

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

In Re: Weymouth Public Schools

BSEA # 09-1335

DECISION

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

A hearing was held on May 18, 19, and 27, 2009 and July 16 and 23, 2009 in Malden, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

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| Student | |
| Student's Mother | |
| Melissa Sheldon | REACH Educational Services |
| Christine Blake | REACH Educational Services |
| Blue Favreau | Consultant |
| Kirsten McGhee ¹ | Neuropsychologist, Boston Neuropsychological Services |
| Regina Callahan | Paraprofessional, Weymouth Public Schools |
| Paulina McDonald | Substitute Teacher, Weymouth Public Schools |
| Seth Johnson | ABA Assistant, Weymouth Public Schools |
| Alyssa Hinkley | Speech-Language Pathologist, Weymouth Public Schools |
| Kristina Quigley | Classroom Teacher, Weymouth Public Schools |
| Jessica Manger | Autism Specialist, Weymouth Public Schools |
| Christina Stuart | Autism Specialist, Weymouth Public Schools |
| Jane Connolly | Out-of-District Liaison, Weymouth Public Schools |
| Susan Nutting | Principal, Nash Elementary School, Weymouth Public Schools |
| Janis Chapman | Special Education Teacher, Canton Public Schools |
| Paul Mahoney | Autism Specialist, Canton Public Schools |
| Alan Dewey | Assistant Superintendent for Student Services, Canton Public Schools |
| Robert Desmond ² | Administrator of Special Education, Weymouth Public Schools |
| Theresa Skinner | Administrator of Special Education, Weymouth Public Schools |
| Colby Brunt | Attorney for Weymouth Public Schools |
| Tami Fay | BSEA Legal Intern |

The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-A through P-M, but disregarding Parent's handwritten annotations on exhibit P-

¹ Dr. McGhee testified by conference call.

² Mr. Desmond is no longer the Administrator of Special Education for Weymouth. He has been replaced by Ms. Skinner.

H-16; documents submitted by the Weymouth Public Schools (Weymouth) and marked as exhibits S-1 through S-63; and the equivalent of approximately three full days (spread out over five hearing days) of recorded oral testimony and argument.

ISSUES

The issues in dispute are the following:

A. Has Weymouth failed to provide Student with a free appropriate public education (FAPE) through:

1. Failure to provide an individualized education program (IEP) reasonably calculated to provide Student with FAPE during the 2008-2009 school year?
2. Failure to implement Student's IEP during the 2008-2009 school year?

And, if so, what compensatory education, if any, is due?

B. With respect to Parent's claims subsequent to May 30, 2008, is Parent entitled to reimbursement of expenses for testing, independent services, independent evaluations, tuition and services at Sterling Nursery School, private social skills training, and transportation?

C. Is Weymouth continuing to deny Student FAPE; and if so, should Weymouth be required to immediately put "appropriate" personnel in place for Student?

D. Has Weymouth proposed an IEP for the summer of 2009 and for the 2009-2010 academic year that is reasonably calculated to provide Student with FAPE? More specifically, must Weymouth's proposed IEP be changed to include any of the following:

1. Consultation by Parent's consultant (Blue Favreau) at the same (or higher) level as is currently being provided, with the addition of two hours per month of home consultation?
2. Continuation of the current home service providers at the same (or higher) level as is currently being provided?
3. Additional 1:1 services?
4. Additional staffing?
5. Other modifications or additions?

E. In the event that Weymouth's proposed IEP is not appropriate and cannot be made appropriate, should Weymouth be required to fund Student's summer placement at HandiKids (where Parent has unilaterally placed Student) and should Weymouth be required to place Student within a private program or a program within the Weymouth Public Schools, as requested by Parent.

HISTORY OF THE DISPUTE

On August 15, 2008, Parent filed with the Bureau of Special Education Appeals (BSEA) a hearing request, seeking relief regarding a limited issue pertaining to the implementation of her daughter's special education program. Specifically, Parent took the position that her daughter's 1:1 paraprofessional did not have sufficient experience and training to implement the IEP. With the assistance of the Hearing Officer, the parties engaged in multiple discussions, seeking to resolve this issue.

Over time, it became apparent that Parent had broad objections to her daughter's educational program and its implementation, and that these objections far exceeded the scope of Parent's original hearing request. On January 9, 2009, Parent filed a request to amend her hearing request. On March 23, 2009, Parent filed a second request to amend her hearing request. Both hearing request amendments were not opposed by Weymouth, and both were allowed by the Hearing Officer.

On April 24, 2009, Weymouth filed a motion *in limine* to limit the scope of the hearing based upon an agreement entered into by the parties. By Ruling dated May 5, 2009, it was determined that on May 30, 2008, the parties had entered into a settlement agreement that addressed Parent's past special education claims and resolved Student's services for the summer of 2008 and Student's placement for the 2008-2009 school year. The agreement included a release clause that unambiguously stated that the parties settle "any and all disputes that exist or may exist between the parties ... through the date of execution of this agreement." The Ruling concluded that this agreement precluded the parties' re-litigating any matters prior to May 30, 2008.

There were a variety of other intervening issues that have been addressed by the Hearing Officer, including the scope of Parent's right to observe her daughter's program, and various discovery disputes.

On May 18, 19, and 27, 2009, this matter went to hearing on Parent's compensatory claims (described in paragraphs A and B of the Issues part of this Decision, above), as well as certain aspects of Parent's prospective claims that were apparent to the parties at that time—specifically, Parent's desire to have a continuation of her home service providers and a continuation of consultation by Ms. Favreau, regardless of her daughter's educational placement.

Soon after the third hearing day (May 27, 2009), it became clear that the extent of Parent's prospective claims had not yet be fully identified. Both parties had previously believed that Student would be placed in a substantially-separate classroom within the Canton Public Schools (Canton) for the summer of 2009 and for the 2009-2010 school year. Weymouth had proposed an IEP for the Canton program, and had reason to believe that this placement would, in general, be acceptable to Parent. It was anticipated that any remaining prospective issues would pertain to any modifications to the Canton program—for example, the need for additional, 1:1 staffing.

After obtaining additional information from Canton, Parent came to believe that there were substantial deficiencies with the Canton program, and that Canton would not agree to the modifications believed by Parent to be minimally necessary. This threw into doubt the Canton placement for the 2009-2010 academic year since Weymouth, at that time, was reluctant to press forward with a public school placement that Parent found unacceptable.

When it became uncertain whether Student would be attending the Canton program for the 2009-2010 academic year, this also brought into question Student's services for the summer of 2009. Originally, the parties had anticipated that summer services would be at the Canton Public Schools, that Canton summer services would serve as a transition into the Canton academic year program, and that the summer and school year services would be agreeable to both parties. However, the Canton summer services were dependent upon Student's attending Canton for the 2009-2010 academic year. When Parent rejected the Canton academic year services, the Canton summer services became unavailable. Weymouth then informally offered its own summer program. Parent then made clear her objections to the summer services being offered by Weymouth for the summer of 2009.

Since Weymouth had previously determined that Student could not be served appropriately within its public schools, both parties turned their attention to seeking to identify an appropriate private placement. Weymouth hoped to find a private placement agreeable to Weymouth and Parent, in lieu of the Canton placement. After sending packets to a number of private placements that might be appropriate for Student, after following up with these placements, and with participation and assistance from Parent in proposing and visiting placements, Weymouth was unable to identify a private school placement that would likely accept Student and that was acceptable to Parent.

During the process of exploring the possibility of a private placement, Canton changed its position somewhat and agreed to allow certain additional services (consisting of 1:1 ABA services for one hour each day) to be provided within its program for Student. These additional services satisfied some, but not all, of Parent's concerns regarding the Canton program. Parent continued to oppose the Canton program as it was proposed.

After Canton agreed to allow these additional 1:1 services and after being unable to find a private placement acceptable to Parent, Weymouth decided to defend its originally-proposed IEP for the Canton placement, with an amendment to include the one hour daily of 1:1 services. Weymouth's proposed IEP also included services for the summer of 2009 within the Canton program. In addition, Weymouth continued to offer, informally, the option of Student's participation within the Weymouth summer program because Parent continued to reject the Canton program, including the Canton summer services.

Parent continued to reject the Weymouth summer services, as well as the Canton summer and school year services. Eventually, Parent unilaterally placed her daughter into the HandiKids summer program starting July 27, 2009.

Once the nature and extent of the dispute regarding the summer of 2009 and the 2009-2010 academic year became clear to the parties, hearing dates of July 16 and 23, 2009 were scheduled to address the remaining issues regarding the appropriateness of Weymouth's

proposed IEP. Originally, July 16th was scheduled to address summer services so that a decision could be made very soon thereafter on that part of the dispute, but Parent was not able to obtain, for the July 16th hearing day, all of her necessary witnesses for summer services. The parties then agreed to hear both issues (services regarding the summer and services regarding the following academic year) over the course of both hearing days.

At the end of the hearing day on July 23, 2009, the parties made oral closing arguments regarding services for the summer of 2009. On July 24, 2009, I issued an Order finding that the proposed summer services were appropriate and indicated that I would elaborate on the reasons in a subsequent, full Decision. The Order is attached to this Decision as Appendix A.

On or before July 24, 2009, the parties provided written closing arguments regarding Parent's compensatory claims. On or before July 31, the parties provided written closing arguments regarding services for the 2009-2010 academic year.

This Decision addresses all aspects of the dispute—that is, compensatory claims, summer services, and academic-year services.

POSITIONS OF THE PARTIES

Parent, who did not testify as an expert but who has a detailed and comprehensive understanding of services for children on the autism spectrum, took the position that during the 2008-2009 school year her “daughter went through Hell.” Parent believes that “not one person” working with her daughter had the requisite training and experience needed to provide appropriate services. Parent takes the position that as a result, her daughter's educational services were inadequate and inappropriate, resulting in her daughter becoming frustrated at school, regressing in certain areas, and making little or no progress in other areas. Parent believes that, as a result of Weymouth's actions, her daughter “suffered,” both “physically and emotionally.”

With respect to Weymouth's proposed IEP, Parent takes the position that the substantially-separate classroom at Canton is inadequately staffed because there is an insufficient number of staff and because the staff are not appropriately experienced and trained. Parent also believes that the peer group of the classroom is inappropriate because of the age range and because of the social level of the children. Parent believes that the classroom is not language-based, that there is not sufficient facilitation or encouragement of social interaction in the classroom, and that there is an unresolved, antagonistic relationship between two of the children. Parent is also seeking ten hours of 1:1 ABA instruction per week, which is not provided under the proposed IEP. In her exhibit P-M, Parent has made additional, extensive and detailed suggestions for changes to the proposed IEP.

Parent takes the position, alternatively, that her daughter should be placed back into a Weymouth Public Schools program, into a private program, or possibly into a substantially-separate classroom within another school district. Parent argues that her daughter would be appropriate for a substantially-separate classroom currently available within Weymouth. Parent believes that the Weymouth classroom is better staffed than the Canton classroom,

and Parent takes the position that many of the Weymouth staff (including the speech-language pathologist, occupational therapist, and behaviorist) have extensive experience working with children on the autism spectrum such as her daughter. Parent believes that her daughter should return to a Weymouth school until such time as a more appropriate placement can be identified. Parent also takes the position that there are one or more private schools that would likely be appropriate for her daughter and currently have an opening, including the Pathways program at McLean Hospital, and that other appropriate private schools will likely have an opening at a future time. Parent would also like Weymouth to explore other public school districts that offer a substantially-separate classroom for children on the autism spectrum.

Weymouth takes the position that because Parent agreed to the IEP for the 2008-2009 school year, she cannot now attack its appropriateness. Weymouth agrees that Parent rejected the placement in December 2008, but also points out that Parent accepted all of the services at that time. Weymouth also argues that Parent's delay in consenting to three-year evaluations precluded any substantive improvements in the IEP until after the March 2009 IEP Team meeting when Weymouth proposed a different service delivery model. Weymouth takes the position that any significant deficiencies in the IEP for the 2008-2009 school year did not appear until on or after the March 2009 Team meeting; and that in any event, Student made progress in meeting her IEP goals during the school year, that Weymouth staff worked diligently to develop and adjust an appropriate behavior plan for Student, and that many of Student's difficulties were caused by her attending what was, in many respects, a kindergarten classroom at Sterling Nursery School prior to attending 2nd grade at Weymouth.

Weymouth defends its currently-proposed IEP calling for placement in a substantially-separate classroom within the Canton Public Schools. Weymouth takes the position that this classroom, together with the related services to be provided Student, satisfy the recommendations made by all of those who have evaluated Student.

FACTS

1. **Student Profile.** Student, who is nine years old and lives with her mother in Weymouth, MA, recently completed the 2nd grade in a regular education classroom at Weymouth's Nash Primary School. Student is a lively, energetic, engaging, and happy child. Testimony of Parent; exhibits P-C-8, S-57.
2. Student has a variety of learning strengths and weaknesses that are not in dispute. She has a history of delayed receptive and expressive language skills, social skills deficits, and stereotypical behaviors (for example, hand flapping and body tensing). Recent testing reveals that Student has a relative strength in functional communication skills (i.e., basic verbal communication skills used on a daily basis to express herself verbally and to understand what other are saying to her) and basic word knowledge. Testimony of Parent, Favreau; exhibits P-C-8, S-17, S-18, S-57.
3. Student has age-appropriate skills regarding spelling, word reading, and sounding out nonsense words. Her reading fluency and accuracy are within age expectations. In contrast, her comprehension is significantly lower, she has difficulty completing tasks

that require written output (because of written expression weaknesses and fine motor control weaknesses), and she has difficulties analyzing and interpreting visual information. Student also has weaknesses in math reasoning and numerical operations, and difficulty following multi-step directions. Student has significant difficulty maintaining her attention and is easily distracted—for example, by her own thoughts and by objects in a room—and she has an impulsive response style. Student has anxiety occasionally, particularly with transitions, which have been difficult for her. Testimony of Favreau; exhibits P-C-8, S-16, S-17, S-18, S-57.

4. Cognitive testing indicates that Student’s verbal intellectual abilities are in the average range, while her non-verbal abilities are in the low-average range. She has a diagnosis of Pervasive Developmental Disorder/Autism. Exhibits P-C-8, S-19, S-57.
5. **IEP from 5/8/08 to 5/7/09.** A fully-accepted IEP for the period from 5/8/08 to 5/7/09 called for Student to be placed in a regular education 2nd grade classroom. The IEP provided for the following direct services outside of the regular education classroom: applied behavior analysis (ABA) services from a behavior specialist for one hour, twice each week; ABA services from an ABA assistant for one hour each day; speech-language services for a half hour, twice each week; occupational therapy for a half hour, twice each week; physical therapy for a half hour, once each week; and parent training in the home by a behavior specialist for one hour, six times per week. Exhibits P-I-6, S-1.
6. This IEP called for the following direct services within the regular education classroom: ABA services from an ABA assistant for one hour each day; speech-language services for a half hour, once each week; occupational therapy for a half hour, once each week; physical therapy for a half hour, once each week; and “carry over” services by regular education/special education teacher for one hour, three times per week. Exhibits P-I-6, S-1.
7. This IEP also called for the following consultation services: behavior management consultation by a special education teacher or aide for a half hour, once per month; ABA by a behavior specialist, for one hour twice per month; ABA supervision by an ABA supervisor for one hour, twice per week; and ABA supervision by an ABA supervisor at school and home for one hour, once per week. The IEP also called for extended year services consisting of participation in Weymouth’s summer program with a focus on social skills, and continuation of the parent training/home program. Exhibits P-I-6, S-1.
8. Also, by agreement of the parties, Blue Favreau, MEd, BCBA, was retained by Weymouth as a consultant for Student for three hours per month through December 2008, and for two hours per month thereafter. Typically, Ms. Favreau’s consulting work for Weymouth included a monthly observation of Student, and then a written

observation and recommendations for Weymouth staff. Testimony of Favreau; exhibits P-C-7, P-I-6, P-I-9.³

9. **Amendments to the 5/8/08 to 5/7/09 IEP.** The IEP Team met on October 20, 2008 to review and amend Student's IEP for the purpose of adding speech-language, occupational therapy, and physical therapy consultation, and to add a half hour per week of physical therapy to address gross motor issues. On December 8, 2008, Parent accepted the service changes but rejected the placement. Exhibits S-3, S-5.
10. On January 12, 2009, an IEP amendment was proposed to change three (of the five) hours of ABA services, which had been provided within the regular education classroom, so that these services would be provided outside of the regular education classroom. Parent accepted this change. Exhibits P-C-1, S-6.
11. **IEP from 3/30/09 to 3/29/10.** At an IEP Team meeting on March 30, 2009, an IEP was developed for the period 3/30/09 to 3/28/10. During the meeting, after reviewing its three-year evaluations, the Weymouth members of the IEP Team concluded that Student could not be appropriately served within a regular education classroom. The proposed IEP called for all direct special education services to be provided outside of the regular education classroom, with all academic instruction to be provided through special education services. The principal additional change to Student's services was that Student would participate in a social skills group for one hour, three times per week and would receive social skills instruction from a speech-language pathologist for a half hour, twice per week. Exhibits S-14, S-15
12. When proposed to Parent, the IEP did not identify a placement because, at time of the March Team meeting, Weymouth concluded that it did not have an appropriate in-district placement and would therefore need to explore a placement elsewhere—either within another public school or in a private special education school. On April 24, 2009, Parent accepted the “additional modifications/accommodations” in the IEP, she accepted the additional services regarding social skills, and she rejected the remainder of the IEP. Testimony of Desmond; exhibits S-14, S-15.
13. **IEP from 6/16/09 to 3/29/10.** On June 16, 2009, an IEP Team meeting resulted in a proposed IEP for the period 6/16/09 to 3/29/10. This IEP called for placement of Student into a substantially-separate classroom within the Canton Public Schools during the 2009-2010 academic year, as well during the summer of 2009. Pursuant to this IEP, Student's current home service provider would be continued, via a contract with Weymouth, through September 2009. On October 1, 2009, Canton would utilize its own home service provider. Exhibit S-57.
14. This IEP called for all direct special education and related services to be provided outside of the regular education classroom. These direct services included the following: academic instruction by a special education teacher for 324 minutes each

³ Ms. Favreau is a highly-experienced teacher/therapist and consultant who served as Student's lead therapist while Student attended Sterling from September 2006 to August 2008. Testimony of Favreau; exhibit P-C-3.

day; social skills instruction by a special education teacher and staff for 360 minutes per day; communication skills taught by a speech-language pathologist for 30 minutes, three times per week; occupational therapy by an occupational therapist for 30 minutes, three times per week; adaptive physical education by an adapted physical education teacher for 30 minutes, once per week; and parent training in the home by an ABA specialist for 120 minutes, three times per week. Exhibits S-57, S-62.

15. This IEP also called for extended year services taught by a special education teacher and staff for 300 minutes per day from 7/6/09 to 8/14/09. Extended year services included the following additional services: communication skills taught by a speech-language pathologist for 30 minutes, twice per week; occupational therapy by an occupational therapist for 30 minutes, once per week; and physical therapy by a physical therapist, once per week. Exhibits S-57, S-62.
16. The IEP called for the following consultation services: ABA consultation by a behavior consultant for one hour per month; communication consultation by a speech-language pathologist for 30 minutes per month; occupational therapy consultation for ten minutes per month; and physical therapy consultation by a physical therapist for 15 minutes per month. Exhibits S-57, S-62.
17. On July 14, 2009, this IEP was amended administratively to add discrete trial training by a special education teacher or staff on a 1:1 basis or small group instruction for an hour each day. Exhibit S-62.
- 18. Educational History.** From September 2006 to August 2008, Student attended the Sterling Nursery School (Sterling). Sterling is an integrated pre-school, where 80 to 90% of the children are regular education students. Over the course of this time, Student progressed to the point that stereotypical behavior was substantially eliminated, she was able to learn in small groups with one or two other children, she was able to work independently with reinforcement, and she had friendships at school. Overall, Student made excellent educational progress at Sterling. Testimony of Favreau, Parent.
19. For the 2008-2009 school year, by agreement of the parties, Student was enrolled in the 2nd grade at the Weymouth Public Schools pursuant to a fully-accepted IEP. The IEP, which covered the period from 5/8/08 to 5/7/09 and is summarized above, called for Student to be placed in a regular education classroom, with special education and related services provided within and outside of the classroom. Exhibits P-I-6, S-1.
20. One of the services provided by this IEP was a dedicated 1:1 aide. Student's 1:1 aide (Ms. Callahan) was selected by the Nash Elementary School Principal (Ms. Nutting). Ms. Nutting testified that she believed that Ms. Callahan would be qualified and appropriate to work with Student in this capacity. Ms. Callahan had two years previous experience but did not have previous experience working with children diagnosed with autism. Testimony of Nutting; exhibits P-C-6, S-1.

21. During absences of Ms. Callahan, a substitute paraprofessional (Ms. McDonald) served as Student's 1:1 aide. In preparation for this assignment, Ms. McDonald was trained on Student's behavior cards so that she would know when and how Student's behavior was to be reinforced. Ms. McDonald also reviewed Student's IEP. Testimony of McDonald.
22. As noted above, Weymouth had agreed to hire Ms. Favreau, who had worked with Student for two years at Sterling, to consult to Weymouth regarding Student's educational services. Initially, Ms. Favreau consulted for three hours per month, typically observing Student at school and writing up a report of her observations and recommendations. Testimony of Favreau.
23. Ms. Favreau testified that, on the basis of her first observation in September 2008, there was room for improvement at the beginning of the 2008-2009 school year, but it appeared that the school year was starting for Student in an appropriate way. At the beginning of the school year, Weymouth utilized a behavior plan that had been put in place and successfully utilized at Sterling for a brief period of time. Christina Stuart, BCBA (Weymouth's autism coordinator who worked directly with Student) testified that within a month or so after the beginning of school, she concluded that this behavior plan was not appropriate for Student in a 2nd grade classroom. Ms. Stuart explained that the behavior plan, as originally implemented, included breaks every five minutes for Student, which, in Ms. Stuart's opinion may have been appropriate in a kindergarten classroom (in which Student had been placed during the previous academic year at Sterling) but was too short a time period for 2nd grade. Ms. Stuart also testified that the plan targeted behavior at too general a level. Ms. Stuart explained that Student's behavior plan has been adjusted over time to address these concerns. She opined that Student's behavior plan, once it was adjusted, appeared to be relatively effective at the outset. Testimony of Stuart, Favreau; exhibits P-C-7, P-I-9 (part IX), S-35.
24. Ms. Stuart testified that, in her opinion, Ms. Favreau's suggestions were often not appropriate for a 2nd grade classroom although she believed that Ms. Favreau's suggestions may have been appropriate at Sterling where there is a kindergarten program. Testimony of Stuart.
25. As the pace of the classroom increased after the beginning of the school year, Student began to have a difficult time keeping up with the curriculum. In her October observation, Ms. Favreau noted that Student became frustrated when she fell behind the rest of the class. In this observation, Ms. Favreau noted that Student was working less independently in the classroom than she had been previously and generally was not demonstrating what she had been able to do at Sterling. Ms. Favreau opined that the principal reason for this was a matter of fluency rather than a skills deficit—that is, Student was unable to keep up in class with the pace of the instruction, and when this happened, she would stop working. Ms. Favreau recommended that fluency be worked on with Ms. Callahan—that is, that Student be taught to work more quickly. Ms. Stuart also testified that aberrant behavior (that had not been observed previously at Weymouth) appeared. Also, because of the pace of instruction and degree of

difficulty of the curriculum for Student, Student did not have opportunities for social interactions in the classroom. Testimony of Stuart, Favreau, Blake; exhibits P-C-7, P-I-9, S-2.

26. Ms. Favreau testified that subsequent to her first observation in September 2008, she became aware of Student's schedule (Student's schedule had not been in place during Ms. Favreau's September observation). Ms. Favreau opined that one of the principal causes of Student's difficulties at Weymouth was the manner in which Student's day was structured. She explained that Student was in the classroom at times when she should have been pulled out, and vice versa. Testimony of Favreau.
27. For example, it was generally agreed that Student was not capable of participating academically in the math instruction that was provided to the other children in the classroom. Part of the difficulty was that the other children were using a math program (Every Day Math) that was not appropriate for Student. Also, as noted above, Student has weaknesses in math. It was intended that Student would participate in the math part of the classroom in order to have social opportunities, but it turned out not to be possible to create these opportunities while the children were working on math. Also, when math was taught in the classroom, Student's 1:1 teacher (Mr. Johnson) was not available to work with her individually on a pull-out basis. The next-best solution was for Student to work on math by herself in the back of the room. Testimony of Favreau, Stuart.
28. On October 20, 2008 Student's IEP was amended to add speech-language, occupational therapy, and physical therapy consultation, and to add a half hour per week of physical therapy to address gross motor issues. On December 8, 2009, Parent accepted the service changes but rejected the placement. This was the first time that Parent rejected any part of the 5/8/08 to 5/7/09 IEP that had previously been fully accepted pursuant to a settlement agreement. Exhibits S-3, S-5.
29. Ms. Favreau observed in November 2008 and expressed concern in her report regarding what she believed to be insufficient behavioral reinforcement being provided to Student. Ms. Favreau testified that appropriate, frequent, and systematic reinforcement is vital to Student's making progress academically and behaviorally. Christine Blake (one of Student's home service providers employed by REACH) testified that she attended the monthly meetings at Student's school, during which Student would be discussed. She testified that it is very important that Student be given frequent and prompt reinforcements to avoid Student's going into a downward spiral. Testimony of Favreau, Blake; exhibits P-C-7, P-I-9, S-4.
30. Ms. Favreau testified that as of the time of her November observation, Student's educational program was just barely being held together. She was concerned that at some point, there would be so many difficulties that the whole program would not be working for Student. Ms. Favreau testified that she observed that at this time, Student was not making the progress that she knew Student was capable of making. Ms. Favreau believed that a critical issue at this time was that there was not sufficient motivation on Student's part—she needs a high level of motivation to be successful—

and the lack of motivation was caused by insufficient reinforcement. In addition, Ms. Favreau noted continuing scheduling difficulty, which resulted in Student's working in the classroom when demands on her were too high and she should not have been in the classroom during those times. Ms. Favreau explained that this scheduling difficulty reduced Student's motivation so that even work that she was capable of doing, she would not do. Testimony of Favreau.

31. In an e-mail dated November 24, 2008, Ms. Favreau communicated her concerns to Mr. Desmond and Ms. Stuart. Ms. Favreau explained that she had been giving much thought to Student's program following her November observation. In the e-mail, Ms. Favreau stated that although she believed that Weymouth staff had made a "good effort to pull together [Student's] program," she did not believe it to be a "very cohesive program." Consequently, Ms. Favreau recommended a language-based classroom or resource room for the majority of Student's school day where higher level of reinforcement would be built into the day, where instruction would use less language, and where there would be a high level of repetition; or alternatively, if a language-based program was unavailable, Ms. Favreau recommended a re-structuring of Student's program to reduce the number of staff working with Student throughout the school day. Ms. Favreau offered specific, concrete recommendations for accomplishing this re-structuring. Exhibits P-C-7, P-I-9 (part VII).
32. In January 2009, Ms. Favreau's consultation time was reduced from three hours to two hours per month. By the time of Ms. Favreau's January 2009 observation, she noted that problematic behaviors had increased because Student was no longer receiving systematic reinforcement. In her January 8, 2009 observation report, she stated that Student's reinforcement system should be more systematic so that Student could anticipate when she would receive reinforcement. Testimony of Favreau; exhibits P-C-7, P-I-9 (part IX), S-35, S-36.
33. During a January meeting, Ms. Favreau suggested that Student not be taught cursive penmanship since Student had a frustrating time with this skill, and had a difficult enough time with printing. She also recommended a teaching program to discriminate between when Student should raise her hand and when she should simply respond—Student had mastered this skill at Sterling, but by January 2009, she was no longer demonstrating this skill. Ms. Stuart agreed, in her testimony, that Student demonstrated these difficulties in the classroom—for example, she would call out at inappropriate times, and would raise her hand (imitating her peers) even though she did not want to be called upon. Testimony of Favreau, Stuart.
34. Ms. Stuart testified that in January 2009, Student's behavior plan was changed to reflect that Student would receive money for appropriate behaviors, and Student could turn in the money for reinforcers. Ms. Stuart explained that later, this plan was changed to include taking money away from Student as a result of inappropriate behaviors because it was believed that this would increase Student's motivation. Ms. Favreau expressed concern regarding the appropriateness of this part of the behavior plan. Testimony of Stuart, Favreau; exhibits P-I-4, P-I-5, S-36, S-37.

35. Ms. Favreau testified that she made recommendations to Weymouth that they make changes to the January revised behavior plan to make it more effective. Specifically, Ms. Favreau advised Weymouth that she did not believe that the behavior plan was sufficiently systematic, that a trade-in procedure should be added (when money is earned by Student, there needs to be a time for Student to turn in the money), and that the rules should be reviewed with Student before starting an activity. She addressed these concerns and made recommendations in her February observation report. Testimony of Favreau; exhibits P-C-7, P-I-9
36. As noted above, on January 12, 2009, an IEP amendment was proposed to change three (of the five) hours of ABA services, which had been provided within the regular education classroom, so that these services would be provided outside of the regular education classroom. Ms. Stuart testified that the IEP was being amended in order to provide more of Student's academic instruction in the resource room since some of the goals and objectives on her IEP could not be accomplished in the classroom and because the curriculum in the classroom was moving at too fast a pace for Student. On January 21, 2009, Parent signed the amendment and checked both the acceptance box and the rejection box. She also crossed out part of the explanation for the change, and she wrote in her explanation for the changes. This combination of both an acceptance and a rejection by Parent made it unclear to Mr. Desmond whether the change of services was accepted by Parent. As a result, Weymouth did not immediately implement the change. The change was eventually implemented in March 2009. Testimony of Desmond, Stuart; exhibits P-C-1, S-6.
37. Ms. Stuart testified that after this change was implemented so that more of the services were provided to Student individually, outside of the classroom, Student began making progress towards the academic goals and objectives on her IEP. Ms. Stuart testified that Mr. Johnson had been providing time to address social skills during pull-out. After the change to the IEP, during pull-out sessions, Mr. Johnson continued to address social skills and used the added time to address Student's academic needs. Testimony of Stuart; Johnson.
38. On February 13, 2009, an independent neuropsychological evaluation of Student was conducted by Kirsten McGhee, PsyD, of Boston Neuropsychological Services. The evaluation recommended that Student be taught in a small classroom setting with a low student-teacher ratio and with opportunities for 1:1 teaching as needed. It was also recommended that her classroom peers have learning styles and needs similar to those of Student, and that her peers function at or above Student's level. The report noted that Student would benefit from structured time with typically-developing peers. Dr. McGhee also recommended that, at least twice per week, Student attend a systematic, structured group that focuses on pragmatic language development. Testimony of McGhee; exhibits P-C-8, S-22.
39. Melissa Shelton (one of Student's home services provider employed by REACH) testified that on February 10, 2009, she was working with Student when Student stopped what she was doing and, with tears in her eyes, said "you are not going to hurt me, are you?" Ms. Shelton stated that Student seemed genuinely concerned. She

also noted that Student had not previously had this response and did not subsequently have this response. Testimony of Shelton.

40. On February 18, 2009, Mr. Desmond learned of Parent's concerns regarding Student's being harmed but Parent did not identify who allegedly had harmed her daughter. Mr. Desmond made inquiries and determined when and where the alleged harm may have occurred. As a mandatory reporter, Mr. Desmond then filed a report with the Massachusetts Department of Children and Families (DCF). DCF followed up by conducting its own inquiry. DCF reported orally to Mr. Desmond that it had screened out the complaint, with DCF concluding that no further DCF action was warranted. Testimony of Desmond.
41. On the basis of his own inquiry into this matter and the oral report from DCF, Mr. Desmond testified that he felt confident that Weymouth staff had done nothing wrong. Testimony of Desmond; exhibits P-I-3, S-23, S-24, S-25, S-26, S-32.
42. Parent testified that she does not believe that her daughter was intentionally hurt, but she does believe that her daughter's hand was hurt while at school. She explained that this could easily have happened inadvertently. Student testified regarding this incident, but Parent led her testimony, and Student's testimony was unclear. I did not find Student's testimony to provide any independent support for any of the facts regarding this incident. Testimony of Student, Parent.
43. At the beginning of the school year (in September 2008), Weymouth had decided to move up Student's three-year evaluations because Student had not been attending the public schools for the previous two years, and evaluations were necessary in order to obtain base-line data on Student, to determine Student's academic levels, and to determine whether any adjustments should be made regarding her services. Weymouth sought consent for these evaluations in a form dated September 30, 2008. Parent delayed her consent to the evaluations until January 30, 2009 when she consented to occupational therapy testing, physical therapy testing, and a home assessment. On January 12, 2009, Parent consented to the remaining testing except that Parent did not give her consent to any tests that had already been given privately. By letter of February 27, 2009, to Parent from Weymouth's attorney, Weymouth explained its understanding that Parent had now consented to Weymouth's three-year evaluation. The evaluations were completed in March 2009. Exhibits S-7, S-10, S-12, S-18 through S-21. Testimony of Desmond, Stuart.
44. Weymouth's three-year evaluation results were considered at an IEP Team meeting on March 30, 2009, and an IEP was developed for the period 3/30/09 to 3/28/10. During the meeting, after reviewing these evaluations, the Weymouth members of the IEP Team concluded that Student could not be appropriately served within a regular education classroom. The proposed IEP called for all direct special education services to be provided outside of the regular education classroom, with all academic instruction to be provided through special education services. The principal, additional change to Student's services was that Student would participate in a social skills group for one hour, three times per week and would receive social skills

instruction from a speech-language pathologist for a half hour, twice per week. On April 24, 2009, Parent accepted the “additional modifications/accommodations” in the IEP, she accepted the additional services regarding social skills, and she rejected the remainder of the IEP. Testimony of Desmond; exhibit S-14.

45. Ms. Favreau’s next observation was in April 2009. She observed that Student was having greater difficulties in the classroom than she had had all year. In the classroom, she was not earning reinforcement, she was no longer working independently, and she was unable to follow even one direction from Ms. Callahan. Ms. Favreau noted that the 1:1 time with Mr. Johnson was more successful as Student was earning reinforcement from Mr. Johnson and she was completing her work. Testimony of Favreau; exhibit P-C-7.
46. Ms. Stuart testified that on the day that Ms. Favreau observed in April 2009, Student was having an “off day” and that during the time in class on that day, Student was not doing some of the things that she is able to do and that, at other times, she would do in the classroom. Testimony of Stuart.
47. When Ms. Favreau met with Weymouth staff two or three weeks after her April observation, Weymouth had instituted Ms. Favreau’s recommendations from her observation, as well as some earlier recommendations from September and February. Some of her recommendations that were implemented were to go back to the plan being used by Weymouth in September (but then were later abandoned by Weymouth). Testimony of Favreau; exhibits S-38, S-39.
48. In her May observation, Ms. Favreau noted improvements as a result of changes made to incorporate her earlier recommendations. However, when Ms. Stuart testified on May 27, 2009, she explained that more recently, the changes made in the April 2009 behavior plan had not been working as well as previously. Ms. Stuart and Ms. Callahan testified that typically with Student, a behavior plan works better in the earlier stages than in the later stages of the plan’s implementation. Testimony of Favreau, Stuart, Callahan; exhibit P-C-7.
49. Ms. Stuart testified that, as of the day of her testimony on May 27, 2009, a new behavior plan was being used that breaks down the entire day according to what behaviors are needed for each part of the day. She explained that this plan incorporates some of Ms. Favreau’s suggestions. Testimony of Stuart.
50. Mr. Johnson (Student’s ABA aide) testified on May 18, 2009 that more recently, Student has been doing well interacting with her peers and also, within the past several weeks, Student has been fairly independent in her play, needing only one or two reminders; and this is an improvement for Student, reflecting progress in social situations. Testimony of Johnson.
51. When Ms. Favreau testified on May 18, 2009, she opined that with the changes that had been made since April, Student’s skills would likely be maintained for the remainder of the 2008-2009 school year. She explained that as of the date of her

testimony, a change of staff at this point in time would not necessarily be helpful or appropriate unless there were a different behaviorist within Weymouth who could work with Student, and this possibly could be helpful. Testimony of Favreau.

52. Ms. Quigley (Student's classroom teacher during the 2008-2009 school year) testified that Student has made progress over the course of the school year. This progress has included understanding more of what is going on in the classroom, using more of the grammatical skills that she has been taught, starting conversations without prompting, and improving the ideas expressed in her written work. Ms. Quigley did not believe that Student had any areas where she either regressed or made no progress. However, she noted that Student's demeanor has had its ups and downs over the year, with the result that at times, she was happy and at other times unhappy, and she noted that there appeared to be a connection between her demeanor and the particular behavior plan that is in place. She noted that the then current behavior plan that was implemented in mid-April seemed to be working well. She also noted that over the course of the school year, Student's negative comments had increased, particularly recently. Testimony of Quigley.
53. Ms. Hinkley (Weymouth's speech-language pathologist) testified that over the course of the 2008-2009 school year, Student made progress regarding her speech-language goals. Ms. Hinkley explained that at the beginning of the school year, Student had difficulty interacting with her peers, but at the time of her testimony (May 18, 2009), Student was participating more in class, for example, by initiating discussion and by being more interactive. Testimony of Hinkley.
54. Ms. Stuart testified that Student has made progress regarding her academic goals over the course of the school year. Ms. Stuart further testified that over the course of the school year, Student's ability to function independently has decreased. She noted that the most difficult thing for Student is to take what she has learned within a 1:1 setting and to demonstrate this in another context. Testimony of Stuart.
55. Ms. Stuart testified that, in her opinion, much of Student's difficulties during 2008-2009 academic year stemmed from her attending a kindergarten classroom last year at Sterling Nursery School and then moving to a 2nd grade classroom during the current school year. Although Student received a 1st grade curriculum last year, it was provided within the context of a kindergarten setting, and most of her 1st grade curriculum was taught on a 1:1 basis rather than within a classroom. Testimony of Stuart.
56. Ms. Stuart testified that as the pace of the curriculum increased within the classroom, there were fewer opportunities for Student to develop her social skills, and, in general, there were too few supports in place for Student to develop social skills. Ms. Stuart explained that Student's deficits regarding inferencing and abstract concepts have been a major obstacle for her, and these deficits are addressed through social skills development. Ms. Stuart also noted that Student's difficulties regarding social skills negatively impacted her academics. Ms. Stuart testified that during this academic year, Student has maintained her social skills but has not made improvements in this

area. A pull-out session for social skills development was added to the IEP developed in March 2009. Testimony of Stuart; exhibit S-14.

57. Ms. Stuart and Ms. Callahan testified that over the course of the school year, the amount and intensity of Student's negative talk increased. This corresponded with the increasing demands of the curriculum, making it more difficult for Student to keep up with what was being taught. Student's negative behaviors impacted her learning. Testimony of Stuart, Callahan.

58. In her testimony on May 18, 2009, Ms. Favreau summed up her opinions regarding the 2008-2009 school year by stating that the key stumbling blocks to Student's success during the year were that (1) there was a lack of effective reinforcers—that is reinforcements were not potent enough, were not given frequently enough, and were not sufficiently motivating; (2) there were scheduling difficulties with the result that Student was not in class at the times that would have been most beneficial for her; and (3) Ms. Stuart possibly did not have sufficient experience. In Ms. Favreau's opinion, over the school year, Student has made progress in some of her 1:1 teachings, but her participation in the classroom has decreased (although recently may possibly have re-increased). Overall, Student has been "maintained" but has gone backwards in her overall attitude, becoming more negative, and Ms. Favreau has observed things that had not seen after the first six months at Sterling. In sum, in Ms. Favreau's words, there has been, over the course of the school year, a lot of maintaining, a little good, and some set backs in terms of overall attitude and happiness, which is important in that when Student is in a negative mood, she is not receptive to learning, she shuts down, and pushes learning away, as compared to being happy and engaged in learning. Ms. Favreau opined that some of this could be made up through the changes that were made in April, but she questioned whether there would be sufficient, consistent follow through, and if not, then Student may go back in a negative direction. She further testified that scheduling difficulties had never been addressed, so this remained a continuing concern. Testimony of Favreau.

59. Ms. Favreau expressed concerns regarding services provided by Ms. Callahan. Ms. Favreau testified that at the beginning of the year, she thought that Ms. Callahan had capabilities. Ms. Favreau testified that there may have been insufficient supervision or problems with the behavior plan—Ms. Favreau was not sure where the breakdown was. Testimony of Favreau.

60. Ms. Quigley testified that Student would do better in a smaller classroom, as compared to her classroom this year that consisted of 21 children. She explained that in a classroom of 21 children, Student is easily distracted, and that in a smaller classroom, Student would receive instruction that would be more individually-tailored to her learning style and speed of learning. Ms. Stuart testified that if Student were placed in a classroom with a small number of children, she would not likely need an additional 1:1 aide, although such a 1:1 aide would be needed for time in inclusion classes or inclusion activities, and would also be needed for purposes of practicing social skill development in a natural setting. Testimony of Quigley, Stuart.

61. Ms. Blake testified that if the home services provider is changed, there should be an opportunity for a transition since changes are difficult for Student. Testimony of Blake.
62. Ms. Favreau testified regarding the need for additional consultation for a period of transition for the 2009-2010 school year. She explained that it would be important for her to be involved since she can help identify what educational services would be appropriate and how these services should be adjusted, and this would be a good way for Student to learn some of the skills that she has lost during the 2008-2009 school year. Testimony of Favreau.
63. As discussed in greater detail above, Weymouth proposed an IEP that would provide for a substantially-separate classroom within the Canton Public Schools for the 2009-2010 academic year and for essentially the same services (except that the school day would be one hour shorter) to be provided by Canton for six weeks during the summer of 2009. See pars. 13-17, above.

DISCUSSION

Introduction

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)⁴ and the Massachusetts special education statute.⁵ The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."⁶ The Massachusetts special education statute also includes a FAPE requirement.⁷ FAPE must be provided in the least restrictive environment.⁸

The Supreme Court has explained that under the federal statute, FAPE is intended to require special education services that allow a student to access public education.⁹ Access must be meaningful,¹⁰ and sufficient to confer educational benefit,¹¹ but need not maximize a

⁴ 20 USC 1400 *et seq.*

⁵ MGL c. 71B.

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

⁷ MGL c. 71B, ss. 1, 2, 3.

⁸ The phrase "least restrictive environment" means that, to the maximum extent appropriate for the particular student, the student is to be educated with other students who do not have a disability. 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); 20 USC 1412(a)(5)(A); MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

⁹ *Rowley*, 458 U.S. at 192 (1982) ("intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside").

¹⁰ *Rowley*, 458 U.S. at 192 ("in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful"); *Frank G. v. Board of Educ. of Hyde Park*, --- F.3d ---, 2006 WL 2077009 (2nd Cir. 2006); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 319 (4th Cir. 2004) ("state must provide children with 'meaningful access' to public education"); *Alex R. v. Forrestville Valley Community Unit School Dist. # 221*, 375 F.3d 603, 612 (7th Cir. 2004) (question presented is whether the school district appropriately addressed the student's needs and provided him with a meaningful educational benefit), *cert. denied*, 543 U.S. 1009 (2004); *Deal v. Hamilton County Board of*

student's educational potential.¹² In addition, FAPE is defined by the IDEA to include state educational standards.¹³ Massachusetts and federal educational standards require that the IEP be designed to enable the student to make effective progress.¹⁴ Massachusetts standards also mandate that the special education services be designed to develop the student's educational potential.¹⁵

The sufficiency of a particular student's progress is judged within the context of the student's individual potential or capacity to learn because the "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."¹⁶

Education, 392 F.3d 840 (6th Cir. 2004); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984) ("federal basic floor of meaningful, beneficial educational opportunity"), *aff'd* 471 U.S. 359 (1985).

¹¹ *Rowley*, 458 U.S. at 200 ("Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.").

¹² *Rowley*, 458 U.S. at 197, n.21 (1982) ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education."); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004) ("IDEA does not require a public school 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.").

¹³ 20 USC 1401(9)(b); *Winkelman v. Parma City School Dist.*, 127 S.Ct. 1994, 2000-2001 (2007) ("education must ... meet the standards of the State educational agency"). See also MGL c. 71B, s.1 (definition of FAPE, describing Massachusetts educational standards as those "established by statute or established by regulations promulgated by the board of education").

¹⁴ Massachusetts standards: 603 CMR 28.05(4)(b) (IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) (defining *Progress effectively in the general education program*). Federal standards: 20 USC 1400(d)(4) ("purposes of this title are . . . to assess, and ensure the effectiveness of, efforts to educate children with disabilities"); *Lenn v. Portland School Committee*, 998 F.2d 1083, 1090 (1st 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, 991 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F.Supp.2d 479, 489 (D.Mass. 2007) (educational program "must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as special needs").

¹⁵ MGL c. 71B, s. 1 (defining the term "special education" to mean "educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities"). See also MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential"); 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"); *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) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

¹⁶ *Rowley*, 458 U.S. at 202. See also, e.g., *Beth R. v. Forrestville Valley Comm. Unit Sch. Dist. No. 221*, 375 F.3d 603, 615 (7th Cir. 2004) ("requisite degree of reasonable, likely progress varies, depending on the student's abilities"), *cert. denied*, 125 S. Ct. 628 (2004); *Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004) ("IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential") (Alito, J.); *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004) ("IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall

Student's right to FAPE is assured through the development and implementation of his IEP.¹⁷ The IEP must be custom tailored to meet her "unique" needs so that she will receive sufficient educational benefit.¹⁸

I will first consider whether the programming and specialized services embodied in Weymouth's currently-proposed IEP are consistent with these legal standards. I will then consider Parent's compensatory claims. Parent has the burden of persuasion regarding these issues.¹⁹

2009-2010 Academic Year Services

Weymouth proposed an IEP that would provide for a substantially-separate classroom within the Canton Public Schools for the 2009-2010 academic year. Within this classroom, there will be a total of 11 children, including Student. Two of these children, including Student, will be girls, and the remainder will be boys. The 11 children range in grade level from kindergarten through 4th grade, with three children in 3rd grade and two in 4th grade. All of the children have a similar level of educational need and all are on the autism spectrum. This class, as compared to other classes at Canton for children on the autism spectrum, is for children who are functioning at a relatively high level. Testimony of Chapman, Dewey.

The academic year classroom is staffed by a special education teacher (Janis Chapman). Ms. Chapman is assisted by two aides, one of whom would be newly-hired and one of whom has ten years experience working with Ms. Chapman. A full-time BCBA Canton staff person consults to the classroom. Testimony of Chapman, Mahoney, Dewey.

All of the children in the classroom are included with regular education students during "specials" that include music, art, library, and health. Also, all of the children have lunch and recess with regular education students. In addition, children from the classroom are included with regular education students in academic classes as appropriate for the particular

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 [emphasis supplied].").

¹⁷ 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305, 311-12 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 182 (1982).

¹⁸ 20 USC 1400(d)(1)(A) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); 20 USC 1401(9), (29) ("free appropriate public education" encompasses "special education and related services," including "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability"); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs"); *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (citing 20 U.S.C. § 1401(18)) (student's FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program'"); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 2008 WL 484042 (1st Cir. 2008) (noting the school district's "obligation to devise a custom-tailored IEP").

¹⁹ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief; a party who has the burden of persuasion "loses if the evidence is closely balanced").

child. Aides accompany the children as needed when they are included with regular education students. Testimony of Chapman.

The classroom utilizes discrete trial training, a prompt hierarchy, and ABA principles which are embedded into the class teaching and activities. Approximately half of the class time is devoted to academics and approximately half is devoted to learning social skills. Approximately 30% of the class time is devoted to working with all of the children in a group, and 70% of the class time is devoted to working on the children's individual IEP goals. In addition, individual IEP goals are embedded into the group work, and social skills instruction is embedded into incidental teaching throughout the day. Testimony of Chapman, Stuart, Dewey; exhibit S-63.

Ms. Chapman observed Student at Weymouth, and Student participated in Ms. Chapman's Canton classroom for approximately one and one-half hours during the school year. Also, Ms. Chapman reviewed Student's records, including her evaluations. On the basis of these observations and record review, Ms. Chapman testified that, in her opinion, Student would fit in well in her classroom both socially and academically, and that Student would be a good fit in both the academic year and the summer classrooms. Ms. Chapman's opinion was based, in part, on how easily Student participated in Ms. Chapman's classroom for the one and one-half hours—for example, Ms. Chapman observed that Student was able to easily follow the routine of the class, she was able to attend to what was going on, and she seemed to fit in well socially with the other children. In sum, Ms. Chapman testified that Student would likely "flourish" in her classroom both academically and socially, and that she has no reservations regarding Student's participation in her summer and academic year classrooms. She also opined that Student would not require an additional 1:1 aide because of the relatively small class size and three staff. Ms. Chapman further testified that, in her opinion, Student would not need any 1:1 ABA services while attending her classroom, but she had agreed to the one hour per day of 1:1 ABA services for Student because of Parent's desire for these services. Testimony of Chapman.

It is undisputed that Ms. Chapman, who has 21 years of experience working with children on the autism spectrum, is an exceptional teacher. Through her record review, observation of Student at Weymouth, and observation of Student within her own classroom, Ms. Chapman, perhaps better than any other witness, was well-equipped to provide expert testimony regarding the appropriateness of her classroom for Student. Ms. Chapman testified in a credible and candid manner. I found her testimony persuasive. Testimony of Chapman, Blake, Dewey.

There is ample, additional evidence to support Ms. Chapman's opinion that Student would likely thrive in her classroom. Weymouth's autism specialist (Christina Stuart), who provided direct services and consultation to Student during the 2008-2009 school year, observed Ms. Chapman's classroom, and spoke with Ms. Chapman. She testified that, in her opinion, both the Canton program for the academic year and the Canton summer program would be appropriate for Student. She further explained that this classroom is precisely what Weymouth had hoped to have for Student because of the small class size, the ABA methodology embedded into the instruction throughout the day, opportunities for inclusion with regular education students, breaking down of tasks and skills by the teacher, data

collection, oversight by a person with a BCBA, and appropriate peer group academically and socially. A significant advantage of the Canton program, as compared to a private placement, will be the opportunity for Student to spend as much time as is appropriate with typical peers during the school day. Testimony of Stuart.

Canton's Assistant Superintendent for Student Services (Mr. Dewey) has a general knowledge of Student's education profile and a complete understanding of Ms. Chapman's classroom. He testified that, in his opinion, this classroom would be an excellent fit for Student. Testimony of Dewey.

Other witnesses and reports have also made clear the importance of Student's being placed in a relatively small classroom with children who have learning profiles similar to Student's profile, the need for Student to have contact with regular education children and the opportunity to have this contact increase to include academic classes as appropriate, the importance of social skills instruction and ABA methodology being embedded within the classroom, the need for a slower paced instruction than would occur within a regular education classroom, and the importance of having teachers with specialized knowledge regarding children on the autism spectrum. The Canton classroom offers all of these advantages. Testimony of Chapman, Favreau, Blake, Quigley, McGhee; exhibit P-C-8 (neuropsychological evaluation).

In sum, Student will likely gain substantial benefit from Canton's partially-integrated program because it has been specifically designed for children with Student's profile and because it is staffed with highly-experienced staff.

Parent's consultant (Blue Favreau) testified that she had not observed the Canton program and had not spoken with Ms. Chapman for any significant period of time. Ms. Favreau was present during Ms. Chapman's testimony. Ms. Favreau testified that what she understood from Ms. Chapman's testimony regarding her classroom sounded appropriate for Student. Ms. Favreau's principal concern was that much of what Ms. Chapman was doing in the classroom was not included in Student's IEP, with the result that if Ms. Chapman left her employment at Canton or if Student changed classroom teachers or placements, Student's IEP would not necessarily result in a continuation of what Ms. Chapman would be providing Student. When asked about the need for 1:1 services, Ms. Favreau testified that Student continued to need 1:1 services and that five hours per week would be sufficient, but only if there were another five hours per week of time spent in the classroom working on Student's individual IEP goals. Testimony of Favreau.

Ms. Favreau was a credible and persuasive witness, but none of her concerns leads to a conclusion that the IEP, as written, is inappropriate. In her testimony, Ms. Chapman made clear that during a substantial part of each day, the individual goals of the students in the classroom are addressed. I conclude that Ms. Chapman's classroom would satisfy Ms. Favreau's concern in this regard. Otherwise, Ms. Favreau's concerns were directed at the importance of including sufficient detail in Student's IEP. Much of what Ms. Favreau believes should be included in the IEP consists of classroom methodology. The IEP does address methodology in significant detail—for example, the IEP specifies that the instruction will use ABA methodology to include discrete trial, incidental teaching, modeling, shaping,

chaining, prompt fading, and desensitization. The IEP also lists extensive accommodations. It was unclear whether Ms. Favreau was aware of this language in the IEP, and, in any event, Ms. Favreau did not testify as to what part or parts of the methodology description and accommodation description within the IEP were insufficient. For these reasons, I am not persuaded that the IEP need include additional detail in order to be reasonably calculated to provide Student with FAPE.²⁰

One of Student's home service providers (Christine Blake) testified that although she has not observed the Canton summer or academic year programs, she had an opportunity to speak with Ms. Chapman and with Parent, and she had an opportunity to review the proposed IEP for the Canton program. Ms. Blake testified that, in her opinion, the proposed IEP for the Canton program is inappropriate in that it does not provide for a dedicated 1:1 aide for Student, does not provide sufficient 1:1 services, does not provide for the development and implementation of an individualized behavior plan for Student, and does not sufficiently provide for direct instruction of social skills. Ms. Blake emphasized that explicit social skills instruction is important because the development of social skills is critical for Student, and explicit instruction is necessary for her to learn in this area; a 1:1 aide all of the time is necessary to facilitate social interactions, to teach self-advocacy skills, and to provide necessary support to Student; additional 1:1 instruction is necessary because it has not been demonstrated, and therefore it cannot be assumed, that Student's individual IEP goals can be addressed through group instruction; and addressing Student's behavioral deficits is critical and it has not been demonstrated, and therefore it cannot be assumed, that these deficits can be appropriately addressed without a behavior plan that has been individualized to meet her particular needs. Testimony of Blake.

Ms. Blake testified that the 2008-2009 school year was not successful for Student, making it particularly important that Student's education soon "come together" in an appropriate way for the 2009-2010 school year. Ms. Blake emphasized, within this context, the need for Student's 2009-2010 year services to be sufficiently individualized to meet Student's particular needs so that it will be a successful year. Testimony of Blake.

Ms. Blake was a credible witness, but her experience with Student has been principally as a home-service provider. It also is important to remember that Student had significant success within a group-learning model at Sterling, prior to Student's placement in a Weymouth Public Schools' classroom for 2nd grade. Ms. Blake may be judging Student too much on the basis of her 2nd grade experience where Student was participating in a regular education classroom. Also, I do not give her testimony as much weight as that of Ms. Chapman and Ms. Favreau. Nevertheless, some of Ms. Blake's points may bear further consideration during the implementation of Student's IEP—most particularly, whether the educational program for Student at Canton is sufficiently individualized to address her behavioral needs and whether she receives sufficient staff support. But, at this juncture, I am not persuaded to conclude that in order to be appropriate, the IEP must be changed to address Ms. Blake's concerns.

²⁰ See *S.M. v. Mass. Dept. of Education*, CA No. 07cv11440-NG, pages 9-12 (D.Mass. March 9, 2009) (discussing need for sufficient detail within an IEP).

A principal concern expressed by Parent is that much of the likely success of Canton's program depends on Ms. Chapman's being Student's teacher. I agree with Parent. As with any educational program, the expertise and experience of the principal person providing and overseeing the instruction may be central to how much educational benefit the student will derive from the program. Nevertheless, I conclude that the basic structure of the educational services and placement, as reflected within the IEP, is appropriate for Student and satisfies Weymouth's obligations under state and federal special education law, regardless of the identity of the teacher. In the event that Ms. Chapman became unavailable, a teacher would need to be selected who had sufficient experience and expertise to provide the classroom special education services described within Student's IEP.

Parent has raised several additional issues. She seeks continuation of the current home service providers at the same (or higher) level as is currently being provided. The proposed IEP allows the current home services providers to continue through September, with a change of service providers to Canton's own staff as of October 1, 2009. As Mr. Dewey explained in his testimony, there are advantages of consistency and continuity for Canton to utilize its own staff for this purpose. The mandates within state and federal law allow a school district discretion to choose the service provider, so long as the services that are provided are sufficient to provide Student with FAPE. There is no credible evidence that a continuation of the present service providers is required in order that Student receive FAPE.

Parent has also asked that Weymouth continue to pay for Ms. Favreau to consult. Although her consultation, particularly during a transition period, would likely be quite helpful (and is discussed further within the compensatory section of this Decision), there is no credible evidence that this is required for Student to receive FAPE. I also note that Canton has its own outside consultant, whom it would likely use as needed. Testimony of Dewey.

Parent has also argued that there should be additional staffing within the Canton classroom and that the Canton staff are not sufficiently trained. Additional staffing might improve Student's education in this classroom, but there was no credible evidence in support of the proposition that additional staffing is needed in order for Student to receive FAPE.

Similarly, Parent has proposed extensive revisions to the most recently-proposed IEP for her daughter. While I do not doubt that a number of these proposed revisions could improve the IEP, Parent has not provided any credible evidence that any of these revisions are necessary for Student to receive FAPE. As discussed above in greater detail in the Introduction section, the FAPE legal standard is one of moderation rather than requiring maximum educational development, and so long as Weymouth proposes an IEP that satisfies the FAPE standard, a BSEA Hearing Officer has not authority to require Weymouth to make further improvements, additions, or other changes to the IEP even if those changes would benefit Student.

For these reasons, I find that Weymouth's IEP is reasonably calculated to provide FAPE (and is therefore appropriate) with respect to the 2009-2010 school year.

Summer Services

The state special education regulations utilize a regression standard to determine whether a summer program may be appropriate:

An extended year program may be identified if the student has demonstrated or is likely to demonstrate substantial regression in his or her learning skills and/or substantial difficulty in relearning such skills if an extended program is not provided.²¹

The federal special education regulations employ a FAPE standard:

(a) *General.* (1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section. (2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.²²

Federal courts have interpreted the federal regulatory standard typically to mean that summer services are appropriate either when a regression standard is met,²³ or when the benefits accrued to a disabled student during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months, with the parameter of requisite summer services defined by what is necessary to avoid this outcome.²⁴

The classroom proposed for Student for the summer of 2009 is substantially the same as the academic year classroom within the Canton Public Schools. The summer classroom has a similar composition of students to the academic classroom, except that there would be a total of ten children (including Student), with one girl other than Student. The summer classroom is staffed identically to the academic year classroom except that instead of the aide who is to be hired, there is an aide who worked with Ms. Chapman during the summer of 2008. During the summer, there are no opportunities for inclusion with typical children and the day is one hour shorter. Testimony of Chapman, Dewey.

The summer and academic year classrooms utilize the same discrete trial training, a prompt hierarchy, and ABA principles which are embedded into the class teaching and activities. Approximately half of the class time is devoted to academics and approximately half is devoted to learning social skills. Approximately 30% of the class time is devoted to working with all of the children in a group, and 70% of the class time is devoted to working on the children's individual IEP goals. Also, the summer and academic year classrooms similarly

²¹ 603 CMR 28.05(4)(d)1.

²² 34 CFR 300.106.

²³ E.g., *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990). Although the federal FAPE standard may, arguably, be broader than the Massachusetts regression standard, the commentary to the 2006 federal regulations appears to take the position that states may properly use regression as their criteria for eligibility for extended year services. Federal Register, vol. 71, no. 156, August 14, 2006, page 46582, 3rd column.

²⁴ *Kenton County School District, v. Hunt*, 384 F.3d 269, (6th Cir. 2004); *MM by DM and EM v. School Dist. of Grenville County*, 37 IDELR 183 (4th Cir. 2002); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990); *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986).

embed individual IEP goals into the group work and social skills instruction into incidental teaching throughout the day. Testimony of Chapman, Stuart, Dewey; exhibit S-63.

For the same reasons that Weymouth's proposed IEP for the 2009-2010 school year is appropriate for Student (as discussed above), the proposed services for the summer of 2009 are appropriate.

Compensatory Relief

Courts have generally recognized that an award of compensatory education is equitable relief that may consider the particular situation at the time that relief is awarded in order to remedy the wrong that has occurred.²⁵ In rendering his or her decision, the Hearing Officer is obligated to employ the same equitable standards as courts when fashioning compensatory relief.²⁶

Parent's expert (Blue Favreau) was a credible and persuasive witness. She had a thorough understanding of Student, not only from working directly with her for two years at Sterling but also from monthly observations and meetings over the course of the 2008-2009 academic year. Ms. Favreau has significant expertise regarding the education of someone with Student's profile. She testified in a balanced, objective, and candid manner. In addition, testimony from Weymouth witnesses further supported some of Parent's and Ms. Favreau's concerns.

As explained more fully in the Facts section of this Decision, the 2008-2009 academic year did not provide Student with the opportunity to make meaningful and effective progress commensurate with her potential, as is required in order to meet FAPE standards. Through her two years at Sterling, Student made substantial progress and demonstrated the ability to make further, substantial progress with appropriate services in 2nd grade within the

²⁵ See *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005) ("inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"); *Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184, 188 (1st Cir. 1993). See also *Draper v. Atlanta Independent School System*, 518 F.3d 1275, 1289 (11th Cir. 2008) (adopting the *Reid* analysis); *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 290 (1st Cir. 2008) ("compensatory education is . . . a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA"); *Board of Educ. of Fayette County, Ky. v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (adopting the *Reid* analysis); *G. ex rel. RG v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 309 (4th Cir. 2003) ("Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student."); *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), cert. denied 499 U.S. 923, 111 S.Ct. 317 (1991) (compensatory education is intended to be "an appropriate remedy to cure the deprivation of a child's right to a free appropriate public education"); *Miener v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986) (compensatory education intended to cure the deprivation of a handicapped child's statutory rights).

²⁶ See, e.g., *Reid* at 518, 524, 526 (criticizing the "hearing officer's mechanical calculation" of the compensatory award; also indicating that the "fact-specific exercise of discretion" in determining the appropriate compensatory award may be done by the hearing officer or district court; and remanding the case to the district court but also indicating that the district court may further remand the case to the hearing officer for determination of the appropriate compensatory award); *B.B. ex rel. Bruner v. Perry Tp. School Corp.*, 2008 WL 2745094, *12 (S.D.Ind. 2008) ("IHO [Impartial Hearing Officer] has the broad authority to award remedial relief that is necessary to address violations of the IDEA").

Weymouth Public Schools. However, from the beginning of the school year, Student's classroom schedule placed her within the classroom at times that she could not keep up, and did not allow for sufficient and timely opportunities for pull-out services to address her individual needs. In addition, the behavior plans, which were initiated and then frequently adjusted, proved ineffective in significant ways. Student's behavior regressed at times over the course of the year, particularly within the classroom, and she became increasingly negative towards learning, which in turn affected her willingness and ability to learn. By the end of the school year, Student had minimal ability to learn within the classroom context. Over the course of the school year, Student also regressed in her ability to work independently. There was also an unfortunate incident, during which Student may have felt pain during instruction, but one can ascribe no ill intent to Weymouth staff and, at most, it was an isolated incident that resulted in no significant harm to Student. On the more positive side, Student generally performed well within a 1:1 context. This allowed her to make some progress regarding academics and speech-language goals. She also made progress regarding social skills. See Facts section of this Decision (Facts) at pars. 25-37, 39-42, 45-60.

There was no persuasive evidence that during the 2008-2009 academic year, Weymouth failed to implement the accepted IEP. Rather, the evidence points to a lack of effective and meaningful progress because of the nature of the services and placement that were set forth within the IEP.

A determination of a lack of sufficient progress does not end the inquiry relative to the question of what, if any, compensatory services should be awarded. This is because what must be determined by the BSEA Hearing Officer for purposes of a compensatory education claim is not whether there was sufficient progress but, more precisely, whether an IEP, when it was developed, was "reasonably calculated" to provide sufficient educational progress.²⁷ In considering this question, the actions of a school district are not to be "judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, *objectively reasonable* when the snapshot was taken, that is, at the time the IEP was promulgated."²⁸

The operative term is "objectively reasonable" and in considering this standard, the facts of the particular dispute, including what was known to the parties when decisions were made take on central importance. Determination of appropriate compensatory relief may also include consideration of the actions of the parties.²⁹

The IEP in question, for the period 5/8/08 to 5/7/09, was fully accepted by Parent pursuant to an agreement that settled all of Parent's claims through the date of the agreement (May 30, 2008). The general and well-settled rule is that acceptance of an IEP precludes the Hearing

²⁷ *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

²⁸ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (emphasis supplied). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 2008 WL 484042 (1st Cir. 2008) (lack of progress by the student does not necessarily mean that an IEP is inadequate in light of the "fundamental concept that an IEP is a snapshot, not a retrospective"); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985) ("ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time").

²⁹ See, e.g., *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) ("courts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct").

Officer from considering its appropriateness. I am aware of nothing within the instant dispute that would support making an exception to this rule. In short, Parent cannot now dispute the appropriateness of the IEP when it was accepted.³⁰

The parties' May 30, 2008 settlement agreement did not preclude Parent from re-assessing the appropriateness of the IEP over time, and rejecting the accepted IEP. In December 2008, Parent rejected the placement described within the IEP. Parent was justified in doing so, as Student had been making limited progress in some areas and was regressing in other areas.

Parent's decision to reject the placement was supported by the IEP Team's determination on March 30, 2009 that Student could not be appropriately educated within a regular education classroom, that Student required a substantially-separate classroom, and that such a classroom was not available within Weymouth.

It is also important to consider whether Parent's conduct interfered with Weymouth's responsibility to assess and re-consider the appropriateness of its IEP over the course of the school year. In September 2008, Weymouth had decided to move up Student's three-year evaluations because Student had not been attending the public schools for the previous two years, and evaluations were necessary in order to obtain base-line data on Student, to determine Student's academic levels, and to determine whether any adjustments should be made regarding her services. Weymouth sought consent for these evaluations in a form dated September 30, 2008. The issue of consent was not fully resolved until February 27, 2009, when Weymouth's attorney sent a letter to Parent explaining Weymouth's understanding that Parent had now consented to Weymouth's three-year evaluation. The evaluations were completed in March 2009, and were considered at the IEP Team meeting on March 30, 2009. Exhibits S-7, S-10, S-12, S-18 through S-21. Testimony of Desmond, Stuart.

Courts have made clear that, as a general rule, parents may not preclude a school district from re-evaluating their son or daughter if the parents desire continuation of special education services.³¹ Parent's conduct (in delaying her consent to evaluations) resulted in delaying Weymouth's ability to understand fully Student's special education needs and limited its ability to develop a more appropriate IEP until March 30, 2009. At the same time, however, over the course of the school year, there was ample evidence of the shortcomings of Weymouth's IEP, and many of these shortcomings were recognized and pointed out to Weymouth by Ms. Favreau. Accordingly, although Parent's delay in consenting to

³⁰ *Independent School District No. 432, Mahnomon School v. J.H.*, 8 F.Supp.2d 1166, 28 IDELR 427 (D.Minn. 1998) (acceptance of IEP precluded Hearing Officer from considering its appropriateness); *In Re: Yale and Upper Cape Cod Regional Technical School and Sandwich Public Schools*, BSEA#06-0501 & #06-0808 (MA SEA 2005) (without a showing lack of notice of parental options and due process rights, lack of meaningful parental participation in the development of the IEP, or any other procedural impropriety, the BSEA does not revisit accepted expired IEPs); *In Re: Quabbin*, 11 MSER 146 (MA SEA 2005); *In Re: Sharon Public Schools*, 8 MSER 51, 67 (MA SEA 2002); *In Re: Carver Public Schools*, 7 MSER 167, 179 (MA SEA 2001).

³¹ E.g., *M.T.V. v. Dekalb County School District*, 446 F.3d 1153, 1160 (11th Cir. 2006) ("Every court to consider the IDEA's reevaluation requirements has concluded '[i]f a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation.'" (collecting cases).

evaluations reduces Weymouth's compensatory liability, it does not extinguish it during the time period from September 2008 through March 2009.

Also, Weymouth is to be credited for recognizing that Student's services and placement should be changed and then proposing a more appropriate IEP on March 30, 2009. As a practical matter, the IEP developed at the March 30th IEP Team meeting could not be implemented immediately. Because Weymouth did not have, within district, an appropriate classroom for Student, Weymouth had to begin a process of considering out-of-district placements, both within other public school districts and within private schools.

In addition, following the March 30, 2009 Team meeting, Weymouth staff seemed to recognize the need to make further changes to better address Student's educational needs. The undisputed evidence was that changes that were made in April 2009 had a positive effect on Student's education. It should also be noted, at the same time, that the positive effects of these changes appear to have been limited in terms of both the amount of improvement to Student's education and the duration of the positive effects.

In light of all of these considerations, I find that compensatory education is due, but only to a limited extent. I turn now to the question of what compensatory services should be provided by Weymouth.

With respect to compensatory relief for Student, the most important consideration is to identify what would most likely assist Student to make up for what was not learned during the 2008-2009 school year. When asked by the Hearing Officer during her testimony whether it would be useful to have her continued consultation services during the 2009-2010 academic year, Ms. Favreau responded that during a period of transition to a new program, it would be important for her to be involved since she can help identify what educational approaches have been successful in the past, based on her previous experiences with Student, and how those approaches should be adjusted for 3rd grade. She noted that providing this consultation would help Student to learn (during the 2009-2010 school year) some of the skills that she has lost during the 2008-2009 school year. Ms. Favreau testified that during the 2009-2010 school year, Student could make up some or all of what was not learned during the 2008-2009 school year if she is provided with appropriate staff and appropriate instruction since she has a fast acquisition rate. I am not persuaded that Ms. Favreau's consultation is necessary for Student to receive FAPE, but I agree with Ms. Favreau that her assistance, particularly during a transition period, could substantially improve the services provided by Canton.³²

There are two additional reasons in support of a time-limited consultation role for Ms. Favreau. First, during his testimony, Canton's Assistant Superintendent for Student Services (Mr. Dewey) stated that he would welcome the assistance of those who had previously worked with Student for purposes of helping Canton transition Student successfully into the

³² One might be concerned that Ms. Favreau's recommendations (that she be retained as a consultant) are self-serving. However, I find, on the basis of Ms. Favreau's testimony in this dispute as a whole, that there is little likelihood that her recommendations for continued consultation were influenced by any self-interest. Her testimony throughout the hearing demonstrated a very high level of integrity and professionalism.

Canton program. He gave this general response to a question specifically asking about consultation from Ms. Favreau.

Second, although I do not find all of Ms. Blake's concerns and objections (regarding the Canton program) to be persuasive, I agree with her in several important respects—that is, (1) the 2008-2009 school year was not successful for Student, (2) this makes it particularly important that the educational services be appropriate for Student during the 2009-2010 school year, and (3) the single most important concern regarding the Canton program is that it may possibly be not sufficiently individualized to meet Student's particular needs. More than anyone else, Ms. Favreau is likely to be able to understand and communicate to Canton what modifications may be helpful at the outset in order to tailor sufficiently its program to meet Student's unique educational needs.³³

I am persuaded that compensatory relief should provide resources to Canton that will assist Canton to tailor its educational program to address Student's unique needs and, importantly, that will allow Canton to do so as quickly as possible. For the reasons explained above, I find that the appropriate vehicle to accomplish this is consultation services from Ms. Favreau during the time period when Canton is planning for and is in the early stages of providing educational services for Student. Others who have worked with Student (for example, Ms. Stuart and Ms. Blake) may also be useful to Canton for this purpose. Weymouth argues that it should be allowed to choose its consultants, a proposition with which I generally agree. However, because of her high degree of expertise, her direct involvement in providing and overseeing services to Student at Sterling for two academic years, and her consultation role throughout the 2008-2009 school year, I find that Ms. Favreau is uniquely qualified to assist Canton in quickly tailoring its special education services to address Student's unique special education needs during the 2009-2010 school year.

At the same time, I note that Canton already has significant expertise and experience providing special education services to children such as Student. In particular, Ms. Chapman is a highly experienced teacher of children on the autism spectrum, and Mr. Dewey has substantial experience implementing programs for children on the autism spectrum. Canton also has its own outside consultant whom it will utilize as it believes to be necessary regarding Student. Mr. Dewey also testified that he is likely to utilize Ms. Stuart to assist with transitioning Student into Canton's program. Given this level of expertise and resources already available to Canton, it seems important that Canton be given discretion as to how best to use Ms. Favreau's time so as to supplement, and not duplicate, its existing resources. Testimony of Dewey.

For these reasons, I find that Weymouth is responsible for providing Parent with compensatory educational services, which shall consist of paying for consultation from Ms. Favreau for purposes of assisting Canton to understand how Student's educational needs may be addressed most effectively through the Canton program. These consultation services are

³³ I also note that Parent, for good reason, has considerable confidence in Ms. Favreau's opinions and recommendations. In addition, perhaps more than anyone other than Parent herself, Ms. Favreau understands Parent's concerns regarding her daughter's education. To the extent that Ms. Favreau can help Canton develop and implement an educational program for Student that satisfactorily addresses Parent's principal concerns, Student will inevitably benefit.

intended to be provided as part of Student's transition into the Canton program, with Canton having the discretion (after receiving input from Ms. Favreau regarding best use of her time) to determine specifically how to utilize Ms. Favreau's time for these purposes.

The amount of Ms. Favreau's consultation time to be paid by Weymouth shall be 15 hours. This number reflects the minimum number of hours recommended by Ms. Favreau for providing consultation to Canton during the transition of Student into the Canton program.³⁴

In the event that Ms. Favreau is unable or unwilling to provide all of the 15 hours of consultation, Ms. Favreau shall provide whatever number of hours she is able and willing to provide, and a substitute consultant shall be selected by Canton for purposes of providing the additional hours, after giving Weymouth and Parent an opportunity for input into the selection of the substitute consultant.³⁵

ORDER

Weymouth's most recently-proposed IEP is reasonably calculated to provide Student with FAPE in the least restrictive environment, and is appropriate with respect to services for the summer of 2009 and for the 2009-2010 school year.

Weymouth shall provide compensatory relief of 15 hours of consultation time by Blue Favreau, as further described within this Decision.

By the Hearing Officer,

William Crane

Dated: August 7, 2009

³⁴ For purposes of providing consultation during Student's transition into a new program, Ms. Favreau testified that it would be useful to provide her consultation twice during the first month, for three or four hours for each consultation; to repeat this consultation for the second month; to provide approximately half of this level of consultation for the third month; and to provide no further consultation. Testimony of Favreau. This testimony provided the basis for the order of 15 hours of consultation time. However, Canton may be guided by, but is not required to follow, Ms. Favreau's suggested schedule of consultation.

³⁵ Parent also took the position that she is entitled to reimbursement of expenses for testing, independent services, independent evaluations, tuition and services at Sterling Nursery School, private social skills training, and transportation. Parent provided no credible evidence in support of this claim. Parent also requested an immediate change in Weymouth staff during the 2008-2009 school year. Again, there was no credible evidence in support of this requested relief.

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Weymouth Public Schools

BSEA # 09-1335

ORDER

In order to apprise the parties in a timely manner of my findings in this case, this Order is issued in advance of a full Decision. The only issue addressed by this Order is Weymouth's proposed services for the summer of 2009. The full Decision regarding summer services will be issued no later than 25 days after the close of the record, which occurred on July 23, 2009. The full Decision will also address all other aspects of this dispute.

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

A hearing regarding summer services was held on July 16 and 23, 2009 in Malden, MA before William Crane, Hearing Officer. The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-A through P-M, but disregarding Parent's handwritten annotations on exhibit P-H-16; documents submitted by the Weymouth Public Schools (Weymouth) and marked as exhibits S-1 through S-63; and the recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on July 23, 2009, and the record closed on that date.

I have now had an opportunity to review and consider the entire evidentiary record, as well as the arguments of both parties, regarding the issue of summer services.

On the basis of this review, I find that Weymouth's proposed services for the summer of 2009 are appropriate. These summer services are as reflected within Weymouth's most-recently proposed IEP for the period 6/16/09 to 3/29/10. Exhibit S-62.

By the Hearing Officer,

William Crane
Dated: July 24, 2009

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

THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL

Effect of the Decision

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

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

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

Compliance

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

Rights of Appeal

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

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

Confidentiality

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

Record of the Hearing

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