

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

Student v. Littleton Public Schools

BSEA #1504613

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 April 30, 2015, which was scheduled for June 4, 2015. Littleton Public Schools (hereinafter, Littleton) requested a postponement of the initial hearing date on May 11, 2015, which request was allowed. There was a pre-hearing conference on June 4, 2015. The Parties reached a partial resolution and signed an agreement requesting, among other things, that the case be placed off calendar for three months. On September 4, 2015, Parents requested that the matter be placed back on calendar and that the hearing be re-scheduled. On October 9, 2015, Parents submitted an Amended Hearing Request. On October 28, 2015, the BSEA scheduled the hearing for February 24, 25, and 26, 2016. On November 10, 2015, Littleton's counsel sought a postponement of the hearing dates due to the unavailability of a key hearing participant on the scheduled dates. The hearing officer allowed Littleton's request and the hearing was re-scheduled to March 22, 23, and 24, 2016. On March 17, 2016, the hearing was administratively reassigned from Hearing Officer Rosa Figueroa to Hearing Officer Catherine Putney-Yaceshyn. The hearing was held on March 22, 23, and 24, 2016. 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 April 25, 2016 for the submission of closing arguments. Parents submitted their closing argument on April 25, 2016. Littleton submitted its closing argument on April 26, 2016 and the record closed¹ on that date.

Those present for all or part of the hearing were:

Mother

Father

Student

Jeffrey Drayer

David Satin

Maureen McMahon

Christopher Christy

Rita Detweiler

Parents' Neuropsychologist

Observing attorney with Parents

School Psychologist, Littleton Public Schools

Guidance Counselor, Littleton Public Schools

Director of Pupil Personnel Services, Littleton Public Schools

¹ Littleton encountered technical problems with the BSEA's fax machine. Parents did not object and were not prejudiced by the BSEA receiving the closing argument on April 26.

Zachary Hirtle	Special Education Teacher, Littleton Public Schools
Jennifer Feudo	Teaching Assistant, Littleton Public Schools
Danya Sclar	School Psychologist, Littleton Public Schools
Michael Gillen	Teacher, Littleton Public Schools
Susan Harvey	Teacher, Littleton Public Schools
James Baron	Attorney for the Parents
Andrea Bell	Attorney, Littleton Public Schools
Brenda Ginisi	Court Reporter
Catherine Putney-Yaceshyn	Hearing Officer

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

ISSUES

1. Whether Littleton complied with Student's 504 plan.
2. Whether Littleton erred in finding Student not eligible for an IEP on or about October 2, 2014.
3. Whether the 504 plan provided Student with a free appropriate public education as defined by section 504.²
4. If not, whether Littleton should be required to provide Student with compensatory services for the 2014-2015 school year.
5. If Student is owed compensatory services, what services should be provided to him by Littleton.
6. Should Littleton be required to amend Student's current IEP to require that his executive functioning services be provided by "a special education teacher or outside expert trained in working with high school students with attention and executive functioning weaknesses."

SUMMARY OF THE EVIDENCE

1. The student (hereinafter, "Student") is an eighteen year old³ eleventh grade student who resides in Littleton, within the Littleton Public Schools. He has been diagnosed with

² At the outset of the hearing Parents framed this issue as follows: "Whether Student demonstrated meaningful progress during the 2014-2015 in the areas addressed by his 504 plan." In reviewing this standard, the hearing officer determined that the issue as framed does not accurately reflect a district's obligation to a student with respect to a 504 plan. There is no requirement that a student make meaningful progress under a 504 plan. Therefore, the issue was re-framed.

³ Student was seventeen years old at the time of the hearing.

Attention Deficit Hyperactivity Disorder (ADHD). He also struggles with issues surrounding executive functioning and slow processing speed. (S-1)

2. Student attended St. John's High School in Shrewsbury, Massachusetts during his ninth grade (2013-2014). He received the following final grades in his academic subjects: Algebra II (Honors): C; Biology (Honors) C+; English I (Honors): C+; Spanish I: C; World History I (Honors) C+. (P-103)⁴ Student struggled socially at St. John's and demonstrated anxiety, decreased motivation, and low self-esteem. (P-107, P-108)
3. Student's mother (hereinafter, "Mother") began contacting Littleton in spring 2014 regarding Student's return to Littleton the following school year. She requested an IEP for Student and sought to schedule a Team meeting. Additionally, Mother requested specific services/accommodations⁵. She provided Littleton with a copy of a private neuropsychological evaluation that had been completed by Rafael Castro, Ph.D., in November and December 2013. (P-105, P-106, P-108) Mother signed an Evaluation Consent Form on May 23, 2014 assenting to Littleton's conducting an educational achievement assessment, educational assessment, psychological assessment, and an observation. (P-104, S-2)
4. A 504 Plan was written for Student following a meeting in May 2014⁶. Meeting participants included Rita Detweiler, Pupil Personnel Director, John Harrington, Building Principal, Christopher Christy, Guidance Counselor, Danya Sclar, School Psychologist, Zachary Hirtle, special education teacher, and Parents. The 504 plan notes that Student is having difficulty with organizational skills, executive functioning and slow processing speed. It includes a list of ten accommodations, including teachers providing Student with notes, extended testing time, preferential seating, allowing Student to type his work, teacher breaking down long-term projects, allowing student to make verbal versus written explanations, and modified homework grading. The plan was signed by Littleton on September 17, 2014. (S-1, P-99)
5. Maureen McMahon, CAGS, Littleton School Psychologist, evaluated Student on September 9, 10, 11, 12, and 15, 2014⁷. (P-102, S-3) Ms. McMahon noted that Student had previously been diagnosed with Attention Deficit Hyperactivity Disorder and put on a 504 plan. She concurred with Dr. Castro's prior finding of weakness in the area of processing speed. Overall, she found, Student demonstrated strong word decoding and passage comprehension skills and superior performance in his ability to compute

⁴ These grades are in contrast to his grades at Littleton Middle School during the 2012-2013 school year. Student's final grades in academic areas were as follows: English Language Arts: 87; 8th Grade Algebra: 87; Science: 87; World History: 76; Spanish 8: 90. (P-109)

⁵ Mother wrote that Student would benefit from daily meetings with someone he is comfortable with who is familiar with the homework assignments and project due dates. She noted that Student needs help keeping track of assignments and needs to learn how to work around his disability. She noted that his self-esteem has plunged because he "can't find a way out of this cycle." (P-104, S-2)

⁶ The specific date of this meeting is not evident from the record.

⁷ Ms. McMahon administered the Cognitive Assessment System, Conner's, Third Edition (short form), Parent and Student ratings, Parental interview; Woodcock Johnson, Test of Achievement, Form A, Third Edition, and the Test of Oral Written Language, Fourth Edition. (P-102, S-3)

mathematical operations and solve math word problems. His ability to produce writing samples also fell within the superior range for his age. He performed weakest on timed tasks. His then-current 504 plan allowed him extra time on tests and quizzes. Ms. McMahon made a number of recommendations for accommodations for Student. (See P-102, S-3)

6. On or around September 22, 2014, Mr. Christy sent Mother an e-mail indicating that he had added an accommodation to Student's 504 plan. He also provided her with a copy of the updated plan, with an additional accommodation providing that Student would record his homework assignments and his teachers would check in with him daily to ensure he had done so. (P-98)
7. The Team⁸ convened on October 2, 2014 to determine Student's eligibility for special education services. Littleton's N2 form indicated that the Team considered Ms. McMahon's evaluation, two observations, teacher reports, Student's eighth and ninth grade transcripts and MCAS scores. The Team also referenced a private evaluation completed by Dr. Castro. Littleton noted that Student was accessing the curriculum and progressing, although not maximizing his academic potential, and therefore did not find him eligible for special education services. The only option the Team rejected was Parents' request to hire an "ADHD Life Coach⁹." (S-7, P-92)
8. Student's 504 Team convened in October 2014. The 504 plan arising from that meeting was substantially similar to the prior version of the 504 plan. It removed the accommodation requiring Student to receive seating at the front of the classroom¹⁰. (P-88)
9. Mother expressed frustration that all of Student's teachers were not consistently signing his agenda book. On October 10, 2014, she e-mailed Mr. Christy, Dr. Harrington, and Dr. Detweiler and reported that Student's agenda book was not consistently being signed by all his teachers on a daily basis¹¹. (P-91; P-118) Mother sent what she described as a strongly-worded e-mail after receiving e-mails from his history teacher about how poorly Student was doing, after the history teacher had not been regularly signing Student's

⁸ Team members included Maureen McMahon (school psychologist), John Harrington (Principal/Team Chair), Christopher Christy, (Guidance Counselor), Margaret Gillen (Spanish teacher), Zach Hirtle (special education teacher), and Parents. (S-7)

⁹ Mother testified that she did not use the term "ADHD Life Coach." She had requested that somebody with expertise and training in executive functioning be used to teach Student. She was angry and deflated by Littleton's choice of words and found it to be disparaging and condescending. (Mother) Mr. Hirtle used the phrase and put it in quotation marks to indicate that those were not the exact words used by Mother. He was trying to convey the sense of what was discussed when he could not recall the exact wording. (Hirtle)

¹⁰ Student told Mr. Christy that sitting at the front of the classroom terrified him. (Christy)

¹¹ "It seems as though someone needs to have a nice chat with all of [Student]'s teachers and have them take a good look at what's going on. I don't want him to spiral down again. All it will take for that to happen is for his teachers to fail to make sure he has his assignments written in his planner, which is proposed in the new version of the 504."..."It is frustrating that the teachers are not better informed of [Student]'s problem and keep insisting that if he's so smart, he should be able to keep track of homework assignments on his own. That kind of ignorant thinking demonstrates that some of those educators need to attend some kind of instructional program on Executive Function Disorder and what it does to kids. (P-91)

agenda. After her e-mail, Mother stated that teacher compliance with the agenda spiked to about 90% and then faded out again. (P-64)

10. The Parties participated in a mediation which culminated in a mediated agreement on November 13, 2014. The agreement specified that Student would have a pull-out guidance session on Mondays (during health class) in order to review the week's assignments and to make a study plan for the week. Teachers were to keep a file in their classrooms with all of the work Student needed to complete. Student was to stay after school on specified days with specified teachers. The teachers would send a follow up e-mail to parents indicating whether Student had attended, what he had worked on, and any assignments or study plans that were discussed. The Parties agreed to have another mediation in January 2015 to discuss Student's response to the plan and develop a new plan for the next semester. (P-87)
11. The 504 Team, including Dr. Harrington, Christopher Christy, Maureen McMahon, Michael Gillen, and Mother reconvened on February 2, 2015 and made some revisions to Student's 504 plan. Item #9, which allowed for modified grading pursuant to which homework would be weighted less, was removed. Several additions were made to Student's plan. Accommodation #9 provided that Littleton would be available to work with any private tutor and/or therapist who was working with Student and #10 designated Littleton's school psychologist as the contact person for communications with any outside tutor or therapist. Item #11 provided that Student's core academic teachers and counselors would meet bi-weekly to share information about Student's progress and coordinate classroom strategies and potential adjustments. The twelfth accommodation provided for continued access to Student's teachers after school for additional assistance. Thirteenth, Student was to have access to his school counselor once per week to check in on his academic progress. Lastly, Student was to meet with the school psychologist once every two weeks for help with his organizational and study skills. (P-70, S-8)
12. Jeffrey Drayer, Ph.D., has been a licensed psychologist specializing in pediatric (or developmental) neuropsychology since 2010. His doctorate is in counseling and applied educational psychology. His specific expertise in executive functioning was gleaned from a two semester graduate course in neuroanatomy and cognitive and affective basis of behavior. He did graduate research in establishing executive functioning profiles in preschoolers with autism. He is engaged in private practice in which he works with clients between the ages of three and twenty five. Most of his clients are in grade school. He conducts approximately eighty to one hundred neuropsychological evaluations per year. He has never taught in a high school setting or taken part in a special education Master's degree program.

Dr. Drayer conducted a neuropsychological evaluation of Student on March 21, 2015. He conducted the evaluation over the course of six hours in one day. He also reviewed neuropsychological evaluations done by Dr. Rafael Castro in 2011 and 2013. (P-52) He testified that Student exhibited several strengths across his academic functioning, such as superior math calculation skills and good creative writing and reading comprehension

skills. He noted that he has the potential to take on new information and would be capable of moving through high school and going into college. He observed that based upon his testing and teacher rating scales, Student has some significant difficulties controlling and being able to regulate his attention and with executive functioning, primarily with organization, initiation, and inhibiting impulses. Also, when time is involved, his writing, math, and reading fluency were lower than during untimed testing. From reviewing Student's educational records Dr. Drayer noted Student had a unique learning profile. His fluid reasoning intelligence was quite superior, but he exhibited a processing speed that was quite slow. His evaluations showed clinically elevated symptoms of attention deficit hyperactivity disorder, with executive functioning challenges in organization, self-monitoring, and initiation-inhibiting impulses. (Drayer)

Dr. Drayer did not believe it would be appropriate to move Student from Honors courses to college prep courses, although he admitted that he did not know what an Honors course, as opposed to a college prep course, looked like at Littleton High School. He stated that by dropping the curriculum level, one would just be masking the problem. Student's issue is not that he cannot learn the content in honors level classes. He "needs the instruction manual for how to get through the day-to-day learnings of the curriculum." Student has strong overall academic abilities, but the execution of the work is difficult for him. (Drayer)

Dr. Drayer recommended a two pronged approach with Student. The first prong would be accommodations. He recommended extended time on tests, a distraction-free environment for tests and exams, and note-taking supports. The second prong was direct remediation or provision of services to provide Student with the tools and strategies to be able "to execute better independently moving forward."

Dr. Drayer explained that there is no treatment for executive function dysfunction, but there are services that are appropriate for students with said dysfunction. He stated that within the school there should be somebody working with the student on a daily basis that can be the point person to work with him on direct remediation to improve generalization and good habits. The person would also provide accountability and track data over time. He stated Student would require organizational supports aimed at assisting him in organizing his thoughts, scaffolding writing strategies, focusing on the main points in his studying, monitoring homework completion to increase accountability and breaking down large assignments into smaller, more manageable tasks.

Dr. Drayer stated that the person working with Student had to be a special education teacher who is trained in working with high school students with attention and executive functioning weaknesses. He explained, "his or her typical background is in education. ...in special education it's even more targeted to working in educating children or students with disabilities." He stated that a teacher would require training and understanding in disabilities to understand how to modify and tie in curriculum to help children with disabilities. He suggested the person working with Student would first determine what was difficult for Student and then look to practical strategies that can be used. The person would help Student determine what is required in writing and homework assignments. He

envisioned the person then using different worksheets in a binder to track what interventions were used and what kind of progress Student is reporting. The person would determine what interventions were useful and which were problematic and modify them to increase Student's independence moving forward. He anticipated the person would be the point person who would corral the syllabi, to look at the assignments and tests and help Student break down the work and meet deadlines. (Drayer)

In sum, Dr. Drayer believes Student needs daily executive-functioning instruction by a special education teacher who can provide him with tools and supports on a consistent basis and would have the training and expertise to work with a high school student who is very bright, but lacks the ability to execute. On cross examination Dr. Drayer conceded that it would be possible for a school psychologist to provide these services. (Drayer)

Dr. Drayer observed Student in the school setting after writing his report. He was able to speak with some of Student's teachers who mentioned Student's difficulty completing work and handing in work, being forgetful with materials and being disorganized.

At Dr. Detweiler's request, Dr. Drayer provided some consultation services to Littleton, specifically to Ms. McMahan and Mr. Christy. He consulted with Ms. McMahan and Mr. Christy approximately six times by phone, beginning in October 2015. They discussed Student's ongoing difficulties with completing assignments, handing in homework, remaining organized, and accessing and utilizing the strategies that were being taught to him. Ms. McMahan told him that Student's willingness to accept interventions varied from session to session. There were times that Student would not follow through with what he was supposed to do and times he did not seem like he wanted to engage in the process. Dr. Drayer suggested to Ms. McMahan that she had to form an alliance or therapeutic relationship with Student before providing interventions. He suggested to Ms. McMahan and Mr. Christy that they work on relationship building with Student¹². He also recommended that Littleton hire an outside executive functioning expert because Student's difficulties were ongoing and he did not see meaningful progress. (Drayer)

13. Danya Sclar, school psychologist, Littleton, described Student as very bright, but his slow processing speed can make it hard for him to keep up with the workload. Typically, when a student has a processing speed as low as Student's the workload needs to be modified. She recommended that Student's work be prioritized to enable him to be successful, given the speed at which he is able to process information. (Sclar)
14. Susan Harvey is Student's U.S. History teacher. She maintains a class website which contains an agenda for each week for each of her classes. This is the second year that Student has been in her class. She noted that Student is pretty attentive in class and participatory. He does well on tests. Student's debate skills are good. His writing is very good, and his prose is "rather elegant."

¹² Dr. Drayer referred Ms. McMahan and Mr. Christy to research regarding the "stages of change mode." He stated it is hard to provide interventions for someone who is in the precontemplative stage of change if one is assuming they are in the action stage. He suggested that they try to build up their relationship with Student in a way that can bring him to a place where he is going to be more accepting of the strategy. (Drayer)

Ms. Harvey is one of the teachers required to meet bi-weekly to discuss Student. Her meeting attendance was not perfect, but when she missed one she followed up with Mr. Christy or Ms. McMahon and sometimes sent an e-mail report. She was also not perfectly compliant in signing Student's agenda book. However, each Monday she gives each student a paper agenda for the week. The agenda is also on her website and on her bulletin board. There were times that Student did not bring his agenda to class. Ms. Harvey always allows Student to have extensions for assignments and has provided him with assistance in completing his research paper, even meeting with him over February break. She has broken down parts of the research paper for Student to complete, but he had difficulty completing them nonetheless. At times Student told her he had turned in work, but he had not. She believes he was trying to buy time to complete his history work because he was overwhelmed by physics (Harvey)

15. Michael Gillen has been a teacher at Littleton High School for the past six years and was Student's teacher for Honors Chemistry last year. He testified that he was not perfect about signing Student's agenda book, but when he was unable to sign the book, he would e-mail the assignment home and stayed in contact with Parents. He offered Student extra time on tests and quizzes, but Student rarely took advantage of it. Student earned a grade of 78 in his class which indicated to him that he mastered an acceptable portion of the curriculum in a difficult class.
16. Student's 504 Team convened on April 17, 2015 to review the private neuropsychological evaluation conducted by Jeffrey Drayer, Ph.D. Additionally, the Team reviewed Student's previous MCAS results and his then-current grades.¹³ The Team considered the parental report that they had previously provided private tutoring to address Student's executive functioning concerns, but the interventions did not have a significant positive impact. Student's then-current medications of Celexa and Adderall were discussed as was his involvement in outside therapy. The Team recommended an assistive technology evaluation and reviewed and revised Student's 504 plan. Two accommodations were added: teachers would provide duplicate copies of assignments to the guidance office to serve as a spare set of documents for student to access; and Student would be provided with a designated laptop/chrome book for his use in academic classes. (P-47, S-12, S-13)
17. Student's MCAS scores for the tenth grade (spring 2015) were 262 (Advanced) in English Language Arts, 266 (Advanced) in Mathematics, and 262 (Advanced) in Chemistry. (S-17)
18. Student's final grades for the tenth grade (2014-2015) were as follows: English (Honors): 85; U.S. History (Honors): 81; Geometry (College Prep): 89; Chemistry (Honors): 78; and Spanish II (Honors): 82. (S-14)
19. Rita Detweiler has been the Director of Pupil Personnel Services in Littleton since 2013. She believes that focusing on Student's homework completion and grades has complicated

¹³ Chemistry (Honors) 84/B; English (Honors) 82/B-; History (Honors) 73/C-; Geometry 87/B+; and Spanish (Honors) 83/B- (P-47, S-13)

the Team's efforts to provide Student with effective interventions. She pointed to Student's tenth grade MCAS scores, in which he scored at the Advanced level, as a better indicator of his academic progress and ability to access the curriculum than his homework completion rate. She noted that Student received a ninety-five percent on his physics midterm exam, demonstrating mastery of the course content. However, he has received zeroes for not handing in assignments. His course grades are therefore ultimately compromised as they not only reflect a measure of his acquisition of course content, but a measure of his work habits/homework completion, as well. Such grades, in turn, have an effect on his self-esteem. He may start to see himself as a failing student even though he is not. (Detweiler)

20. The Parties participated in a pre-hearing conference at the Bureau of Special Education Appeals on or about June 4, 2015, which resulted in an agreement that an IEP would be drafted for Student. (P-43)
21. Littleton sent Parents a proposed IEP prior to July 14, 2015. On July 14, 2015, Parents' attorney e-mailed Littleton's attorney a six page list of items the Parents and Dr. Drayer proposed revising. (P-38) On August 6, 2015, Littleton's attorney sent Parents' attorney a revised IEP. The IEP included goals in Organization, Note Taking, and Self Advocacy. The service delivery grid includes consultation with the school psychologist and outside psychologist 1 x 30 minutes twice per month, and consultation with the general education and special education teacher¹⁴ 1 x 15 minutes twice per month. The B Grid includes study skills with the school psychologist 2 x 49 minutes per week. The C Grid includes organization with the school psychologist 2 x 49 minutes per week in the supported academic support center, and counseling 1 x 49 with the guidance counselor. (S-18)
22. Parents partially rejected the IEP via letter dated August 21, 2015. They accepted the services. (S-18)
23. An IEP compliance training was held for Student's teachers and service providers on September 15, 2015. All signed a statement indicating they had read the IEP and understood their responsibilities with respect to Student. (S-19)
24. Littleton re-sent the IEP to Parents on October 2, 2015. Parents rejected it in part. They rejected benchmarks for goal number one as being too low and made a suggestion for revising it. They rejected the removal of the last two benchmarks from goal #1. They rejected the failure to include assistive technology, such as a LiveScribe Pen, to assist Student with in-class notetaking. They rejected the failure of the IEP to include a requirement that the provider of executive functioning services be a special education teacher or expert trained in working with high school students with attention and executive functioning weaknesses. (S-20)
25. Maureen McMahon has been a school psychologist in Littleton since 2014. She holds a bachelor's degree in psychology and social rehabilitative services, a Master's degree in

¹⁴ The Additional Information section indicates that the special education teacher is Student's special education liaison. (S-18)

counseling psychology, and a certificate of advanced graduate studies in school psychology. Last year she met with Student pursuant to his 504 plan and sees him pursuant to his IEP this year. She has tried different strategies for getting student to complete his work, however he has continued to have difficulty getting his assignments in. Student was not able to catch up in his physics homework.

26. Ms. McMahon has been using a curriculum she and Danya Sclar developed over the summer using Peg Dawson's¹⁵ materials. Ms. McMahon uses the curriculum she helped to develop when working with Student, but tweaks lessons according to what Student needs and is struggling with. In addition to reading Peg Dawson's materials Ms. McMahon attended a training in Ms. Dawson's methodologies in 2014 and attended a follow-up study group. She continues to work with that study group to date. She meets with Student four days a week and talks to him about what assignments are missing. Student's teachers e-mail her if he is missing assignments. Ms. McMahon also communicates with Jen Feudo, a teaching assistant in the Academic Support Center (ASC).
27. Ms. McMahon noted that things are not going well for Student with respect to his physics class. It is not a matter of Student's ability level. Rather, he is overwhelmed by the sheer number of assignments. His frustration with physics impedes his ability to get other classwork done. It is hard for him to think about his other classes because he is so overwhelmed by physics, and sometimes asks to use his time with Ms. McMahon to complete physics work. Ms. McMahon indicated she would expect a student with Student's slow processing speed to struggle with homework completion, particularly in a class with the high level of demand such as physics.
28. Ms. McMahon noted that Student's work completion has not improved. She is trying to teach him strategies and ways to break things down and hopes that he will use them. She thinks it would be helpful not to require Student to complete as much work. She suggested for example, if he could demonstrate mastery of a concept in physics while completing fewer assignments, it would reduce his stress level. She recalled that the Team had discussed that with parents last year and they wanted him to meet the same expectations as other students because they were concerned about college preparation. (McMahon)
29. Jennifer Feudo, the teaching assistant who works with Student in the academic support center, is a licensed special education teacher. She provides Student with a supportive environment, but does not provide specialized instruction. She sees Student daily and has observed that he has the ability to plan and has some organizational skills. When he comes to the academic support center she asks him what he plans to work on and Student tells her his plan. He plugs in his computer and gets to work. He knows what he needs to do when he arrives and takes out his materials and initiates tasks. (Feudo)
30. Christopher Christy, licensed adjustment counselor, is a guidance counselor at Littleton High School. He meets with Student once per week and assists him with advocacy. He

¹⁵ Peg Dawson is an expert in executive functioning who was referred to by both Dr. Drayer and Littleton personnel throughout the hearing. (McMahon, Drayer, Detweiler)

helps him to connect more with adults and communicate with his teachers. He noted that not all teachers provided a duplicate copy of Student's assignments to guidance: some teachers sent Student copies by e-mail; some had their own web site where assignments were posted; and some used a computer application called Aspen that students could access.

31. Mother described cycles that Student goes through. She explained that at some point in the school year, for one reason or another, Student will forget to do an assignment in one class. He then avoids further work in that class and "it seems as though it spreads to all of his classes and he becomes overwhelmed." His disorganization does not allow him to dig out and he becomes irritable and depressed and "requires a rescue." Mother also explained that Student is unable to take notes in class because it is hard for him to listen and pay attention and then shift to writing down something relevant.

Mother did not believe that Student's 504 plans provided enough for Student, nor did she believe that Student's IEP was appropriately addressing his needs. She believes he needs somebody to teach him how to break a task down himself instead of having somebody break it down for him. She also thinks somebody needs to teach him to take notes instead of being provided with notes. Further she thinks he learns how to be organized instead of having somebody else organize him. (Mother)

She was surprised in late September when she learned via e-mail from Maureen Palange that Student was doing very poorly in his Physics and VHS¹⁶ classes. Although the VHS class (which was a Java class in an independent study format) met daily, Student had only spent thirty five minutes on course work. Student was also missing a number of physics assignments and was doing poorly in pre-calculus. (Mother)

Student continued to struggle with remembering to hand in completed assignments and with attending meetings with teachers. Mother does not think Student is overwhelmed by the workload in his Honors level classes, but admitted that there is "quite a bit of homework in physics¹⁷." Although conceding that the amount of assigned work in Student's Honors level classes is a contributing factor to Student's being overwhelmed, Mother did not believe that his feeling of being overwhelmed could be remediated through a more thoughtful selection of classes at the college preparation and Honors level.

Mother acknowledged Student's very slow processing speed and its impact on his ability to take notes. She also acknowledged that Littleton had suggested that Student's homework count for less of his grade (or not count at all) as a way of trying to address Student's very slow processing speed. Mother asserted, though, that despite Student's

¹⁶ VHS stands for Virtual High School. (Mother)

¹⁷¹⁷ The Littleton High School Program of Studies contains the following language with respect to Honors physics. "Significant student effort is required to develop an understanding based on logical reasoning about the natural world. The purpose of instruction is to provide students with strategies for developing this type of critical thinking. Practice of these strategies (through mastery – 100% completion) – of assignments is essential to success in this course. Prospective students should consider delaying taking physics until their senior year if they have a tendency toward completion of assignments "at the last possible minute." (S-27)

weakness, he should still be expected to do ninety percent of the work “with help around his weaknesses.”

32. Mother acknowledged that their family had hired private executive functioning tutors to work with Student in the past, with minimal progress. She believes, based upon what Student reports, that Ms. McMahon is currently providing Student with some executive functioning support, but not instruction. Student has reported that he often uses his meetings with her to catch up on his homework. Her knowledge of Ms. McMahon’s background is that she is a school psychologist. She did not know whether she had a graduate degree or what her exact credentials were when she started working with Student. She rejected the portion of the IEP that called for Ms. McMahon to provide Student’s services based on “her prior performance and prior reactions to [Student].” (Mother)
33. Student explained that his disability has become harder to deal with in high school as the workload has increased and he is required to keep track of more demanding amounts of work. He has difficulty organizing himself and forgets about assignments. He also forgets to turn in assignments he completes. He has a hard time implementing new strategies. Sometimes it is very uncomfortable for him and sometimes he is a little bit stubborn about implementing them. He also feels that he has sometimes gotten stuck wanting to change and not being able to. The volume of work he has to do in his physics class is overwhelming for him. (Student)
34. Littleton has offered to conduct a home assessment due to a discrepancy between the way Student and his abilities are perceived at school and in the home environment. Also, Littleton has offered to conduct a functional behavior assessment (fba) to assess Student’s behaviors relating to reporting that assignments are done when they are not and not being able to follow through with completing work in a timeline he has established. Dr. Detweiler believes an fba would be helpful because Littleton could use the results to help Student develop a more functional reaction to not getting work done. Parents have not consented to either of the aforementioned evaluations. Littleton has offered staff professional development in the area of executive functioning during the current school year. Peg Dawson will give a presentation to staff about executive functioning. Ms. Detweiler has also spoken to her about potentially providing consultation to Ms. McMahon and Mr. Christy as Dr. Drayer previously did¹⁸. (Detweiler)

FINDINGS AND CONCLUSION:

As of May 2014, Student was deemed qualified to receive an accommodation plan under Section 504 of the Rehabilitation Act of 1974. Regulations promulgated under section 504 require a recipient of federal funding that operates a public elementary or secondary education program to provide a free, appropriate public education to each child covered by section 504 in the recipient’s jurisdiction. 34 C.F.R. § 104.33(a) (2011). The section 504 regulations define appropriate education as “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to

¹⁸ Dr. Drayer ended his consultation with Littleton regarding Student when the litigation began. (Drayer, Detweiler)

procedures that satisfy the requirements” of further regulations governing educational setting, evaluation and placement, and procedural safeguards.

As of June 2015, Student has been determined to be an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)¹⁹ and the state special education statute.²⁰ Under the Individuals with Disabilities Education Act and Massachusetts laws, 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).) As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor her entitlement is in dispute.

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 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. The first issue raised by Parents is whether Littleton complied with Student’s 504 plan during the 2014-2015 school

¹⁹ 20 USC 1400 *et seq.*

²⁰ MGL c. 71B.

year²¹. This issue directly relates to the third issue before me, and thus, the issues will be addressed together. Student's 504 plan was revised several times during the course of the 2014-2015 school year. In answering the question of whether Littleton complied with the plan and whether the plan provided Student with a free appropriate public education, I review the various versions of the plan collectively. With respect to compliance, there is no real dispute as to compliance with most of the accommodations in the plan. However, Mother and some of Student's teachers agreed that there was not perfect compliance by all of the teachers with respect to signing Student's agenda book. (Mother, Harvey, Gillen, P-118) Additionally, the testimony demonstrated that some of Student's core academic teachers missed some of their bi-weekly meetings. (Mother, Harvey) Thirdly, evidence shows that teachers did not always provide Student with a duplicate copy of his assignments at the guidance office. However, teachers testified that when they did not provide such copies, they provided Student with the information via a hard copy of the weekly agenda, an e-mail, or a website. (Harvey, Gillen, Christy) The credible evidence shows that Littleton complied with the other accommodations as written in Student's plan.²²

Although the evidence shows that Littleton did not comply completely with every accommodation in the 504 plan, that does not automatically entitle Student to receive compensatory services. Compensatory services are available under section 504 when a district has not provided a Student with a free appropriate public education. *Hampden-Wilbraham Regional School District*, 108 LRP 29931 (2008) Despite the fact that Student's agenda book was not always signed and all of his teachers did not always attend the required bi-weekly meetings, Student was able to receive a free appropriate public education as discussed above. Therefore, there is no basis for any award of compensatory education to Student.

An appropriate education is defined under section 504 as "The provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." The evidence shows that Student's needs were met as adequately as those of his non-disabled peers. Student successfully participated and accessed the curriculum in Honors levels classes. He scored in the advanced level on the MCAS in all areas assessed. He progressed from the tenth to the eleventh grade. The only item that Parents requested that the 504 plan did not provide was direct instruction from a special education teacher in executive functioning. The preponderance of the evidence shows that Student's needs were met as adequately as those of his non-disabled peers without the provision of direct instruction from a special education teacher.

I now turn to consideration of whether Littleton erred in finding Student not eligible for an IEP in October 2014. As IEPs are not to be considered in hindsight (as noted above), a decision not to offer an IEP must be considered in light of the information available to the Team when the

²¹ Mother was critical of the number of times Littleton revised the 504 plan, but section 504 contemplates periodic review and revision of a plan based upon the effectiveness of its interventions.

²² Mother testified that she was not aware of Student being provided with notes or being allowed to provide verbal explanations (except on one occasion.) However, her testimony in that regard was not credited, as she was not present during Student's classes when such accommodations would be provided. Ms. McMahon and Mr. Christy were present in school each day and spoke frequently with Student's teachers. Their testimony that the accommodations in the plan were provided to Student were credible. Additionally, they each testified credibly about their own meetings with Student in compliance with the 504 plan.

decision was made. In October 2014 Student had just returned from spending a year at St. John's where he had earned C's in Honors level classes. His prior MCAS scores were mostly in the advanced range. The Team reviewed the cognitive and educational testing completed by Littleton and reports from his teachers regarding his progress to date. It concluded that Student was accessing the curriculum and progressing, although not maximizing his educational potential. The Team also considered an outside evaluation completed by Rafael Castro, although Dr. Castro did not attend the meeting²³. Based upon its review of all of the information available to the Team, it was reasonable for the Team to conclude that Student did not require specialized instruction to access the curriculum, and was thus deemed ineligible for an IEP. It was also reasonable, based upon the foregoing, that Student be found to continue to require a 504 accommodation plan.

The final question before me is whether Student's current IEP should be amended to provide for executive functioning services provided by a special education teacher or outside expert. This was perhaps the area of most disagreement between the Parties throughout the hearing. Parents, in reliance on Dr. Drayer's recommendation, are convinced that nobody other than a special education teacher or an expert in providing services to teenagers with executive processing issues can provide appropriate services to Student. Littleton is equally convinced that Student's academic performance is most greatly impacted by his very slow processing speed that can most appropriately be accommodated by reducing his workload.

The most credible evidence before me supports Littleton's position. There is little dispute regarding the results of Student's testing. Both Dr. Drayer and Littleton found that Student has very superior cognitive skills and very slow processing speed, among other weak executive functioning skills. There is some dispute regarding how Student's executive functioning weaknesses impact his classroom performance and what types of tasks he is able to complete independently. (See testimony of Dr. Drayer in contrast to Ms. Feudo.) There is no dispute that Student requires direct instruction in organization and executive functioning skills, and his IEP requires that he receive same. The dispute regarding these services is with respect to what type of personnel can appropriately provide the services.

Parents rely on Dr. Drayer's recommendation that only a special education teacher (perhaps with consultation from an "expert" in working with students with executive functioning difficulties) can provide Student with services to address his executive functioning deficits. I do not credit his recommendation for several reasons. First, he testified that special education teachers are trained to provide appropriate modifications, but was not familiar with the requirements of a special education Master's program. Additionally, he had never worked in a high school and had no particular expertise in executive functioning²⁴. Further, he conceded that a school psychologist could appropriately provide services to address executive functioning. Thus, he did not have a valid basis for explaining why the provider had to be a special education teacher and I therefore do not rely upon Dr. Drayer's testimony with respect to Student requiring the services

²³ It is interesting to note that Dr. Castro's report makes recommendations for supports rather than specifically recommending special education services. (P-108)

²⁴ He testified that he had taken a two-semester graduate course that pertained to executive functioning and had done graduate research in establishing executive functioning profiles in preschoolers with autism, but did not testify to having expertise in working with or making recommendations regarding teenagers with executive functioning difficulties.

of a special education teacher or an expert in providing executive functioning services. That is not to say that Student should not continue to receive the services required by his IEP. However, Parents have not met their burden of showing that Student requires the services to be provided by a special education teacher or “expert” in executive functioning.

Although the issue is not directly before me, I find, as many Littleton witnesses testified, that Student requires modifications to his workload. Although I am mindful that Parents are very concerned that Student be able to meet college expectations, the overwhelming evidence shows that Student, because of his slow processing speed and executive functioning difficulties, is simply unable to meet the demands of many of his classes. He is clearly able to glean the required information from his courses, as evidenced by his grades on mid-year and final exams and his MCAS scores. Since Student is able to access curriculum at a high level he should be permitted to continue to do so without having to complete an amount of work that is simply impossible for him to manage given his entire profile. The provision of special education services to address Student’s executive functioning skills is not a panacea and will not guarantee that his processing speed or his ability to independently complete assignments will improve. In fact, Dr. Drayer testified that processing speed cannot be improved and can only be accommodated. Student continues to require accommodations to address his processing speed.

Finally, Dr. Detweiler testified that Littleton has discussed hiring Peg Dawson to consult with Ms. McMahon and Mr. Christy as Dr. Drayer previously did. Given that Student’s ability to complete work has not improved and that there is a provision in his IEP for a consultation with a person with executive functioning expertise, it would be appropriate for Littleton to hire Ms. Dawson or another person with expertise in executive functioning to consult with Student’s service providers.

ORDER

Based upon the foregoing, I find that although Littleton’s compliance with Student’s 504 plan was not perfect, Student received a free appropriate public education and is therefore not entitled to compensatory education.

I find that Littleton’s finding that Student was not eligible for special education in October 2014 was appropriate.

I find no basis for ordering that Student’s IEP be amended to provide for executive functioning services to be provided by a special education teacher or outside expert trained in working with high school students with attention and executive functioning weaknesses.

The Team shall convene to consider what if any modifications should be made to Student’s IEP to address his workload given his processing speed and executive functioning weaknesses.

Additionally, the Team shall consider whether to add the consultation services of Peg Dawson or another provider of consultation regarding executive functioning deficits in high school students.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn
Dated: June 2, 2015