

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

**In Re: Stoneham Public Schools**

**BSEA # 1300160**

**DECISION**

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

A hearing was held on, August 31, 2012 and September 6, 2012 in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Student's Father	
Student's Aunt	
Cathy Mason	Educational Specialist and Consultant to Parents
Linda Daniel <sup>1</sup>	Private Neuropsychologist
Ann Marie Gailis	General Education Teacher, Stoneham Public Schools
Nancy Sotis	Special Education Teacher, Stoneham Public Schools
Frances Loperfido	Paraprofessional, Stoneham Public Schools
Patricia Perkins	Speech-Language Pathologist, Stoneham Public Schools
Julia Mezeika	School Psychologist, Stoneham Public Schools
Steven Orloff	Director of Student Services, Stoneham Public Schools
Gretchen Timmel	Educational Consultant to Stoneham Public Schools
Nancy Nevils	Attorney for Stoneham Public Schools
Shawn O'Brien	BSEA observer

The official record of the hearing consists of documents submitted by the Parents and marked as exhibits P- G-1 (G refers to Parents' Green Binder) through P-G-30 (with the exception of P-G-3) and exhibits P-O-1 (O refers to Parents' Orange Binder) through P-O-37 (with the exception of P-O-1, P-O-27, P-O-29, and P-O-30); documents submitted by the Stoneham Public Schools (Stoneham) and marked as exhibits S-1 through S-54; and approximately two days of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made on September 11, 2012, and the record closed on that date.

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<sup>1</sup> Dr. Daniel testified by telephone conference call.

## **SUMMARY**

This case requires me to determine whether, for the 2012-2013 school year, Student can be appropriately educated in Stoneham's substantially-separate classroom where all core academic subjects would be taught by a special education teacher; and if not, whether Stoneham must fund Parents' requested private placement at the Learning Prep School in Newton, MA. Also in dispute is whether Parents are entitled to reimbursement for their unilateral placement of Student at the Tufts Summer Reading Program in Medford, MA, for the summer of 2012. For reasons explained below, I have found for Stoneham, and against Parents, on both questions.

## **ISSUES**

With respect to prospective placement during the 2012-2013 school year, the issues to be decided are the following:

1. Is Student's individualized education program (IEP) most recently proposed by Stoneham reasonably calculated to provide him with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would placement at Learning Prep School satisfy this standard?<sup>2</sup>

With respect to reimbursement for services during the summer of 2012, the issues to be decided are the following:

1. Is the IEP most recently proposed by Stoneham appropriate with respect to extended year services during the summer of 2012?
2. If not, was Parents' unilateral placement at the Tufts Summer Reading Program appropriate?

## **FACTUAL BACKGROUND**

Student is a nine-year-old third grader who lives with his Parents in Stoneham, MA. His non-verbal cognitive abilities are in the average range, making this an area of strength. He is a motivated, diligent and strategic learner, and he enjoys school. Testimony of Mother, Mason, Daniel, Mozeika; exhibits P-G-14, P-G-18, S-6, S-12.

Student has a diagnosis of Pervasive Developmental Delay, Not Otherwise Specified. He has also been diagnosed with a language-based learning disability and reading disability. Student has demonstrated deficits in the areas of working memory, word retrieval, processing speed and verbal abstract reasoning. At school, he is easily distracted. As a result of his

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<sup>2</sup> Stoneham stipulated that if issues (1) and (2), above, were resolved in favor of Parents, then it would agree that Learning Prep School would be an appropriate placement for Student.

disabilities and deficits, Student is substantially compromised regarding his ability to understand and use language. Testimony of Mother, Mason, Daniel, Mozeika, Timmel; exhibits P-G-14, P-G-18, S-6, S-12.

During the 2011-2012 school year (second grade), Student attended a combined 2<sup>nd</sup>/3<sup>rd</sup> grade classroom at Stoneham's Central Elementary School. He received his English language arts and math instruction from a special education teacher (Ms. Sotis) and paraprofessional (Ms. Loperfido) in a language-based classroom with five other special needs students. Student participated in all other educational courses and activities (including social studies, science, gym, homeroom, recess and lunch) with typical peers in general education. Testimony of Sotis.

Student's IEP for the period 9/21/11 to 9/21/12, pursuant to which his special education and related services were provided for nearly all of second grade, included special education instruction in (1) mathematics for one hour each day, (2) the Wilson reading program (including fluency training beginning in March 2012) for one hour each day,<sup>3</sup> and (3) written language for a half-hour, three times per week. The IEP also called for speech-language services for a half-hour, three times per week; occupational therapy for a half-hour, twice per week; and adaptive physical education for a half hour per week. The IEP further provided for "inclusion support" by a special education teacher or aide for up to two hours per day for those times that Student was in a general education classroom (including social studies and science); consultation by "related service providers" (for example, the speech-language pathologist and occupational therapist) for 15 minutes per week; and unspecified extended school year services "[i]n order to prevent substantial regression." Exhibit S-22 (pages 18, 19).

On March 24, 2012 (during the spring of Student's second grade), Cathy Mason, M.Ed., conducted an educational evaluation of Student and on April 27, 2012, she observed his special education classroom for approximately two hours. These were done at Parents' request "to assess Student's current levels of academic functioning, his response to his educational program, and to assist in educational planning." Exhibits P-G-14, S-12 (pages 1, 2). Ms. Mason obtained background information through Parent interview and review of educational records, and she administered the Kaufman Test of Educational Achievement-II and the Comprehensive Test of phonological Processing (CTOPP). Testimony of Mason; exhibits P-G-14, S-12 (pages 2-5).

In her written report, Ms. Mason "strongly recommended" that Student be placed in a "substantially-separate, language-based [l]earning disabilities setting for all subjects." Exhibits P-G-14, S-12 (page 14). The report further emphasized the need for all "instruction [to] be very explicit, and language-based" with a "high degree of curricular integration so

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<sup>3</sup> In addition to the IEP services, Student's reading skills were addressed during English language arts support periods (approximately one hour per week) when he worked on reading comprehension and site words, and during poetry/fluency (approximately 45 minutes per week) when he worked on fluency and identification of word patterns. Testimony of Sotis; exhibits P-O-21, S-19.

that [Student] can make connections and practice the skills/concepts in a variety of settings.” *Id.* The report concluded that Student “will require **2-3 hours/day** of intensive, language arts instruction.” *Id.* (bold and italics in original).

In January of the previous school year (2010-2011), Linda Daniel, Psy.D., had completed a neuropsychological evaluation and educational consultation report at the request of Parents, diagnosing Student with Pervasive Developmental Disorder, Not Otherwise Specified, and making a number of recommendations including language-based instruction, a reading program, extended year services, and a social pragmatics group to address Student’s “social vulnerabilities”. Exhibits S-6, P-G-18 (page 10).

On April 13, 2012, Dr. Daniel followed up her January 2011 neuropsychological evaluation with a letter “To Whom It May Concern” “in response to the question regarding diagnosis clarification.” In her letter, Dr. Daniel emphasized the importance of Stoneham’s addressing Student’s social deficits, explaining that “while educational programming should continue to place emphasis on addressing his learning needs, this should not be at the cost of neglecting the social/communicative needs that arise from this developmental diagnosis of PDD-NOS.” Exhibits P-18, S-10.

On May 30, 2012, Stoneham convened Student’s IEP Team to consider Ms. Mason’s evaluation and Dr. Daniel’s letter, and to make any necessary changes to Student’s IEP as a result of their recommendations. The Team accepted Ms. Mason’s recommendation that social studies and science be taught by Student’s special education teacher in a language-based classroom. The IEP Team declined to an increase in Student’s language arts instruction and declined to add services to address Student’s social deficits. However, the Team proposed adding speech therapy consultation of 15 minutes per week and specified the following proposed extended year services from 7/9/12 to 8/9/12: language-based classroom four days per week (270 minutes each day); speech-language services for a half hour, twice each week; and occupational therapy services for a half hour each week. The IEP was amended to cover the period 5/30/12 to 9/21/12. Exhibits P-G-15, S-37, S-38 (page 17).

For the 2012-2013 school year (third grade), Stoneham proposed that Student be placed in a combined 3<sup>rd</sup>/4<sup>th</sup> grade language-based classroom that would be taught by Student’s special education teacher from the previous year (Ms. Sotis). There would be six children in the classroom (in addition to Student)—all five of the special needs children who were in Student’s class the previous year and a child with a language-based disability as well as a hearing impairment. An additional paraprofessional would be assigned to the classroom, in part to provide sign language communication for this child as needed. Testimony of Sotis, Orloff.

Pursuant to the above-discussed amended IEP (for the period 5/30/12 to 9/21/12), Student would continue with the same levels of special education mathematics instruction, reading

instruction<sup>4</sup> and written language instruction that he received during second grade, the same levels of speech-language services and occupational therapy, and the same amount of consultation services except for an additional speech therapy consultation of 15 minutes per week. Pursuant to this IEP, Student would attend the language-based classroom for 250 minutes per day, and during this time, he would receive social studies and science instruction through “guided reading”. Exhibits P-G-4, S-38 (page 17), S-54.

Parents rejected Stoneham’s proposed IEP and placement for third grade, instead seeking public funding of a placement at a private school—Learning Prep School in Newton, MA—where Student was accepted for the 2012-2013 school year. Testimony of Mother.

For the summer of 2012, Parents unilaterally placed their son in the Tufts Summer Reading Program in Medford, MA, for which they now seek reimbursement. Testimony of Mother.

## DISCUSSION

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”<sup>5</sup> “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”<sup>6</sup> An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.<sup>7</sup> A student is not entitled to the maximum educational benefit possible.<sup>8</sup> Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”<sup>9</sup>

In the application of the meaningful benefit standard, “levels of progress must be judged with respect to the potential of the particular child”<sup>10</sup> unless the potential is “unknowable”<sup>11</sup> because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”<sup>12</sup>

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<sup>4</sup> In addition to the IEP services, Student’s reading skills would be addressed during poetry/fluency (approximately one hour per week) when he would work on fluency and identification of word patterns. This additional instruction was included in Student’s proposed classroom schedule. Testimony of Sotis; exhibit S-54.

<sup>5</sup> 20 U.S.C. § 1400 (d)(1)(A).

<sup>6</sup> *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) (internal quotations omitted).

<sup>7</sup> See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be “tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP)”; *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1<sup>st</sup> Cir. 2012) (“IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1<sup>st</sup> Cir. 2007) (FAPE includes “specially designed instruction ... [t]o address the unique needs of the child that result from the child’s disability”) (quoting 34 C.F.R. § 300.39(b)(3)).

<sup>8</sup> See *Rowley*, 458 U.S. at 197, n. 21 (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”).

<sup>9</sup> *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 2012 WL 2206887, \*1 (D.Mass. 2012).

<sup>10</sup> *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008). See also *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

<sup>11</sup> See *D.B. v. Esposito*, 675 F.3d at 36.

<sup>12</sup> *Rowley*, 458 U.S. at 202.

The IDEA also reflects a preference for mainstreaming disabled students.<sup>13</sup> This entails ensuring, “[t]o the maximum extent appropriate,” that disabled children are taught with nondisabled children.<sup>14</sup> “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”<sup>15</sup>

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

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations<sup>16</sup> and which may exceed the federal floor<sup>17</sup>) seek “to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential in the least restrictive environment.”<sup>18</sup>

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.<sup>19</sup>

The initial issue presented is whether the programming and specialized services embodied in Stoneham’s most-recently proposed IEP are consistent with these legal standards. Parents have the burden of persuading me that the IEP does not meet these standards and that their proposed educational programs are appropriate.<sup>20</sup>

In determining the appropriateness of the proposed IEP for the 2012-2013 school year, I consider Student’s progress during the previous school year because the IEP services and placement for the 2012-2013 school year are closely modeled on the IEP services and

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<sup>13</sup> 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

<sup>14</sup> 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i).

<sup>15</sup> *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1<sup>st</sup> Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1<sup>st</sup> Cir. 2002) (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990).

<sup>16</sup> See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the “education standards established by statute or established by regulation promulgated by the board of education”).

<sup>17</sup> See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1<sup>st</sup> Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

<sup>18</sup> See 603 CMR 28.01(3) (“purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential in the least restrictive environment in accordance with applicable state and federal laws”). See also MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities”).

<sup>19</sup> MGL c. 71B.

<sup>20</sup> See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

placement that were provided Student during the previous school year. Specifically, Student's disabilities substantially impact three academic areas—reading, writing and math—and essentially the same IEP services and placement provided pursuant to the 2011-2012 school year IEP to address each area are proposed for the 2012-2013 school year. Exhibits P-G-4, S-22, S-38. As a result, the “similarity [of IEPs] provides a reasonable basis for assessing the likelihood of future progress.”<sup>21</sup>

During the 2011-2012 school year, math was addressed for an hour, daily by Student's special education teacher, and it is not disputed that Student made substantial progress. Assessments over the course of the year and teacher reports reflect that Student began working on low level math skills in September of 2011—for example, at the beginning stage of adding and subtracting—and by the end of the year, he was demonstrating the ability to solve higher level math problems—for example, adding three-digit numbers including re-grouping numbers. This was an area of strength for Student, and no recommendations have been made by Stoneham's or Parents' witnesses for additional or different special education services in this area. Testimony of Sotis; exhibit S-50 (page 15).

Student's special education reading instruction utilized the Wilson program, which is a rule-based, structured reading program designed to address phonemic awareness, encoding, decoding, vocabulary and fluency. During the 2011-2012 school year, Student was instructed for an hour, daily in this program, beginning the school year at the program's step 1.3 and ending the year at step 2.4. In her testimony, Ms. Timmel credibly explained the skills that Student exhibited at step 1.3, and then at step 2.4, and why his reading progress, as measured by advancement from step 1.3 to 2.4, was substantial. There is no evidentiary support for additional Wilson instruction or for utilization of a different reading program. Testimony of Sotis, Timmel; exhibit S-51 (pages 50, 51).

Stoneham further assessed Student's reading progress using the Fontas & Pinnell Benchmark Assessment System. In September 2011, Student was assessed as reading at the mid-kindergarten instruction level and by May 2012 was reading at the late 1<sup>st</sup> grade instructional level. As compared to the “controlled” texts used in the Wilson reading program, the Fontas & Pinnell System utilized stories where the texts were “uncontrolled”—that is, not limited to what Student was studying through the Wilson program. Ms. Timmel credibly testified that this gain demonstrated Student's ability to generalize what he was learning through the Wilson reading program and reflected substantial progress, particularly with respect to reading comprehension. Testimony of Timmel; exhibit S-39.

Student also made substantial progress regarding memorization of site words during the 2011-2012 school year. Memorization of site words is essential for reading progress because these words cannot be sounded out. In September 2011, he knew 63% of the Dolce pre-primer list and 12% of the Dolce primer list; by January 2012, he knew 98% of the pre-primer list and then began work on the primer list; and by May 2012, he knew 85% of the primer list. Testimony of Sotis; exhibit S-51 (page 44).

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<sup>21</sup> *D.B. v. Esposito*, 675 F.3d at 36-37.

An additional and important literacy skill area for Student is phonological awareness—that is, his awareness of the sound structure of words. On the basis of her test scores and review of previous testing, Ms. Mason found that Student’s phonological processing and rapid naming skills were “stagnating and delayed.” Exhibits S-12, P-G-14 (page 13). She noted that Student’s Wilson reading program is appropriate but does not address his need for “daily, systematic instruction in . . . phonological awareness.” *Id.* “[Student’s] phonological processing skills [are] central for the development of early literacy.” *Id.* (page 12). Stoneham did not dispute either the importance of this area of development or Student’s limited proficiency. On the basis of Ms. Mason’s credible testimony and evaluation, I find that Student’s phonological processing skills must be further addressed in order to ensure the continuing development of his educational potential.<sup>22</sup>

Student’s writing was addressed principally through Writers’ Workshop which focused on the writing process—for example, brainstorming, sentence structure, grammar and paragraph development. During the 2011-2012 school year, this special education instruction was provided three times per week for a total of one hour and 45 minutes. Student made progress in some of the beginning areas of writing—for example, brainstorming and verbalizing his ideas in complete sentences—but by the end of the school year, Stoneham progress reports indicated that even writing one to three sentences on a particular topic continued to be a “daunting task” for Student. Similarly, the 2012 Tufts summer program noted in its end-of-program report that Student “struggles significantly with written expression” and was “unable to start sentences with phrases other than ‘I like’.” It was not disputed that this remains an area of relative weakness and that little progress was made during the 2011-2012 school year. Testimony of Sotis; exhibits S-14 (page 9), S-50 (page 17).

As explained above, Student’s progress must be considered within the context of his educational potential—that is, I must determine whether his progress would be considered by educational professionals to be meaningful for someone with his particular educational profile. It is not disputed that Student has substantial and multiple language deficits while at the same time has non-verbal cognitive abilities in the average range. There is no doubt that Student has the potential to make appreciable educational gains if instruction is provided that is accessible to him but, at the same time, his language deficits undoubtedly slow and make more challenging the learning process as compared to his typical peers. Although I am able to consider his progress within the context of his educational profile, Student’s

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<sup>22</sup> A review of other evaluations supports Ms. Mason’s opinions. Student’s composite scores on phonological awareness testing on the CTOPP were at the 27<sup>th</sup> percentile in testing in October 2010 and dipped to the 5<sup>th</sup> percentile in testing in January 2011. Further CTOPP testing in August and September 2011 at the Speech and Language Center in North Andover, MA, revealed a “significant reduction in [Student’s] phonological awareness skills”, with the evaluator noting that Student “will need intensive work on these skills in order to build a foundation for reading.” Ms. Mason’s phonological awareness testing on the CTOPP placed Student at the 12<sup>th</sup> percentile in March 2012. The Tufts summer program’s phonological awareness testing on the CTOPP placed Student at the 9<sup>th</sup> percentile in June 2012. Exhibits S-2, S-6 (page 11), S-7 (page 9), S-12 (page 20), S-14 (page 3).

learning deficits make it difficult to determine, with any certainty, his long-term educational potential. Testimony of Mason, Timmel, Mozeika; exhibits P-G-14, P-G-18, S-6, S-12.

I find that within the context of Student's educational profile, he made meaningful progress during the 2011-2012 school year (and would likely continue to make meaningful progress with Stoneham's IEP for the 2012-2013 school year) regarding reading and math, but not with respect to phonological awareness and written language skills.

Ms. Sotis and Ms. Timmel testified credibly that Student's weakness in phonological awareness may be addressed appropriately during the 2012-2013 school year by adding a daily, 15-minute session on sound segmentation to expressly teach phonological processing skills. This additional service would supplement the on-going work on phonological awareness through the Wilson reading program. Testimony of Timmel, Sotis.

To better address Student's continuing difficulties with written instruction during the 2012-2013 school year, Ms. Sotis and Ms. Timmel testified credibly that written language instruction should be increased to a half hour each day, as compared to three times per week during the previous school year.

Ms. Mason testified prior to Ms. Sotis and Ms. Timmel, and she did not specifically address their recommendations, but Ms. Mason appeared to recommend a higher level of services to address Student's phonological awareness and written language deficits. She testified generally that Student should receive instruction in fluency and phonological awareness for one hour each day in addition to the one hour per day of Wilson reading instruction, and she recommended that Student receive written language instruction for 45 minutes each day. Testimony of Mason.

I do not doubt that Student would benefit from the amounts of instruction recommended by Ms. Mason. However, I am not persuaded that her recommendations must be implemented in order for Student to receive FAPE. As the First Circuit has explained, "FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice".<sup>23</sup> For reasons explained below, I am persuaded that the special education and related services recommended by Ms. Sotis and Ms. Timmel persuasive are sufficient to afford Student the opportunity to make meaningful progress commensurate with his learning potential and to ensure the development of his educational potential.

Ms. Mason was a credible expert witness who testified on the basis of extensive experience (more than 20 years) evaluating children who have educational profiles similar to Student's. She had the benefit of formally testing Student, reviewing previous evaluations and reports, and observing Student at school. Testimony of Mason; exhibit P-G-30 (resume). However as described below, in important respects, Ms. Sotis understands Student's educational needs

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<sup>23</sup> *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1<sup>st</sup> Cir. 1991).

better than Ms. Mason, and Ms. Timmel provided credible, expert support for Ms. Sotis's recommendations.

Ms. Sotis is a highly-skilled and experienced teacher who has taught, observed and tested Student over the course of a full school year and would continue to teach Student during the 2012-2013 school year. Testimony of Sotis; exhibit S-53 (resume). It is undisputed that she has been providing appropriate language-based instruction to Student. She testified in a candid, objective and authoritative manner regarding Student's past progress and need for additional services to make meaningful progress. Importantly, she was willing to support adding services (sound segmentation instruction, additional written language instruction and additional consultation) to improve Student's IEP where it was weak. Alone, her testimony may possibly not have been more persuasive than Ms. Mason's recommendations, but Ms. Sotis's testimony was strongly supported by Ms. Timmel in all important respects.

Although Ms. Timmel has neither evaluated nor observed Student, her testimony warrants substantial weight for several reasons. Ms. Timmel has considerable experience evaluating children with Student's profile through her private practice and for approximately 25 years with Massachusetts General Hospital. She observed Student's classroom in the fall of 2011 at the request of another family, reviewed all relevant records and reports, spoke with Ms. Sotis, and was present for Ms. Mason's testimony as well as the testimony of Stoneham witnesses. It is noteworthy that nearly all of Ms. Timmel's work is done on behalf of students and their families—indeed, each of the previous 15 times that Ms. Timmel has testified at the BSEA, she has done so on behalf of the student and parents. And, when asked by Stoneham to review Student's records and render an opinion regarding what would be needed to appropriately educate Student, she advised Stoneham that she would do so only if she could provide an independent, professional opinion regarding Student's educational needs and how they should be met. Testimony of Timmel; exhibits S-15, S-53 (resume).

I also note that with the additional services recommended by Ms. Sotis and Ms. Timmel, the amount of language instruction provided by special education staff for the 2012-2013 school year totals nearly 12 hours per week—that is, one hour daily Wilson instruction, half hour daily written language instruction, 15 minutes daily sound segmentation instruction, one and one-half hours per week of speech-language instruction, one hour per week of poetry/fluency and 40 minutes per week of guided reading. This appears to meet Ms. Mason's recommended "***2-3 hours/day*** of intensive, language arts instruction". See exhibits P-G-14, S-12 (page 14) (bold and italics in original).

For these reasons, I find the above-described additional amounts of phonological awareness and written language instruction (in conjunction with the other special education and related services) to be sufficient for Student to receive FAPE.

Parents also took the position that the proposed IEP should include explicit instruction to address Student's social deficits. It is not disputed that Student has social deficits that need to be addressed through his IEP, and the testimony and report of Parents' other expert (Dr.

Daniel) supports the need for a social pragmatics group to address Student's "social vulnerabilities". Testimony of Daniel; exhibits S-6, P-G-18 (page 10).

However, Dr. Daniel last evaluated Student in January 2011 and has never observed Student at school or otherwise interacting with his peers. Testimony of Daniel; exhibits S-6, S-10, P-G-18. I found more useful the testimony of Student's general education teacher during the 2011-2012 school year (Ms. Gailis), Student's school psychologist during that year (Ms. Mozeika) and Ms. Sotis, who have more recently and extensively observed Student within the classroom as well as during recess, lunch and other informal settings where he interacts with his peers. These Stoneham witnesses credibly testified that Student has no noticeable social difficulties interacting with his peers, and that his social skills are sufficiently developed so that no direct instruction in this area is needed. Rather, they were persuasive that he requires only certain accommodations that are already included in his IEP—such as social coaching and clarification of abstract language—to support his utilizing those skills with others, together with his current speech-language services that include social language instruction. Testimony of Gailis, Mozeika, Sotis; exhibit S-38 (page 6).

For these reasons, I am not persuaded that Student's IEP should be amended to include explicit instruction to address his social deficits.

Parents took the position that regardless of what additional services may or may not be added to Stoneham's proposed IEP, Student's special education needs cannot be appropriately met within Stoneham Public Schools, and that he therefore requires placement at Learning Prep School in order to receive an appropriate education. I find no credible support for this position.

Ms. Mason, who was Parents' only expert who addressed this issue, testified that she was generally satisfied with *how* Student was being taught, but not with *what* Student was being taught—that is, she found Ms. Sotis to be providing appropriate, language-based instruction, and focused her recommendations on increasing the special education services in Student's IEP, as discussed above. When asked by the Hearing Officer whether Stoneham's proposed IEP could be made appropriate by the addition of her proposed special education services, she testified that the IEP would then be appropriate, provided that Student's educational program was sufficiently "cohesive"—that is, appropriate language-based instruction must be consistently taught and reinforced across the curriculum. Ms. Mason did not testify that Student's educational program was not cohesive last school year or that it would not likely be cohesive for the 2012-2013 school year, but only that it must be in order to be appropriate. Stoneham did not dispute the need for cohesive language-based instruction for Student. Testimony of Mason, Sotis, Timmel.

Importantly, it is Ms. Sotis who would be teaching Student all of his core academic courses, as well as providing the Wilson instruction, thereby insuring consistency of instruction in these areas of Student's curriculum. The only potential area of concern is ensuring consistency between the speech-language pathologist and classroom teacher (Ms. Sotis). For this purpose, consultation from the speech-language pathologist to the special education

teacher (currently, 15 minutes per week) has been included in the proposed IEP so that the teacher is appropriately reinforcing skills taught by the speech-language pathologist in order to ensure cohesiveness. Ms. Mason recommended *daily* speech-language consultation to the classroom teacher for this purpose.

Stoneham's speech-language therapist (Ms. Perkins), who will continue to serve Student during the 2012-2013 school year, and Ms. Sotis worked closely together during the 2011-2012 school year. In their testimony, they explained how the consultation occurred in order to ensure consistency. Ms. Sotis testified that additional consultation from the speech-language therapist would be useful, but suggested only doubling the currently-proposed 15 minutes per week of consultation. Testimony of Sotis, Perkins. On the basis of their testimony, I am satisfied that a total of a half hour per week of consultation is sufficient to ensure a coordinated and consistent approach by these staff for purposes of providing a cohesive, language-based program for Student during the 2012-2013 school year. Testimony of Sotis, Perkins.<sup>24</sup>

Parents raised additional concerns. Mother is extremely dedicated to her son in general and to his education in particular, and she and has immersed herself in the nuances of his special education services. At the evidentiary hearing, she presented both testimony and argument in support of her position that Stoneham has failed and will likely continue to fail to educate her son appropriately—for example, Stoneham lacks a sense of urgency even though her son is one to two years behind grade level, Stoneham's three-year evaluation was not done properly, her son has not been given an opportunity to access the curriculum and often cannot participate with typical peers even though he has average non-verbal intelligence, progress monitoring has been improper, and Stoneham does not have a complete or accurate understanding of her son's educational profile. Testimony of Mother; exhibits P-G-2, P-G-8.

I have no doubt that Mother is correct that Stoneham's efforts have not been perfect and may not be sufficient to maximize Student's educational potential. However, there was no credible support for the position that these alleged shortcomings compromised his opportunity to receive an education that is "appropriate", as that term is defined in state and federal special education law. "Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential."<sup>25</sup>

Finally, I note that Stoneham's proposed program is less restrictive than a private school because at Stoneham, Student will have significant, daily opportunities to interact with typical peers—for example, during lunch, recess, and homeroom. As explained above, Stoneham has an obligation to propose the least restrictive program that can appropriately meet Student's needs.

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<sup>24</sup> Ms. Mason also testified regarding the benefits of co-teaching by the speech-language pathologist, but I was persuaded by Ms. Sotis, Ms. Perkins and Ms. Timmel that given the high level of coordination that already occurs, co-teaching would offer little benefit and would likely take away from time needed by the speech-language pathologist to teach skills to Student outside of the classroom.

<sup>25</sup> *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993).

For these reasons, I conclude that with (1) daily fifteen minute sound segmentation instruction, (2) an additional two periods per week of written language instruction (resulting in daily half hour written language instruction), and (3) an additional 15 minutes per week of consultation from the speech-language pathologist (resulting in two 15-minute consultations per week),<sup>26</sup> Stoneham's proposed IEP is tailored to Student's unique special education needs so as to allow him to make meaningful progress commensurate with his educational potential within the least restrictive environment and to develop his educational potential.

I now turn to Parents' claim for reimbursement for extended year services during the summer of 2012. Massachusetts special education regulations provide that extended school year programs "may be identified if the student has demonstrated or is likely to demonstrate substantial regression in his or her learning skills and/or substantial difficulty in relearning such skills if an extended program is not provided."<sup>27</sup>

A BSEA Hearing Officer may require the school district to reimburse the parents for the cost of their unilateral, private enrollment only if the Hearing Officer finds *both* (1) that the school district had not made FAPE available to the student in a timely manner prior to that enrollment and (2) that the private school placement was appropriate. In such circumstances, the school system may be found responsible for the out-of-pocket costs incident to that private placement, including tuition and transportation.<sup>28</sup>

As noted above, Parents have the burden of persuasion on this issue. However, Parents did not present any evidence regarding the inappropriateness of Stoneham's proposed extended year services or the appropriateness of the Tufts Summer Reading Program. Because Parents did not meet their burden of persuasion, they are not entitled to reimbursement.

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<sup>26</sup> Stoneham has the capacity to incorporate these three additional services into Student's proposed educational program. Testimony of Sotis, Orloff; exhibit S-54.

<sup>27</sup> 603 CMR 28.05(4)(d)(1). The corresponding federal regulation, 34 CFR 300.106, requires school districts to provide ESY services "as necessary to provide FAPE" and do not reference regression or difficulty re-learning skills. However, the comments accompanying the regulations further explain: "The concepts of recoupment and likelihood of regression or retention have formed the basis for many standards that States use in making ESY eligibility determinations and are derived from well-established judicial precedents.... However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary ESY services." 71 FR 156, pages 46582-46583 (August 14, 2006) (citations and internal quotations omitted).

<sup>28</sup> See 20 USC 1412 (a)(10)(C)(ii); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11-13 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370, 373-74 (1985); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1<sup>st</sup> Cir. 2006).

## **ORDER**

Stoneham's most recently proposed IEP is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Stoneham shall add two periods per week of written language instruction (resulting in daily half hour written language instruction), shall add a 15 minute daily sound segmentation instruction, and shall add fifteen minutes per week of consultation from the speech-language pathologist (resulting in two 15-minute consultations per week).

Because, with these additions, the IEP is appropriate, Parents are not entitled to prospective placement at Learning Prep School.

Parents did not meet their burden of persuasion to establish that Stoneham's most recently proposed IEP was not appropriate with respect to extended year services during the summer of 2012, and Parents did not meet their burden of persuasion to establish that their unilateral placement at the Tufts Summer Reading Program was appropriate. Therefore, Parents are not entitled to reimbursement for the Tufts Summer Reading Program.

By the Hearing Officer,

William Crane

Dated: September 20, 2012

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

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

**Effect of the Decision**

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

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

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

**Compliance**

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

## **Rights of Appeal**

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

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

## **Confidentiality**

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

## **Record of the Hearing**

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