APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT.

C.D., BY AND THROUGH her Parents and Next Friends, M.D. and P.D.; M.D.; P.D.,
Plaintiffs, Appellants,

v.

NATICK PUBLIC SCHOOL DISTRICT;
Bureau of Special Education Appeals,
Defendants, Appellees.

No. 18-1794

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May 22, 2019

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
[Hon. F. Dennis Saylor, IV, *U.S. District Judge*]

Opinion

LYNCH, Circuit Judge.

The Individuals with Disabilities Education Act (IDEA) requires that students with certain disabilities be provided a "[f]ree appropriate public education"

(FAPE) in the "[l]east restrictive environment" (LRE) appropriate for each student. 20 U.S.C. § 1412(a)(1), (5). Under the IDEA and Massachusetts law, the individualized education programs (IEPs) of certain disabled students must also contain postsecondary transition goals and services based on age-appropriate assessments. *Id.* § 1414(d)(1)(A)(i)(VIII); Mass. Gen. Laws ch. 71B, § 2.

Appellants are C.D., a resident of Natick, Massachusetts, who qualified as a child with a disability under the IDEA, and her parents. They challenge this circuit's prior interpretations of these IDEA requirements as incomplete or as inconsistent with the IDEA and current Supreme Court case law. The parents seek reimbursement for at least three years of C.D.'s education in a specialized private school. Rejecting these challenges, we affirm the district court, which upheld a decision of the Massachusetts Bureau of Special Education Appeals (BSEA) ruling that the Natick Public School District (Natick) had complied with the FAPE, LRE, and transition requirements in proposed IEPs for C.D. *See C.D.* v. *Natick Pub. Sch. Dist. (C.D. II)*, No. 15-13617-FDS, 2018 WL 3510291, at *1 (D. Mass. July 20, 2018); *C.D.* v. *Natick Pub. Sch. Dist. (C.D. I)*, No. 15-13617-FDS, 2017 WL 3122654, at *1 (D. Mass. July 21, 2017).

I.

The IDEA offers states federal funds for the education of children with disabilities in exchange for the states' commitments to comply with the IDEA's directives, including its FAPE and LRE requirements. *See Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*,

548 U.S. 291, 295, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006).

A FAPE "comprises 'special education and related services'—both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry* v. *Napoleon Cmty. Sch.*,—U.S.—, 137 S. Ct. 743, 748–49, 197 L.Ed.2d 46 (2017) (quoting 20 U.S.C. § 1401(9), (26), (29)). "The primary vehicle for delivery of a FAPE is an IEP." *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotation marks omitted). IEPs are "comprehensive plan[s]" that are developed by the child's "IEP Team (which includes teachers, school officials, and the child's parents)" and that "must be drafted in compliance with a detailed set of procedures." *Endrew F.* v. *Douglas Cty. Sch. Dist. RE-1*,—U.S.—, 137 S. Ct. 988, 994, 197 L.Ed.2d 335 (2017) (internal quotation marks omitted). Under the Supreme Court's recent decision in *Endrew F* v. *Douglas County School District RE-1*,—U.S.—, 137 S. Ct. 988, 197 L.Ed.2d 335 (2017), the services offered in an IEP amount to a FAPE if they are "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001.

The IDEA also requires states receiving federal funds to educate disabled children in the "[l]east restrictive environment" appropriate for each child. 20 U.S.C. § 1412(a)(5). The statute mandates at § 1412(a)(5)(A):

> To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes,

> separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. The Supreme Court has characterized this LRE mandate as embodying a "preference" for "mainstreaming" students with disabilities in "the regular classrooms of a public school system." *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 202–03, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *see also Endrew F.*, 137 S. Ct. at 999 ("[T]he IDEA requires that children with disabilities receive education in the regular classroom 'whenever possible' " (quoting *Rowley*, 458 U.S. at 202, 102 S.Ct. 3034)). But the IDEA's preference for mainstreaming "is not absolute." *T.M. ex rel. A.M.* v. *Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014); *see also Rowley*, 458 U.S. at 197 n.21, 102 S.Ct. 3034 ("The Act's use of the word 'appropriate' ... reflect[s] Congress' recognition that some settings simply are not suitable environments for ... some handicapped children."). Instead, as we explained in *Roland M.* v. *Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement."[1] *Id.* at 993.

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[1] *Roland M.* interpreted the IDEA's predecessor statute, *see* 910 F.2d at 987, but the text of the provision at issue has not changed, *compare* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 612(5), 89 Stat. 733, 781 (1975), with 20 U.S.C. § 1412(a)(5)(A).

The final IDEA requirement at issue here is the instruction at § 1414(d)(1)(A)(i)(VIII) that certain students' IEPs "include[ ] ... appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and ... independent living skills" along with "the transition services (including courses of study) needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)–(bb). Massachusetts has made these transition requirements applicable starting at age fourteen. *See* Mass. Gen. Laws ch. 71B, § 2; *see also* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (making this requirement applicable "beginning not later than the first IEP to be in effect when the child is 16"). Because C.D. was fourteen or older when the IEPs at issue were proposed, these requirements applied.

II.

C.D. has borderline intellectual functioning and significant deficits in language ability. She attended public school in Natick through fifth grade. For middle school, she attended McAuliffe Regional Charter Public School in Framingham, Massachusetts, where she took all of her classes except math in a regular classroom setting. To assist C.D., two private tutors hired by C.D.'s parents attended C.D.'s middle school classes with her.

The summer before C.D. entered high school, her parents worked with Natick to develop an IEP for C.D.'s ninth grade year at Natick High School. C.D.'s parents wanted C.D. to continue her education in a regular classroom setting, with the help of the same private tutors. School officials explained that only

Natick employees were allowed to teach or tutor students in Natick's classrooms.

Natick was concerned that larger class sizes and more advanced content in high school would make it difficult for C.D. to access the general education curriculum. It considered placing C.D. in replacement classes in which a modified general education curriculum is taught by a special education teacher. Ultimately, Natick, in its proposed IEP, chose a third option.

The school presented C.D.'s parents with a proposed ninth grade IEP, for the 2012–2013 school year, that placed C.D. in regular classrooms for her elective courses but in a setting called the ACCESS Program for her academic courses. The ACCESS Program is a self-contained special education program located at Natick High School and designed for students who, like C.D., have cognitive and communication deficits. ACCESS offers a significantly modified curriculum, and its students typically earn certificates rather than high school diplomas.

C.D.'s parents rejected the IEP, saying that the ACCESS Program was an overly "restricted environment" and that C.D.'s placement there would "hinder" her academic and social growth. They enrolled C.D. at Learning Prep School, a private school that specializes in educating students with disabilities.

The summer before C.D. was to enter tenth grade, Natick presented to C.D.'s parents an IEP for the 2013–2014 school year that again placed C.D. in the ACCESS Program for her academic classes. C.D.'s

parents again rejected the IEP, giving the same reasons, and enrolled C.D. at Learning Prep.

Before the next school year, the IEP Team reconvened, this time with the benefit of a fresh set of assessments of C.D. Based on these assessments and on reports of C.D.'s progress at Learning Prep, Natick proposed a new IEP for the 2014–2015 school year that placed C.D. in a mix of ACCESS classes, replacement classes, and general education classes. C.D.'s parents rejected this IEP for two reasons. As they saw it, the proposed schedule left inadequate time for speech and language services. In addition, Natick had not yet conducted a formal postsecondary transition assessment. As to C.D.'s postsecondary transition, the 2012–2013, 2013–2014, and initial 2014–2015 IEPs had stated the parents' goal that C.D. graduate from high school and had provided transition and vocational services from the school's learning center.

Natick then performed a formal transition assessment and presented a revised 2014–2015 IEP. This final IEP proposed the same mix of classes, but extended C.D.'s school day to allow for speech and language therapy as well as career preparation services. C.D.'s parents rejected this IEP, and C.D. attended Learning Prep for the 2014–2015 school year.

In 2014, C.D.'s parents filed a complaint with the BSEA seeking reimbursement for C.D.'s tuition at Learning Prep. To qualify for reimbursement, the parents had to show that Natick's IEPs for 2012–2013, 2013–2014, and 2014–2015 "had not made a free

appropriate public education available."[2] *See* 20 U.S.C. § 1412(a)(10)(C)(ii). After a hearing in May 2015, a BSEA Hearing Officer denied the parents' request for reimbursement. The Hearing Officer concluded that the IEPs were "reasonably calculated to provide [C.D.] with a free appropriate public education in the least restrictive environment." And the Hearing Officer found that the facts and testimony presented did not support the parents' arguments that the transition assessments and plans were inadequate.[3]

C.D.'s parents sought review of the BSEA's decision in federal district court. The district court denied the parents' motion for summary judgment and their supplemental motion for summary judgment. *See C.D. I*, 2017 WL 3122654, at *26; *C.D. II*, 2018 WL 3510291, at *4. Giving "due weight" to the decision of the BSEA, *C.D. I*, 2017 WL 3122654, at *15, the district court made three relevant rulings. First, because *Endrew F.* had been decided while the parents' motion for summary judgment was pending, the district court verified that the Hearing Officer had

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[2] The transition planning and transition assessment requirements are procedural. Only certain procedural flaws, such as those that result in the denial of a FAPE or "a deprivation of educational benefits," are actionable under the IDEA. 20 U.S.C. § 1415(f)(3)(E)(ii); *see also*, *e.g.*, *R.E.* v. *N.Y.C. Dep't of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012) (applying this harmless error principle to a claimed violation of the transition requirements).

[3] The Hearing Officer also rejected other arguments not presented on appeal.

applied a FAPE standard consistent with *Endrew F.*[4] *Id.* at *16 ("[T]he standard articulated in *Endrew F.* is not materially different from the standard set forth in" the First Circuit's prior cases and "applied by the hearing officer."). Second, the district court found it "unclear" whether the BSEA's decision had followed the First Circuit's prior cases on the LRE mandate. *Id.* at *19. And so the district court remanded to the BSEA to determine whether the 2012–2013 and 2013–2014 IEPs, which proposed to place C.D. in the ACCESS Program for her academic courses, had provided a FAPE in the LRE. After the BSEA responded with a clarification order, the district court concluded that "based on the preponderance of the evidence, the BSEA hearing officer appropriately found that the district balanced the benefits of mainstreaming against the restrictions associated with the [ACCESS] classes, and that the ... IEPs were reasonably calculated to provide a FAPE in the least restrictive environment possible." *C.D. II*, 2018 WL 3510291, at *4. Third, the district court agreed with the BSEA that the 2012–2013, 2013–2014, and the final 2014–2015[5] IEPs complied with the IDEA's transition planning and assessment requirements. *C.D. I*, 2017 WL 3122654, at *19, *21.

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[4] The district court first remanded in part to the BSEA for the Hearing Officer to confirm that she had applied a standard consistent with *Endrew F.*

[5] The district court held that any challenges to the initial 2014–2015 IEP were mooted by that IEP's replacement with the final 2014–2015 IEP. *C.D. I*, 2017 WL 3122654, at *21.

III.

C.D.'s parents now argue that the district court applied the wrong legal standards. They say first that *Endrew F.* defined "progress appropriate" as "appropriately ambitious" and "challenging" so that the district court was required to ask, in evaluating whether a FAPE was offered, whether the IEPs contained sufficiently "challenging objectives." *Endrew F.*, 137 S. Ct. at 1000. Next, the parents urge us to adopt, and contend that the district court should have applied, a multi-part test from *Daniel R.R.* v. *State Board of Education*, 874 F.2d 1036 (5th Cir. 1989), to evaluate whether the IEPs placed C.D. in an overly restrictive environment. Finally, C.D.'s parents argue that the district court ignored the plain language of the IDEA's transition planning and assessment requirements.

Our review of the district court on these legal issues is de novo. *See Johnson* v. *Bos. Pub. Sch.*, 906 F.3d 182, 191 (1st Cir. 2018). We hold that the district court properly applied this circuit's standards and that those standards are consistent with *Endrew F.* and with the IDEA. The parents also raise alternative arguments that the district court erred in applying law to fact, and we review these fact-dominated rulings deferentially. *Id.* (quoting *Doe* v. *Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 76 (1st Cir. 2016)). Finding no errors, we affirm.

A.

Until *Endrew F.*, the Supreme Court had "declined ... to endorse any one standard for determining" whether the services offered in a student's IEP amounted to a FAPE. *Endrew F.*, 137 S.

Ct. at 993. This circuit, along with several others, said that to offer a FAPE, an IEP must be "individually designed" and "reasonably calculated to confer a meaningful educational benefit." *D.B.*, 675 F.3d at 34–35 (citing *D.S.* v. *Bayonne Bd. of Educ.*, 602 F.3d 553, 557 (3d Cir. 2010), then citing *D.F. ex rel. N.F.* v. *Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005), and then citing *Deal* v. *Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004)). After *Endrew F.*, this court confirmed, in *Johnson* v. *Boston Public Schools*, 906 F.3d 182 (1st Cir. 2018), that this "meaningful educational benefit" standard for evaluating whether an IEP offers a FAPE "comports" with the standard "dictated by *Endrew F.*"[6] *Id.* at 194–95.

C.D.'s parents say that our *Johnson* decision restricted its view to *Endrew F.*'s language about "progress appropriate in light of the child's circumstances," *Endrew F.*, 137 S. Ct. at 1001, and that we have yet to examine language in *Endrew F.* about "ambitious" and "challenging" goals, *id.* at 1000. On the parents' reading, after *Endrew F.*, courts must ask not only whether an IEP offers meaningful educational progress, but also, separately, whether the IEP's objectives are ambitious and challenging.

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[6] Other circuits that use a "meaningful benefit" standard have held the same. *See L.H.* v. *Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 792 n.5 (6th Cir. 2018); *Mr. P.* v. *W. Hartford Bd. of Educ.*, 885 F.3d 735, 757 (2d Cir.), *cert. denied sub nom. Mr. P.* v. *W. Hartford Bd. of Educ.*,—U.S.—, 139 S. Ct. 322, 202 L.Ed.2d 219 (2018); *K.D. ex rel. Dunn* v. *Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018).

The parents misread *Endrew F.*, which did not construe the FAPE standard as two independent tests. That decision's core holding was that the "merely more than *de minimis*" educational benefit standard that had been used by the appellate court to evaluate Endrew's IEPs was insufficiently "demanding." *Id.* at 1000–01; *see also id.* at 997 (quoting *Endrew F. ex rel. Joseph F.* v. *Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015)). *Endrew F.* defined a FAPE—"an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *id.* at 1001—in contrast to this rejected, "de minimis" standard. It was in this context that the Supreme Court employed the terms "ambitious" and "challenging." The Court explained that, for many children with disabilities integrated into "the regular classroom," an "appropriately ambitious" goal is "advancement from grade to grade." *Id.* at 1000. And the Court stated that, for those "not fully integrated in the regular classroom," the particular "goals may differ, but every child should have the chance to meet challenging objectives." *Id.* In short, *Endrew F.* used terms like "demanding," "challenging," and "ambitious" to define "progress appropriate in light of the child's circumstances," not to announce a separate dimension of the FAPE requirement. *Id.* at 1000–01; *cf. R.F.* v. *Cecil Cty. Pub. Sch.*, 919 F.3d 237, 252 (4th Cir. 2019) (defining adequate progress and "challenging objectives" under *Endrew F.*).

Under both *Endrew F.* and our precedent, a court evaluating whether an IEP offers a FAPE must determine whether the IEP was reasonably calculated to confer a meaningful educational benefit in light of

the child's circumstances. *See Johnson*, 906 F.3d at 195; *cf. K.D. ex rel. Dunn* v. *Downingtown Area Sch. Dist.*, 904 F.3d 248, 256 (3d Cir. 2018) (equating meaningful progress and challenging objectives). Depending on context, determining whether an IEP is reasonably calculated to offer meaningful progress may or may not require a sub-inquiry into how challenging the plan is. Here, the district court did just what *Endrew F.* and *Johnson* require in affirming the BSEA's conclusion that the 2012–2013 and 2013–2014 IEPs offered a FAPE.[7] *See C.D. I*, 2017 WL 3122654, at *16 (describing the standard applied by the BSEA); *C.D. II*, 2018 WL 3510291, at *4 (affirming the BSEA's FAPE conclusion).

The district court also did not err in applying that standard to the facts in the record. The parents maintain that C.D. would not have made appropriate progress in the ACCESS Program, but the district court reasonably concluded that the record supported the BSEA's finding that C.D., given her diagnosed intellectual disability and serious language deficits, could be expected to make meaningful progress in the ACCESS program and general education electives. *See C.D. II*, 2018 WL 3510291, at *3–4.

B.

C.D.'s parents argue next that the 2012–2013 and 2013–2014 IEPs violated the LRE mandate by proposing to place C.D. in the ACCESS Program, which the parents view as overly restrictive. They

[7] C.D.'s parents argue that, in evaluating the 2012–2013 and 2013–2014 IEPs, the BSEA misapplied the First Circuit's FAPE standard by omitting the word "meaningful" from its analysis. But the BSEA did not overlook that operative word.

urge us to adopt, and argue that the district court should have applied, the multi-step test from the Fifth Circuit's decision in *Daniel R.R.* to evaluate this claim.[8] *See* 874 F.2d at 1048–50. We reject both arguments. Instead, we affirm the district court, which properly relied on our decision in *Roland M.* in ruling that the IEPs did not violate the LRE mandate.

Courts that use the *Daniel R.R.* methodology evaluate compliance with the LRE mandate in two steps, asking first "whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily," and, if the child cannot be educated in the regular classroom, asking second "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 1048. In answering the first question, *Daniel R.R.* instructs courts to consider whether the district has made reasonable efforts to accommodate the child in a regular classroom; the benefits, both academic and non-academic, available to the child in a regular class compared to the benefits, both academic and non-academic, available in a more restricted class; and the effects of inclusion on other children in the regular

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[8] Natick and the BSEA argue that C.D.'s parents waived their argument based on *Daniel R.R.* by neglecting to "set forth [its] multifactor test" before the district court. But we deem sufficient the parents' reliance on *Daniel R.R.* in the district court; the parents' motions cited to and the district court quoted from *Daniel R.R.* *See C.D. II*, 2018 WL 3510291, at *3; *see also Rivera-Gomez* v. *de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) (finding no waiver where " the district court was not left ... to ferret out an evanescent needle from an outsized paper haystack").

classroom. *Id.* at 1048–49; *see also Oberti by Oberti* v. *Bd. of Educ.*, 995 F.2d 1204, 1217–18 (3d Cir. 1993).

The parents frame their claim as presenting the following question, which they say is one of first impression in this circuit: When does a school's decision to educate a child with disabilities in a setting other than the regular classroom violate the IDEA's LRE mandate? Several other circuits, the parents observe, have used the *Daniel R.R.* test to evaluate parents' claims that their children should be mainstreamed.[9] *See Oberti*, 995 F.2d at 1216–17; *T.M.*, 752 F.3d at 161–62; *L.B. ex rel. K.B.* v. *Nebo Sch. Dist.*, 379 F.3d 966, 976–77 (10th Cir. 2004); *Sacramento City Unified Sch. Dist.* v. *Rachel H. ex rel. Holland*, 14 F.3d 1398, 1400–01 (9th Cir. 1994). The parents' premise is incorrect. There is no ground for distinguishing our prior cases, like *Roland M.*, involving parents who sought a more restrictive placement than the one proposed in the IEP.[10] Those cases and this one in fact present the same question:

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[9] The Fourth and Eighth Circuits have applied the Sixth Circuit's test from *Roncker* v. *Walter*, 700 F.2d 1058 (6th Cir. 1983), which asks "whether the services which make ... [an alternative] placement superior could be feasibly provided in a non-segregated setting." *Id.* at 1063; *see also DeVries* v. *Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878–79 (4th Cir. 1989); *A.W.* v. *Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987).

[10] *See*, *e.g.*, *C.G. ex rel. A.S.* v. *Five Town Cmty. Sch. Dist.*, 513 F3d279, 287 (1st Cir. 2008) (holding that the district court "supportably concluded" that public school day placement rather than residential placement requested by parents was least restrictive environment appropriate); *Roland M.*, 910 F.2d at 993; *Abrahamson* v. *Hershman*, 701 F.2d 223, 229–30 (1st Cir. 1983).

Did the IEP's proposed placement violate the IDEA's LRE mandate?

The text of § 1412(a)(5)(A) and prior precedent provide the guidance we need to evaluate whether Natick complied with the LRE mandate here. In eschewing the *Daniel R.R.* test because "[t]he Act itself provides enough of a framework," we join the Seventh Circuit. *See Beth B.* v. *Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002) (declining to adopt the *Daniel R.R.* test).

C.D.'s parents argue that the *Daniel R.R.* test adds needed "complexity" to the statute's terms. But determining an appropriate placement for a disabled child is already a complex task. It is one that "involves choices among educational policies and theories—choices which courts, relatively speaking, are poorly equipped to make." *Roland M.*, 910 F.2d at 992; *see also C.G. ex rel. A.S.* v. *Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 289 (1st Cir. 2008) (acknowledging "the truism that courts should recognize the expertise of educators with respect to the efficacy of educational programs"). That is why the IDEA "vests" state and school "officials with responsibility for" choosing a child's placement. *Endrew F.*, 137 S. Ct. at 1001. And it is why courts owe respect and deference to the expert decisions of school officials and state administrative boards. *See Lessard* v. *Wilton-Lyndeborough Coop. Sch. Dist. (Lessard II)*, 592 F.3d 267, 270 (1st Cir. 2010) ("The standard of review is thus deferential to the educational authorities, who have 'primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs.' " (quoting

Rowley, 458 U.S. at 207, 102 S.Ct. 3034)). There is no need to add complexity to the LRE mandate in the form of *Daniel R.R.*'s judicial gloss, and every reason not to do so.

We proceed to review the district court's decision under § 1412(a)(5)(A) and our cases interpreting it. Again, the IDEA mandates, at § 1412(a)(5)(A):

> To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). Our cases have "weighed" this preference for mainstreaming "in concert with the" FAPE mandate. *Roland M.*, 910 F.2d at 992–93. The two requirements "operate in tandem to create a continuum" of possible educational environments, each offering a different mix of benefits (and costs) for a student's academic, as well as social and emotional, progress.[11] *Id.* For schools, complying with the two mandates means evaluating potential placements' "marginal benefits" and costs and choosing a placement that strikes an appropriate balance

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[11] We have recognized that educating students with disabilities with their nondisabled peers can have benefits for disabled students' social and communication skills. *See Lenn* v. *Portland Sch. Comm.*, 998 F.2d 1083, 1090 & n.7 (1st Cir. 1993) (citing *Oberti*, 995 F.2d at 1216–17).

between the restrictiveness of the placement and educational progress. *Id.*; *see also Amann* v. *Stow Sch. Sys.*, 982 F.2d 644, 650 (1st Cir. 1992) (per curiam) (phrasing the question as whether the "IEP 'reasonably calculated' the balance between academic progress and" restrictiveness).

The district court correctly identified this legal framework. Quoting *Roland M.*, the district court explained that " '[m]ainstreaming may not be ignored, even to fulfill substantive educational criteria.' Rather, the benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment."[12] *C.D. II*, 2018 WL 3510291, at *3 (internal citation omitted) (quoting *Roland M.*, 910 F.2d at 993).

The parents argue, again relying on applications of *Daniel R.R.*, that the district court erred in failing to ask whether C.D. could have been educated in the regular classroom considering "the whole range of supplemental aids and services." *Oberti*, 995 F.2d at 1216. The record belies this contention. The district court here verified that Natick and the BSEA had considered "the nature and severity" of C.D.'s disability as well as the impact of "supplementary aids and services." 20 U.S.C. § 1412(a)(5)(A). It noted that the BSEA and Natick had both examined three potential placements: the regular classroom,

[12] The parents argue that the district court "erred where it did not even articulate the need to balance non-academic benefits against the putative academic advantages of a substantially separate classroom." But the district court properly understood the balancing inquiry outlined in *Roland M.*

replacement classes, and the ACCESS Program. *C.D. II*, 2018 WL 3510291, at *3. Then the district court found that evidence supported the BSEA's and Natick's conclusion that the ACCESS Program was appropriate because of C.D.'s particular disability—an "intellectual disability in conjunction with weaknesses in receptive and expressive language."[13] *Id.* (internal quotation marks omitted).

We see no error in the district court's appropriately deferential analysis. As we have emphasized, the IDEA vests state and local educational officials, not federal courts, with the primary responsibility to make placement decisions consistent with § 1412(a)(5)(A).

C.

C.D.'s parents next argue that the district court ignored the plain language of the IDEA in affirming the BSEA's ruling that the IEPs complied with the statute's transition provision. Not so.

We have previously held that the IDEA "does not require a stand-alone transition plan." *Lessard* v. *Wilton Lyndeborough Coop. Sch. Dist. (Lessard I)*, 518 F.3d 18, 24 (1st Cir. 2008). Nor does the statute require that the underlying transition assessments take a particular form. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). Indeed, there is no restriction on the means of gathering information about a student's interests or abilities that may be relevant to the development of postsecondary transition goals.

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[13] C.D.'s parents' dispute of a related factual finding made by the BSEA in its initial ruling on the LRE issue is misplaced. The district court ultimately reviewed the facts as clarified by the BSEA.

See, *e.g.*, Mass. Dep't of Elementary & Secondary Educ., Transitional Assessment in the Secondary Transition Planning Process, Technical Advisory SPED 2014-4, at 1–3 (Apr. 9, 2014) (declining to adopt "a restrictive approach which might seem to imply the required use of highly specialized formal assessments for each student").

The district court did not err in articulating or applying these transition requirements. It discussed the statute's assessment and planning dimensions, it cited repeatedly to Massachusetts' guidance implementing the federal provision, and it relied on case law correctly applying the transition requirement. *See C.D. I*, 2017 WL 3122654, at *19, *21 (citing *Sebastian M.* v. *King Philip Reg'l Sch. Dist.*, 774 F. Supp. 2d 393, 407 (D. Mass. 2011), aff'd, 685 F.3d 79 (1st Cir. 2012)).

The district court then reasonably applied those rules in affirming the BSEA's ruling. The IEPs stated grade-appropriate goals and services designed to prepare C.D. for the post-secondary transition.[14] *See Lessard I*, 518 F.3d at 25; *see also*, *e.g.*, *Rodrigues* v. *Fort Lee Bd. of Educ.*, 458 F. App'x 124, 128 (3d Cir.

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[14] Specifically, C.D.'s 2012–2013 IEP stated that C.D.'s parents hoped she would receive a high school diploma and vocational training. The IEP outlined educational goals and services that would have helped C.D. make progress toward that diploma, and it also provided for vocational services from the school's learning center. The 2013–2014 IEP was similar, and it added opportunities to meet with the school's guidance counselor and career specialist to discuss post-secondary plans. The final 2014–2015 IEP further proposed educational and vocational services and set out specific goals related to job readiness, job coaching, and independent living.

2011) (finding adequate an IEP that listed a transition goal and noted available services). And the 2012–2013 and 2013–2014 plans reflected and were developed based on a transition-specific discussion at the 2012–2013 IEP meeting and on extensive educational and psychological evaluations done of C.D. and provided to Natick as part of the IEP development process. The final 2014–2015 IEP reflected and was based on assessments like these as well as a formal transition assessment. All three IEPs contained "appropriate measurable postsecondary goals based upon age appropriate assessments." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa).

IV.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

C.D., BY AND THROUGH her parents and next friends, M.D. and P.D.,
Plaintiffs,

v.

NATICK PUBLIC SCHOOL DISTRICT and Bureau of Special Education Appeals,
Defendants.

Civil Action No. 15-13617-FDS
|
Signed 07/20/2018

ORDER ON ENTRY OF JUDGMENT

SAYLOR, J.

On July 20, 2018, the Court denied plaintiffs' motion for supplemental summary judgment. Although defendants did not formally move for summary judgment, because the matter was "in substance an appeal from [the BSEA]," it appears that there are no further matters for the Court to resolve. *North Reading Sch. Comm. v. BSEA*, 480 F. Supp. 2d 479, 480 n.1 (citations and internal quotation marks omitted).

Accordingly, the clerk is hereby directed to enter judgment for defendants. The parties, for good cause shown, may move to reopen this matter within 14 days, or by August 3, 2018.

So Ordered.

Dated: July 20, 2018

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

C.D., BY AND THROUGH her parents and next friends, M.D. and P.D.,
Plaintiffs,

v.

NATICK PUBLIC SCHOOL DISTRICT and Bureau of Special Education Appeals,
Defendants.

Civil Action No. 15-13617-FDS
|
Signed 07/20/2018

MEMORANDUM AND ORDER ON PLAINTIFFS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

F. Dennis Saylor IV, United States District Judge

This dispute arises out of an administrative decision by the Massachusetts Bureau of Special Education ("BSEA") concerning individualized education programs ("IEPs") proposed by the Natick School District. The BSEA found that the IEPs were adequate to provide C.D., a student with learning disabilities, with a free appropriate public education

("FAPE"), as required under the Individuals with Disabilities Education Act ("IDEA"), and denied tuition reimbursement for her placement in a private school. C.D. and her parents then brought suit against the School District and the BSEA seeking to overturn the BSEA's decision.

On July 21, 2017, the Court denied plaintiffs' motion for summary judgment but remanded the case in part to the BSEA to determine whether the 2012–13 and 2013–14 school year IEPs provided a FAPE in the least restrictive environment possible. The BSEA issued its order on March 22, 2018, concluding that the IEPs were reasonably calculated to provide a FAPE in the least restrictive environment.

Plaintiffs have since moved for supplemental summary judgment to reverse that order. For the reasons stated below, the motion will be denied.

I. Background

The factual background, statutory framework, and procedural history of this matter are set forth in the Court's earlier memorandum and order dated July 21, 2017. *See C.D. by & through M.D. v. Natick Pub. Sch. Dist.*, 2017 WL 3122654 (D. Mass. July 21, 2017). For brevity's sake, the Court will not repeat that history here. That order denied plaintiffs' motion for summary judgment and remanded the matter in part to the BSEA to determine whether the 2012–13 and 2013–14 IEPs provided a FAPE in the least restrictive environment possible.

On March 22, 2018, the hearing officer issued an order affirming her previous opinion, stating that Natick had rationally balanced the benefits of mainstreaming against the restrictions associated

with the Access classes. (*See generally* Docket No. 87).[1] She concluded that the 2012–13 and 2013–14 IEPs proposed by Natick were "reasonably calculated to provide [C.D.] with a free appropriate public education in the least restrictive environment." (*Id.* at 3).

II. Legal Standard

Plaintiffs have moved for supplemental summary judgment on their challenge to the BSEA's conclusions. However, "[i]n a case like this, summary judgment is merely the device for deciding the issue, because the procedure is in substance an appeal from an administrative determination, not a summary judgment." *North Reading Sch. Comm. v. BSEA*, 480 F. Supp. 2d 479, 480 n.1 (citations and internal quotation marks omitted). The burden of proof rests on the party challenging the hearing officer's decision. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992).

Essentially, "judicial review [of administrative decisions on claims brought under the IDEA] falls somewhere between the highly deferential clear-error standard and the non-deferential *de novo* standard." *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 24 (1st Cir. 2008) (citing *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990)). The IDEA provides that courts reviewing agency decisions "(i) shall receive the records of the administrative

[1] The Access Program is separate from the general education classrooms within Natick High School. In the Access Program, students "receive a vocational and life centered educational approach using the [Massachusetts] Curriculum Frameworks entry point levels for High School." (A.R. 4148–4151).

proceeding; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). The Supreme Court has explained that a district court's review entails both procedural and substantive aspects. *Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) ("When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid."). Thus, in reviewing the appropriateness of an IEP, a court "must ask two questions: 'First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?' " *Roland M.*, 910 F.2d at 990 (quoting *Rowley*, 458 U.S. at 206–07).

A reviewing court must ensure that the school district and state education agency adhere scrupulously to the procedural requirements of the statute and relevant regulations and rules. *See Rowley*, 458 U.S. at 206 (noting that the Act "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."). However, in reviewing an agency's substantive decisions on FAPEs and IEPs, a reviewing court's "principal function is one of involved oversight." *Roland M.*, 910 F.2d at 989. "[C]ourts should be loathe

to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." *Id.* at 992; *see also Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) ("The *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods."). Nonetheless, it is the reviewing court's role to render "an independent ruling as to the IEP's adequacy based on a preponderance of all the evidence, including the hearing officer's duly weighted findings." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1089 (1st Cir. 1993).

In short, on matters that implicate educational expertise, heightened deference is due to an agency's administrative findings. *Mr. I v. Maine Sch. Admin. Dist. No. 55*, 416 F. Supp. 2d 147, 156 (D. Me. 2006). However, "when the issue is more a matter of law, the educational expertise of the agency is not implicated, and less deference is required." *Id.* at 157.

As to the evidence, the administrative process is to be accorded "its due weight" such that "judicial review does not become a trial *de novo*, thereby rendering the administrative hearing nugatory." *Roland M.* at 996. The First Circuit has directed district courts reviewing appeals of administrative decisions under the IDEA to

> review[ ] the administrative record, which may be supplemented by additional evidence from the parties, and make[ ] an independent ruling based on the preponderance of the evidence. That independence is tempered by the requirement that the court give due weight to the hearing

> officer's findings. This intermediate level of review reflects the concern that courts not substitute their own notions of educational policy for that of the state agency, which has greater expertise in the educational arena.

Lt. T.B., 361 F.3d at 83–84 (citations and internal quotation marks omitted).

Finally, an IEP should not 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." *Roland M.*, 910 F.2d at 992.

III. Analysis

Plaintiffs' challenge is to the adequacy of the 2012–13 and 2013–14 IEPs. Because the 2013–14 IEP was created pursuant to the same information that was the basis for the 2012–13 IEP, the Court will address them together.

On partial remand, this Court ordered the hearing officer to "consider, or at a minimum clarify, whether the 2012–13 [and 2013–14 IEPs were] reasonably calculated to provide a FAPE in the 'least restrictive' environment possible." *C.D.*, 2017 WL 3122654, at *19.

The IDEA's requirement that students with disabilities be educated in the "least restrictive environment" means that "[m]ainstreaming may not be ignored, even to fulfill substantive educational criteria." *Roland M.*, 910 F.2d at 992–93. Rather, the benefits to be gained from mainstreaming must be weighed against the educational improvements that

could be attained in a more restrictive (that is, non-mainstream) environment. *Id.*

When a child's unique needs cannot be met through education in a regular classroom, "the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1045 (5th Cir. 1989); *see also Abrahamson v. Hershman*, 701 F.2d 223, 230 (1st Cir. 1983) (finding that "[t]he placement is not to be made by mechanically choosing the least restrictive environment; rather, the decision must consider the child's own needs.").

Although the educational benefit of a FAPE need not maximize a child's potential, the state must, however, "provide the child with personalized instruction and sufficient support services to allow the child to benefit educationally." *Gonzalez v. Puerto Rico Dep't of Educ.*, 969 F. Supp. 801, 807 (D.P.R. 1997). Accordingly, although mainstreaming is required under the Act whenever possible, it is unwarranted when placement in a mainstream general education classroom would result in a child simply "monitoring" classes. *DeVries by DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989) (finding mainstreaming inappropriate when disability "would make it difficult for [the child] to bridge the 'disparity in cognitive levels' between him and the other students" because "he would glean little from the lectures, and his individualized work would be at a much lower level than his classmates.").

In her clarification order, the hearing officer found that the 2012–2013 and 2013–2014 IEPs "[were] reasonably calculated to provide [plaintiff] with a free

appropriate public education in the least restrictive environment." (Docket No. 87 at 3). The hearing officer went into detail explaining the three options considered by the Natick team, including the general education program, replacement classes, and the Access Program. (*Id.* at 2). The hearing officer noted that the district considered the parents' preference that C.D. take part in general education, but found the district's proposal more appropriate because of C.D.'s unique "intellectual disability in conjunction with weaknesses in receptive and expressive language." (*Id.*).

The hearing officer also took into consideration the district's proposal to allow C.D. to participate in general education electives, to "expose [C.D.] to general education peers, while also providing her with the specialized services she requires, including support for her significant language deficits, to make progress on her IEP goals." (*Id.*). The district had further offered to reconvene in October 2012 to determine if C.D.'s progress merited a move to a less restrictive environment in replacement or general education classes. (*Id.*). The hearing officer's findings are entirely consistent with the administrative record, and reflects the discussion highlighted in the July 27, 2012 IEP meeting. (A.R. 383–433).

Accordingly, based on the preponderance of the evidence, the BSEA hearing officer appropriately found that the district balanced the benefits of mainstreaming against the restrictions associated with the Access classes, and that the 2012–2013 and 2013–2014 IEPs were reasonably calculated to provide a FAPE in the least restrictive environment possible. The Court sees no reason to overturn that judgment.

IV. Conclusion

For the foregoing reasons, plaintiffs' motion for summary judgment is DENIED.

So Ordered.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW
APPEALS SPECIAL EDUCATION APPEALS

FILED 2018 MAR 22 AM 11:39

Student v. **BSEA #1408860R**
Natick Public Schools

CONSIDERATION/CLARIFICATION ON PARTIAL REMAND

I. Introduction

The instant Clarification is issued pursuant to the District Court's remand.

By Memorandum and Order on Plaintiff's Motion for Summary Judgment, dated July 21, 2017 (hereinafter, "District Court Decision"), the District Court Denied Plaintiff's Motion for Summary Judgment and remanded, in part, my Decision of July 24, 2015 (BSEA #1408860) to the Bureau of Special Education Appeals (hereinafter, "BSEA") for further proceedings consistent with the District Court Decision. Specifically, this matter was remanded to "permit the hearing officer to consider, or at a minimum clarify, whether the 2012–13 IEP was reasonably calculated to provide a TAPE [free appropriate public education] in the 'least restrictive'

environment possible" and "whether the 2013–14 IEP provided for an appropriate education in the least restrictive environment."

Because, as noted above, the Remand was ordered to "permit the hearing officer to consider, or at a minimum clarify, whether the 2012–13 IEP was reasonably calculated to provide a FAPE in the 'least restrictive' environment possible" and "whether the 2013–14 IEP provided for an appropriate education in the least restrictive environment" there was no basis for hearing additional testimony or admitting additional exhibits. Thus, the undersigned, by Order dated August 10, 2017, allowed the Parties (both of whom were represented by counsel) to submit briefs with respect to the remand order on or before September 8, 2017. On August 25, 2017, the Parties jointly requested an extension of the deadline for submitting briefs until October 20, 2017. Their request was allowed by Order dated September 14, 2017. Natick submitted its Memorandum of Law on Least Restrictive Environment on October 20, 2017. Parents submitted their Brief Pursuant to BSEA Order Regarding District Court Remand on October 23, 2017 and the record closed at that time.

II. Least Restrictive Environment

Under state and federal special education law, a school district has an obligation to provide services in the "least restrictive environment." 20 U.S.C. § 1412(a)(5)(A); Mass. Gen. Laws c. 71B, §§ 2, 3. *See also* 20 U.S.C. § 1400(d)(1)(A); 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.114(a)(2)(i); 603 C.M.R. § 28.06(2)(c). The phrase "least restrictive environment" means that, to the maximum extent

appropriate, a student must be educated with other students who do not have a disability, and that "removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily." *See also Burlington v. Mass. Department of Education*, 471 US 359, 369 (1985) (federal statute "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children"). Where there is tension between the educational services necessary to meet the needs of a child (and to provide her with educational benefit) and the principles of least restrictive environment, "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement . . . , requir[ing] a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum." *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

When the Natick Team convened to consider Student's placement for the 2012–2013 school year, they considered three programs. The first, the general education program, with supports, was preferred by the Parents, but deemed inappropriate by Natick because, based on Student's IEP from her prior placement and her test scores, Natick did not believe that general education was appropriate for her. (Administrative Record ("A.R.") 413–414). The second option was replacement classes, designed for students who have communication disabilities, language-based

learning disabilities, specific learning disabilities and reading difficulties. Such classes provide students with access to the regular curriculum, but material is presented at a slower pace. The classes follow the Massachusetts curricular standards. (Hearing testimony of Liptak, Vol 3, pg. 143.) The third option for Student was the Access Program, a substantially separate program, with opportunities for inclusion, for students with intellectual disabilities and communication difficulties. (Hearing testimony of Michelson and Franciose) Natick, during both the May 2012 Team meeting and the July 2012 Team meeting, appropriately discussed each of the options and determined which environment could appropriately meet Student's needs. Although Parents' strong preference was for general education, none of the Natick Team members believed that Student's IEP services could be provided, or that her needs adequately addressed, in the general education setting, even with supports. Although Student was described as organized, hard-working, and cooperative, she had an intellectual disability in conjunction with weaknesses in receptive and expressive language. Based upon the information available to the Team, Natick did not believe even the replacement classes designed for students with communication disabilities and taught at a slower pace would be appropriate for Student. Natick, thus, proposed placement for Student in the Access Program where she would have received a modified curriculum according to her abilities, as well as instruction in a small group. Mindful of its obligation to provide Student with her services in the least restrictive appropriate environment, Natick proposed that

Student participate in general education electives. Such programing would expose Student to general education peers, while also providing her with the specialized services she required, including support for her significant language deficits, to make progress on her IEP goals. (*See* Decision, July 24, 2015, pgs. 3–5, 10, 11.)

Not only did Natick's proposed IEP for the 2012–2013 school year provide for appropriate services in the least restrictive environment, but, Natick offered to reconvene the Team in October 2012 to assess Student's progress and the appropriateness of the program. This would have allowed Natick, after working directly with Student for several weeks, to amend her IEP to include additional time in less restrictive settings as appropriate. Natick could have provided Student with a continuum of less restrictive options through which she could have moved as she progressed.[1] However, after arguing that Natick's proposal was overly restrictive, Parents placed Student in an out-of-district school for special education students where she would spend all of her time in a substantially separate classroom without any exposure to general education peers.

Natick's proposed IEP for the 2012–2013 school year would have provided Student with the opportunity to

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[1] In fact, after Student's three-year evaluation, Natick did propose changes to Student's program that provided her with a general education social studies class with paraprofessional support as well as general education health and electives with paraprofessional support. (Decision July 24, 2015, pages 7–8.) Students in the Access Program were routinely transferred to replacement classes as appropriate. (Decision July 24, 2015, page10)

independently access curriculum at her level, rather than relying on aides, as would have been required in a general education setting. One of the stated purposes of the Individuals with Disabilities Education Act ("IDEA") is "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 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.1(a). Natick's proposed placement would have satisfied IDEA'S purpose of better preparing Student for future independence in education and employment, by instructing and encouraging her to perform more tasks independently while still in high school.

The record is clear that Natick balanced the benefits to be gained, namely Student being able to independently access curriculum at a level and pace appropriate to her profile, against being outside of the general education setting for much of her day in the more restrictive Access classes. The record supports the Team's determination that Student required specially designed instruction in small group classes outside of the general education setting with a modified curriculum to make progress during the 2012–2013 school year.

As noted in the Decision, the IEP for the 2013–2014 school year was substantially similar to that proposed by Natick for the 2012–2013 school year and continued

to propose placement in Natick's Access Program.[2] For the reasons explained above (and in in the original Decision). I find that Natick's proposal for the 2013–2014 school year also would have provided Student with a free appropriate public education in the least restrictive environment.

III. Conclusion

The 2012–2013 IEP proposed by Natick was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. The Team considered three options and reasonably determined that the Access program was the least restrictive setting that could adequately address Student's specific needs. Further, Natick could have provided a continuum of less restrictive options through which Student could have moved as deemed appropriate by the Team.

Likewise, the 2013–2014 IEP, which was substantially similar to the 2012–2013 IEP was reasonably calculated to provide free appropriate public education in the least restrictive setting for the reasons delineated with respect to the 2012–2013 IEP.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn
Dated: March 20, 2018

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[2] The 2013–2014 IEP also proposed vocational and community services which do not impact the analysis of the least restrictive environment.

APPENDIX E

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS.

C.D., BY AND THROUGH her parents and next friends, M.D. and P.D.,

Plaintiffs,

v.

NATICK PUBLIC SCHOOL DISTRICT and Bureau of Special Education Appeals,

Defendants.

Civil Action No. 15-13617-FDS
|
Signed 07/21/2017

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

F. Dennis Saylor IV, United States District Judge

This dispute arises out of an administrative decision by the Massachusetts Bureau of Special Education ("BSEA") concerning individualized education programs ("IEPs") proposed by the Natick, Massachusetts Public School District. The BSEA found that the IEPs were adequate to provide C.D., a student with learning disabilities, with a "free

appropriate public education," as required under the Individuals with Disabilities Education Act, and denied tuition reimbursement for her placement in a private school. C.D. and her parents have brought suit against the School District and the BSEA seeking to overturn the BSEA's decision.

Plaintiffs have moved for summary judgment. For the reasons stated below, the motion will be denied, but the case will be remanded to the BSEA for further consideration or clarification as to whether two of the proposed IEPs provided for an education in the least restrictive environment possible.

I. Background

A. Statutory Background

The Individuals with Disabilities Education Act ("IDEA") conditions the provision of federal funds to public schools on compliance with a requirement to provide all disabled children with a "free appropriate public education" ("FAPE"). *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990) (quoting 20 U.S.C. §§ 1400(c), 1414(b)(2)(A), 1416).[1] "Substantively, the 'free appropriate public education' ordained by the Act requires participating states to provide, at public expense, instruction and support services sufficient 'to permit the child to benefit

[1] On December 10, 2015, Congress enacted the Every Student Succeeds Act ("ESSA"). *See* Pub. L. No. 114-95,129 Stat. 1802 (2015). Like the No Child Left Behind Act, which the ESSA replaced, the statute is a reauthorization of the Elementary and Secondary Education Act of 1965. The ESSA also includes minor amendments to the IDEA that are not relevant to this case.

educationally from that instruction.' " *Id.* (quoting *Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982)).

1. Individualized Education Programs

The individualized education program ("IEP") is the IDEA's primary means for assuring the provision of a FAPE to disabled children. IEPs are written statements detailing an individualized education plan for disabled children. At a minimum, "[e]ach IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *see also Roland M.*, 910 F.2d at 987.

> There is no mechanical checklist by which an inquiring court can determine the proper content of an IEP; IEPs are by their very nature idiosyncratic. One thing is clear: the substance of an IEP must be something different than the normal school curriculum and something more than a generic, one-size-fits-all program for children with special needs.

Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23 (1st Cir. 2008) (citations and internal quotation marks omitted). The specific requirements for IEPs can come "from either federal or state law (at least to the extent that the latter is not incompatible with the former)." *Id.*

The IDEA contains procedural safeguards that must be followed when creating an IEP. In particular, parental involvement is required in order to ensure adequate protections for the interests of individual children with disabilities. *See Rowley*, 458

U.S. at 208. IEPs must be formulated through the participation of a team that includes the student's parents, at least one of the student's regular-education teachers (if any), at least one special-education teacher, a representative of the local education agency, and an individual who can interpret the instructional implications of evaluation results. *North Reading Sch. Comm. v. BSEA*, 480 F. Supp. 2d 479, 482 n.5 (D. Mass. 2007) (citing 20 U.S.C. § 1414(d)(1)(B)). At the discretion of the parents or the agency, the team may also include "other individuals who have knowledge or special expertise regarding the child." 20 U.S.C. § 1414(d)(1)(B)(vi). Parents also have the right to obtain an independent educational evaluation of their child. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 58 (1st Cir. 2002). Furthermore, under Massachusetts law, schools are required to, "upon request by a parent, provide timely access to parents and parent-designated independent evaluators and educational consultants for observations of a child's current program and of any program proposed for the child." Mass. Gen. Laws ch. 71B, § 3.

IEPs must be reviewed annually and revised when necessary. *Roland M.*, 910 F.2d at 988. Children with disabilities must be reevaluated at least once every three years. 34 C.F.R. § 300.303(b)(2).

2. <u>Appropriateness and Adequacy</u>

The IDEA requires an "appropriate" education and an "adequate" IEP; it does not require perfection. As the Supreme Court recently articulated, a student receives a FAPE if the IEP is "reasonably calculated to enable a child to make progress appropriate in

light of the child's circumstances." *Endrew F. v. Douglas County School Dist. Re-1*, 580 U.S.—at 11 (2017). *Endrew F.* elaborated on the Court's prior statement in *Rowley* that a student receives a FAPE if her IEP is "reasonably calculated to enable [her] to receive educational benefits." *Rowley*, 458 U.S. at 207.

Prior to *Endrew F.*, the First Circuit articulated the appropriateness requirement in the following way:

> "[T]he obligation to devise a custom-tailored IEP does not imply that a disabled child is entitled to the maximum educational benefit possible." *Lessard*, 518 F.3d at 23, *see also Rowley*, 458 U.S. at 198; *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004). The Supreme Court has said that an IEP must offer only "some educational benefit" to a disabled child. *Rowley*, 458 U.S. at 200. Thus, the IDEA sets "modest goals: it emphasizes an appropriate rather than an ideal, education; it requires an adequate, rather than an optimal, IEP." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). At the same time, the IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a "federal basic floor of meaningful, beneficial educational opportunity." *Town of Burlington v. Dep't of Educ. of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984). Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit.

D.B. ex rel. Elizabeth B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012).

3. Least Restrictive Environment

The IDEA expresses a preference for the education of children with disabilities in the "least restrictive environment." *See* 20 U.S.C. § 1412(a)(5). It requires states to maintain policies and procedures to ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* IEPs must, therefore, balance the often competing interests of "mainstreaming," on the one hand, with substantive educational improvement, on the other. *Roland M.*, 910 F.2d at 992–93.

4. Transition Plans

In accordance with its purpose to prepare children with disabilities for "further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A), the IDEA requires the provision of "transition services" beginning at age sixteen. *Id.* § 1414(d)(1)(A)(i)(VIII). The term "transition services" means "a coordinated set of activities for a child with a disability" that

> (A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's

> movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
>
> (B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and
>
> (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluations.

Id. § 1401(34). Thus, at least by age 16, IEPs must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills" and "the transition services (including courses of study) needed to assist the child in reaching those goals." *Id.* at § 1414(d)(1)(A)(i)(VIII)(aa)–(bb). By statute, Massachusetts has lowered the age at which transition planning must begin to fourteen. Mass. Gen. Laws ch. 71B, § 2.

The IDEA does not require that there be a separate, stand-alone "transition plan." *Lessard*, 518 F.3d at 25. Rather, statements of transition services are to be integrated with the IEP. *Id.*

5. Rejection of a FAPE

Where a state fails to provide a FAPE in a timely manner, the parents of a disabled child have the right to seek reimbursement, where appropriate, for private-school tuition. *See Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985). The Supreme Court has made clear, however, that parents who unilaterally change their child's placement without the consent of state or local school officials "do so at their own financial risk," *see Burlington*, 471 U.S. at 374, and are entitled to reimbursement "*only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (emphasis in original). A school district that is "unable to furnish a disabled child with a FAPE through a public school placement" is "responsible for the reasonable costs incident to [a proper] private placement," including tuition reimbursement. *Five Town*, 513 F.3d at 284–85.

6. Administrative Hearings

Should the parents of a disabled child or a school district wish to contest an IEP, the IDEA requires the state to convene an impartial hearing. 20 U.S.C. § 1415(f)(1)(A). In Massachusetts, those hearings are conducted by the BSEA in accordance with rules that it has promulgated pursuant to Massachusetts law. *See* Mass. Gen. Laws ch. 71B, § 3; 603 Mass. Code Regs. 28.08(5); *see also Roland M.*, 910 F.2d at 988. Under Massachusetts law, the BSEA has jurisdiction to hear disputes

> between and among parents, school districts, private schools and state agencies concerning: (i) any matter relating to the identification, evaluation, education program or educational placement of a child with a disability or the provision of a free and appropriate public education to the child arising under this chapter and regulations promulgated hereunder or under the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.*, and its regulations; or (ii) a student's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and its regulations.

Mass. Gen. Laws. Ch. 71B, § 2A(a). The BSEA's administrative decision is reviewable in either state or federal court. *See* 20 U.S.C. § 1415(i)(2)(A), (i)(2)(C)(iii); *see also Roland M.*, 910 F.2d at 987–88. However, before such an action is brought, the party seeking review must exhaust all administrative procedures under the IDEA. 20 U.S.C. § 1415(l).

B. Factual and Procedural Background

1. The Parties

C.D. is a young woman who has been diagnosed with Borderline Intellectual Functioning. (A.R. 3876). She lives with her parents in Natick, Massachusetts. (A.R. 272). The Natick schools receive federal funds from the United States Department of Education pursuant to the IDEA. (*Id.* at ¶ 14).

2. C.D.'s Middle-School Experience at McAuliffe

C.D. attended McAuliffe Regional Charter Public School in Framingham, Massachusetts, for grades six through eight. (A.R. 3378). She took all of her

classes, with the exception of math, in an inclusive, general-education setting. (A.R. 3378, 1695). She received supplementary support in her general-education classes from two retired special-education teachers, Nan Coellner and Marcia Soden, who had been hired by her parents. (A.R. 271, 1694–1696). Coellner and Soden would stand near C.D. and make sure that she understood what she was supposed to be doing in class. (A.R. 1696). It appears that C.D. did very well at McAuliffe, was able to access the general-education curriculum, and that her self-confidence improved significantly while she was there. (A.R. 1697–98).

3. The 2012–13 IEP

a. The May 2012 Meeting

In May 2012, C.D.'s parents contacted Natick by e-mail to request a meeting to discuss C.D.'s re-enrollment in the Natick public school system. (A.R. 161). C.D. would be completing the eighth grade at McAuliffe that spring, and planned to enroll at Natick High School for summer services and ninth grade in the fall. (*Id.*). In anticipation of the meeting, C.D.'s parents sent Natick her most recent educational evaluation, which had been conducted by Dr. Steve Imber in the winter of 2012; a neuropsychological evaluation conducted by Dr. Erin Gibbons; a speech and language evaluation conducted by Susan Flax, C.D.'s speech therapist; and her course selection list for the high school. (A.R. 161, 177, 238, 2750). C.D.'s parents requested that prior to the meeting, they receive copies of the syllabuses for general education classes as well as whatever

program Natick thought would be appropriate for C.D. (A.R. 161).

On May 22, 2012, Gina Dalan, the director of special education, responded to C.D.'s parents, informing them of Natick's usual practices for transferring students from McAuliffe to Natick High School. (A.R. 268). It appears that a meeting had already scheduled for May 24, and Dalan informed C.D.'s parents that the meeting would be "more of an information sharing meeting than an IEP meeting." (*Id.*). At the meeting, Natick's special-education coordinator would inform the parents about the services offered at the school and what services might be appropriate for C.D., but would not actually propose a new IEP. (*Id.*). Dalan also informed the parents that if they did decide at the meeting to enroll C.D. at Natick High School, she would send someone from Natick to McAuliffe to observe C.D. and speak with her teachers to help plan for her transition. (*Id.*).

At the meeting on May 24, C.D.'s parents brought Soden and Coellner, C.D.'s private tutors; Flax, her speech therapist; and Dr. Imber, an independent evaluator. (A.R. 271). Also present at the meeting were Dalan, the director of special education; Joshua Hanna, a general-education teacher from Natick; Milly Cuiffo, a speech and language therapist; Donna Cymrot, a school psychologist at the high school; Karan Litpak, a Learning Center teacher at the high school; Barbara Molinari-Bates, the evaluation team

leader at the high school; and attorneys for both Natick and the parents. (A.R. 271–72).[2]

The parents informed Natick that C.D. had done well in an inclusive setting at McAuliffe, and that they wanted her to continue in an inclusive, general-education program at the high school. (A.R. 273). The parents, Coellner, and Soden explained their arrangement and the support Coellner and Soden that provided to C.D. at McAuliffe. (A.R. 274–76). The parents hoped that similar support could be provided at the high school to enable C.D. to continue in an inclusive setting. (A.R. 276–77).

Natick informed the parents about the different education models available for students with learning disabilities at the high school. (A.R. 294–95). At one end of the spectrum, Natick offered inclusive, general-education classes with teaching aides. (A.R. 294). It also offered replacement classes—separate classes taught by a special education teacher where all students were on an IEP. (A.R. 294–95). Finally, it offered an ACCESS program, a substantially separate program with a significantly modified curriculum in which students would typically not take standardized tests (the Massachusetts Comprehensive Assessment System, or "MCAS") and would not receive high-school diplomas. (A.R. 295).

The parents asked about the possibility of observing the programs available at the high school. (A.R. 313). Molinari-Bates responded that the school

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[2] The "Learning Center" appears to be a class or facility during which students with special needs can receive additional support in their coursework. (A.R. 286).

district typically permits parents or their designee to observe a program that had been proposed in an IEP, but because no IEP had yet been proposed—and because C.D. had not yet enrolled at the high school—it was too early to schedule any observation. (*Id.*).

The attorney for the school district noted that pursuant to the law concerning transfer students, the district was required to provide services comparable to C.D.'s current IEP at McAuliffe. (A.R. 314). However, several representatives for Natick stated that based on the information available at the time, the school district had concerns about a general-education placement. (A.R. 317–28, 321). Specifically, Molinari-Bates stated that she was concerned that the larger class sizes (approximately 30 students per class at the high school compared to 18 students per class at McAuliffe) would make the general-education environment difficult for C.D. (A.R. 316–18, 321). Molinari-Bates stated that the ACCESS program appeared to be appropriate for C.D., but, as the parents had made clear that they were not interested in that program, that replacement classes would likely be the most comparable program to the services provided at McAuliffe. (A.R. 319). When the parents inquired about the possibility of having C.D.'s private tutors continue to help her in general-education classes at the high school, Molinari-Bates and the attorney for the school district responded that having private tutors in the classroom would not be possible because Natick employed its own teachers and teaching aides. (A.R. 318).

Finally, the team members briefly discussed possible plans for C.D.'s education after high school. (A.R. 326–328). The parents stated their hope that C.D. would receive a high-school diploma, but stated that they did not yet have post-high school plans. (A.R. 327). Dalan informed them of the school district's Achieve program, which is a job-coaching program for students aged 18 to 22. (A.R. 327–28).

b. The July 2012 Meeting

The parents submitted C.D.'s completed registration paperwork to Natick on May 29, 2012. (Pl. SMF ¶ 89; A.R. 360–68). On May 31, 2012, Dalan, the director of special education, went to observe C.D. at McAuliffe and speak with her special-education teacher. (A.R. 370). On June 5, 2012, Dalan wrote to the parents informing them that while the ACCESS program appeared to be appropriate for C.D. based on the information available, Natick would be recommending all replacement classes given the parents' objections to the ACCESS program. (*Id.*). Dalan also informed the parents that due to scheduling difficulties, the parents would not be able to observe classes at the high school prior to the end of the school year. (*Id.*). However, she stated that they would be welcome to observe early in the fall, prior to writing a new IEP for C.D. (*Id.*). Finally, Dalan informed the parents that she would be leaving the school district on June 22, 2012, and that Tim Luff would be replacing her as the director of special education. (A.R. 371).

The parents, through their attorney, then wrote to Natick on June 13, 2012, requesting an IEP team meeting prior to the start of the 2012–13 school year.

(A.R. 374–75). They noted their concern about placing C.D. in replacement classes, simply to comply with regulations requiring that a transfer student receive services comparable to their current IEP, only to then propose a new program in the first few weeks of the school year after proposing a new IEP. (A.R. 374). In particular, they were concerned that C.D. would start the school year in replacement classes only to be switched into the ACCESS program, which they did not believe was appropriate for her. (*Id.*). They requested an IEP meeting over the summer so that a new IEP could be proposed prior to the school year. (A.R. 375).

Natick granted the request for an IEP meeting. Prior to the meeting, the parents requested a copy of any report or notes that Dalan had generated as a result of her observations of C.D. at McAuliffe. (A.R. 378). The parents wanted the information gathered from those observations to inform the IEP meeting. (*Id.*). Dalan responded that her observations were simply intended to help ease C.D.'s transition to the high school, that it was not a formal evaluation, and that she did not create a written report. (*Id.*). She further stated that her observations were not intended to change what the IEP team had discussed at their last meeting, and that their recommendation of the ACCESS program for C.D. was based on their discussions at that meeting and Dr. Imber's most recent evaluation of C.D. (A.R. 377).

An IEP meeting was held on July 27, 2012. (A.R. 383). Present at the meeting were the parents; their attorney; C.D.'s tutors, Coellner and Soden; Dr. Imber; Lindsey McGovern, the Assistant Director for Student Services at Natick High School; Tim Luff,

the new Director of Student Services at Natick High School; Paul Tagliapietra, the Assistant Director of Student Services at Natick elementary schools; Donna Bresnick, a special education teacher at Natick High School; Kari-Anne Daley, a social studies teacher at Natick High School; Rose Bertucci, Principal of Natick High School; Susan Balboni, the Assistant Director for Student Services at Natick Middle School; and Alisia St. Florian, the attorney for Natick. (A.R. 384–85. 2601).

The purpose of the meeting was to discuss C.D.'s transition to Natick High School and to develop a new IEP for her. (A.R. 385). McGovern began the meeting by asking the parents if they had any concerns that should guide the IEP development. (A.R. 385). The parents expressed concern about whether C.D. would be placed with students who had behavioral issues; the kind of support she would receive in non-academic courses; whether she would be able to access the general-education curriculum; and whether the block schedule—with 80-minute classes two or three days per week instead of 45-minute classes five days a week—would be difficult for C.D. given her memory deficits. (A.R. 385–86).

Tagliapietra, who appears to have worked with C.D. over the summer during her extended-school-year classes, reported on the kind of work she had been doing over the summer. (A.R. 387–88). He stated that her level of performance over the summer matched the level of performance that was stated in her previous IEP from McAuliffe. (A.R. 387).

The team then discussed long-term plans for C.D. (A.R. 391–92). The parents expressed some concern about whether C.D. would pass the MCAS—which is required to receive a high school diploma—and asked about what vocational services Natick could provide to help C.D. get a job after high school. (A.R. 392). Natick representatives then explained the range of transition services and vocational services available. (A.R. 392–95). They also explained that because C.D. was 14 years old, they would begin planning for her transition that year. (A.R. 392). McGovern recommended that the IEP team reconvene in October to make any necessary revisions to C.D.'s IEP and to begin developing a detailed transition plan for her. (A.R. 392–93).

C.D.'s tutors then discussed her performance at McAuliffe. (A.R. 396–400). They highlighted her areas of strengths and weaknesses, and stated that she did well in her general-education classes with appropriate support—which they described as being not significant. (*Id.*). Dr. Imber then explained that because of the ways in which tests and formal evaluations are performed, C.D.'s test scores did not adequately reflect her abilities. He also stated that with appropriate supports and services, she could perform at a level substantially higher than that indicated by her test scores. (A.R. 400). Natick representatives expressed some concern about what they perceived as the very large discrepancy between what the parents and the parents' experts said about C.D.'s abilities as compared to her very low test scores. (A.R. 402).

The team then discussed C.D.'s goals and objectives—which they adopted from her prior IEP—

and the types of services that would be necessary to help her achieve those goals. (A.R. 405). McGovern stated her belief that the ACCESS program would best help C.D. achieve her goals, because it was designed for students with cognitive, communication, and social/pragmatic deficits, and that C.D. "would, on paper, fit into that category" given her intellectual disability and difficulties with communication and social/pragmatic skills. (A.R. 406). Natick representatives then explained the curriculum and structure of the ACCESS program. (A.R. 407–08). The parents again expressed concern about the block schedule, given C.D.'s memory deficits. McGovern explained that the ACCESS program would help address those concerns because, as a separate program with a single teacher, it provides more continuity of instruction across different subject matters. (A.R. 408–09). Several Natick representatives also explained that students in the ACCESS program can transition into replacement or general-education classes as they are able to do so, and that they take general-education electives with appropriate supports and instructional assistants. (A.R. 410–12).

The parents again expressed their belief that, based on her performance at McAuliffe, C.D. should be in general-education classes with support. (A.R. 413). McGovern stated that, based on her IEP from McAuliffe and her test scores, the school district did not believe that general education was appropriate for her and that the ACCESS program would best meet her needs. (A.R. 413–14). Thus, McGovern stated that Natick would propose an IEP that included the ACCESS program, plus electives in

general education. (A.R. 416–17). McGovern also stated that they would re-evaluate in October and make any adjustments necessary. (A.R. 416–17, 419).

c. The Proposed IEP

On July 30, 2012, Natick provided the parents with their proposed IEP for the 2012–13 school year. (A.R. 2600). The IEP provided that all of C.D.'s academic classes would be in the ACCESS program, with electives in the general-education setting. (*Id.*). The IEP reflected the conclusion that the ACCESS program was the least-restrictive environment in which to ensure FAPE and address C.D.'s needs. (A.R. 2606). It also indicated that the recommendation was based on C.D.'s prior IEP from McAuliffe, as well as input from the Assistant Director of Student Services, who oversaw the extended school year program in which C.D. participated; C.D.'s father; her tutors and educational consultant; Natick's Directors of Student Services at the middle- and high-school levels; and the principal of Natick High School. (*Id.*). The IEP also referred to Natick's long-term plan for C.D., reflecting her parents' hopes that she receive a high-school diploma and receive appropriate vocational training. (A.R. 2606). The IEP did not set out a specific transition plan, but did state that one would be developed at the next IEP team meeting in October. (A.R. 2606, 2621).

On August 9, 2012, the parents rejected the proposed IEP. (A.R. 2621). The parents stated their belief that placement in the ACCESS program would hinder C.D.'s academic and social development, that the goals set out in the IEP were not aggressive

enough, that the services being proposed were not adequate to help C.D. meet her goals, and that a general-education setting would be more appropriate for her. (A.R. 2623–25, 3427). The parents decided to enroll C.D. at a private school, Learning Prep, for the 2012–13 school year, and requested that Natick fund her placement there. (A.R. 3427).

4. The 2013–14 IEP

On May 22, 2013, Natick convened a team meeting to review C.D.'s IEP and propose a new IEP for the 2013–14 school year. (A.R. 3307). A general-education teacher was present at the meeting to review the electives available at Natick High School. (*Id.*). The ACCESS teacher was also present to answer questions about that program; however, C.D.'s father, who participated by conference call, did not have any questions or comments for her. (*Id.*). At the meeting, the team reviewed reports of C.D.'s performance at Learning Prep in the areas of history, biology, and language arts/literature. No one from Learning Prep attended the meeting. (*Id.*).

Based on the information presented at the meeting, Natick again proposed an IEP that provided for all of C.D.'s academic classes to be in the ACCESS program, with general-education electives. (*Id.*). The proposed IEP for the 2013–14 school year was very similar to the IEP proposed for the 2012–13 school year. (A.R. 2360–61).

On June 17, 2013, the parents rejected the 2013–14 IEP for the same reasons as they rejected the prior IEP. (A.R. 3424). They decided to re-enroll C.D. at Learning Prep, where they believed she was receiving an appropriate education. (*Id.*). They again

requested public funding for her placement. (A.R. 3426). Natick declined that request, stating that Learning Prep, which is a school exclusively for students with learning and language disabilities, was a more restrictive environment than that provided by Natick's proposed IEP, where C.D. would have at least some opportunities to take classes in a general-education setting. (A.R. 3425–26).

5. The 2014–15 IEPs

On March 12, 2014, Natick requested the consent of C.D.'s parents to conduct educational assessments, achievement testing, psychological testing, and a speech and language evaluation as part of C.D.'s three-year re-evaluation. (A.R. 596–97; 2754). On March 17, the parents rejected the proposed evaluations due to questions about the evaluations that were going to be performed. (A.R. 2756). Natick then scheduled a team meeting for April 15, both to discuss C.D.'s re-evaluation and to propose a new IEP in order to replace the prior IEP, which was set to expire. (A.R. 604–05; 2362). Natick proposed an IEP for the 2014–15 school year (the IEP was dated April 15, 2014, through April 15, 2015) with the expectation that C.D.'s three-year reevaluation would be conducted shortly and that the team would reconvene in June in order to revise the IEP in accordance with the information gained from the reevaluation. (A.R. 2362; 3282).

Employees or representatives of Natick then conducted a psychological evaluation on May 23, 2014 (A.R. 959); a speech and language re-evaluation on May 27, 2014 (A.R. 945); and an achievement evaluation on June 6, 2014 (A.R. 954). The

psychological evaluation found that C.D. had strengths in social, emotional, and behavioral domains, but cognitive functioning in the extremely low/borderline range. (A.R. 966–67). The speech and language re-evaluation found that C.D. had strengths in pragmatic language, including things such as eye contact and body language, as well as word memory and comprehension of spoken paragraphs, but significant deficits in sentence formation, understanding vocabulary and semantic relationships, and memory in general. (A.R. 950). The achievement evaluation demonstrated that C.D. was below average in reading and written expression and significantly below average in mathematics. (A.R. 955).

A team meeting was then held on June 13, 2014, to review the evaluations as well as reports of C.D.'s progress as Learning Prep. (A.R. 983–84). Present at the meeting were Barbara Molinari-Bates; Lindsey McGovern; Maryann Ouellet, the Chair of the English Department; C.D.'s father; Dr. Imber; and the three individuals who had performed C.D.'s evaluations. (*Id.*). The team members reviewed the information provided by Learning Prep, which indicated that C.D. was a hard-working student, but that she had difficulties processing information and maintaining attention, as well as deficits with her memory and expressive and receptive language. (A.R. 987). Each evaluator then summarized their findings. (A.R. 991–1006).

After reviewing all of that information, Natick stated that C.D.'s disability category, which had been noted as "Intellectual" in her prior IEPs, was not supported by the evidence. (A.R. 1007). Donna

Cymrot, the school psychologist who had administered C.D.'s psychological evaluation, explained that her strengths in social and emotional functioning, as well as her cognitive functioning, suggested that she did not fit within the category of "intellectually disabled" but, rather, had a narrower language or communication disability. (A.R. 1007–08). C.D.'s father was surprised by the change, and stated that he needed time to process the information. (A.R. 1008–09).

Based on the information presented from Learning Prep and the evaluations, the team then discussed a new IEP for C.D. (A.R. 1009).[3] First, Natick proposed placing C.D. in replacement classes for English, which it believed would be comparable to the English classes she was taking at Learning Prep, as well as an additional ACCESS reading class. (A.R. 1011–12, 1015). It proposed replacement classes for science, which would prepare her to take the science MCAS. (A.R. 1038). It also proposed placing her in general-education classes, with appropriate supports, for history/social studies. (A.R. 1027). It proposed placing her in the ACCESS program for math, because she required additional support in that area. (A.R. 1025). Finally, it proposed a daily academic-services class for additional support as well as speech and language services. (A.R. 1021, 1046–47). Representatives for Natick also discussed their plans to conduct a formal transition evaluation in order to

[3] Natick had already proposed one IEP for the 2014–2015 school year in April 2014, but the parents had rejected it on the ground that it was nearly identical to the IEPs they had rejected in the past. (A.R. 3423).

plan for C.D.'s transition out of high school, and discussed her areas of interest and possible internship opportunities for her. (A.R. 1010, 1051–54).

C.D.'s father expressed some concerns about the block schedule at Natick High School, both in terms of the reduced number of classes C.D. would be able to take and the day-long break between classes. (A.R. 1017, 1021). He also expressed concern that the reading and writing requirements in a general-education history class might be too demanding for her. (A.R. 1030). Representatives for Natick assured him that she would receive any necessary supports and modifications. (A.R. 1030–32).

Following the meeting, Natick formally proposed a new IEP for the 2024–15 school year. (A.R. 2529). On July 7, 2014, the parents rejected that IEP on the grounds that no transitional assessment had yet been done (and that a transitional assessment would change C.D.'s benchmarks and objectives) and because there would not have been time in Natick's proposed schedule for her to receive speech and language services. (A.R. 3420). They decided to re-enroll her at Learning Prep for the 2014–15 school year. (*Id.*).

6. Classroom Observations and the Motion to Compel

On May 29, 2014, the parents requested that their independent evaluators and educational consultants, Dr. Imber and Flax, be allowed to observe the program proposed for C.D. At that time, the proposed program offered only the ACCESS program

for academic classes and general-education classes for electives. (A.R. 3126). They also requested that Dr. Imber and Flax be permitted to meet with the ACCESS program teacher and the school's speech-language pathologist. (*Id.*).

On June 10, 2014, Dr. Imber and Flax met with the ACCESS teacher, observed ACCESS math and science classes, and observed a general-education elective with ACCESS students. (A.R. 3129). They were permitted to ask the ACCESS teacher brief factual questions related to their observations. (*Id.*). The speech-language pathologist was not available to meet with them that day. (*Id.*). (A.R. 3144–46)

In September 2014, after Natick's proposed IEP had changed to include replacement and general-education classes, the parents requested that they and their evaluators and consultants be allowed to observe those classes. (A.R. 3130). They also requested that C.D.'s tutors be allowed to observe the ACCESS program. (*Id.*). Observations were scheduled for October 24, 2014, and the parents were told that their consultants would be permitted to observe only, but not to ask questions of the teachers. (A.R. 3131–3140). It appears that during the prior observations, the ACCESS teacher felt that their questions had been disruptive and inappropriate. (A.R. 3146). The parents requested separate time, not during class time, to speak with staff. (A.R. 3136). Natick declined that request, stating that the observations were to be observations only, not an opportunity to speak in depth with staff. (A.R. 3137). However, Natick did provide that each visitor would have an escort who would be able to answer basic factual questions. (*Id.*).

During the course of the observations on October 24, 2014, the attorney for Natick contacted the parents to inform them that their consultants had asked for time to speak with teachers during the observations, despite their instructions that the consultants were to observe only. (A.R. 3140). Flax had asked a few basic questions of the replacement English teacher during a class break. (A.R. 3147). However, she later stated that she was unable to evaluate the appropriateness of the class for C.D. due to her inability to ask the teacher more detailed questions. (A.R. 3148). Dr. Imber also stated that his inability to ask questions prevented him for properly evaluating the appropriateness of the proposed IEP. (A.R. 3153, 3755). Flax and Dr. Imber both stated that it is their usual practice to observe proposed classes as well as interview teachers and other service providers, and that they had never before encountered such significant barriers to speaking directly with teachers. (A.R. 3147, 3149, 3152).

On November 12, 2014, the parents filed a motion to compel with the BSEA seeking an order compelling Natick to provide them and their consultants with the opportunity to directly communicate with the teachers and service providers who would be working with C.D. under Natick's proposed IEP. (A.R. 3112). The hearing officer concluded that permitting the parents' experts to submit written questions would provide sufficient access to staff, and ordered them to submit any outstanding questions from their observations in writing and ordered Natick to respond in writing. (A.R. 815–16). The parents' experts submitted numerous questions to the

teachers of the specific classes that they observed, and received responses. (A.R. 1399–1400).[4]

7. The November 14, 2014 Team Meeting and Updated 2014–15 IEP

Natick conducted a transition evaluation with C.D. in the fall of 2014. (A.R. 1180). The evaluation indicated that C.D. was interested in culinary arts and fashion, including being a hairstylist or make-up artist. (A.R. 3246). However, C.D. appeared unaware of what was required to obtain a job in one of those areas and lacked independent goal-setting and planning skills. (*Id.*).

In order to review the evaluation and discuss an updated IEP, Natick scheduled a team meeting for November 14, 2014. (A.R. 3404). Prior to the meeting, the parents provided Natick with independent evaluations conducted by their consultants. (A.R. 3662–3755, 3802–3833, 3876–3898).[5] Present at the meeting were C.D.'s father; a

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[4] By order of the hearing officer, Natick was not required to answer every question that the parents' experts submitted. The hearing officer concluded that some of the questions were more akin to interrogatories than clarifying questions based on their observations, and that Natick was not required to answer such questions. (A.R. 1399–1400).

[5] The independent evaluators recommended that C.D. stay at Learning Prep for the remainder of high school. They emphasized the benefits of receiving a "regular" high-school experience rather than being pulled in and out of separate programs. In addition, the independent evaluation of Suzanne Flax concluded that the diagnoses that best described C.D.'s disability were a primary diagnosis of intellectual impairment with a secondary diagnosis of communication impairment. (A.R. 3832). The independent evaluation conducted by Dr. Gibbon

special-education teacher; a transition coordinator; a general-education teacher; McGovern, the Assistant Director of Student Services; Luff, the Director of Student Services; Cymrot, the school psychologist; Flax; Dr. Imber; Coellner, C.D.'s tutor; and attorneys for both Natick and the parents. At the meeting, the parents objected to the reclassification of C.D.'s disability from "learning" to "communication," although the basis of their objection is unclear from the record. (A.R. 2501).

Natick then proposed a new IEP for C.D., again recommending general education classes for electives and social studies and either replacement classes or the ACCESS program for science, math, English, and reading. (A.R. 2502, 2517). The IEP also recommended speech and language therapy as well as transition services. (A.R. 2517). In order to provide all of the services recommended, the IEP proposed an extended school day in which C.D.'s transition services and career preparation would take place after regular school hours. (A.R. 2518).

The parents had additional questions after the November 14, 2014 meeting, and requested a second team meeting to discuss the transition plan and new IEP. (A.R. 3400). Natick did not believe that a second meeting was necessary. (*Id.*).

The parents rejected the proposed IEP on December 20, 2014. (A.R. 3398). They provided a lengthy list of reasons for their rejection, including, among other things, the change in C.D.'s disability

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stated that C.D.'s evaluation was consistent with diagnosis of mild intellectual disability. (A.R. 3893).

category from "intellectual" to "communication"; unaddressed concerns about the block schedule; the lack of time in C.D.'s schedule for non-academic electives; concerns about the extended school day; and C.D.'s placement in the ACCESS program for math, which would not prepare her for the MCAS. (A.R. 3403). Their notification of rejection also requested a meeting to discuss the refused placement. (A.R. 3398).

A team meeting was held on January 7, 2015, to discuss the parents' rejection of the 2014–15 IEP. (A.R. 3395). At the meeting, representatives for Natick explained that the IEP was based on an individualized assessment of C.D.'s strengths and weaknesses, not on her disability category. (*Id.*). Natick rejected the request to change C.D.'s disability category, stating that the switch to "communication" was based on C.D.'s transition assessment. (*Id.*). Natick also rejected the parents' request that C.D. participate in the standard administration of the math MCAS. (A.R. 3396). Instead, Natick proposed that based on data from her teachers at Learning Prep and the recent assessments showing significant weaknesses in math, she should take the MCAS Alternate Assessment for math. (*Id.*) Natick also stated, however, that it would continually review that decision were C.D. to enroll at Natick High School. (*Id.*). In order to address the parents' concerns about C.D.'s schedule, Natick also agreed to provide them with draft schedules based on the proposed IEP. (*Id.*).

8. <u>The Appeal to the BSEA</u>

The parents first requested a due-process hearing challenging Natick's proposed IEPs on May 23, 2014. (A.R. 870). They amended that request on April 1, 2015. (A.R. 869). The parents alleged that (1) Natick's proposals to place C.D. in the ACCESS program for all academic subjects in the 2012–13 and 2013–14 IEPs, as well as the initial 2014–15 IEP, violated C.D.'s rights under the IDEA to be educated in the least restrictive environment in which she could succeed (Claim I); (2) Natick "predetermined" C.D.'s placement in the ACCESS program, thereby violating the IDEA's procedural requirement that parents have the opportunity to participate meaningfully in IEP meetings (Claim II); (3) Natick failed to provide transitional planning as required (Claim III); (4) Natick failed to provide extended-school-year services in July 2012 (Claim IV); (5) Natick unnecessarily scheduled annual reviews, IEP team meetings, and evaluations while C.D. was unilaterally placed in a private school in another district or violated procedural requirements under IDEA by failing to include persons knowledgeable about C.D. and the proposed programs at IEP meetings (Claim V); (6) Natick failed to disclose that its attorney would be participating in IEP meetings (Claim VI); and (7) Natick retaliated against the parents and C.D. for requesting a due-process hearing by changing C.D.'s disability category and denying her to opportunity to take the Math MCAS (Claim VII).

A hearing was held before Hearing Officer Catherine Putney-Yaceshyn on May 12, 13, 27, and 28, 2015. (A.R. 1551). In a written order dated

July 24, 2015, the Hearing Officer concluded that the IEPs proposed by Natick for the 2012–13, 2013–14, and 2014–15 school years were all reasonably calculated to provide C.D. with a free appropriate public education in the least restrictive environment. (A.R. 1571).[6]

As to the proposed IEP for the 2012–13 school year, the hearing officer concluded that the IEP was less restrictive than C.D.'s placement at McAuliffe because it provided her "the opportunity to independently access academic services in a program specifically designed for students with profiles similar to [hers]," whereas at McAuliffe, she received one-on-one assistance from her tutors. (A.R. 1565). The hearing officer noted that while none of the witnesses testified about the level of restrictiveness of C.D.'s placement at McAuliffe, she "took note of it." (*Id.*). She also concluded that one of the parents' reasons for rejecting the 2012–13 IEP—the father's belief that the goals in the proposed IEP, which were the same goals contained in the McAuliffe IEP, should have changed because the setting was changing from an inclusive, general-education setting to the separate ACCESS program—was not valid because the father did not have any credentials in education. (A.R. 1566). She also discredited the father's contention that the hours of service in the proposed IEP were decreasing from those provided in the prior IEP because "[h]e did not present any

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[6] Although dated July 24, 2015, the Hearing Officer's final order was actually issued on July 28, 2015, and includes three paragraphs inadvertently omitted from the July 24 version. (A.R. 1549).

credible evidence to support that presumption." (*Id.*). She also concluded that the parents' assumption that placement in the ACCESS program would result in C.D. being unable to pass the MCAS was not supported by the evidence, as the ACCESS teacher had testified that students in the program are routinely placed in replacement classes when their abilities indicate that is appropriate. (*Id.*).

As to the proposed IEP for the 2013–14 school year, the hearing officer concluded that because it was substantially similar to the IEP proposed for the prior year, and because it had been rejected for the same reasons as the prior IEP, she found that it was reasonably calculated to provide C.D. with a free appropriate public education for the same reasons. (A.R. 1567).

As to the first IEP proposed for the 2014–15 school year, the Hearing Officer concluded that it was created before C.D.'s three-year evaluation could be conducted, and therefore was simply a provisional proposal that was created with the understanding that it would be updated following the three-year evaluation. (*Id.*).

As to the second IEP proposed for the 2014–15 school year, the hearing officer noted that the parents had rejected the IEP in part because no transition assessment had yet been conducted and that such an assessment would likely change the benchmarks and objectives of the IEP. (A.R. 1568). However, she concluded that the fact that a transition assessment, once conducted, might change the relevant benchmarks and objectives had "no bearing on the appropriateness of what was proposed by Natick."

(*Id.*). In addition, the hearing officer did not credit the parents' contention that the services proposed could not actually all be delivered within Natick's schedule, concluding that there was no evidence in the record to support that belief. (*Id.*). She also concluded that despite the parents' objections to C.D.'s placement in any ACCESS classes, the proposal for math and reading classes in the ACCESS program was appropriate given C.D.'s well-documented weaknesses in those areas. (*Id.*). Finally, she concluded that there was credible evidence that students in the ACCESS program often move to replacement classes where they are then able to take the MCAS. (*Id.*).

The third IEP proposed for the 2014–15 school year included the same recommendations for C.D.'s academic classes, but included additional transition services to be provided in a one-on-one setting after school. (A.R. 1569). The parents objected to the proposed transition services on the grounds that the one-on-one setting was inappropriate and that C.D. would not receive services tied to her specific interests. (*Id.*). The hearing officer concluded that based on the credible testimony of Lindsay McGovern, the delivery of transition services in a one-on-one setting after school was simply one of several scheduling options presented to the parents and was intended to allow C.D. to receive transition services without taking away time in her schedule for non-academic electives in the general education setting. (*Id.*). She also concluded that based on the testimony of Katherine Brown, who taught the vocational class for the ACCESS program, C.D. would have been able to receive vocational training related

to her interests in cooking and baking. (A.R. 1559, 1569). Thus, the hearing officer concluded that Natick's proposed vocational training was appropriate. (A.R. 1569). Finally, the hearing officer noted the parents' objection regarding the change in C.D.'s disability classification. (*Id.*). She concluded, however, that they had not pointed to any impact that the change would have on the delivery of services, and that Natick staff had credibly testified that the change would in fact have no impact on the way in which services were delivered. (*Id.*).

The hearing officer next addressed the alleged procedural violations. She concluded that the credible evidence did not support the parents' contention that they had been unable to receive information and thus to participate meaningfully in the team's decision-making. (A.R. 1570). She found that the parents and their consultants were able to ask questions at all of the team meetings, that they had the opportunity to ask Dalan and her predecessor questions following the team meeting in the summer of 2012, and that McGovern and the ACCESS teacher had, on one occasion, made themselves available to answer questions about the program. (*Id.*). She concluded that the parents failed to point to any specific instance in which they were not able to participate in the team process or to have their questions answered. (*Id.*).

As to the retaliation claim, the hearing officer noted that the record was unclear as to the basis of the claim but that, in any event, the BSEA did not have jurisdiction over claims of discrimination under Section 1983. (*Id.*)

Finally, the hearing officer concluded that because the IEPs proposed by Natick were all reasonably calculated to provide C.D. with a free appropriate education in the least restrictive environment, the parents were not entitled to reimbursement for their unilateral placement of C.D. at Learning Prep. (*Id.*).

The hearing officer noted that, in reaching her decision, she did not rely on the testimony of Dr. Imber or Suzanne Flax. (*Id.*). She concluded that Flax was not a credible witness based on her statements that C.D. would not benefit from any inclusion classes—a statement not supported by any other witness and inconsistent with Flax's prior recommendations—and her statement that C.D. would not make any friends in the ACCESS program—a statement based entirely on speculation. (*Id.*). She concluded that Dr. Imber was not credible because his belief that inclusion was no longer important for C.D. suggested that he changed his recommendations to align with whatever placement she was in at the time. (A.R. 1570–71). Finally, the hearing officer did not rely on the most recent reports submitted by Flax, Dr. Imber, and Dr. Roffman (a transition expert) as they were first presented to Natick just prior to the hearing and were not available to the team while preparing the proposed IEPs. (A.R. 1571).

9. The Appeal to This Court and Remand to the BSEA

On October 21, 2015, plaintiffs filed the complaint in this action seeking review of the BSEA's decision. They filed for summary judgment on June 27, 2016.

A hearing was held on December 1, 2016, and the Court took the motion under advisement.

On March 22, 2017, while the motion was under advisement, the Supreme Court issued its decision in *Endrew F.* On March 28, the Court denied plaintiffs' motion for summary judgment and remanded the case to the BSEA in order for the hearing officer to indicate whether the standard she applied was in accordance with the standard announced in *Endrew F.* The hearing officer responded on April 10, indicating that the standard she applied—the standard articulated in the First Circuit prior to *Endrew F.*—was in accordance with the standard set forth in *Endrew F.* and that her decision in this case was not impacted by *Endrew F.* Plaintiffs then renewed their motion for summary judgment.

II. Legal Standard

Plaintiffs have moved for summary judgment on their challenge to the BSEA's conclusions. However, "[i]n a case like this, summary judgment is merely the device for deciding the issue, because the procedure is in substance an appeal from an administrative determination, not a summary judgment." *North Reading*, 480 F. Supp. 2d at 481 n.1 (citations and internal quotation marks omitted). The burden of proof rests on the party challenging the BSEA hearing officer's decision. *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 54 (1st Cir. 1992).

Essentially, "judicial review [of administrative decisions on claims brought under the IDEA] falls somewhere between the highly deferential clear-error standard and the non-deferential *de novo* standard." *Lessard*, 518 F.3d at 24 (citing *Roland M.*, 910 F.2d

at 989). The IDEA provides that courts reviewing agency decisions "(i) shall receive the records of the administrative proceeding; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). The Supreme Court has explained that a district court's review entails both procedural and substantive aspects. *Rowley*, 458 U.S. at 205 ("When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid."). Thus, in reviewing the appropriateness of an IEP, a court "must ask two questions: 'First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?' " *Roland M.*, 910 F.2d at 990 (quoting *Rowley*, 458 U.S. at 206–07).

A reviewing court must ensure that the school district and state education agency adhere scrupulously to the procedural requirements of the statute and relevant regulations and rules. *See Rowley*, 458 U.S. at 205–06 (noting that the Act "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."). However, in reviewing an agency's

substantive decisions on FAPEs and IEPs, a reviewing court's "principal function is one of involved oversight." *Roland M.*, 910 F.2d at 989. "[C]ourts should be [loath] to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." *Id.* at 992; *see also Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 83 (1st Cir. 2004) ("The *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods."). Nonetheless, it is the reviewing court's role to render "an independent ruling as to the IEP's adequacy based on a preponderance of all the evidence, including the hearing officer's duly weighted findings." *Lenn*, 998 F.2d at 1089.

In short, on matters that implicate educational expertise, heightened deference is due to an agency's administrative findings. *Mr. I v. Maine Sch. Admin. Dist. No. 55*, 416 F. Supp. 2d 147, 156 (D. Me. 2006). However, "when the issue is more a matter of law, the educational expertise of the agency is not implicated, and less deference is required." *Id.* at 157.

As to the evidence, the administrative process is to be accorded "its due weight" such that "judicial review does not become a trial *de novo*, thereby rendering the administrative hearing nugatory." *Id.* at 996. The First Circuit has directed district courts reviewing appeals of administrative decisions under the IDEA to

> review[ ] the administrative record, which may be supplemented by additional evidence from the parties, and make[ ] an independent ruling based on the preponderance of the evidence. That independence is tempered by the requirement that the court give due weight to the hearing officer's findings. This intermediate level of review reflects the concern that courts not substitute their own notions of educational policy for that of the state agency, which has greater expertise in the educational arena.

Lt. T.B., 361 F.3d at 83–84 (citation and internal quotation marks omitted).

Finally, an IEP should not 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." *Roland M.*, 910 F.2d at 992.

III. Analysis

A. The Impact of *Endrew F.*

As noted, the Supreme Court refined its formulation of the standard for determining the appropriateness and adequacy of an IEP during the pendency of this case. In *Endrew F.*, the court held that a student receives a FAPE if the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 580 U.S. at 11. The standard as articulated by the First Circuit prior to *Endrew F.* states that "an IEP must be reasonably calculated to

confer a meaningful educational benefit." *D.B. ex rel. Elizabeth B.*, 675 F.3d at 34.

The Court agrees with the hearing officer that the standard articulated in *Endrew F.* is not materially different from the standard set forth in *Elizabeth B.*, and applied by the hearing officer, at least as it applies to the facts of this case. Contrary to plaintiffs' contention, *Endrew F.* did not reject all standards that focus on the level of *benefit* provided in favor of a standard based on the level of *instruction*. Rather, *Endrew F.* explains that the benefit to be provided is "appropriate" educational progress. That is consistent with a "meaningful educational benefit." *See Brandywine Heights Area Sch. Dist. v. B.M.*, 2017 WL 1173836, at *10 n.25 (E.D. Pa. March 29, 2017) (concluding that "meaningful educational benefit" standard applied by hearing officer is consistent with *Endrew F.*).

B. Adequacy of the 2012–13 IEP

Plaintiffs' first challenge is to the adequacy of the 2012–13 IEP.

1. Procedural Challenges

Plaintiffs first contend that Natick violated the procedural requirements of the IDEA by failing to have a team composed of individuals knowledgeable about either C.D. or the classes and programs being proposed for her. In particular, they allege that there was no one from Natick present at the July 2012 meeting with direct knowledge about C.D., nor was there a teacher from the ACCESS program. That contention fails for two reasons.

First, plaintiffs' contention is belied, in part, by the administrative record. The transcript from the July

2012 meeting makes clear that a teacher familiar with C.D. from the extended-school-year program at Natick was in fact present, and did share his observations regarding C.D.'s performance. (A.R. 387).

Second, while the ACCESS teacher was not present, that absence did not constitute a procedural violation of the IDEA. The IDEA requires that an IEP team include (1) the student's parents; (2) at least one of the student's regular-education teachers (if the student is or may be placed in regular education classes); (3) at least one special-education teacher, or, where appropriate, at least one of the student's special-education "providers"; (4) a representative of the local educational agency; and (5) "an individual who can interpret the instructional implications of evaluation results." 20 U.S.C. § 1414(d)(1)(B). In addition, where appropriate, other individuals with knowledge or expertise about the student and/or the student herself may also participate. *Id.*

There is no statutory requirement that the teacher of the program in which a student is likely to be placed be present at all team meetings.[7] The IDEA

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[7] The IDEA does require that the IEP include one of the student's regular-education teachers. While the team did include a regular-education teacher from Natick High School, there was not a regular-education teacher who had taught C.D. However, the parents have not objected to the team composition on that ground. In addition, because C.D. had been at McAuliffe—an out-of-district placement—for the past three years, there was not a regular-education teacher at Natick with any direct experience with her. While the presence of one of C.D.'s teachers from McAuliffe might have been beneficial, it is

simply requires a special-education teacher, of which there was at least one present at the July 2012 meeting. (A.R. 384–85). Furthermore, while the presence of the ACCESS teacher likely would have been beneficial, Natick accommodated the parents' request to hold an IEP meeting before the start of the school year, and can hardly be faulted for failing to pull together an ideal team in the middle of the summer.

Finally, there is no indication that any potential shortfalls in the team composition compromised C.D.'s right to an appropriate education or seriously hampered the parents' ability to participate in the creation of her IEP. The transcript from the July 2012 meeting suggests that most of the parents' specific questions about the ACCESS program were answered. (*see*, *e.g.*, A.R. 406–11). After the meeting, and after the proposed IEP had already been developed, the parents requested "study guides for the 9th grade Access program." (A.R. 453). McGovern responded that they "raise[d] good questions about [C.D.'s] program of study" and suggested that they meet with the lead ACCESS teacher at the beginning of the school year to discuss the curriculum. (*Id.*). Natick "cannot be faulted for drafting an IEP that does not answer all of the parents' after-the-fact questions when the parents were given an opportunity to participate in the IEP." *Alloway Tp. Bd. of Educ. v. C.Q.*, 2014 WL 1050754,

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not clear that Natick can be faulted for not including an out-of-district teacher in its IEP team. *See Roland M.*, 910 F.2d at 995. Furthermore, C.D.'s private tutors were present at the meeting and able to comment on her performance in the general-education setting at McAuliffe. (A.R. 397–403).

at *9 (D.N.J. March 14, 2014). With one minor exception, the parents had all of their questions about the ACCESS program—including questions about the other students in the program, the number of students, the schedule, the nature of instruction in the program, and the ability of students in the program to move into replacement or general education classes—answered at the July 2012 meeting. (A.R. 406–11, 417–18).[8]

The parents also contend that Natick predetermined C.D.'s proposed placement in the ACCESS program. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. In such cases, regardless of the discussions that may occur at the meeting, the School District's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" *H.B. ex rel. P.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342, 344 (9th Cir. 2007) (quoting 20 U.S.C. § 1415(b)(1)). "However, predetermination is not

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[8] C.D.'s father did ask whether students in the English/Language Arts ACCESS class read the same books as students in the general-education classes. (A.R. 409). McGovern responded that she did not know, but that C.D. would likely be reading modified texts so that she could access texts at her grade level. (*Id.*). In response to a question from one of C.D.'s tutors about whether they would be reading actual texts or things like recipes, McGovern assured the parents that students in the ACCESS program read texts. (*Id.*).

synonymous with preparation." *Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). School districts may come to IEP meetings with a proposal in mind, but must remain open to input from parents and their experts. *See G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947–48 (1st Cir. 1991) (finding no predetermination despite the fact that the district came to team meeting with draft IEP); *KD. ex rel. C. L. v. Department of Educ., Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011) (finding no predetermination where district had a placement in mind before meeting but considered alternatives).[9]

Here, there is certainly evidence that Natick considered the ACCESS program to be an appropriate placement for C.D. prior to the July 2012 IEP meeting. In a communication prior to that meeting, Dalan stated that the district's recommendation of the ACCESS program was based on Dr. Imber's most recent evaluations of C.D. as well as their discussions at the May 2012 meeting. (A.R. 377). Dalan also stated that her observations of C.D. at McAuliffe were not intended to change that recommendation. (*Id.*). Furthermore, at the July

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[9] For example, courts have found predetermination where school districts have unofficial policies of refusing certain programs or placements regardless of a child's individual needs, making programming or placement decisions based purely on financial considerations, or prohibiting parents from asking questions during IEP meetings. *See Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 855–59 (6th Cir. 2004); *W.G. Bd. of Trus. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992) (finding predetermination where district decided placement prior to IEP meeting and "assumed a 'take it or leave it' position at the meeting").

2012 meeting, representatives for Natick expressed reluctance to reconsider their recommendation of the ACCESS program, despite statements from the parents' consultants that C.D. was able to perform well in a general-education setting with some additional one-on-one support. (A.R. 402, 413–14). They expressed concern about the discrepancy between their description of her abilities and her low test scores, and stated that, "on paper," the ACCESS program was the most appropriate placement to meet her needs. (*Id.*).

Coming to an IEP meeting with a proposal in mind and then declining to change that proposal after considering the parents' input does not amount to predetermination. Pre-meeting consideration only amounts to predetermination if the district refuses to consider the input, objections, and suggestions of the parents such that they are denied the opportunity to meaningfully participate in the IEP development process. *Nack*, 454 F.3d at 610.

Here, there is no evidence that representatives for Natick were following an unofficial policy in recommending the ACCESS program, that they recommended the ACCESS program based solely or even predominantly on financial considerations, or that they steadfastly refused to consider alternative placements. As the hearing officer noticed, while the district never formally proposed an IEP including replacement classes in 2012, it did initially recommend starting C.D. in replacement classes for the 2012–13 school year and then reconvening in the fall to create a new IEP. (A.R. 370). Furthermore, there is evidence that the recommendation of the ACCESS program did take into account some of the

concerns raised by the parents at the July 2012 meeting. For example, representatives for Natick believed that the ACCESS program would help address the parents' concerns about the block schedule at Natick High School. (A.R. 408–09). In addition, they made clear that the proposal was flexible and that they would re-evaluate C.D.'s placement in October 2012, after they had more direct experience with her. (A.R. 419). Because the record shows that representatives for Natick meaningfully considered the parents' input when proposing C.D.'s placement in the ACCESS program, and remained open to reconsidering her placement in the future, they did not predetermine C.D.'s placement in violation of the IDEA.

The parents also contend that Natick denied them the opportunity to participate meaningfully in the IEP process by not allowing them to observe the ACCESS program. Under Massachusetts law, school districts are required, "upon request by a parent, [to] provide timely access to parents and parent-designated independent evaluators and educational consultants for observations of a child's current program and of any program proposed for the child." Mass. Gen. Laws ch. 71B, § 3. The administrative record shows that the parents requested the opportunity to observe classes at Natick at the end of the 2011–12 school year, but that, due to scheduling complications including standardized testing, special events, and final exams, Natick was not able to find a time for them to observe. (A.R. 370). However, Natick did recommend holding a team meeting in October 2012 to reevaluate C.D.'s placement, and stated that the

parents would be welcome to observe classes prior to that meeting. (*Id.*). While the parents thus did not have the opportunity to observe classes prior to the July 2012 IEP meeting, Natick cannot be faulted for failing to find an appropriate time for observations at the end of the school year. Similarly, because the parents requested an IEP meeting in the summer, Natick cannot be faulted for their inability to observe classes prior to that meeting. Natick's offer to have the parents observe classes in the fall was reasonable and, under the circumstances, would have constituted "timely access."

2. Substantive Challenges

Plaintiffs contend that the hearing officer erred in concluding that the 2012–13 IEP was reasonably calculated to provide a FAPE in the least restrictive environment. Their primary complaint appears to be that the ACCESS program was more restrictive than necessary to provide an adequate education, and that the hearing officer failed to consider evidence in the record showing that C.D. had performed well in the general-education setting at McAuliffe.

The IDEA mandates a preference for educating students with disabilities in general-education settings. The IDEA's requirement that students with disabilities be educated in the "least restrictive environment" means that "[m]ainstreaming may not be ignored, even to fulfill substantive educational criteria." *Roland M.*, 910 F.2d at 993. Rather, the benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment. *Id.*

The hearing officer concluded that C.D.'s placement in the ACCESS program was "less restrictive than [her] McAuliffe placement," where she was in general-education classes with the assistance of a tutor, "because [the ACCESS placement] did not provide for the assistance of a one to one aide throughout the day. It provided [C.D.] the opportunity to independently access academic services in a program specifically designed for students with profiles similar to [hers]." (A.R. 1565).

It is likely true that the ACCESS program provides greater individual autonomy to the student than a one-on-one aide, and in that sense is "less restrictive." But as a general matter, a separate program for students with disabilities is not less restrictive than a placement in mainstream, general-education classes. While C.D. may well have benefitted academically from a placement in the ACCESS program—a conclusion well within the educational expertise of the agency—such academic benefits "cannot be invoked to release an educational agency from compliance with the [IDEA's] mainstreaming provisions." *Roland M.*, 910 F.2d at 993 (internal quotation marks omitted). It is unclear whether the hearing officer adhered to the requirement that the benefit of mainstreaming be weighed against the benefits of a more restrictive environment. Under the circumstances, on this issue, remand is appropriate in order to permit the hearing officer to consider, or at a minimum clarify, whether the 2012–13 IEP was reasonably calculated to provide a FAPE in the "least restrictive" environment possible.

Plaintiffs also contend that the 2012–13 IEP was defective because Natick had not yet conducted a transition assessment. Under Massachusetts law, transition planning is to begin when students are 14 years old, and C.D. was 15 when the 2012–13 IEP was created. (A.R. 2602). However, the IDEA does not require a stand-alone transition plan. *See Sebastian M.*, 744 F. Supp. 3d at 407. Nor does Massachusetts law require a separate transition assessment. Under Massachusetts law, transition assessment and planning can consist of informal discussion of the student's postsecondary goals, her skills and strengths that might contribute to that goal as well as the skill and strengths she would need to acquire in order to achieve that goal, and the supports and services necessary to help her make progress towards achieving that goal. *See* Technical Advisory SPED 2014-4: Transitional Assessment in the Secondary Transition Planning Process ("SPED 2014-4") ("Any assessment that is conducted when a student on an IEP is aged 14-22 can be viewed as a transition assessment, in that it affords information which can be used to discern the student's vision; understand the student's needs, strengths, preference, and interests; and measure progress towards the acquisition of skills.").

C.D.'s post-secondary goals were discussed at both the May and July 2012 meetings, and Natick discussed available services that might help her achieve those goals. (A.R. 326–28; 391–95). The parents stated that they hoped she would receive a high-school diploma, but did not yet know of any specific postsecondary goals. (A.R. 326–27; 391–93). The proposed IEP stated, under the heading of

"Vision Statement," that C.D.'s parents hoped that she would receive a high-school diploma and vocational training. (A.R. 2606). Furthermore, the IEP specified that in order to help C.D. achieve her goals, she would be provided with vocational services. (A.R. 2617). Because transition services were discussed at the team meeting and mentioned in the IEP, there was no error in the 2012–13 IEP based on transition planning. *See Sebastian M.*, 744 F. Supp. 3d at 407 ("Because transition services were mentioned in the IEPs and because transition services were actually provided to [the student], there is no error here based on transition planning.").

C. Adequacy of the 2013–14 IEP

Plaintiffs contend that the 2013–14 IEP was procedurally improper because Natick failed to include accurate and up-to-date information regarding C.D.'s then-present levels of performance. However, according to the 2013–14 IEP, Natick was unable to update C.D.'s current performance level because Learning Prep—the school C.D. had attended for the past year—had not provided sufficient data regarding her performance. (A.R. 2584). Plaintiffs fail to put forth any specific information that Natick should have considered in creating the 2013–14 IEP but did not.

However, because the 2013–14 IEP was virtually identical to the 2012–13 IEP, it is subject to the same substantive concerns as the prior IEP regarding whether placement in the ACCESS program was the least restrictive environment possible. Accordingly, and for the same reasons stated above, remand is appropriate to enable the hearing officer to determine

whether the 2013–14 IEP provided for an appropriate education in the least restrictive environment possible.[10]

D. Adequacy of the 2014–15 IEPs

1. Procedural Challenges

The parents contend that Natick predetermined the change in C.D.'s disability classification from "intellectual" to "communication" prior to the team meeting on June 13, 2014. At the June 13 meeting, representatives for Natick stated that, based on the results of C.D.'s three-year re-evaluations, they were "looking at noting her disability category as communication" instead of intellectual. (A.R. 1007). C.D.'s father was surprised, and stated, "I just think that the parents need a little bit of time to process that and, you know, it certainly can be proposed. But it probably just needs some discussion." (A.R. 1008). Donna Cymrot, the school psychologist, responded, "I respect that it takes a little time to digest a change.... [C]ertainly we can discuss it further if you care to." (*Id.*).

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[10] Plaintiffs also contend that the first IEP proposed for the 2014–15 year was not reasonably calculated to provide a FAPE in the least restrictive environment. However, for the reasons stated below, any challenge to the substantive adequacy of that IEP is moot because it was replaced prior to the start of the relevant school year. *See Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F. Supp. 2d 547, 555 (N.D. Ohio 2009). Furthermore, because plaintiffs do not appear to challenge the adequacy of the second and third IEPs proposed for the 2014–15 years on the grounds that they were not reasonably calculated to provide a FAPE in the least restrictive environment (*see* Pl. Reply at 2) remand on this issue is only necessary as to the 2012–13 and 2013–14 IEPs.

As discussed above, pre-meeting consideration only amounts to predetermination if the district refuses to consider the input, objections, and suggestions of the parents, such that they are denied the opportunity to participate meaningfully in the IEP development process. *Nack*, 454 F.3d at 610. It appears from the administrative record as though representatives for Natick were willing to consider the parents' input and further discuss the change in C.D.'s classification with them. Thus, the record does not support the parents' contention that Natick predetermined the reclassification. Furthermore, even if there had been some procedural inadequacy regarding the reclassification, there is no evidence that the change in C.D.'s disability classification impeded the parents' ability to participate meaningfully in the IEP development process or changed the nature of the services provided to C.D.[11]

The parents also contend that Natick denied them the meaningful opportunity to participate in the IEP process by unreasonably restricting their ability, as well as that of their consultants, to observe classes at Natick High School. Under Massachusetts law, school districts are not only required to provide timely access to parents and their evaluators or consultants for observation, they are also prohibited from imposing any

> conditions or restrictions on such observations except those necessary to ensure the safety of

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[11] After discussing the potential change in C.D.'s disability category, a representative for Natick stated "there is no one here that doesn't think that [C.D.] needs to have continued support from a special education IEP." (A.R. 1009).

> children in a program or the integrity of the program while under observation or to protect children in the program from disclosure by an observer of confidential and personally identifiable information in the event such information is obtained in the course of an observation by a parent or designee.

Mass. Gen. Laws ch. 71B, § 3. The parents contend that Natick imposed an unreasonable restriction by prohibiting their experts from asking any questions during their observations.

Nothing in either § 3 or the Commonwealth's guidance concerning that section explicitly requires that parents or their experts be given the opportunity to speak with school staff during the course of their observations. *See* Mass. Gen. Laws ch. 71B, § 3; Technical Assistance Advisory SPED 2009-2: Observation of Education Programs by Parents and Their Designees for Evaluation Purposes ("SPED 2009-2"). Nonetheless, the BSEA has, in the past, concluded that allowing experts the opportunity to ask questions of teachers and other service providers is essential to enable those experts to conduct thorough and meaningful evaluations of proposed IEPs. *See In Re: Northbridge Public Schools*, BSEA # 09-2533 (Oct. 30, 2008). However, in order to avoid classroom disruption, school districts do not need to permit experts to ask questions during the observations themselves, but may set aside a separate time for questions afterward. *See id.*

Here, it appears that Natick did not set aside time for the parents' experts to ask questions related to their observations. Furthermore, there is evidence in

the administrative record that the experts were unable to make a full evaluation of the adequacy of the proposed IEP given their inability to ask follow-up questions. (A.R. 3148, 3153, 3755). However, any procedural error was cured when the parents' experts where able to submit clarifying questions in writing. The parents have not pointed to any evidence in the record that the written questions and answers were inadequate to enable their experts to make a meaningful evaluation of the appropriateness of Natick's proposed IEPs.

2. Substantive Challenges

Plaintiffs next contend that the first two IEPs proposed for the 2014–15 year were not reasonably calculated to provide a FAPE because a transition assessment had not yet been conducted. As to the first IEP proposed for the 2014–15 year, it was replaced prior to the start of the relevant school year, and thus any challenge to its adequacy is moot. *See Pohorecki*, 637 F. Supp. 2d at 555 (concluding that IEP that was never implemented and was replaced prior to start of relevant school year "is not ripe for adjudication as to whether it provided [student] with a FAPE"). As to the second IEP proposed for 2014–15, transition planning was discussed at the June 2014 team meeting and mentioned in the IEP. (A.R. 1085, 2557–58). That is sufficient to satisfy the requirement for transition planning. *See Sebastian M.*, 744 F. Supp. 3d at 407.

Plaintiffs also contend that the first proposed IEP for 2014–15 (dated April 15, 2014 through April 15, 2015) was not reasonably calculated to provide C.D. with a FAPE in the least restrictive environment.

Again, however, that IEP was only intended to be provisional and was replaced in June 2014, prior to the start of the 2014–15 school year. Any challenge to its adequacy is therefore moot. *See Pohorecki*, 637 F. Supp. 2d at 555.

E. The Hearing Officer's Treatment of Witness Testimony

Plaintiffs also contend that the hearing officer erred by giving insufficient weight to the testimony of their witnesses and giving too much weight to the testimony of Natick's witnesses. However, "[c]redibility determinations . . . are the province of the factfinder, which in this case is the Hearing Officer," and should not be "recalibrate[d]" absent compelling evidence. *Andover Sch. Comm. v. Bureau of Special Educ. Appeals of Div. of Admin. Law Appeals*, 2013 WL 6147139, at (D. Mass. Nov. 21, 2013). *Accord Sebastian M.*, 685 F.3d at 86 ("The valuation of expert testimony is precisely the sort of first-instance administrative determination that is entitled to judicial deference by the district court."). Here, there is no compelling evidence to warrant disregarding the hearing officer's credibility determinations.

1. Testimony of C.D.'s Father

Plaintiffs contend that the hearing officer improperly discounted the testimony of C.D.'s father. They first contend that the hearing officer erred by discrediting the father's statement that the 2012–13 IEP was inadequate because it contained the same goals as the McAuliffe IEP, even though the McAuliffe IEP involved education in an inclusive, general-education setting, while the Natick IEP did

not. The hearing officer discredited that statement based on the fact that the father did not have any credentials in education. (A.R. 1566). Plaintiffs contend that by discrediting that statement, "the hearing officer completely disregarded the fundamental importance Congress placed on parental participation in the educational decision-making process under the IDEA." (Pl. Am. Mem. at 31–32). However, hearing officers are free to disregard parent testimony when that testimony is "impressionistic and not based upon any expertise." *J.E. v. Boyertown Area Sch. Dist.*, 834 F. Supp. 2d 240, 251 (E.D. Pa. 2011). Disregarding such testimony under appropriate circumstances does not improperly strip parents of their right to participate in the development of IEPs.

Plaintiffs also contend that the hearing officer erred by dismissing the father's statement that the hours of service in the 2012–13 IEP were less than those provided in the prior IEP. The hearing officer concluded the father "did not present any credible evidence to support that presumption." (A.R. 1566). Plaintiffs now point to a chart provided to Natick by the father indicating that the hours of service provided by the proposed IEP would be lower than the hours of service provided by the prior IEP. (*See* A.R. 3432). However, in connection with his testimony regarding the reduced programming, the father also testified that he understood that the IEP proposed by Natick offered different programing, including different types of classes, from the prior IEP at McAuliffe. (A.R. 1666). Given those differences, and even assuming that the hours of service were in fact lower, there is nothing in the

record to suggest that the decrease in hours alone would have rendered the IEP inadequate to provide a FAPE.

Finally, plaintiffs contend that the hearing officer erred by disregarding their concern as to whether the ACCESS program would prepare C.D. to take the MCAS. The hearing officer noted the parents' concern, but stated that their belief that the ACCESS program would be inappropriate because it would not prepare C.D. for the MCAS "was an assumption made by Parents and their evaluators that was not supported by the evidence before me." (A.R. 1566). The parents now contend that the hearing officer failed to consider evidence showing that students in the ACCESS program are not prepared for the MCAS. However, there is also evidence in the record (including testimony at the hearing from Natick teachers) showing that students were able to move from the ACCESS program into replacement classes when their abilities and classroom performance suggested that such a move was appropriate, and that students in the replacement program are generally prepared to take the MCAS. (*See* A.R. 2298, 2396, 2439–40). It was within the hearing officer's discretion to credit that testimony over that of the parents. *See Andover Sch. Comm.*, 2013 WL 6147139, at *14.

2. <u>Testimony of Nan Coellner</u>

Plaintiffs next contend that the hearing officer erred by allegedly omitting all of the testimony of C.D.'s tutor, Nan Coellner. However, the hearing officer recounted Coellner's testimony in her summary of the evidence, and considered that

testimony in her analysis. (*See* A.R. 1553, 1565, 1569). The hearing officer ultimately credited the testimony of others rather than that of Coellner's, but did not, as plaintiffs contend, fail to consider any of her testimony.

3. Testimony of Suzanne Flax and Dr. Steve Imber

Plaintiffs further contend that the hearing officer erred by discrediting the testimony of C.D.'s speech therapist, Suzanne Flax, and their independent evaluator, Dr. Steve Imber. The hearing officer's order stated that she did not rely on the testimony of either Flax or Dr. Imber because she did not find them credible. (A.R. 1570–71). As to Flax, the hearing officer reasoned that while she "had appropriate credentials and experience," she made statements during her testimony that "caused her to lose credibility." (A.R. 1570). In particular, the hearing officer noted that Flax testified that C.D. "would not benefit at all from any inclusion," a statement not supported by any other witness and contrary to her own prior recommendations for C.D. (*Id.*). As to Dr. Imber, the hearing officer stated that while he previously supported an inclusive placement, "he no longer believed that inclusion was as important for [C.D.]," and that, on that basis, it appeared that he "changed his recommendations to align with which ever placement she was in at the time he was asked to state his opinion." (A.R. 1570–71).

Plaintiffs have failed to produce any evidence suggesting that this Court should now "recalibrate" the hearing officer's credibility determinations, and

the Court will therefore defer to those determinations. *See Andover Sch. Comm.*, 2013 WL 6147139, at *14; *Sebastian M.*, 685 F.3d at 86.

4. Testimony of Arlyn Roffman

Plaintiffs next contend that the hearing officer improperly disregarded the testimony of Arlyn Roffman, an expert in the field of transition services. Roffman testified at the hearing as to her opinion of the transition services proposed by Natick. Plaintiffs contend that the hearing officer "without explanation summarized [Roffman's testimony] as, 'she opined that the transition plan contained in S-4 was not properly filled out.'" (Pl. Mem. at 37). It is true that the hearing officer stated that "[m]ost of Dr. Roffman's criticisms of the transition services Natick proposed related to her opinion that forms were not filled out correctly." (A.R. 1569). While it may not have constituted the majority of her testimony, Roffman did testify regarding the way in which the transition planning forms were completed. (A.R. 1755–56, 1780). More significantly, however, the hearing officer did not disregard the rest of her testimony. The hearing officer also addressed Roffman's opinions that it was inappropriate for C.D. to receive vocational services in a one-on-one setting as part of an extended school day and that the proposed services were not adequately tailored to C.D.'s interests. (A.R. 1569). The hearing officer concluded that the testimony of two Natick witnesses, McGovern and Cymrot, adequately addressed those concerns and suggested that the transition services proposed were not inadequate on those grounds. (*Id.*). While plaintiffs question Cymrot's credibility as a witness, they have failed to

offer any reason to second-guess the hearing officer's determination that the testimony of McGovern and Cymrot was more credible on these points than that of Roffman.

5. Testimony of Donna Cymrot

Plaintiffs next contend that the hearing officer erred by crediting the testimony of Donna Cymrot, a psychologist at Natick High School, concerning the appropriateness of a "blended program" of instruction that would combine some services in the ACCESS program with others in general-education classes. The hearing officer credited the testimony of Cymrot, as well as two other Natick witnesses (McGovern and Liptak), in concluding that the father's objection to C.D. being placed in any classes in the ACCESS program did not a support finding that the 2014–15 IEP, which proposed a blended program, was inadequate. (A.R. 1567–68). In particular, the hearing officer credited Cymrot's testimony that a blended program would enable C.D. to address areas of weakness, such as math, more intensively in the ACCESS program, while also allowing her to receive instruction in other areas in less-restrictive replacement classes. (*Id.* at 1568).

Plaintiffs point to a number of statements that Cymrot made on cross-examination that they contend undermine her credibility as a witness. (Pl. Mem. at 38). Many of those statements relate to Cymrot's opinion regarding the change in C.D.'s disability classification, and do not appear to be relevant to her testimony concerning the appropriateness of a blended program. The rest of the statements suggest that Cymrot had not reviewed the entire

administrative record. However, the record shows that Cymrot was well-versed regarding C.D.'s strengths and weaknesses. (*See* A.R. 1007–09). There was thus adequate evidence in the record to support the hearing officer's conclusion that Cymrot was a credible witness, and the Court will not now second-guess that determination.

6. Testimony of Karen Liptak

Next, plaintiffs contend that the hearing officer erred in crediting the testimony of Karen Liptak, a special-education teacher at Natick High School. As with Cymrot, the hearing officer credited Liptak's testimony regarding the appropriateness of a blended program over the father's testimony that placement in any ACCESS classes was inappropriate. Specifically, the hearing officer credited Liptak's testimony that C.D. would benefit from the opportunity to interact with different peers in the different classes. (A.R. 1568).

Liptak testified that she had seventeen years of experience as a special-education teacher, that she was familiar with both the ACCESS program and replacement classes at Natick High School, and that she had some familiarity with C.D. from a summer program she attended at Natick at which Liptak was a teacher. (A.R. 2321–26). It appears reasonable, based on that experience, to credit Liptak's testimony regarding the benefits of a blended program. While plaintiffs point out that Liptak only had limited experience with C.D. in the summer of 2012, that is not a sufficient basis on which to overrule the hearing officer's credibility determination.

7. Testimony of Christine Michelson

Finally, plaintiffs contend the hearing officer erred by crediting the testimony of ACCESS teacher Christine Michelson over that of the parents and their witnesses. Specifically, plaintiffs contend that the hearing officer erred by relying on Michelson's opinion that the IEP 2014–15 IEP was appropriate because Michelson had neither met nor observed C.D. and had not reviewed all of the available evaluation reports. However, while the hearing officer recounted Michelson's testimony in her summary of the evidence, it does not appear that she relied on that testimony in finding that the IEPs proposed for 2014–15 were appropriate. (*See* A.R. 1560–61, 1567–69). In her consideration of the appropriateness of those IEPs, the hearing officer specifically referred to and relied upon the testimony of other Natick witnesses—including McGovern, Cymrot, Litpak, Brown, and Karian—but did not refer to Michelson's testimony. Plaintiffs' contention accordingly appears to be misplaced.

F. Hearing Officer's Failure to Consider the Expert Reports of Dr. Imber, Flax, and Roffman

Plaintiffs contend that the hearing officer erred by failing to consider reports that were prepared by Dr. Imber, Flax, and Roffman and provided to Natick as exhibits five business days prior to the hearing. The hearing officer stated that she "did not rely upon the most recent reports submitted by Ms. Flax or Dr. Imber, as they were first presented to Natick as exhibits in the hearing and the [IEP] Team did not have the opportunity to review them prior to the

hearing." (A.R. 1571). She similarly stated that she "did not rely upon the written report of Dr. Roffman as it was not received by Natick prior to the hearing." (*Id.*).

Plaintiffs contend that the hearing officer's failure to rely on those reports was erroneous, because the reports were timely submitted to Natick as exhibits prior to the hearing in accordance with Rule IX of the BSEA rules and 45 C.F.R. § 300.502. They concede that the reports—which were completed after the development of the third 2014–15 IEP—were not relevant to the hearing officer's determination of the adequacy of that IEP, as they were not available to Natick at the time the IEP was promulgated. (Pl. Reply at 28). They contend, however, that the reports should have been considered for other purposes, such as witness credibility, their assessments of the prior IEPs, and their statements concerning their inability to obtain information from Natick.

It is clear from the record that the testimony of Dr. Imber, Flax, and Roffman provided ample information regarding their professional experiences and expertise, their experience with and knowledge of C.D., their assessments of the prior IEPs, and their abilities or inabilities to obtain information from Natick. (*See, e.g.*, A.R. 2015–23, 2026–2030, 2034, 2040, 2043–52 (Imber); 1840–43, 1845–46, 1854, 1855–56, 1870–72 (Flax); 1745–47, 1751–57, 1761, 1762–64 (Roffman)). Plaintiffs have failed to identify any additional evidence contained within the reports that would have been anything other than cumulative of their testimony at the hearing. There is, therefore, no basis from which to conclude that

hearing officer's failure to consider the results themselves resulted in any kind of error.

G. The Hearing Officer's Determination as to Plaintiffs' Discrimination Claims

In their complaint before the BSEA, plaintiffs alleged that Natick engaged in discrimination and retaliation in violation of 42 U.S.C. § 1983 and § 504 of the Rehabilitation Act. The hearing officer concluded that the record was unclear as to the basis of the allegation and that the parents had "not met their burden of showing that Natick engaged in discrimination" and that the BSEA "does not have jurisdiction over claims of discrimination under Section 1983." (A.R. 1570). Plaintiffs now contend that the hearing officer ignored substantial evidence in the record suggesting that Natick discriminated C.D. on the basis of her disability. They contend that the record was "replete" with evidence of discrimination, citing to evidence concerning the restrictions placed on plaintiffs' consultants when visiting classes at Natick High School.

As to the § 1983 claim, the hearing officer was correct to conclude that she lacked jurisdiction. While section 1983 claims are sometimes permitted to be brought along with IDEA claims in a BSEA proceeding, the BSEA does not have the jurisdiction to resolve such claims. *See In re Rafael v. Norton Public Schools*, BSEA # 1609348, at 8–9 (Aug. 30, 2016). Section 1983 claims may be brought before the BSEA only for the purpose of developing a relevant factual record to aid later court adjudication. *See id.*; *CBDE Pub. Schs. v Massachusetts Bureau of Special Educ. Appeals*, 2012 WL 4482296, at *8 n.7

(D. Mass. Sept. 27, 2012). Because plaintiffs challenge only the hearing officer's determination as to the § 1983 claim, and do not appear to bring an independent claim, that claim must fail.

As to the § 504 claim, plaintiffs bear the burden of proving four elements: "(1) that [C.D.] is disabled; (2) that she sought services from a federally funded activity; (3) that she was 'otherwise qualified' to receive those services; and (4) that she was denied those services 'solely by reason of her ... disability." *Lesley v Hee Man Chie*, 250 F.3d 47, 53 (1st Cir. 2001) (quoting 29 U.S.C. § 794(a)). Plaintiffs appear to contend that Natick discriminated against C.D. on the basis of her disability by placing restrictions on the ability of her consultants to ask questions while observing classes. However, plaintiffs have failed to offer any evidence suggesting that Natick imposed those restrictions "solely by reason of [C.D.'s] . . . disability." The record suggests that Natick imposed those restrictions because the consultants had been disruptive during a prior observation (*see* A.R. 3146), and plaintiffs have not offered any evidence to suggest that reason was pretextual. They have not, for example, offered any evidence "showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the . . . proffered legitimate reasons" provided by Natick." *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 42 & n.10 (1st Cir. 2012) (holding that plaintiffs failed to show that school district's proffered legitimate, non-retaliatory explanations for its actions were pretextual).

IV. Conclusion

For the foregoing reasons, plaintiffs' motion for summary judgment is DENIED. The matter is hereby REMANDED in part to the Board of Special Education Appeals for further proceedings, consistent with this opinion, as to whether the 2012–13 and 2013–14 IEPs provided a free appropriate public education in the least restrictive environment possible.

So Ordered.

APPENDIX F

July 24, 2015

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

DECISION
BSEA # 1408860

BEFORE
CATHERINE PUTNEY-YACESHYN
HEARING OFFICER

LAURIE R. MARTUCCI,
ATTORNEY FOR STUDENT
ALISIA ST. FLORIAN,
ATTORNEY FOR NATICK PUBLIC SCHOOLS

MEMORANDUM

To: Parties in the matter of Student v. Natick Public Schools, BSEA # 1408860

From: The Bureau of Special Education Appeals

Date: July 28, 2015

Re: Decision

There were three paragraphs of the final decision of this matter which were inadvertently omitted from the version of the decision which was sent to the Parties on July 24, 2015. Enclosed is the complete decision including the three paragraphs which were omitted and appear at pages 20–21. The BSEA regrets any inconvenience this may have caused.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW
APPEALS SPECIAL EDUCATION APPEALS

Student v. **BSEA #1408860**
Natick Public Schools

DECISION

This decision is issued pursuant to M.G.L. c. 71B and 30A, 20 U.S.C. § 1401 *et seq*., 29 U.S.C. § 794, and the regulations promulgated under said statutes.

PROCEDURAL HISTORY

Parent requested a hearing on May 26, 2014 which was scheduled for June 27, 2014. Natick Public Schools (hereinafter, Natick) requested a postponement of the initial hearing date on June 2, 2014, which request was allowed. There was a pre-hearing conference on July 14, 2014 and the hearing was rescheduled to proceed on November 18, 19, and 20, 2014. On September 30, 2014, Natick requested a postponement of the hearing which was allowed. The hearing was rescheduled for January 5, 6, and 7, 2015. On January 7, 2015, the matter was reassigned to Hearing Officer Catherine Putney-Yaceshyn. There were telephone conference calls on January 28 and March 3, 2015. The hearing was rescheduled to proceed on May 12, 13, and 27, 2015. The hearing was held on May 12, 13, 27, and 28, 2015. The Parties requested a postponement of the closing of the record to submit closing arguments. The hearing officer allowed their request and set a deadline of June 12, 2015 for the submission of closing

arguments. Natick submitted its closing argument on June 12. Parents submitted their closing argument on June 15, 2015 and the record closed[8] on that date.

Those present for all or part of the hearing were:

Mother	
Father	
Nan Coellner	Parents' special education teacher/consultant
Arlyn Roffman	Parents' transition consultant
Suzanne Flax	Parents' speech language pathologist
Steve Imber	Parents' educational consultant
Erin Gibbons	Parents' Neuropsychologist
Carole Tsang	Transition Coordinator, Learning Prep School
Nancy D'Hemecourt	Teacher, Learning Prep School
Cynthia Manning	High School Principal, Learning Prep School
Laurie Martucci	Attorney for the Parents
Lindsay McGovern	Assistant Direct of Student Services, Natick Public Schools
Timothy Luff	Director of Student Services, Natick Public Schools
Donna Cymrot	School psychologist, Natick Public Schools
Karen Liptak	Special education teacher, Natick Public Schools
Christine Michelson	Special education teacher, Natick Public Schools

[8] Natick did not object to Parents' late filing of its closing argument.

Sarah Karian	Speech language pathologist, Natick Public Schools
Katheryn Brown	Transition coordinator, Natick Public Schools
James Franciose	Special education teacher, Natick Public Schools
Anne Bohan	Court Reporter
Carol Kusinitz	Court Reporter
Alisia St. Florian	Attorney, Natick Public Schools
Catherine Putney-Yaceshyn	Hearing Officer

The official record of this hearing consists of Parent's exhibits marked P-1 through P-90, and Natick Public Schools' exhibits marked S-l through S-53 and approximately six hours of recorded oral testimony.

ISSUES

1. Whether Natick complied with the Student's IEP in providing summer services during the summer of 2012 and if not whether Student is owed any compensatory educational services.
2. Whether the IEP proposed by Natick for the period from 2012–2013 was reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment.
3. Whether the IEP proposed by Natick for the period from 2013–2014 was reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment.

4. Whether the three IEPs proposed during the period from 2014–2015 were reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment.
5. Whether there were any procedural violations committed by Natick that resulted in the denial of FARE to the Student.
6. Whether or not Natick engaged in any discrimination or retaliation in violation of Section 1983 and Section 504.
7. If Natick's IEPs are found to have been deficient, whether Parents are entitled to reimbursement for their unilateral placement of Student at the Learning Prep School.

* * *

counselors could best answer specific questions and would be available around August 20. (Imber)

8. The proposed IEP indicated that Student was attending the Natick Extended School Year program and that she was making slow progress while working on her IEP goals and objectives. The Narrative Description of School District Proposal indicated that the services would be delivered through the Access program. The IEP contained goals in the following areas: communication, mathematics, socialization/ peer interaction, reading comprehension, writing composition, content vocabulary and study skills. The service delivery grid contained consultation services in the area of speech language 1 x 15 minutes per cycle and

consultation between the staff and learning center teacher l x 15 minutes per cycle. The B grid contained academic/electives with a "student support facilitator" (SSF) 9 x 80 minutes per cycle. The C grid contained speech language services with the speech language pathologist 2 x 30 minutes per cycle; mathematics with the learning center teacher and SSF 3 x 80 minutes per cycle; science with the learning center teacher and SSF 3 x 80 minutes per cycle; vocational services with the learning center teacher/SSF 3 x 80 minutes per cycle; social studies with learning center teacher and SSF 3 x 80 minutes per cycle, English/Language Arts with the learning center teacher and SSF 3 x 80 minutes per cycle, and extended school year services. (P-20, S-6)

9. The Nonparticipation Justification section of the IEP stated that Student requires specially designed instruction in small group classes outside of the general education setting for all core academic content areas and for vocational/post-secondary skill development using modified curriculum and approaches in order to make progress. (P-20, S-6)

10. Parents rejected the IEP and placement in full on or around August 9, 2012. Father attached a document indicating his reasons for the rejection. It stated that because Student had been in a general education classroom for most of her academics for the past three years, he believed that placing her in a self-contained classroom would hinder her growth. He also rejected a number of goals because they were

the same goals contained in the McAuliffe IEP in the inclusion setting, and he thought the goals should change if the setting was changing. (S-6, Father) Father also believed that the hours of service were decreasing from those provided in the prior IEP. (S-6) Dr. Imber did not believe the IEP was appropriate for Student. His biggest concern was that it proposed going from a primarily inclusive environment [McAuliffe] to the most restrictive environment Natick had. He did not believe that she would have access to the general education curriculum and thus would not be able to pass MCAS. (Imber)

11. Parents' attorney sent a letter to Natick's attorney dated August 14, 2012. The letter reiterates Parents' rejection of Natick's proposed IEP and placement and indicates that Parents would be withdrawing Student from Natick, placing her at Learning Prep, and seeking reimbursement from Natick. (P-40)

12. Natick's attorney responded to Parents' attorney in a letter dated August 15, 2012. The letter indicated that Natick declined to fund the unilateral placement and stated that the placement at Learning Prep was a more restrictive placement than the in-district program Natick had proposed for Student. The letter also referenced a decision in BSEA # 11-3131 in which the hearing officer had affirmed the appropriateness of Natick's Access program for Student. (P-39)

13. Lindsey McGovern, Natick's Assistant Director of Student Services, testified that she was surprised that Parents and their experts found Natick's proposal of the Access program to be too restrictive for Student and that they then placed her in Learning Prep, an out-of-district placement. She noted that the recommendations of Parents' consultants (Ms. Flax and Dr. Imber) had significantly changed over time. She also noted that Student's profile had not changed significantly and in fact she had made gains in expressive language, which in Ms. McGovern's view would warrant a less restrictive, not more restrictive setting. (McGovern)

14. Student attended Learning Prep for the 2012–2013 school year. (P-56, P-55, P-54, P-53)

15. Natick convened the Team on May 22, 2013 and Father participated in the meeting via conference call. The Access teacher was at the meeting, but Father did not have any questions for the teacher. The proposed IEP provided for support in the general education setting for electives and the Team discussed a range of options for electives. The Narrative Description of School District Proposal indicated that the services were to be delivered within the Access Program. The goals and service delivery grid were very similar to those previously proposed by Natick. Father rejected the IEP and the placement on or around June 10, 2013, He sent a letter to Natick dated June 17, 2013 indicating that he would be enrolling Student at Learning Prep for extended school year services

in 2013 and for the 2013–2014 school year. He stated that his decision was based on the same concerns he had raised with respect to Student's IEP for the 2012–2013 school year. This IEP contained a transition action plan which provided for Student to meet with her guidance counselor to explore post-secondary learning opportunities and with the career specialist to explore employment and internship possibilities. It also stated Student should explore non-degree post-secondary programs. The plan indicated Student would benefit from exploring vocational opportunities and receiving vocational training. It stated Student would learn to access community services and transportation in the community, manage money and increase her social thinking strategies. (P-38, S-5)

16. Student attended Learning Prep for the 2013–2014 school year. (P-52, P-51, P-50)

17. Natick sent Parents an Evaluation Consent Form to perform her three-year evaluation on or around March 12, 2014, Father rejected the proposed evaluation in full indicating that before he consented he wanted a description of the tests that would be conducted and the location. (S-24) Father later provided consent for the proposed evaluations on April 15, 2014 and they were completed in May and June of 2014. (Father, S-24)

18. Student's Team convened on April 15, 2014 and proposed an IEP for the period from April 15, 2014 through April 15, 2015. The IEP was

substantially similar to the IEPs proposed by Natick for the two prior school years. The IEP contained a transition planning Action Plan which listed a number of items for Student to work on in the transition realm. (S-4, P-18)

19. Father sent a letter to Natick, dated May 27, 2014, in which he rejected the proposed IEP and placement. He further stated his intent to place Student at Learning Prep for extended year services and for the 2014–2015 school year. (P-37)

20. Donna Cymrot, School Psychologist, Natick Public Schools, conducted a psychological evaluation of Student on May 23, 2014. She concluded that Student continued to show competencies in social/emotional and behavioral domains with fairly even cognitive functioning in the Extremely Low/Borderline range. She noted that cognitive development was keeping pace with her age as indicated by her stable scores. She noted that Student continued to require special education supports to access her education due to her cognitive and language limitations. (S-9) Ms. Cymrot testified that Student had nicely developed motor skills and age-appropriate social skills and behavior. She noted that the area of long-standing deficit had been in the area of language (language understanding, language expression, reading comprehension, and written language). Additionally, Student has strong executive function skill, is very motivated and her behavior is age appropriate. Based upon those factors, Ms. Cymrot believed

that a language disability or communication disability more accurately describes Student. Ms. Cymrot stated that Student's disability category would not have any impact on her service delivery. (Cymrot)

21. Mark D'Angelo, special education teacher, Natick, completed an "achievement evaluation" on June 6, 2014. He administered the Wechsler Individual Achievement Test, Third Edition. He noted that Student's composite score in reading fell at the thirteenth percentile, her written expression score was at the seventh percentile, and her reading comprehension and fluency scores fell below the average range. Both her mathematics and mathematics fluency scores fell in the low range. He recommended some accommodations. (S-10)

22. Sarah Karian, MS, CCC-SLP, Natick, conducted a speech and language re-evaluation on May 27, 2014. Ms. Karian noted that Student demonstrated strengths in pragmatic language, word memory, and comprehension of spoken paragraphs. She demonstrated less developed skills in the areas of memory, sentence formulation, and understanding vocabulary and semantic relationships. She reported that Student's results revealed significantly below average skills in the areas' of receptive and expressive language, language content and memory. She noted that Student's impairments in most areas of language impact her ability to learn through traditional measures and access regular education curriculum. (S-11)

23. The Team reconvened on June 13, 2014 to review the results of Student's three year reevaluation. The Team meeting summary indicates that the Team discussed Student participating in an internship in an area of interest as well as in extracurricular activities such as the fashion club. Student had stated that she is interested in cooking and fashion and might be interested in going to school to study one of those areas. The Team discussed proposing a transition assessment of Student and a 688 referral was recommended. The Team proposed some modifications to the previously proposed service delivery grid. It continued to propose consultation in the areas of speech language and academics for fifteen minutes per cycle. It added consultation between the speech language pathologist and Student's outside speech language therapist for six hours per year. The B grid included general education social studies with a paraprofessional 2 x 80 minutes per cycle and health and electives with general education staff and a paraprofessional 2 x 80 minutes per cycle. The C grid included speech/language services with the speech language pathologist 2 x 45 minutes per cycle (1 individual and 1 group session), English Language Arts (Writing, Literature) with a special education teacher 2 x 80 minutes per week (small group); Reading Comprehension with a special education teacher 2 x 80 minutes per cycle in the Access class; mathematics with a special education teacher 2 x 80 minutes per cycle in the Access

class; Academic Support/Transition with a special education teacher 4 x 80 minutes per cycle; science with a special education teacher 2 x 80 minutes per week. The C grid also contained extended year services in the areas of speech language therapy and academic support. (S-20, S-4, P-17)

24. Father rejected the IEP and placement on or around July 7, 2014. (P-36) He sent a letter to Natick dated July 7, 2014 stating he was rejecting the IEP because a transitional assessment had not been done and he thought such assessment would change all of the benchmarks and objectives and because he believed the total hours in the service delivery grid exceeded the hours available in the school's 4 day cycle, leaving no time for speech language services. In the same letter he informed Natick that Student would be attending Learning Prep for the 2014–2015 school year and Parents would seek reimbursement for Student's placement. (P-36) Father testified that he also rejected the IEP because it contained placement in Access classes and indicated that Student would take the MCAS alternate assessment in math. (Father)

25. Student attended Learning Prep for the 2014–2015 school year. (Father, (P-47, P-48)

26. Katheryn Brown, Natick's Transition and Vocational Coordinator, conducted a transition evaluation of Student on October 22, 2014[9].

[9] Ms. Brown used the Transition Planning Inventory, Employability Skills Inventory, Vineland II, AIR

(S-8, P-67) Ms. Brown concluded that Student had clear interests in fashion, cooking, and baking, and most of all, hairstyling and make-up application. She noted that Student would require further development to build her knowledge of requirements and skills for specific jobs, as she seemed completely unaware of what training and skills will be necessary for her to become a hairstylist or make-up artist. She recommended Student participate in transitional activities such as job shadowing and internships in her two main areas of interest. Ms. Brown made a number of specific recommendations for IEP goals which are described in her report. (S-8, P-67)

27. The Team reconvened on November 14, 2014 to review the transitional assessment and revised Student's Transition Planning Form. (S-2, P-15) The IEP, for the period from November 14, 2014 through June 13, 2015, proposed Student having an extended day in order to receive the recommended transition services. It provided that extended school day services be provided by the transition coordinator to address Student's goals in career awareness and readiness and independent living skills.

Self-Determination Scale, Career Clusters Interest Survey, Test of Interpersonal Competence for Employment, Things That Are Difficult for Me Questionnaire, Personal Strengths Checklist, Skills Checklist, Student Interview, and Situational Work Assessment. (S-8, P-67, Brown)

28. The service delivery grid provided for consultation services with the speech language pathologist and between the general education teacher and paraprofessionals. The B grid provides for student's participation in academic/electives with a general education teacher and paraprofessional 2 x 80 minutes per cycle and social studies with a general education teacher and paraprofessional 2 x 80 minutes per cycle. The C grid contains speech language with the speech language pathologist 2 x 45 minutes per cycle (1 small group and 1 individual session); science with a special education teacher 2 x 80 minutes per cycle; mathematics with a special education teacher 2 x 80 minutes per cycle; academic support with a special education teacher 4 x 80 minutes per cycle; reading comprehension with a special education teacher 2 x 80 minutes per cycle; English/language arts with a special education teacher 2 x 80 minutes per cycle; and Transition with a special education teacher/transition specialist/job coach/ paraprofessional 2 x 80 minutes per cycle, (S-2, P-15)

29. Katheryn Brown taught the vocational class for the Access program during the 2014–2015 school year. She worked with students and their families on their future vision to determine what can be done in Access to prepare them for their vision. She begins meeting with eighth grade students transitioning to the high school and then begins working on the first day of their freshman year.

If Student had attended Natick High School, there would have been potential opportunities for her to participate in job shadowing in her career areas of interest. Ms. Brown has students who job shadow in their junior and senior years with the hope that it will lead to an internship in their area of interest.

Ms. Brown described the in-school vocational program provided to students at Natick High School. She stated that there are many opportunities throughout the school for students to practice and explore vocational skills. There are jobs in the cafeteria including cookie packaging, refilling the coolers, refilling the snack and chip displays, helping to run the breakfast snack cart, preparing the ingredients for a smoothie bar. There are students who work in the library at tasks such as setting up displays of books or setting up wall displays, and IT tasks such as setting up PowerPoint presentations which are shown on televisions throughout the building. Ms. Brown could work on finding a job for Student that would be specific to her interests, such as cooking and baking.

Student would not be required to receive her vocational class after school in an extended day program. The extended day option was one of several that were presented to Parents by Lindsey McGovern. (Brown)

30. Father rejected the IEP in full because it contained an Access class for reading comprehension which a Natick teacher told

father had never been proposed for a student before. Father assumed since it was never done before it was a "program that was just being developed" and was thus inappropriate for Student. Additionally, Father stated that he rejected the IEP because after seeing the transitional program and talking to the consultants he had hired, he did not think it was appropriate. He attached a list of his concerns regarding the IEP to his rejection. He rejected Natick's changing Student's disability category from Intellectual to Communication. He stated that he had questions and concerns about the block schedule, but was denied the opportunity to have his questions and concerns addressed. He stated that he had questions about the extended day program. He rejected the exclusion of counseling services from the grid. He rejected a number of goals. He stated that the service delivery grid did not allow for non-academic electives despite the extended day program. He stated that the forty-five minute speech language sessions would cause Student to be late for other classes. (Father, P-26)

31. Throughout his testimony, Father referenced conclusions he had drawn regarding the Access program. He explained that he did not believe that students in the Access program were receiving grade level curriculum with modifications because he did not believe the students in the program would be taking the MCAS. (Father, Vol. 1, pg. 93) He believed the Access program was a "lifeskills" program and would not prepare students to receive a diploma.

(Father, Vol. 1, pg. 103) He believed that the Access peers would not have been appropriate peers for Student due to their behavioral issues. (Father, Vol. 1, pg. 90)

32. James Franciose was the lead teacher for the Access program for thirteen years, including the 2012–2013 and 2013–2014 school years. (Franciose, Michelson) During the 2012–2013 school year there were three paraprofessionals in his classroom and eight students. The students in the program had primary disabilities of intellectual impairment and communication impairment. There were students with mild autism. Mr. Franciose explained that students in the Access program are routinely moved into replacement classes when their performance makes replacement classes appropriate. He also reported that several students who moved from his class to replacement classes were able to pass the regular MCAS and will receive a regular diploma. Mr. Franciose testified that there were not any students with significant behavioral or emotional issues in his class during the 2012–2013 school year. He recalled one student who had occasional outbursts that could be disruptive to the class, but they were few and far between. He recalled another student who had issues with verbal communication who was moved into replacement classes and was on track to receive a regular diploma from Natick. He referenced another student who entered the program with

immature behavior and interrupted the class a few times, but never enough to interrupt the flow of a lesson. (Franciose)

33. Mr. Franciose found the IEP proposed for Student for the 2012–2013 school year to be appropriate based upon a record review and attendance at one of Student's Team meetings. He further found the IEP proposed for Student for the 2013–2014 school year to be appropriate. He noted that when a student enters his program he can get a better sense of their skill level and can reconvene the Team if he believes that replacement classes would be more appropriate for the student. That has happened many times. (Franciose)

34. Christine Michelson became the lead teacher of the Access program in October 2014. There were eleven students in the program during the 2014–2015 school year presenting with disabilities including autism, intellectual disability and traumatic brain injury. All the students had some kind of communication deficit as well. None of the students in the program was non-verbal. There were four paraprofessionals in the program. She consults with Ms. Brown, the transitional coordinator, daily. She described the Access program and explained that typically all academic classes are provided within the Access classroom, but students have the opportunity to be placed in replacement classes and small group general education classes with paraprofessional support. Students have the ability to be transferred from the Access classroom to a

replacement or general education class at any time in the school year. The decision to move a student to a different classroom is very individualized. Students are taught a modified curriculum according to their abilities. The curriculum is gleaned from the Massachusetts Curriculum Frameworks and grade-level Common Core. None of the students misses time from academic classes to attend speech language therapy.

35. Based upon her review of Student's records, Ms. Michelson believes that the IBP proposed by the Natick Public School for the 2014–2015 school year was appropriate for Student and that she would have appropriate peers within the Access program. She believes that her students benefit from the inclusion opportunities provided because she has seen them make friends with students from other settings. Ms. Michelson believes that the behaviors that her students exhibit in class are the same behaviors that are typical in all high school classrooms. She stated that some of her students can be disruptive, but that is true in any class. She specified that one or two students in her class may "call out an answer", but they are easily redirected. Ms. Michelson believes that a blended program that includes some Access classes, some replacement classes and some general education classes with support would be appropriate for Student.

36. Karen Liptak, special education teacher, Natick, is a learning center teacher and teaches small-group English classes, referred to as

replacement classes. She described replacement classes as being designed for students with communication disabilities, language-based learning disabilities and reading difficulties. The students can access the regular curriculum, but they need material to be presented at a slower pace. The classes follow the Massachusetts curricular standards. Replacement class sizes vary from five to ten students. During the 2014–2015 school year she had one paraprofessional in her English replacement class. She has seen students moved from the Access program into replacement classes. Ms. Liptak met Student and provided services to her during the summer of 2012. She did not recall anything unusual about Student's attendance or participation in the summer program. She noted that Student was very amiable. Ms. Liptak believes that the Access program would be an appropriate placement for Student and that a blended program providing for some replacement classes with support would be appropriate. She thinks the proposed transition program would meet Student's needs. From her experience teaching replacement classes, she does not believe other students' behavior will interfere with Student's learning. (Liptak)

37. Ms. McGovern, Assistant Director of Student Services, testified that the Team reconvened in January 2015 to review the rejected IEP. Ms. McGovern was concerned that Father had indicated he had not previously had a chance to ask all of his questions. That was not her

impression of previous meetings, but she wanted to make sure she was mindful of asking if Father had any remaining questions. She prepared a projection explaining four proposed schedules that Student could have at Natick High School. She later prepared written copies of the sample schedules and sent them to Parents. In order to accommodate Father's concern that Student be able to participate in electives, she proposed providing Student's vocational class after school as part of an extended school day. She was trying to balance the Parents' concern that Student spend some time in the general education setting with the proposed service delivery grid, which contained a number of services, including double English classes.[10]

38. Arlyn Roffman, Ph.D.[11], has worked at Lesley University for 37 years where she founded the Threshold Program, a transition program for young adults with disabilities, in 1981. She reviewed Student's relevant IEPs[12], met

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[10] Ms. McGovern explained that Natick proposed that Student participate in two English classes (one replacement English class and one Access reading comprehension class) because she enjoys writing and has some relative strength in that area, but needs rigorous instruction in reading comprehension. She would then be averaging one 80 minute English class per day. (McGovern)

[11] Dr. Roffman has a Ph.D. in developmental psychology, a Master's degree in learning disabilities, and is a licensed special education teacher. (Rothman)

[12] Dr. Roffman's testimony indicates that the IEPs she reviewed prior to the hearing may not have been complete copies

Student in late 2012, and observed her at Learning Prep twice. Dr. Roffman was critical of Natick's Action Plan in the IEP for the period from May 2013–May 2014 (S-5) because it did not contain goals and was not measurable. Additionally, she opined that the transition plan contained in S-4 was not properly filled out. She stated that it was not clear what the services would be from the IEP. Dr. Roffman observed a career class at Natick High School in October 2014 and noted some "very good teaching." She observed what was described to her as students learning prevocational skills of following directions and routine and following through. She observed students getting cookies and putting them into waxed paper bags to be sold at lunch. She noted very good prompting and no behavioral issues. She also observed students wiping down fitness equipment in the gym and shelving books at the library. She noted that the cookie task would not be a challenge or of interest to Student and she did not think it would lead to any sort of competitive employment. She did not find the length of the eighty minute blocks at Natick to be problematic for student and noted that students could be helped to work on memory. She did not think it would be appropriate for Student to receive her transitional services in a 1:1 setting, because she though Student would benefit more from learning from peers and benefitting from

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of the IEPs. (*See* testimony of Arlyn Roffman, Transcript, Vol. I, pgs. 199–200)

their lessons as well. She noted that Natick's 2014 assessment of Student's transitional needs was adequate. Dr. Roffman concluded that Natick did not provide appropriate transitional planning or propose appropriate transitional services for any of the IEP periods at issue.

39. Dr. Roffman wrote a report dated May 4, 2015[13]. In it, she noted that an appropriate transition program for Student should include employment training that would prepare her for competitive employment or for entry into competitive employment. It should also contain community living skills which would give her hands-on experience in areas of need, and contain postsecondary planning activities that would give Student a chance to see what is out there and assistance with making application to programs. She did not think Student's services should be provided 1:1, but that Student should be integrated as much as possible. Dr. Roffman believes Student's educational program should be provided with students of differing disabilities and the opportunity for some inclusion. (Roffman)

40. Dr. Gibbons, a neuropsychologist who evaluated Student in 2012 and 2014, testified that her recommendations for Student have been consistent since 2012. She found that

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[13] She had not recently observed Student or evaluated her. She knew that the report had to be available for the hearing in this matter. She never attended a Team meeting and Natick had never seen her report prior to the hearing. (Roffman)

Student needs language-based instruction[14] based on her significant language impairments and requires small classes of six to eight students. She requires multimodal instruction, such as use of thinking maps and other graphic organizers. She stated that Student requires substantially separate special education classes for her academics. Dr. Gibbons found Natick's four day block scheduling concerning because she thinks Student requires daily repetition of each class, especially classes like reading comprehension, which is an area in which Student requires additional support. She did not think it would have been appropriate for Student to be in mainstream classes at Natick Public Schools after attending the McAuliffe School. (Gibbons)

41. Suzanne Flax has an M.S. in speech/language pathology and has provided Student private weekly speech language services since 2007. When Ms. Flax began working with her, Student did not use a lot of verbal language and was not initiating language. In June 2014 she observed at Natick High School for approximately two hours[15].

42. Ms. Flax stated that students' behaviors at Learning Prep are less disruptive than the

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[14] She defined language based instruction entailing material being presented at a slower pace, language is simplified, there is a lot of repetition, additional clarification if needed, and previewing and reviewing. (Gibbons)

[15] Ms. Flax also "interviewed" Lindsey McGovern and Jim Francoise. (Flax)

students' behavior in the Access program based upon spending one hour in an Access classroom in Natick. She further stated that there are no peers in the Access program with whom Student would have been able to make a social connection. She testified that she was absolutely positive that Student would not have made any friends in the Access program given the level of disability that she observed and the lack of interaction of the students with one another. Ms. Flax noted that since Student has been attending Learning Prep she has been using significantly more verbal language and initiating more language. She believes this is because she is interacting with other children who have verbal language at or above her level. She believes Student requires a consistent schedule from day to day due to her language processing issues and short and long term memory deficits. (Flax) Dr. Imber also noted concern about Natick's block schedule. He thought that fact that the schedule rotates would be challenging for Student. (Imber)

43. Although in 2012 Ms. Flax recommended a general education placement for Student, in 2014 she recommended a small substantially separate, language-based, program for her. She stated that her reason for changing her recommendation is because Student has made language gains. She no longer believes that a general education program would be appropriate for Student. She also does not believe that Student would benefit from some inclusion opportunities during her day, not even

for electives. She believes this because Student is "developing and growing and flourishing" at Learning Prep. (Flax)

44. Steven Imber, Ph.D., initially evaluated Student in 2009 at Parents' request. He tested her again in 2010, 2012, and 2014. Additionally, Parents have asked Dr. Imber to be a consultant for them and to observe Student and consult with her teachers. When Student was at McAuliffe, he observed once or twice per year and provided feedback to the teachers regarding what was working well and not so well. He has continued in that role while student has been at Learning Prep. (Imber)

    In 2012, when Dr. Imber's first report was written, he was recommending that Student continue to attend high school in an inclusive environment. According to Dr. Imber, after the July 2012 Team meeting when Natick's only proposal was for the Access program, Parents decided they had to look at other options, because they did not think Access was appropriate. Student was accepted at Learning Prep.

    Dr. Imber believes Student is doing very well at Learning Prep. Although he still supports the notion of inclusion, he thinks it would be disruptive to move Student from that setting at this point. He is not advocating for inclusion at this point because Student has had three successful years at Learning Prep. (Imber)

FINDINGS AND CONCLUSION:

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[16] and the state special education statute.[17] As such, she is entitled to a free appropriate public education (FAPE). Neither her status nor her entitlement is in dispute.

Under the Individuals with Disabilities Education Act (IDEA) and Massachusetts law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); (M.G.L. ch. 71B.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP, (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401 (a)(29).)

A FAPE is provided when the school district implements an IEP that is "'reasonably calculated' to insure that the child receives meaningful 'educational benefits' consistent with the child's learning potential." *Hunt* v. *BSEA & City of Newton,* No. 08-10790-RGS, 2009 U.S. Dist. LEXIS 79775, at *4 n.8 (D. Mass. Sept. 4, 2009) (quoting *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. 16.)*

While an IEP must conform to the procedural and substantive requirements of the IDEA, "the obligation to devise a custom tailored IEP does not imply that a disabled child is entitled to the maximum education

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16 20 USC 1400 *et seq.*

17 MGL c. 71B.

benefit possible." *Lessard, v. Wilton-Lyndenborough Cooperative School District et.al.*, 518 F.3d 18 at 23.

There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the hearing officer must determine whether the district has complied with the procedures set forth in the IDEA. *(Rowley*, *supra*, 458 U.S. at pp. 206–207.) Second, the hearing officer must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. *(Ibid.)*

An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was promulgated. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990)

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In this case, Parents are the party seeking relief, and thus have the burden of persuading the hearing officer of their position.

With the foregoing legal framework in mind, I turn to the issues before me. First, whether Natick complied with Student's IEP regarding Student's extended year services for the summer of 2012. Natick does not dispute Parents' claims that its staff was not aware that Student would be attending its program on the first day. Parents do not dispute the testimony of Natick's staff that Student attended the remainder of the summer program, participated appropriately, and completed work. The purpose of extended year

services is to prevent substantial regression. 603 CMR 28.05(4)(d). Parents did not provide any testimony to suggest that Student regressed in her skills as a result of not receiving services for one day of her summer program. Although Father testified that Student cried and was emotionally upset about not receiving services on the first day, he did not provide any credible evidence that Student was denied a free appropriate public education. Thus, there is no basis for awarding compensatory services to Student.

I turn now to the appropriateness of the IEP for the period from 2012–2013. At the time Natick proposed the IEP Student had just completed three years at McAuliffe where she had been placed by her parents. While at McAuliffe, although Student received academic services in a general education setting, she did so with the assistance of a full time one-to-one assistant who also acted as a one-to-one tutor as needed. (Coellner) Although none of the witnesses testified about the level of restrictiveness of such a placement, the hearing officer took note of it. Parents and their witnesses argued that Natick's proposed IEP placing Student in the Access program was overly restrictive because it did not provide for Student's education within the general education setting. However, it was less restrictive than Student's McAuliffe placement because it did not provide for the assistance of a one to one aide throughout the day. It provided Student the opportunity to independently access academic services in a program specifically designed for students with profiles similar to Student's. If Parents were truly seeking a less restrictive setting in Natick, they could have accepted Natick's offer to place Student in all replacement

classes as relayed to them by Gina Dalan's letter dated June 5, 2012.

The evidence shows that Natick reviewed all information available to them at the time of the May and July 2012 Team meetings, including results of Student's then-most recent testing, the verbal reports of service providers from McAuliffe, Parents' suggestions and concerns, and the previous BSEA decision which had upheld the appropriateness of an Access program for Student. (McGovern, S-30)

One of Parents' stated reasons for rejecting the IEP was that the goals in the proposed IEP were the same goals contained in the McAuliffe IEP in the inclusion setting, and Father thought the goals should change if the setting was changing. (S-6, Father) As Father testified that he does not have any credentials in education, this reason is not considered valid by the hearing officer. Further, Parents could have limited their rejection to the goals of the IEP without rejecting it in its entirety. Father also believed that the hours of service in the proposed IEP were decreasing from those provided in the prior IEP. (S-6) He did not present any credible evidence to support that presumption. Dr. Imber was primarily concerned that the proposed IEP placed Student in Natick's most restrictive environment after she had participated in a primarily inclusive environment [McAuliffe]. As stated above, based on the evidence presented Natick's proposal for Student emerges as less restrictive than Student's placement at McAuliffe. Additionally, as noted above, Student had the option of enrolling in all replacement classes at Natick High School. Dr. Imber affirmed that this offer had been made to Parents during a May 2012 meeting. (Imber)

Finally, the Parents indicated that Natick's proposal for Student's placement in the Access class would be inappropriate because it would not provide Student with access to the general curriculum and she would thus be unable to pass MCAS. Again, this was an assumption made by Parents and their evaluators that was not supported by the evidence before me.

Mr. Franciose, the lead teacher of the Access program for most of the time period relevant to this hearing, testified that students in the Access program are routinely placed in replacement classes when their abilities and classroom performance indicate it is appropriate. Although Parents did not have the opportunity to speak to Mr. Franciose at the time that the IEP was proposed, they were able to ask questions to other Natick Team members. Ms. Dalin, Natick's then-Special Education Director sent Parents a letter dated June 6, 2012, which among other things, informed them that she was available to answer questions at any time until June 22, 2012. Parents could have raised questions to Ms. Dalin or other Natick Team members regarding the ability of Student to access the general curriculum within the Access program.

Parents also point to the fact that they were not able to observe the Access program prior to the beginning of the 2012–2013 school year. Natick did not dispute the fact that Parents had not observed the program prior to the commencement of the school year. However, in addition to Team meetings in May and July where the program was described and Parents were provided opportunities to ask questions about

the program[18], Natick provided Parents opportunities to address any and all questions to Ms. Dalin or Mr. Luff. Dr. Imber was not able to specify what questions Parents still had after the July meeting other than not knowing which specific electives would be available for Student. Dr. Imber stated that Natick informed Parents that the guidance counselors could provide specific information about elective classes when staff returned to school in late August. Further, Ms. Dalin suggested that Parents and their consultants visit the program early in the fall and offered to convene the Team within the first couple of weeks of school to adjust the IEP as necessary.

Father's testimony that Parents had to make a decision about whether to place Student in Natick prior to the return of the guidance counselors from summer break was unpersuasive. The evidence suggests Parents may have made a decision to place Student at Learning Prep as early as June 2012. Ms. Dalin sent an e-mail to Katie Clark of McAuliffe on June 5, 2012 requesting copies of Student's "transition paperwork." Ms. Clark responded to Ms. Dalin in an e-mail dated June 6, 2012 in which she noted, "the transition plan was written with the anticipation that she [Student] was attending Learning Prep High School." (P-75, pg. 10)

Based upon the foregoing, I find that Natick's proposed IEP for the period from 7/27/2012 – 4/4/2013

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[18] The Team attendance sheet from the July 27, 2012 shows that Tim Luff, Lindsey McGovern, Paul Tagliapietra (Asstistant Director of Student Services), Susan Balboni (Assistant Director of Student Services), and Rose Bertucci (Principal of Natick High School) were all present at the meeting.

was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Natick proposed an IEP for the period from 2013–2014 that was substantially similar to the IEP it proposed the prior year. Student had attended Learning Prep pursuant to a unilateral parental placement during the prior school year and there was not any new information about Student for the Team to consider. Father's rejection letter stated that he was rejecting the IEP for the same reasons that he had rejected the prior IEP. For the reasons that I found that the 2012–2013 IEP was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment, I also find that the IEP proposed for the period from 2013–2014 was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Next I turn to the appropriateness of the IEPs proposed for Student during the period from 2014–2015. The first IEP proposed by Natick during this time period was the IEP for the period from April 15, 2014 through April 15, 2015. At that point in time, Natick had sent Parents a request for consent to complete Student's three-year evaluation. Parents had not yet provided consent due to questions regarding the assessments. The Team convened without having updated information to prevent expiration of the IEP. It was proposed with the understanding that the Team would reconvene to review the results of the three-year evaluation and changes could be made to the IEP at that time. (McGovern)

The next IEP proposed for that time period was the IEP for the period from June 13, 2014–June 13, 2015. This IEP contained a number of changes from the previous IEPs, including a proposal for Student to participate in a general education class and some replacement classes. Ms. McGovern credibly testified that the changes to the IEP were made based upon the review of Student's evaluations and some helpful information provided by Learning Prep, including Educational Assessment Forms A and B. Father rejected the IEP in part because a transition assessment had not been done and he believed such assessment would result in changes to the benchmarks and objectives of the IEP. Additionally, he believed that the proposed services could not be provided within the four day cycle used at Natick High School and thus, Student would not receive her speech language services. He further rejected the IEP because it continued the proposal that Student attend some Access classes and proposed that Student take the MCAS-alt in math.

I find that despite Father's objections, the IEP was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. The record contains no support for Father's conclusion that Student's services could not be provided as written and that she would not receive her speech language support. While it is true that Natick had not yet conducted a transitional evaluation and might have adjusted objectives and benchmarks after conducting it, that has no bearing on the appropriateness of what was proposed by Natick. In fact, the record shows that Natick did later conduct a transitional evaluation and propose and update IEP.

Although Father continued to reject Student's placement in any Access classes, the credible evidence shows that placement in Access math and reading comprehension classes was appropriate for Student. Ms. McGovern credibly testified that Student was placed in the Access math class to address an area which has always been an area of significant need for Student. The Team proposed providing Student with two different English classes. To address an area of significant need reading comprehension would be provided within the Access setting, where she would receive additional support. And, recognizing that Student has an interest and relative strength in writing, participation in a replacement English class. This proposal would also address a concern raised by Father, Ms. Flax, and Dr. Imber regarding the rotating block scheduling at Natick High School[19], as Student would receive some instruction in English/language arts for eighty minutes every cycle. Both Ms. Liptak and Ms. Cymrot credibly testified that this "blended program" that Natick was proposing, whereby Student would receive some services in the more restrictive substantially separate Access program, some services in the replacement classes, and some services in the general educational with paraprofessional support, would be appropriate for Student. Ms. Liptak noted that Student would benefit from the opportunity to interact with different

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[19] Although Dr. Imber and Ms. Flax testified regarding their concerns about the appropriateness of the rotating block schedule due to Student's memory issues, this issue was not formally raised to the Team until Father's rejection of the IEP in November 2014. Thus, it could not have formed the basis of Parents' rejection of prior IEPs. (P-26)

peers in the different classes. She also noted that Student would benefit from working with peers with writing, social and reading strengths within the different settings. (Liptak) Ms. Cymrot believed the blended program was appropriate for Student because it would allow her areas of weakness to be addressed intensely (within the Access program) while allowing her to receive content instruction in the less restrictive replacement classes. (Cymrot)

With respect to the issue of the MCAS-alt being proposed for Student, Ms. McGovern and Mr. Franciose credibly testified that students within the Access program often take the regular MCAS exam. They both noted that students are routinely moved from Access classes to replacement classes where they can receive instruction geared toward passing the MCAS.

Based upon the foregoing, I find that the IEP proposed by Natick for the period from June 13, 2014-June 13, 2015 was reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Next, I turn to the appropriateness of the IEP proposed for the period from November 14, 2014 through June 13, 2015. I find that this IEP continued to offer appropriate services to address all of Student's areas of needs. The IEP contained many of the same services as the prior IEP, but contained additional transitional services. Father, Ms. Flax, and Ms. Coellner criticized the program because it proposed that Student receive her transition class in a 1:1 setting after school. However, Ms. McGovern testified that she presented several different

scheduling options to Parents to accommodate the number of services proposed for Student. The option of providing an extended school day was presented as a way to allow Student to continue to receive non-academic general education electives during the school day while still providing her with all the services contained in her service delivery grid. I find that it was appropriate for Natick to propose extended day services as one option for Parents to choose from to enable to Student to receive more inclusion opportunities during the school day, while still receiving all of the transition services she requires. Parents could have chosen one of the other scheduling options offered for Student to receive her necessary IEP services.

Parents relied primarily on Dr. Roffman for their conclusion that the transition services proposed for Student were not appropriate. Most of Dr. Roffman's criticisms of the transition services Natick proposed related to her opinion that forms were not filled out correctly. However, she found that the transition assessment done by Natick was adequate. Most of her criticism of Natick's vocational services centered around her belief that it was inappropriate for Student to receive her vocational services as part of an extended day in a 1:1 setting. As described above, the proposal for Student to receive after school services was just one of many options presented to Parents and thus, is not a basis for finding vocational services to be inappropriate. Dr. Roffman's other substantive criticism of Natick's proposed vocational services was that Student would not receive services tied to her interests. Ms. Brown addressed this concern when she described how Natick individualizes students'

programs to align with their interests. She stated that if she were to begin working with Student she would first seek to find her a task relating to her noted interests in cooking and baking. (Brown)

Parents also point to Natick's decision to change Student's disability category from intellectual to communication. Although they clearly disagree with this decision, they have not pointed to any impact that this decision has or will have on Student's service delivery. Natick staff credibly testified that the change of disability category will not change the way in which services are delivered to Student and Parents did not provide any evidence to the contrary. (Cymrot, Karian)

Based upon the foregoing, Parents have not met their burden of showing that the IEP proposed for Student for the period from November 14, 2014 – June 13, 2015 was not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

I now turn to the Parents' claims of procedural violations. The record is unclear as to what procedural violations Parents believe Natick committed. There were many references throughout the Parents' case to Parents and/or their experts being unable to obtain answers to their questions. The credible evidence before me does not support any claim that Parents may be alleging that they were unable to receive information and thus participate in the Team's decision making. The record shows that Natick convened many Team meetings during the course of the period of time at issue during which Parents and their consultants had opportunities to ask questions.

Additionally, in 2012, Ms. Dalin provided Parents with contact information to enable them to ask her or her predecessor questions regarding the proposed placement. Ms. McGovern and Mr. Franciose made themselves available on one occasion to specifically address Parents (and their consultant's) questions about the program. Parents did not present any evidence of an instance in which they were not able to participate in the Team process or were unable to get answers to their questions. Although Dr. Imber made several references to not being able to get his questions answered, he was unable to point to a specific example of this. I find that Parents were provided with opportunities to participate in the Team process. I am not aware of any other instances in the record in which Parents claim Natick committed any procedural violations. Parents have not met their burden of showing that Natick has committed any procedural violations.

I now address Parents' claims of Natick's engaging in discrimination or retaliation in violation of Section 1983 and Section 504. Again, the record is unclear as to the basis of Parents' allegations in this regard. Thus, Parents have not met their burden of showing that Natick engaged in discrimination. Additionally, the BSEA does not have jurisdiction over claims of discrimination under Section 1983.

Finally, Parents seek reimbursement for their unilateral placement of Student at Learning Prep for the 2012–2013, 2013–2014, and 2014–2015 school years. As I have found the IEPs proposed by Natick to be reasonably calculated to provide Student with a free appropriate public education in the least

restrictive environment, it is not necessary to address the appropriateness of Learning Prep.

In reaching the above decision I did not rely on the testimony of Ms. Flax, as I did not find her to be a credible witness. Although she had appropriate credentials and experience as a speech and language pathologist, the statements she made during her testimony caused her to lose credibility. For example, she steadfastly stated that Student would not benefit at all from any inclusion. This statement was not supported by any other witness for either party, nor did it comport with Ms. Flax's own prior recommendations for Student's programming. Additionally, she stated that she was absolutely certain that Student would not have made any friends in the Access program, had she attended. This is a statement is so speculative as to carry no evidentiary value.

I also did not rely upon Dr. Imber's testimony. A careful review of his testimony shows that his current recommendations were primarily based upon Student's performance at Learning Prep. Although he did not share Ms. Flax's belief that Student would not receive any benefit from inclusion, he did previously support an inclusive placement for Student yet currently stated that he no longer believed that inclusion was as important for Student based upon her performance at Learning Prep. Based upon that opinion, it appears that Dr. Imber has changed his recommendations to align with which ever placement she was in at the time he was asked to state his opinion.

I did not rely upon the most recent reports submitted by Ms. Flax or Dr. Imber, as they were first presented to Natick as exhibits in the hearing and the Team did not have the opportunity to review them prior to the hearing. Likewise, I did not rely upon the written report of Dr. Roffman as it was not received by Natick prior to the hearing.

ORDER

Based upon the foregoing, I find that Natick complied with Student's IEP during the summer of 2012 and find no basis for awarding compensatory services to Student.

I find that the IEPs proposed by the Natick Public Schools covering the 2012–2013, 2013–2014 and 2014–2015 school years were reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

I have found no evidence of procedural violations that resulted in a denial of a free appropriate public education to Student.

I have found no evidence that Natick discriminated against Student/Parents under sections 1983 or 504.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn
Dated: July 24, 2015

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(l)(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 of Special Education Appeals 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 superior 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.