not provide the special education services that [student's] mental health professionals have prescribed").

<sup>36</sup> See *Rafferty v. Cranston Public School Committee*, 315 F.3d 21 (1<sup>st</sup> Cir. 2002) (even if the child makes academic progress at the private school, "that fact does not establish that such a placement comprises the requisite adequate and appropriate education").

<sup>37</sup> *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-14 (1993) (private school need not necessarily meet state educational standards or be state-approved, and need not meet federal statutory definition of FAPE); *Doe v. West Boylston School Committee*, 4 MSER 149, 161 (D.Ma. 1998) (Massachusetts FAPE standards need not be met for private placement to be appropriate).

for Student. Furthermore, LSA is generally consistent with the recommendations of Dr. Boyer, Dr. Brefach, and Ms. Shubow.

Both the Supreme Court and First Circuit have made clear that reimbursement is a matter of discretionary, equitable relief, in light of the totality of the evidence and the reasonableness of the parties' positions. With these considerations in mind, I find that reimbursement to Parents is justified.<sup>38</sup>

Therefore, I find that Parents proved their case by a preponderance of the evidence, consistent with *Shaffer v. Weast*, 546 U.S. 49; 126 S.Ct. 528, 534, 537; 44 IDELR 150 (2005) and as such they are entitled to reimbursement for all out of pocket expenses associated with Student's placement at LSA from the date of her placement in August 2010 through December 2010.

Because the time period subsequent to December 2010 is not before me in the instant case, I cannot enter any order(s) with respect to future programming for Student. However, I urge the Team to reconvene and proffer an IEP, appropriately modified consistent with the terms of this Decision, so that going forward, Student can be educated in the least restrictive environment.

**ORDER:**

1. Westford shall reimburse Parents for their out-of-pocket expenses relevant to the day portion of Student's private placement at Learning Skills Academy limited to the period commencing on the date of her placement in August 2009 through December 2010 (the end of the 2009-2010 IEP period).

By the Hearing Officer,

---

Rosa I. Figueroa

Dated: December 28, 2010

---

<sup>38</sup> E.g., *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); *School Union No. 37 v. Ms. C.* 518 F.3d 31, 34 (1<sup>st</sup> Cir. 2008) ("Reimbursement is an equitable remedy"); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13 (1<sup>st</sup> Cir. 2006) (parent's claim for reimbursement for expenses for private educational services involves an equitable remedy).

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

**THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

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

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

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

**Compliance**

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

## **Rights of Appeal**

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

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

## **Confidentiality**

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

## **Record of the Hearing**

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