

COMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS

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In Re: Nashoba Regional School District

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BSEA #1804287

Zul<sup>1</sup>

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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 those statutes. A Hearing was held on March 20, April 25 and April 26, 2018 at the offices of Catuogno Court Reporting Services in Worcester, MA. The School was represented by Attorney Alisia St. Florian. Ms. Z., an attorney, proceeded *pro se*. The official record of the Hearing consists of exhibits submitted by the Nashoba Regional School District (hereinafter the “School”) marked S1 through S-22, exhibits submitted by the Parents marked P-1 through P-7 and P-11 through P-16; (Ms. Z. “Affidavit” portion excluded) and approximately 12 hours of recorded oral testimony and argument. Written closing arguments were received on May 31, 2018 and the record closed on that date.

ISSUES<sup>2</sup>

As set out in PreHearing Orders dated March 1, 5 and 22, 2018 the issue for resolution is:

Whether the 2017-2018 Individualized Education Program proposed by Nashoba is reasonably calculated to provide a free, appropriate public education to the Student in the least restrictive setting?

SCHOOL POSITION

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<sup>1</sup> “Zul” is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. Derivative pseudonyms are used when necessary for family members.

<sup>2</sup> During the Hearing the Parent raised and argued issues that could be considered counterclaims. Those arguments are addressed *infra*.

The School timely developed an IEP for a newly-enrolled Student that takes into account the findings of all evaluations the Team had access to, the observations and assessments of the Student's new teachers, the services outlined in the Student's "stay-put" IEP and the Parents' concerns. The School appropriately asked for the Parents' consent to comprehensive evaluations, consistent with a 3 year re-evaluation schedule, to update the information available to the Team. While the Parents initially declined consent to evaluate, and rejected the proposed IEPs, the School fully implemented the Student's "stay-put" IEP. The School asserts that the "stay- put" IEP, which calls for the Student's full-time placement in a substantially separate educational setting, is overly restrictive and is causing educational and social harm to the Student.

## PARENTS' POSITION

The School has never fully implemented the Student's "stay-put" IEP. The School's proposed IEP does not contain the type and level of service delivery recommended by the Student's evaluators and which he needs in order to make progress. The School's service providers are not appropriately qualified or credentialed to deliver the necessary special education or Orton-Gillingham programming to Zul. The School's proposed IEP is procedurally defective as the changes it proposes are not based on current valid evaluations. The Parents are justified in rejecting the School's offer to conduct evaluations because the School failed to provide sufficient information about the proposed testing instruments for the Parents to make an informed decision.

## SUMMARY OF THE EVIDENCE

1. Zul is a ten year old, 4<sup>th</sup> grade student currently enrolled in the Nashoba Regional School District. In October 2014, when he was 7 years old, Zul underwent a comprehensive neuropsychological evaluation at Massachusetts General Hospital which resulted in a diagnosis of specific learning disability in reading (dyslexia) and a specific learning disability in math. (S-19; S-20) Zul attended kindergarten in parochial school (2012-2014), 1<sup>st</sup> grade in the Boston Public Schools (2014-2015) and 2<sup>nd</sup> and 3<sup>rd</sup> grade (2015-2017) at the Carroll School, a private special education school. (S-19)
2. During the 2016-2017 school year Boston Public Schools reconvened Zul's Team to develop an IEP for a Boston Public School placement for the 2017-2018 school year. The Parents requested an IEP providing services identical to those Zul was then receiving at the Carroll School. Boston suggested advancing Zul's three year re-evaluation to spring 2017. There is no evidence in the record that a 3 year re-evaluation was conducted at that time by Boston. (S-17)
3. The Boston Team met on October 17, 2016 and March 13 and June 16, 2017. The Team considered the 2015-2017 classroom observations and testing results reported by the Carroll School, the results of the neuropsychological evaluation conducted by Massachusetts General Hospital ("MGH") in January 2016 and the January 2017 educational evaluation authored by Phoebe Adams, MSW. (S-17; P-19; P-20) The Team reported that overall Zul had average to high average cognitive abilities with relative weaknesses in working memory and processing

speed and intact learning and memory. According to the MGH evaluation obtained by the Parents in January 2016, Zul demonstrated phonological skills in the average range with some dysphonetic errors and visually-related word substitutions when reading or spelling. The evaluator noted that Zul had made “striking progress” in overall academic performance since the previous MGH testing in 2014. (S-20; S-17) Similarly, the then most current academic achievement testing performed by Ms. Adams showed that Zul’s reading and mathematics skills fell in the average range while his written language skills were below average. The Carroll School reported that 4 of 5 of Zul’s discrete math skills fell above grade level expectations while the remaining one (base 10) was at grade level. All reading and language scores reported by the Carroll School were at or above his grade level placement. (S-17; Nystedt; See also: P-3)

4. Boston proposed an IEP calling for Zul to be placed in a substantially separate classroom for all academic instruction. The IEP provided for direct special education instruction in reading and writing for 180 minutes per day and in math and executive functioning skills for 105 minutes per day for a total of 285 minutes of special education daily. It also offered weekly occupational therapy.<sup>3</sup> On the PLEP-A form, which sets out the disability-related accommodations necessary for a student to make effective progress in the general curriculum, Boston listed the type of modifications to the general education materials and presentation that were appropriate for Zul under: “Methodology/Delivery of instruction”, including:

- small groups
- resource room
- inclusion
- multi-sensory
- rules based reading with one to one instruction
- slower pace
- highly structured
- positive reinforcement
- multi-sensory approach

(S-17 p.5 of 17)

None of the proposed IEP goals speaks to the issue of setting. Other than indicating that all academic instruction would be delivered by a special education teacher the service delivery grid does not set out the qualifications of the instructor, the method/program of instruction, i.e., OG, Wilson, Project Read or the setting (small/large group or individual/tutorial) in which the instruction is to take place.

Boston’s proposed IEP includes an extended year component in which the IEP’s goals would be addressed in a group setting. (S-17, p. 11 of 17)

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<sup>3</sup> There are no related service evaluations that support the provision of occupational therapy to Zul. Zul had received occupational therapy while a student in Boston during the 2014-2015 school year but did not while a student at the Carroll School. The delivery of occupational therapy was not raised as an issue by either party in this hearing.

On August 1, 2017 the Parent accepted the IEP proposed by Boston. Next to her signature she added: “on the understanding that, as discussed at the Team meeting, all reading instruction will be delivered 1:1 using rules based method of Orton-Gillingham.” (S-17)

5. Zul and Ms. Z moved to the Nashoba Regional School District during the summer 2017. About two weeks before the start of the 2017-2018 school year Ms. Z. contacted the School, shared copies of the 2016-2017 IEP developed by Boston along with Zul’s Carroll School report card and immunization record. She requested that Zul be provided similar services to those provided by the Carrol School and set out in Boston’s proposed IEP. (Pease; Ms. Z.)

6. When the 2017-2018 school year began Zul was assigned to Alicia Willard’s 4<sup>th</sup> grade classroom. During the first few days of the school year all students attend their assigned general education classroom. Activities center on team building and establishing rules and routines. Students also participate in assessments and screenings which inform the teachers’ goals and lesson plans. Direct special education services begin when general education academic instruction begins in the classroom. At that time Zul moved to the special education classroom for all academic instruction, which comprised the bulk of his school day. (Willard; Pease)

Ms. Willard administered a few, timed, multiplication facts assessments to Zul. Other academic and language assessments were conducted by the 4<sup>th</sup> grade special education teacher, Tatiana Firth, and the Orto-Gillingham tutor, Paige Nystedt. (Willard, Firth, Nystedt)

7. Alicia Willard is a Master’s level certified teacher with more than ten years experience at the elementary level. Since 2015 Ms. Willard has been the general education teacher in the 4<sup>th</sup> grade inclusion classroom. For the 2017-2018 school year 23 students were assigned to her classroom. Nine of those students, including Zul, had IEPs, Section 504 Plans or accommodations plans.

Ms. Willard meets formally with Tatiana Firth, the 4<sup>th</sup> grade special education teacher, at least weekly to discuss their shared students, coordinate concepts, approaches, and lesson planning, share materials, etc. They also talk informally daily to ensure their shared students are following the 4<sup>th</sup> grade curriculum and having successful learning opportunities. (Willard, Firth) Any academic work completed by Zul in the 4<sup>th</sup> grade class is given to Ms. Firth for grading and/or feedback.

Ms. Willard testified that Zul participates in the non-academic activities in the 4<sup>th</sup> grade classroom: a 20 minute morning meeting/greeting which sometimes has a homework completion or free reading/writing component; snack; specials (art, music, P.E. etc.); lunch; recess; book buddies, a shared reading experience with the 1<sup>st</sup> grade; and occasionally afternoon meeting.

Ms. Willard described Zul as a very social boy who is always smiling. He has strong friendships with several of the boys in the classroom and has typical 10 year old interactions with his peers. Based on her consultations with Ms. Firth, and coordination of the unmodified 4<sup>th</sup> grade curriculum Ms. Firth follows with Zul in the special education classroom, Ms. Willard

testified that Zul generally functions in the middle range of the entire class in math, English language and writing. When compared to the other students on IEPs Zul's academic skills are at the high end, and more advanced in reading. The other students with IEPs are functioning successfully in the 4<sup>th</sup> grade classroom.

Ms. Willard participated in the Team meetings held to develop Nashoba's proposed 2017-2018 IEP. She testified that Zul could be successful in an inclusion setting and that she agreed with the services and setting outlined in the proposed IEP. Ms. Willard stated that, as the general education teacher, she evaluates how a student is functioning within the continuum of general education students, while a special education teacher evaluates a student's progress toward the IEP goals. (Willard)

8. Tatiana Firth is certified in both elementary education and education of students with moderate disabilities pre-k through grade 12. She has a sheltered English immersion endorsement. She has completed Orton-Gillingham training with certification pending. She has worked in a private elementary school and a public high school. Currently she is the fourth grade special education teacher at Zul's school.

Ms. Firth provides direct specialized instruction in a pull out classroom to students assigned to the two fourth grade classes. There are never more than seven students in the special education classroom. Most of the time Zul is the only student in the classroom. Sometimes one or two other students will form a small learning group. Zul's academic skills far exceed those of most other students in the special education classroom. (Firth/ Nystedt) The students have a variety of disabilities: specific learning disabilities, communication impairments, health impairments, developmental delays and autism spectrum disorder. Most of the students spend the majority of their school day in the general education classroom. Zul receives all academic instruction: English language arts, math, science and social studies, in the special education classroom. Zul follows an unmodified fourth grade curriculum. Zul leaves the special education classroom only for non-academic activities with the general education 4<sup>th</sup> grade or for the 1:1 Orton-Gillingham tutoring with Ms. Nystedt. Ms. Firth communicates throughout the day with Ms. Willard and Ms. Nystedt to coordinate instruction and share materials. For example, Ms. Firth is aware that Ms. Nystedt is working with Zul on Orton-Gillingham based "higher content learning" above a fourth grade level because Zul has mastered all the foundational skills and strategies customarily covered in a fourth grade curriculum. (Firth; Nystedt; Willard)

At the beginning of the 2017-2018 school year Ms. Firth administered the standardized academic assessments typically given to all entering fourth grade students to Zul. On the Fountas and Pinnel, a reading assessment, the expected range for a beginning 4<sup>th</sup> grade student without disabilities is level Q, R and S. Zul achieved a level Q. On the AIMS web fluency measure the target for entering 4<sup>th</sup> grade students is 105 words per minute. Zul achieved 128 words per minute. On the DRA, another reading assessment, the fourth grade benchmark is 40. Zul scored a 40 on that assessment. Ms. Firth described Zul as a strong reader. In the fall 2017 Zul's reading comprehension was the weakest reading skill, low-average, though still within grade level expectations. Ms. Firth therefore planned to concentrate on strengthening that skill. He also had some difficulty tracking, but used appropriate strategies to address that. (Firth;

S-22; See also: Nystedt).

Ms. Firth participated in two Team meetings held to develop a 2017-2018 IEP for Zul: on September 19, 2017 and October 10, 2017. At the first meeting Ms. Firth suggested that Zul spend more academic time in the 4<sup>th</sup> grade class to preview a lesson or work with a peer and then receive targeted skill remediation based on that lesson in the special education classroom. At the time she made that recommendation she had reservations. Ms. Firth thought that level of special education service was overly restrictive given Zul's grade level academic and social skills. (S-11, P-6) At the second meeting Ms. Firth was confident that Zul would benefit from substantially more time in the inclusion setting. Under the proposed IEP, developed at the October 10<sup>th</sup> meeting, Ms. Firth would be co-teaching with Ms. Willard in the 4<sup>th</sup> grade class. Ms. Firth would provide up to an hour per day of direct special education support to Zul in the 4<sup>th</sup> grade classroom, individually or in a small group, in addition to one hour daily of specialized instruction in English language arts and mathematics in the special education classroom (S-3) Ms. Firth is confident that Zul could be successful with the services outlined in the proposed IEP. She believes that Zul's remaining relative weaknesses in reading connected text and reading comprehension would be best addressed in a small group of similarly skilled peers using grade level materials. She testified that Zul has told her of his unhappiness at being removed from his friends and activities in Ms. Willard's class, and that it makes him feel stupid. (Firth)

Ms. Firth testified that she has been following the "stay-put" IEP developed by Boston throughout the 2017-2018 school year. She had the impression that no one on the Boston Team worked with Zul because the IEP painted the picture of a student with much lower academic skills than Zul had on entering Nashoba. For example, all the reading goals and objectives on the IEP had been mastered by Zul.<sup>4</sup>

9. Paige Nystedt has a bachelor's degree in special education and is half-way through a Master's degree program leading to certification as a Reading Specialist. She is licensed as a teacher of students with moderate disabilities and holds certification as an associate level Orton-Gillingham provider. Ms. Nystedt has worked as a special education teacher in the 3<sup>rd</sup> and 4<sup>th</sup> grades at Nashoba Regional School District.

When reviewing Zul's "stay-put" IEP Ms. Nystedt noted that it provided for rules based, multi-sensory phonics instruction. Orton-Gillingham is one of the reading programs that can fill that niche. When school began Ms. Nystedt proceeded to determine Zul's then current level of phonics knowledge through some formal and informal assessments. The WIST (word-identification and spelling list) is used to assess students' level of skill in decoding and encoding and to measure progress throughout the year. Zul first participated in a WIST assessment on September 1, 2017. Overall he scored in the average range.<sup>5</sup> On the WADE, which is used to

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<sup>4</sup> There is no evidence that the Team that developed Boston's IEP included any then current academic service providers.

<sup>5</sup> In repeat testing in January 2018 Zul scored in the above-average range.

determine the appropriate instructional step in the Wilson Reading Program, Zul achieved a 97% accuracy rate at the ceiling level. Based on these assessments Ms. Nystedt would not have recommended Orton-Gillingham instruction for Zul. Any relative weaknesses, in spelling for example, could be addressed in a small group setting. Typically students who benefit from 1:1 Orton-Gillingham instruction enter with all reading skills scores in the below average range. In September 2017 Zul's performance on benchmark testing as well as teacher observations of his reading indicated that his reading skills fell within the 4<sup>th</sup> grade instructional level. He read accurately and fluently and the errors he made did not indicate a need for a specific pattern of phonics instruction. His reading skills were sufficient to permit him to access the general 4<sup>th</sup> grade curriculum. (Nystedt; S-22; S-18)

At the September 19, 2017 Team meeting Ms. Nystedt proposed delivering thirty minutes of Orton-Gillingham based services to address spelling weaknesses twice a cycle in a small group setting. Ms. Nystedt did not conduct any additional assessments or receive new evaluative information between September 19 and October 10, 2017. She did not change her service recommendation. (S-11; S-3; Nystedt)

Throughout the 2017-2018 school year Ms. Nystedt provided 1:1 Orton-Gillingham instruction to Zul for 30 minute sessions three times a 6 day cycle as contemplated by the "stay-put" IEP. She focused instruction on goals 1 and 5 of the Boston IEP. Additional reading instruction was provided by Ms. Firth. Ms. Nystedt worked closely with Ms. Firth and Ms. Willard to coordinate lessons, topics and materials. Ms. Nystedt testified that Zul has mastered the Orton-Gillingham principles and met his IEP goals. She would not recommend continuing Orton-Gillingham instruction. Ms. Nystedt testified that Zul could derive greater educational benefit from the instruction, activities and interventions available in the general 4<sup>th</sup> grade classroom. (Nystedt; S-22; S-18)

10. Megan Mecum is slated to provide Orton-Gillingham instruction to Zul in conformance with the stay-put IEP during Ms. Nystedt's spring 2018 leave of absence. Ms. Mecum has been a special education teacher for 17 years, 10 as a certified reading specialist in the Nashoba Regional School District. She is trained in both the Orton-Gillingham and the Wilson Reading programs. Ms. Nystedt left a folder of work to be completed by Zul. Ms. Mecum testified that the work was advanced well beyond that of a typical 4<sup>th</sup> grade Orton-Gillingham participant. (Mecum)

11. Throughout the 2017-2018 school year Zul received segregated specialized instruction in reading and writing for 185 minutes daily and in mathematics and executive functioning for 65 minutes daily for a total of 250 minutes of special education daily. Of that total, 120 minutes per cycle consisted of structured Orton-Gillingham tutoring. (S-15, Nystedt; Firth; Willard; See also: S-21)

12. The Nashoba Team first met on September 19, 2017. Based on the observations of the teachers, the results obtained on screening instruments and the evaluations and progress reports Ms. Z. shared with Nashoba, the Team determined that Zul's disability-related learning needs could be appropriately addressed with a combination of general education instruction in an inclusion 4<sup>th</sup> grade classroom with co-taught special education support, some pull-out special

education support and some targeted Orton-Gillingham intervention. The proposed IEP included goals in reading, math, executive functioning and writing skills, all reflecting data gleaned from earlier evaluations and other information provided by the Parent, the Carroll School and Nashoba teachers. The IEP also contained a fine motor goal continued from the Boston “stay-put” IEP as no new occupational therapy evaluation had been performed. The proposed IEP provided for one hour per day of special education support in the 4<sup>th</sup> grade inclusion class, two 30 minute sessions each of pull-out special education instruction in English language and Math per cycle and two 30 minute session per cycle of individualized instruction with a reading specialist. (S-9; S-10; S-11; Firth; Nystedt) The Parent rejected the IEP on September 29, 2017.

13. The Team requested parental consent to conduct Zul’s three year re-evaluation. The Parent declined consent to testing, citing a need to avoid interfering with a scheduled January 2018 parentally secured repeat evaluation. (S-11; S-10; S-13; P-14; Mr. Z1; Mr. Z2)

14. The Team reconvened on October 10, 2017 to discuss the Parent’s concerns and propose appropriate revisions to the 2017-2018 IEP. The Team determined that although Zul would benefit from less restrictive special education interventions and more time in the 4<sup>th</sup> grade classroom, the Parent’s concerns could be addressed by increasing the pull-out special education services to be provided to Zul. The Team proposed an IEP retaining the previous goals, modifications and accommodations as well as the level of special education support in the inclusion class. The proposed IEP also retained the two thirty minute sessions per cycle of individualized reading support. The proposed October 10, 2017–October 9, 2018 IEP increased the pull-out special education service to provide for daily 40 minute sessions of instruction in English language and daily 20 minutes sessions of instruction in math, for a total of one hour per day in the segregated setting. The Parent rejected the proposed IEP on October 25, 2017. (S-3; S-7; Firth; Nystedt)

15. A resolution meeting was held on November 2, 2017. Ms. Z disagreed with the proposed IEP and with the School’s assertions that the “stay-put” IEP developed by Boston was being implemented, and that Zul was receiving 1:1 Orton-Gillingham tutoring. The meeting concluded without agreement. (S-5)

16. On November 16, 2017 the School again requested consent to conduct the required three year re-evaluation. (S-4) The Parent provided written consent on March 2, 2018. (S-1)

17. The Parent has not observed any component of Zul’s program at Nashoba. She testified that it is her opinion that Nashoba is not following the “stay-put” IEP developed by Boston. She testified that Nashoba developed its 2017-2018 IEP using only screening instruments, claiming that is a prohibited practice under the IDEA. She acknowledged that she provided Boston’s IEP, Carroll School records, and the evaluations she had privately secured to Nashoba prior to the Team meetings. She acknowledged that she and Zul’s fathers participated in the Team meetings held to develop the proposed 2017-2018 IEP.

Ms. Z. testified that Zul’s skills fall in the average range but that he continues to need intensive Orton-Gillingham support to maintain that functioning level. That opinion is based on

his reading skill progress when Orton-Gillingham services were initiated. Ms. Z. acknowledged that the IEP developed by Boston did not explicitly name the Orton-Gillingham program as the sole rules-based phonics instruction program to be used with Zul, or indicate on the service delivery grid that the service was to be delivered exclusively in a one-to-one setting.

She disagreed with those omissions, so she wrote them in before accepting the IEP. (Ms. Z; see S-17)

## LEGAL FRAMEWORK

A student with special learning needs as defined by 20 U.S.C. 1401 *et seq.* and M.G.L. ch 71B is entitled to receive a free, appropriate public education. A free appropriate public education, often referred to as “FAPE”, is a set of specialized instructional methods and services, curricular modifications, related therapeutic, supportive and health services, equipment, environmental adaptations and settings that are specifically tailored to an individual student’s unique learning needs and designed to provide a meaningful educational benefit to the student. 34 CFR 300.300(3) (ii); *Andrew F. v. Douglas County School District*, 137 S.Ct.988, 580 U.S.\_\_(2017); 603 CMR 28.02(17). What constitutes a meaningful educational benefit must be determined in the context of the student’s potential to learn. At the least, however, the proffered plan for educational services, the Individualized Education Program or “IEP”, must be geared to producing demonstrable improvement in the educational and personal skills identified as special needs. *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3<sup>rd</sup> 18 (1<sup>st</sup> Cir. 2008); *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1983).

The IDEA also requires that students with disabilities be placed in the least restrictive educational environment feasible. In other words, students with special learning needs are entitled to receive specialized educational services alongside their non-disabled peers to the maximum extent possible consistent with their own needs, goals and environmental requirements. Removal from the mainstream is warranted only when the special service cannot be delivered effectively there or when the student demonstrates an inability to learn and make progress in the general education setting. Placement in a more restrictive environment, such as a self-contained classroom, or private day or residential school, is indicated only when the student’s learning needs are such that there is demonstrated incapacity to learn, make progress in or derive a meaningful educational benefit from specialized instruction and support services in a general education setting. 603 CMR 28.02 (12). On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. *School Committee of Town of Burlington v. Dept. of Education of Mass.* 47 U.S. 359 (1985)

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child or whether the school district has deprived a child of FAPE because of procedural missteps, the burden of proof is on the moving party. *Schaffer v. Weast*, 546 U.S. 49 (2005)

In the instant matter, Nashoba Regional School District has the burden of proving by a preponderance of the evidence that the 2017-2018 IEP it developed for Zul is reasonably calculated to provide a free, appropriate public education to him in the least restrictive setting

consistent with his identified learning needs and necessary services. The Parents have the burden of proving by a preponderance of the evidence their claims that Nashoba failed to fully implement the “stay-put” IEP developed by Boston, that the 2017-2018 IEP developed by Nashoba was improper as it was based solely on “screening” tools, and that Nashoba filed the instant hearing request in retaliation for the Parent’s complaint to the U.S. Department of Education’s Office for Civil Rights about Nashoba’s procedural non-compliance.

## FINDINGS AND CONCLUSIONS

There is no dispute that Zul is a student with special learning needs as defined by 20 U.S.C. §1401 *et seq* and M.G.L. c. 71B and is thus entitled to receive a free, appropriate public education through his school district of residence. The issue before the BSEA is whether the 2017-2018 IEP developed by Nashoba R.S.D. is reasonably calculated to provide that to him in the least restrictive setting consistent with that goal. After careful consideration of all the evidence, and of the arguments of the Parties, I find that it is. My reasoning follows:

### A. Proposed 2017-2018 IEP

When the Nashoba Team met on September 19 and October 10, 2017 it had before it 2 independently secured evaluations: one from January 2016 and another from January 2017. The more recent one, authored by Phoebe Adams, reported that Zul’s reading skills fell within the average range for his age and grade placement. The then most recent school progress and testing reports from the Parent’s 2016-2017 unilateral placement at the Carroll School also placed Zul’s reading functioning at average. The educational strengths and weakness summary on the “stay-put” IEP reflected the consistent information available to the Boston Team that Zul’s reading skills were within the average range. The reading and language screening instruments Zul completed at Nashoba, after summer vacation, confirmed that his reading skills remained steadily average.

The observations and informal assessments of expert educators: Ms. Willard, Ms. Firth and Ms. Nystedt also supported the conclusion that, in September 2017, Zul performed in the average range of reading skill to be expected of an entering 4<sup>th</sup> grade student. While he needed some support and practice with tracking and comprehension of connected text, these weaker discrete skills did not lower his overall skill level or require a segregated setting. On the contrary, according to Ms. Willard, Ms. Firth and Ms. Nystedt, these weaknesses would be best addressed in the general 4<sup>th</sup> grade classroom in the company of similarly skilled peers with the support of a special educator. The evaluative and functional educational information available to the Team was consistent: Zul’s average reading and academic skills would fully support an inclusion placement. The lone dissenting voice at the Teams was that of the Ms. Z. The Team listened carefully to parental concerns and requests. In order to allay the Parents’ anxieties, the School then crafted an IEP that provided more special education support, within the general 4<sup>th</sup> grade class and in a separate special education setting, than the educators believed was warranted by the nature and severity of Zul’s disability or beneficial to his educational growth. The Parents did not offer the Teams, nor did they produce at hearing, any then timely expert educational recommendation that would support their position that Zul required a full time

segregated placement and 1:1 Orton-Gillingham instruction in excess of 1 hour daily to address his reading disability. There is no credible evidence to counter the recommendations of Ms. Willard, Ms. Firth and Ms. Nystedt all of whom I found to be exceptionally well qualified educators and thoughtful, candid, knowledgeable and sympathetic witnesses. Unfortunately, in making necessary credibility determinations, I am constrained to find the Parent's testimony wholly unreliable as her communications to the School and the BSEA, and her conduct throughout the proceedings, were riddled with misinterpretations, mischaracterizations and misrepresentations. Therefore, any difference in pertinent factual testimony between Ms. Z. on the one hand and Ms. Willard, Ms. Firth, Ms. Nystedt, Ms. Mecum and Mr. Pease on the other, is resolved in favor of the School's witnesses.

Based largely on the testimony of Ms. Firth and Ms. Nystedt, and supported by the Carroll School's student progress reports, the results obtained on screening instruments administered by Nashoba in September 2017, the academic evaluation of Ms. Adams in January 2017 and the "stay-put" IEP, I find the 2017-2018 IEP proposed by Nashoba after the October 10, 2017 Team meeting properly reflects the findings and recommendations of all Team members, including the Parents. It is reasonably calculated to enable Zul to make appropriate progress in all areas of academic, behavioral and social functioning targeted in the IEP, and expected of typical 4<sup>th</sup> grade students, consistent with his potential and individual circumstances. I further find that it offers a program of special education services in a variety of settings: general education, inclusion support, self contained classroom, and 1:1 tutorial, that were designed to address Zul's unique learning needs, and to permit him to make meaningful educational progress, in the least restrictive setting possible at that time. Ms. Nystedt, Ms. Firth and Ms. Willard brought their professional expertise and judgment to the IEP drafting process and offered "cogent and responsive"<sup>6</sup> explanations of their service recommendations at the Teams and at the Hearing. There is no persuasive evidence to the contrary.

## B. Parental Claims

1. The Parents claim that Nashoba failed to fully implement the "stay-put" IEP developed by Boston<sup>7</sup> There is no credible evidence to support their claim. The Parents rely on two sections of the "stay-put" IEP to argue that Zul was entitled to receive 1 hour per day of 1:1 Orton-Gillingham tutoring. First I note that Boston did not propose "Orton-Gillingham" tutoring. The Parent added that descriptive language after the IEP had been printed and delivered to the Parent for review. The Parents' addition does not alter Boston's Team decision anymore than does a unilateral modification to a previously signed contract. Second, the language on page 6 of Boston's IEP: "rules based reading with one-to-one instruction" does not compel the interpretation advanced by the Parent: that systematic reading instruction be delivered only in a one-to-one setting. Instead the language is inclusive, and should be read broadly to permit flexibility in selecting the appropriate setting for delivery of services. Third, nowhere on the service delivery grid on p. 10 of Boston's IEP is there an indication that 1:1 tutoring is the only, or even an expected, setting for rules based reading instruction. The Boston

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<sup>6</sup>*Andrew F. v. Douglas County School District*, 137 S. Ct. 988, 580 U.S. \_\_\_ (2017)

<sup>7</sup>The Parties did not raise, and therefore I do not address here, whether the Student was a Boston resident at the time the Parent accepted the IEP proposed by Boston.

service delivery grid indicates that specialized instruction in reading and writing will be delivered in a substantially separate setting 180 minutes per day. Zul's 2017-2018 Nashoba schedule shows that he receives 175 minutes of specialized instruction in reading and writing daily in a substantially separate setting.

Massachusetts requires that "stay-put" special education services, and the "stay-put" setting, provided by a new district of residence pending development and acceptance of a new IEP, be "comparable" to those the student received in the former district of residence or pursuant to the last accepted IEP for the student. 603 CMR 28.03(c). Identity is not required. The 175 minutes of daily special education instruction in reading and writing Zul receives in Nashoba is certainly "comparable" to the 180 minutes of daily special education in reading and writing Boston proposed to deliver to him. I find that the potential "loss" of 5 minutes per day of specialized instruction does not constitute a significant procedural or substantive misstep. It is certainly not the type of egregious deprivation of education that would support an award of compensatory educational services.<sup>8</sup> There is no evidence that the 5 minute difference in service delivery time had any negative effect on Zul's educational growth. Instead, there is evidence that the potentially additional exposure to the general education curriculum and integration with non-disabled peers had a salutary effect on Zul's social/emotional health.

Similarly, I note that the total minutes of direct special education services in the areas of reading, writing, math and executive functioning skills outlined in the fully segregated "stay-put" IEP is 285. According to Zul's 2017-2018 school schedule Zul receives a total of 255 minutes of special education service through Nashoba's implementation of comparable services pursuant to that IEP. The missing minutes reflect integration into the general education classroom for morning meeting, snack and specials. Without that participation Zul would be engaging in those 4<sup>th</sup> grade activities alone. I find that the level of special education service delivery and the type of setting and provider Nashoba arranged for Zul pending the development of a new IEP and resolution of this dispute is sufficiently comparable to the setting and services outlined in the "stay-put" IEP developed by Boston as to satisfy Nashoba's "stay-put" obligation under 603 CMR 28.03 (c).

As part of their argument that Nashoba failed to properly implement the "stay-put" IEP, the Parents claimed that Nashoba's educators lacked the appropriate credentials to provide assigned services. On the contrary, the evidence plainly showed that all Nashoba personnel were eminently qualified in their respective practice areas and held all necessary, current, relevant certifications and licensures. (Willard; Firth; Nystedt; P-1; P-11; P-16)

Therefore, I find that the Parents' counterclaim for an award of compensatory educational service as a result of a procedural violation of Zul's "stay-put" rights is not supported by a preponderance of the credible evidence and is not contemplated by applicable legal principles.

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<sup>8</sup>Compensatory education is an equitable remedy involving discretion in determining appropriate relief after consideration of all aspects of the case. *C.G. v. Five Town Community School District*, 513 F.3<sup>rd</sup> 279 (1<sup>st</sup> Cir. 2008); *Pihl v. Mass. Dept. of Education*, 9 F.3d 184 (1<sup>st</sup> Cir. 1993); *Norwood Public Schools*, 17 MSER 248 (2015).

2. The Parents' second claim of procedural impropriety is equally without merit. The Parents object to the fact that Nashoba's Teams did not conduct relevant evaluations in the area of Zul's suspected disability, or the then pending triennial re-evaluation, before proposing an IEP that would provide services and setting different than those set out in the "stay-put" IEP. They argue that pursuant to 20 U.S.C. §1414(a)(1)(e); 34 CFR 300.302, the screening instruments used by the School to objectively assess Zul's reading and language functioning in September, 2017 could not be used as a basis for any Team decision.

The Parents misread the cited regulatory section. It applies to initial determinations of eligibility for special education services, not to situations such as this where the Student has been found to be IDEA-eligible and where the information gleaned from screening instruments is used in concert with other evaluation data, teacher observations, school history and parent reports. It is also important to note that, when asked by Nashoba, the Parents withheld consent to more comprehensive educational evaluations. Thus their claim that the Nashoba Teams had incomplete or inappropriate information about Zul is disingenuous. The Nashoba Teams properly used all the educational information available to craft timely, responsive and appropriate IEPs.<sup>9</sup>

3. Finally, the Parents' claim that Nashoba filed its Request for Hearing in retaliation for the Parents' Complaint to the U.S. Office for Civil Rights finds no support in the evidence. The only documentary evidence of a Parental complaint to the Office of Civil Rights is Nashoba's Response to OCR dated December 1, 2017. (P-16) The School's Request for Hearing was filed on November 21, 2017. The record does not establish a precedential filing. Moreover, even if it did, the School sought BSEA approval of the 2017-2018 IEP rejected by the Parent claiming that continuing Zul in the fully segregated "stay-put" setting denied Zul a free appropriate public education. The School has an obligation to ensure that it provides appropriate special education services to all eligible students in the least restrictive setting. 603 CMR 28.05. When the School believes it is not providing a free appropriate public education, resort to the IDEA's dispute resolution procedures is one appropriate option. 603 CMR 28.08 (3)(a) Here, Nashoba properly availed itself of the services of the BSEA. There is no evidence otherwise.

## ORDER

The 2017-2018 Individualized Education Program developed by Nashoba Regional School District at the October 10, 2017 Team meeting is procedurally compliant and reasonably calculated to provide a free appropriate public education to Zul in the least restrictive setting.<sup>10</sup>

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<sup>9</sup> See also: 20 USC §1414 (b) (2) (3); 34 CFR §300. 303. 304. 305.

<sup>10</sup> I would be remiss if I did not commend Nashoba's attorney for maintaining thoroughly professional conduct and demeanor throughout a particularly, and particularly unwarranted, hostile and provocative appeal process.

By the Hearing Officer

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Lindsay Byrne

Dated: June 25, 2018