

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

In re: Martin¹

BSEA #2003661

DECISION

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

A hearing was held on December 5, 2019 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Brad Brooks	Special Education Director, North Middlesex Regional School District (NMRSD)
Robert C. Canty	School Psychologist, NMRSD
Margaret Desilets	Special Education Department Head, North Middlesex Regional High School
Kimberly Simonich	Reading Specialist, NMRSD
Thomas Nutall	Attorney, NMRSD
Jane Williamson	Court Reporter

The official record of the hearing consists of documents submitted by North Middlesex Regional School District and marked as Exhibits S-1 to S-17, and a one-volume transcript produced by a court reporter following approximately two hours of testimony and oral argument. Parents submitted no documents. Given Parents' voluntary absence from the hearing, the record was held open until January 9, 2020 to permit the parties to submit written closing arguments following receipt of the transcripts. Parents submitted their closing argument on January 6, 2020. North Middlesex Regional School District filed its closing argument on January 9, 2020 and the record closed on that date.

INTRODUCTION

On October 3, 2019, North Middlesex Regional School District (North Middlesex, NMRSD, or the District) filed a *Hearing Request* regarding Martin against his Parents, requesting that the Bureau of Special Education Appeals (BSEA) find that its most recently proposed Individualized Education Program (IEP) for Martin is reasonably calculated to provide him with a free, appropriate public education (FAPE). North Middlesex also requested that the

¹ "Martin" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

BSEA find that proposed compensatory tutoring and occupational therapy services, as outlined in a document dated 9/10/19 that was agreed to during a BSEA-facilitated Team meeting, is appropriate and fulfills the District's compensatory service obligation as delineated by the Department of Elementary and Secondary Education's Problem Resolution System (PRS). According to NMRSD, Parents have never fully accepted any proposed IEP since Martin was found eligible in December 2014.

On October 4, 2019, Martin's Parents filed their own *Hearing Request* against North Middlesex, asserting that Martin requires services for his disabilities but has not received them from the District. Specifically, Parents requested an IEP that "encompasses our son's needs, appropriate goals and services [for] his current homeschool situation and not an IEP written for him in the school system only." They also requested appropriate services for his age, grade, and current school system; a resolution to "the compensatory services issue for reading tutoring;" that all services and goals reflect the findings of a neuropsychological evaluation completed in July 2019; that any IEP, services, and settlements extend to, and be in place at the time of, Martin's graduation; and that "there be some kind of oversight going forward to avoid any more delays or delinquency in the District's providing services."

On October 9, 2019, Parents requested consolidation of the two matters and postponement of the hearings to permit the parties to participate in a Pre-Hearing Conference. The District did not object. By Order dated October 17, 2019, the two matters were consolidated and the hearing was scheduled for November 8, 2019. Following a Conference Call that took place on October 22, 2019, the hearing was postponed at the parties' joint request to November 20 and 21, 2019. On October 28, 2019, Parents requested further postponement due to a scheduling conflict and on November 8, 2019, the parties jointly requested that the hearing take place on November 21 and December 5, 2019.

During the Pre-Hearing Conference that took place November 8, 2019, the parties clarified that the issue of compensatory reading services arose from a finding and corrective action plan issued by the Department of Elementary and Secondary Education (DESE), following the cessation of an informal arrangement made between the family and the NMRSD Superintendent. As I explained on that day and formalized in an Order issued November 15, 2019, there is no basis for me to make a finding that a proposal for compensatory services satisfies the District's obligation as set forth by a separate, independent agency. The hearing, therefore, did not address that claim.

On November 12, 2019, Parents withdrew their hearing request, and BSEA #2003698 was dismissed without prejudice on November 15, 2019. On November 18, 2019, the District requested that the first day of hearing be cancelled, in light of the voluntary dismissal of Parents' *Hearing Request* and its belief that one day would be sufficient for the remaining issue. As Parents had indicated, at the Pre-Hearing Conference, that they were not planning to appear for hearing and the BSEA did not have a fax number for them, an administrative assistant from the BSEA called Martin's mother to ensure that she was aware of the postponement request and that she could file a written objection. Parents did not object, and the first day of hearing was cancelled by Order dated November 20, 2019. Parents did not appear at the hearing on December 5, 2019, nor did they submit documents or witness lists.

For the reasons below, I find that the IEP proposed by North Middlesex for the period from May 3, 2019 to May 3, 2020 is reasonably calculated to provide Martin with a FAPE, with one exception involving one goal. The District must modify Martin's second reading goal, benchmarks and objectives such that they are measurable.

ISSUES

1. Whether the IEP proposed by NMRSD for Martin for the period from May 3, 2019 to May 3, 2020 is reasonably calculated to provide him with a provide a free appropriate public education (FAPE) in the least restrictive environment (LRE);
2. If the answer is no, whether this IEP can be modified to provide Martin with a FAPE in the LRE.

FINDINGS OF FACT

1. Martin is sixteen years old and resides in Ashby, Massachusetts with his mother. His parents are divorced, but he sees his father regularly. His mother is a former teacher, and his father is an engineer. Martin also has an older sister. (S-15, S-16)
2. Martin has been homeschooled by his mother for his entire educational career. He has been described as polite, cooperative, kind, thoughtful, generous, patient, and hard-working. Martin is active in Boy Scouts and participates in a Trap Shooting and Archery League. He enjoys spending time with his family, hunting, being in the woods, working with his hands, working on machinery, and helping others. (S-15, S-16)
3. Martin was born three weeks early, with no complications during pregnancy or birth. His early milestones were within developmental limits, and there were no concerns regarding his development or behavior as a young child. He is generally in good health. (S-16)
4. After repeating fourth grade in his homeschooling program, Martin was referred for a special education evaluation and was assessed in November 2014. He was found eligible for special education on the basis of a Specific Learning Disability in the areas of reading fluency and comprehension, math calculation and application, and writing. (S-1, S-16)
5. Martin's scores on the cognitive evaluation conducted in 2014 were in the superior range for verbal comprehension, the average range for visual spatial skills, and the extremely low range for fluid reasoning. He received a low average range score for working memory and very low for processing speed. On a 2015 academic evaluation, Martin received low scores on several areas of the Grey Oral Reading Tests – Fifth Edition (GORT-V) (rate, accuracy, fluency, oral reading quotient) and a below average score in comprehension. On the Comprehensive Test of Phonological Processing (CTOPP), he received an average phonological awareness score and scores in the low range in the areas of phonological memory and rapid naming. On the Test of Word Reading Efficiency – Second Edition (TOWRE-2), Martin received low scores in sight word efficiency, phonemic decoding, and total word reading. On the Weschler Individual

Achievement Test – Third Edition (WIAT-III), he received average scores in math problem solving, numerical operations, and math fluency, with a below average essay score. Martin received average scores in all areas of the Beck Youth Inventory, with no reported emotional concerns. Generally, Martin displayed strengths in verbal comprehension and visual spatial skills, with weaknesses in fluid reasoning, working memory, and processing speed. (S-1, S-2, S-16; Canty, I: 21-23)

6. At some point in June 2015, when Martin was nearing the end of fifth grade, he began receiving Orton-Gillingham tutorial services as the result of a meeting held outside of the Team process. (Simonich, I: 54) These services were delivered by Kimberly Simonich, MS, A/AOGPE, who has been a reading specialist in NMRSD for 7 years. In this capacity, she uses the Orton-Gillingham method to teach reading to individuals and small groups of students. She also evaluates students throughout the school district. Ms. Simonich has a master's degree in reading and is licensed in Massachusetts as an early childhood educator, grades K to 3, and as a K to 12 reading specialist. She is certified at the associate level with the Academy of Orton-Gillingham Practitioners and Educators. She has completed the coursework and practicum for the next level of certification, but has not yet submitted the paperwork. (S-1; Simonich, I: 46-49, 56)
7. When she began working with Martin, Ms. Simonich assessed his reading skills informally and discovered that although he was approaching the end of fifth grade, he was at the beginning of first grade reading level. At that time, she determined that Orton-Gillingham was an appropriate methodology to use with him. Ms. Simonich delivered these tutorial services approximately five hours per week (5 x 60 minutes) through April 2018,² though they were not included in the IEPs proposed for Martin for the period from 10/26/17 to 10/25/18. Over time, Ms. Simonich incorporated other strategies and skill sets into her tutoring. (S-4; Simonich, I: 54-55, 56-58)
8. Ms. Simonich and school psychologist Robert Canty conducted Martin's three-year reevaluation in the fall of 2017. (S-1, S-2)
9. Ms. Simonich evaluated Martin on September 26, 27, and 29, 2017. At the time, Martin was in eighth grade and although he was homeschooled, he was receiving the specialized reading services outlined above after school five times a week. Ms. Simonich administered several measures: Megawords Decoding of Multisyllable Words; Words Their Way Elementary Spelling Inventory and Upper Level Spelling Inventory; Qualitative Reading Inventory-5 Graded Word Lists; Fountas & Pinnell Benchmark Assessment System Nonfiction Level Y and Fiction Level Z; GORT-V; and the TOWRE-2. Ms. Simonich concluded that Martin had made considerable gains in all areas, as evidenced by both formal and informal tests, and was able to access texts on or just below grade level. Martin demonstrated a weakness in spelling, and decoding and encoding issues continued to impact his reading ability. Ms. Simonich recommended that Martin participate in a multi-sensory reading program including word identification, decoding, and encoding, and receive fluency training. She also recommended that he be

² These services were delivered during the summer of 2016 and 2017, but not during other school vacations. (Simonich, I: 58)

taught using sufficient review, preview, and highlighting of key concepts and vocabulary; that he read aloud; that he continue practicing sight words and comprehension strategies; and that his teacher require detailed answers to comprehension questions and guide him to use more complex sentence structure. (S-1, S-16; Simonich, I: 49-51)

10. Although she is trained in Orton-Gillingham, following this evaluation Ms. Simonich did not recommend to the Team that Martin receive his reading instruction in the form of one-to-one Orton-Gillingham tutorials because he needs work on comprehension and strategies to assist him in transferring his reading skills to other areas of the curriculum. (Simonich, I: 53)
11. Mr. Canty conducted Martin's psychological evaluation on September 25 and October 2, 2017. Mr. Canty has a master's degree in counseling education, with an emphasis in school psychology, grades K through 12, and a Certificate of Advanced Graduate Studies in educational leadership and school psychology. He is licensed as a school psychologist in Massachusetts and is currently attending a dual doctoral program in mental health counseling and school psychology. As a school psychologist for NMRSD, Mr. Canty assesses learning disabilities, emotional disabilities, and other student needs. (S-2; Canty, I: 16-17)
12. Mr. Canty utilized the Wescher Intelligence Scale for Children, fifth edition (WISC-V), and the WIAT-III in his assessment of Martin. He concluded that Martin appears to meet the criteria for a Specific Learning Disability. (S-2; Canty, I: 16)
13. On the WISC-V, Martin displayed significant strengths in the areas of verbal problem-solving and visual spatial skills. His ability to figure out what is needed to solve nonverbal problems bordered the low average to average range, but was significantly lower than both verbal comprehension and visual spatial skills. He displayed significantly lower cognitive efficiency skills (working memory and processing speed) compared to both same-aged peers and his own individual cognitive abilities. (S-2)

Due to a significant discrepancy between subtest scores, Mr. Canty could not report an overall verbal comprehension score, but noted that Martin's verbal problem-solving skills range from high average to very superior, compared with same-age peers. Martin's overall visual spatial score was in the average range. His fluid reasoning score was in the low average range. Martin's working memory and processing speed scores were in the very low and extremely low range, respectively. (S-2)

14. On the WIAT-III, Martin's basic reading scores were in the average range, with a word reading score in the low average range and a pseudoword decoding score in the average range. Mr. Canty noted a significant increase in reading scores since 2014. Martin's writing composition score could not be reported, as there were significant discrepancies between his scores on two different subtests. He received two average range scores and one below average range score on essay composition, and a below average score on the spelling subtest. Martin's essay grammar/mechanics and encoding appear to be significant weaknesses. Martin's overall math score on the WIAT-III was in the below

average range. His math fluency score was on the border between the low and below average ranges. (S-2)

15. Overall, Martin's strengths were in his ability to problem-solve using verbal information and with his visual spatial skills. He tended to struggle when required to determine what problem-solving strategy to use in interpreting abstract, nonverbal information and demonstrated significant weaknesses with both working memory and processing speed skills. He did better with rote auditory tasks, but showed weaknesses in both auditory and visual working memory. Martin displayed below average to average basic reading skills, varied writing skills (below average to average, with significant spelling weaknesses), below average math problem-solving and calculation skills, and significant processing weaknesses. Mr. Canty's recommendations included areas for focused instruction, methodology, consideration of a word processing program, additional time, chunking of material, check-ins for understanding, etc. He specifically recommended that Martin read materials of interest to increase his reading level, receive directions in written form and instruction in various areas related to math calculation and problem-solving, and utilize reference sheets, models, examples, and rubrics, among other things. (S-2; Canty, I: 18-28)
16. A Team meeting occurred on October 25, 2017 to discuss these evaluations as well as Martin's current performance and his upcoming transfer to a high school setting the following fall. (S-3; Canty, I: 22-23)
17. Following this meeting, Martin's Team proposed an IEP for the period from 10/26/17 to 10/25/18, placing him in a partial inclusion program. The IEP included goals in Reading, Mathematics, and Written Language, and the following services: Grid A Consultation by special education and general education teachers and paraprofessional (1 x 15 minutes per week); Grid B English Language Arts (ELA) (5 x 45 minutes per week, to be delivered by special education teaching staff), Content Support (4 x 45 minutes per week, to be delivered by special education teacher/general education teacher/paraprofessional), and Mathematics (5 x 45 minutes per week, to be delivered by special education teaching staff); and Grid C Reading (4 x 45 minutes per week, to be delivered by a special education teacher/reading specialist) and Academic Assistance (5 x 45 minutes per week, to be delivered by a special education teacher). In the "Additional Information" section, the Team noted that Martin continues to be homeschooled, that the IEP is offered to meet his specific needs "[s]hould he be enrolled in NMRSD schools," that he will have access to the guidance counselor, and that he has been receiving tutoring services through the District. (S-4)
18. On or about December 5, 2017, Mother partially accepted the IEP. She noted that Martin will continued to receive tutoring from the reading specialist, and requested that the tutoring occur 5 times a week for the remainder of the 2017-2018 school year, then occur 4 times a week beginning in September. (S-4)
19. The Team reconvened on May 29, 2018, toward the end of Martin's eighth grade year, to discuss his current performance, his reevaluations, and a reading assessment at his annual

review. At this time, Martin's mother reported that in math, he was completing units from an eighth grade Algebra 1 curriculum, with recent scores in the A range, and he was performing in the B range in language arts. The Team also discussed services for Martin at North Middlesex Regional High School and scheduled a tour of the high school. (S-5, S-6)

20. Following this meeting, the Team generated an IEP for Martin dated 05/09/2018 to 05/08/2019 (proposed 2018-2019 IEP), placing him in a partial inclusion program. The IEP again contained two Reading goals, a Mathematics goal, and a Written Language goal. For the remainder of the 2017-2018 school year, the Team proposed consultation (1 x 15 minutes per month) and Grid C Reading (4 x 45 minutes per week). Starting on August 27, 2018, presumably the beginning of the 2018-2019 school year, the Team proposed Grid A Consultation by special education and general education teachers and paraprofessional (1 x 15 minutes per month); Grid B ELA (5 x 70 minutes per week, to be delivered by special education teacher/general education teacher/paraprofessional) and Mathematics (5 x 70 minutes per week, to be delivered by special education teacher/general education teacher/paraprofessional); and Grid C Reading (4 x 45 minutes per week, to be delivered by a special education teacher/reading specialist) and Academic Assistance (5 x 70 minutes per week, to be delivered by special education teacher/general education teacher/paraprofessional). The "Additional Information" section contained the same information as the previous proposed IEP. Parent did not respond to this proposed IEP until the fall of 2018, at which time they rejected it in full. (S-6)
21. On October 9, 2018, Mr. Canty conducted a follow-up evaluation of Martin, as Parent expressed concerns about his social/emotional functioning following a bullying incident that had occurred at a Boy Scouts Camp during the summer of 2018 and resulted in Martin's dismissal from camp. Parent reported that at the time, Martin was seeing an outside counselor but meetings were inconsistent due to the counselor's schedule.

Mr. Canty utilized the Behavior Assessment System for Children, third edition (BASC-3) parent and student rating scales, the Social Skills Improvement System (SSIS) parent and student rating scales, the Multidimensional Anxiety Scale for Children, second edition (MASC-2) parent and student rating scales, and the Roberts-2 Apperception test. Martin discussed the camp incident with Mr. Canty, reporting that when he first left camp he was upset for a period of time but had been able to reset himself and was no longer bothered by it. On the BASC-3, neither parent nor student reported any clinically significant concerns in any area. Parent reported no at-risk concerns; Martin reported one, in the area of self-reliance. Mr. Canty noted that Martin's overly favorable and positive responses about himself might suggest that either he is hiding difficulties he is having, or that he is unable to fully acknowledge, express, or identify his own emotional strengths or weaknesses. Ratings by both Parent and Martin on the MASC-2 scales suggest a low probability that Martin could be diagnosed with an anxiety disorder. On the SSIS, Martin's scores were average when compared to same-aged peers in most areas, though below average in assertion; he reported no concerns in problems related to bullying, and he reported below average scores (fewer problem behaviors than peers) in other areas. Parent's responses on the SSIS suggest that Martin's social skills are above average in

several areas, average in others, and below average in the area of assertion. He reported average scores in problem behavior areas. On the Roberts-2, Martin reported a consistent response pattern of both bullying and academic failure.

Mr. Canty concluded that it is likely Martin is not currently experiencing significant emotional difficulties. He did not recommend any changes to the service delivery grid. He did suggest that Parents determine whether Martin would benefit from more consistent outside counseling, and that Martin practice assertiveness skills with his counselor. (S-7; Canty, I: 31-34)

22. On or about November 27, 2018, the District received Parent's rejection of the proposed 2018-2019 IEP. Martin's mother indicated that the Team had failed to timely meet to discuss testing completed on October 9, 2018 and requested a meeting to discuss the rejected IEP. (S-6)
23. On November 29, 2018, the Team reconvened for a facilitated IEP meeting. All members agreed that the most recently proposed goals remained relevant and appropriate. The Team reviewed Mr. Canty's psychological assessment and agreed that no additional services were warranted. The proposed 2018-2019 IEP was amended on the same date to reflect the results of this assessment. At the meeting, NMRSD agreed to resume two hours of tutoring per week to address decoding and reading comprehension; this tutoring had been suspended on May 18, 2018. The District agreed to provide additional tutoring to compensate for services Martin had not received between May 18 and November 29, 2018.³ Also during this meeting, Parent expressed concern with Martin's handwriting and requested an occupational therapy (OT) assessment. (S-8, S-9; Desilets, I: 63-64)
24. NMRSD requested, and Parent provided, consent for an OT evaluation, which Cynthia Minezzi Sperring conducted on two dates in early January 2019. Martin's standardized scores ranged from the average range to the poor range. He displayed difficulty with some visual perceptual skills, visual figure ground, and form constancy, indicating that he would benefit from accommodations when presented with new or unfamiliar information. Ms. Sperring also recommended that time restraints be minimized. Finally, she outlined a number of accommodations for use with Martin in the general education environment. (S-10; Desilets, I: 64)
25. As of January 31, 2018, Parents had not responded to the amended IEP, and the District sent Martin's mother a reminder. (S-11)
26. On or about February 5, 2019, Parent rejected the amended IEP, noting that it does not include OT testing, tutoring for reading, or "what [Martin] needs." She stated that the issue of compensatory services had not been resolved, and that mediation was needed. (S-9)

³ These Orton-Gillingham tutoring services were arranged and agreed to outside of the Team process. (S-16; Simonich, I: 54)

27. Martin's Team reconvened on March 18, 2019 for a facilitated IEP meeting to discuss the OT assessment. The Team amended the 2018-2019 IEP again to add OT services for a short period of time (12 x 30 minute sessions), and Parent and the District agreed to participate in mediation. (S-12; Desilets, I: 64-65)
28. Parent rejected this amended IEP on or about April 24, 2019, stating that it contains "inconsistent information," that none of the services listed in the Service Delivery Grid had been delivered, that the IEP was not provided initially in a timely manner, and that outstanding noncompliance issues remained unresolved. She refused the placement and requested a meeting to discuss her refusal. (S-13; Desilets, I: 65)
29. Martin's Team convened on May 2, 2019 for his annual meeting and to discuss Parent's rejection of the 2018-2019 IEP, as amended. Based on Parent's reports regarding Martin's performance and progress, the Team made some changes to his accommodations in "Present Levels of Educational Performance -A" and proposed the same goals without updates. Parent requested further accommodations, which the District declined. (S-14; Desilets, I: 65-66)
30. The Team proposed an IEP for Martin for the period from 05/03/2019 to 05/03/2020 (proposed 2019-2020 IEP) placing him in a partial inclusion program at North Middlesex Regional High School. The IEP, which incorporates an 8-day cycle, provides for Consultation to Staff (1 x 15 minutes) by the special education teacher/general education teacher/paraprofessional; Grid B Academic Assistance (5 x 60 minutes per cycle) and Mathematics (5 x 60 minutes per cycle), also delivered by these individuals; and Grid C Reading (5 x 60 minutes per cycle), delivered by the special education teacher/reading specialist, ELA (5 x 60 minutes per cycle), delivered by the special education teacher/general education teacher/paraprofessional, and OT (1 x 30 minutes per cycle), delivered by the occupational therapist/certified occupational therapy assistant. (S-15)
31. The OT services aim to assist Martin with his visual perceptual motor skills, which impact his ability to visually receive information and make an adapted motor response. (S-15)
32. The Academic Assistance class contemplated by Martin's proposed 2019-2020 IEP is an inclusion class taught by a special education teacher. Twenty students attend the class, 4 of whom receive direct services for academic assistance. The curriculum includes direct instruction in executive functioning skills, memorization strategies, study skills, and self-advocacy. (Desilets, I: 66-67)
33. The math class proposed for Martin is inclusion geometry, co-taught by a licensed mathematics teacher and Margaret Desilets. Ms. Desilets is Martin's special education liaison and serves as the special education department chair for North Middlesex Regional High School. She is licensed in special education moderate disabilities, grades 5 through 12, has a bachelor's degree in elementary education, and at the time of hearing had almost completed a master's degree in moderate disabilities. The proposed math

class is comprised of twenty-five students, 8 of whom are on IEPs and 7 of whom receive direct instruction for math. (Desilets, I: 61-62, 66-67)

34. Martin would be in an ELA class taught by a special education teacher, where he would be the fourth student. The course covers tenth grade content at a slower pace, with explicit skills instruction. (Desilets, I: 68-71)
35. The reading services contemplated by the proposed 2019-2020 IEP are delivered in a small group setting. Five students are currently in the class, all receiving instruction in both decoding and comprehension. The class is taught by a special education teacher who is trained – but not certified – in Orton-Gillingham. The course consists of multiple components, including phonics, decoding, comprehension, vocabulary, research and writing, and project-based learning. (Desilets, I: 68-71)
36. The proposed 2019-2020 IEP includes two Reading goals, one focused on reading and spelling sight words, and the other on reading a variety of texts. The second goal reads: Martin “will read fictional, expository, and informational texts at his independent and instructional reading level with satisfactory comprehension and appropriate fluency.” The benchmarks/objectives are as follows:
 1. [Martin] will use information from illustrations, tables of contents, glossaries, indexes, headings, graphs, charges, diagrams, and/or tables to assist in comprehension of text.
 2. [Martin] will return to text to locate information, support conclusions and answer questions.
 3. [Martin] will use a variety of strategies: Rereading, reading on, monitoring, cross checking, predicting, confirming, searching and self-correcting to increase comprehension. (S-15)
37. The “Additional Information” section of the proposed 2019-2020 IEP contains the same information as the previous proposed IEP. (S-15)
38. Parent rejected the proposed 2019-2020 IEP and placement on or about May 21, 2019, stating, “I want tutoring in Reading with a grade appropriate reading specialist and OT as discussed in the meeting.” She requested a meeting to discuss her rejection and wrote, “[Martin] has been without services for an entire year and is also entitled to compensatory services per the state, none of which has been provided.” (S-15)
39. On July 1 and 2, 2019, Caroline Cole, PsyD, With the exception of establishing that Martin’s second reading goal lacks measurability, conducted a private neuropsychological assessment of Martin, funded by the District. She utilized the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), WIAT-III (selected subtests), California Verbal Learning Test – Children’s Version, D-KEFS selected subtests, Rey Osterreith Complex Figure Test, Rorschach Inkblot Test – Comprehensive

Scoring System, Thematic Apperception Test (TAT), Personality Assessment Inventory – Adolescent, Behavior Rating Inventory of Executive Functioning, Social Developmental History Form, and Clinical Interview. (S-16; Desilets, I: 76)

Most of the scores on Dr. Cole’s evaluation were within the range that was expected for Martin’s three-year evaluation, which would have occurred in 2020. Notably, however, his vocabulary scores decreased, even though they were a relative strength; Dr. Cole suggested that this could be related to the fact that Martin was no longer reading as much. (Canty, I: 38)

Martin’s cognitive skills ranged from very low to high average. Dr. Cole found that Martin had average range verbal comprehension skills; visual spatial skills within the average range, with the exception of low average scores in fluid reasoning; low average to average range working memory skills; and a significantly slow processing speed, with skills within the borderline range. Martin was administered a few subtests from the WIAT-III to assess his reading skills. He displayed some challenges with decoding words and understanding phonics; slow, labored, and disjointed oral reading fluency; and below average accuracy. Martin received below average to extremely low scores on tests measuring strategies involved in learning and recalling verbal material in an everyday shopping task. He had significant challenges in learning verbal information. Martin demonstrated intact visual spatial and organization skills. On the D-KEFS assessment of executive functioning, Martin displayed impairment in cognitive shifting; vulnerabilities in verbal fluency, cognitive flexibility, and verbal inhibition skills; and difficulty with categorical processing and utilizing simultaneous processing to succeed in a task. Martin also demonstrated good problem-solving skills, adequate deductive reasoning skills, and a cognitive strength in spatial planning, rule learning, and inhibition. On the BRIEF, Parent’s ratings did not indicate any significant executive functioning problems at home. Upon reviewing measures of emotional functioning, the examiner observed that Martin has a generally stable self-concept with reasonable self-esteem. He appeared to be guarded, and either was attempting to present himself in a more positive light or had difficulty recognizing, and being comfortable expressing, emotions. (S-16; Canty, I: 36-43)

Overall, Dr. Cole found that despite Martin’s relative strength in verbal comprehension, his scores reflected a decline from previous performance in the superior range to current performance in the average range. He displayed perceptual organizational skills in the low average range and was most vulnerable in processing speed tasks, where he scored in the very low range. Dr. Cole concluded that Martin’s slower rate of processing information is likely impacting his academic tasks such as reading, reading fluency, and knowing basic math facts, as well as his ability to shift thinking and engage simultaneous processing. Martin has difficulty with verbal learning tasks, and his verbal learning is not as well developed as his non-verbal memory. He is emotionally guarded and likely to be a hands-on, kinesthetic learner. (S-16)

Results of the evaluation indicate that Martin would benefit from continued special education services to address his vulnerabilities in reading. According to Dr. Cole,

“[c]ontinuing with the Orton Gillingham (*sic*) reading program may be beneficial, but he requires direct instruction on how to generalize these skills to his other academic tasks.” Dr. Cole recommended additional accommodations, including explicit teaching of multiple approaches to solving problems, the use of graphic organizers, cooperative groups, reciprocal teaching, and additional time to complete tasks, etc. (S-16)

40. Mr. Canty’s view of Martin, based on his own testing, did not change after he reviewed Dr. Cole’s report. Mr. Canty was hesitant about Dr. Cole’s recommendation for Orton-Gillingham as he believes a more comprehensive program involving different strategies and a variety of teaching styles would be more beneficial for Martin. (Canty, I; 45)
41. At this point, Ms. Simonich also believes that Martin requires reading services more comprehensive than Orton-Gillingham, because he has acquired many of the basic reading skills for which she provided the tutorial. Because he needs to be able to apply his reading skills across other academic subjects, he would be better served by the reading program recommended by the Team. This approach includes group instruction and collaboration between reading and other academic teachers. (S-15; Simonich, I: 55-60)
42. Martin’s Team reconvened on September 3, 2019 for a facilitated Team meeting to discuss Dr. Cole’s assessment. Dr. Cole participated by telephone. The Team considered Parents’ request to revise all proposed goals and benchmarks, but continued to assert that the developed goals were appropriate, measurable, and reasonably calculated to provide Martin with a FAPE. Dr. Cole had reviewed the proposed IEP and she stated that she agreed with the goals, benchmarks, and accommodations proposed by the Team. Asked specifically whether she believed Martin required Orton-Gillingham instruction in order to make progress, Dr. Cole explained that strategies from Orton-Gillingham would be beneficial, but the program is not the “end all/be all” for Martin, as he requires more comprehensive reading instruction. The District proposed the same goals with no updates, and suggested that Martin could attend classes at the high school in a specially designed program. Parent rejected this option in favor of continuing to homeschool Martin. (S-17; Desilets, I: 73-75)

DISCUSSION

It is not disputed that Martin is a student with a disability who is entitled to special education services under state and federal law. At issue here is whether the IEP developed by North Middlesex for the period from May 3, 2019 to May 3, 2020 is reasonably calculated to provide him with a FAPE, and if not, whether it may be modified such that it does so.

I. Legal Standards

A. *Free Appropriate Public Education*

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education.”⁴ Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the least restrictive environment that will “accommodate the child’s legitimate needs.”⁵

FAPE is delivered primarily through a child’s IEP, which must be tailored to meet his unique needs after careful consideration of his present levels of achievement, disability, and potential for growth.⁶ “To meet its substantive obligation under the IDEA, a [district] must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁷ Among other things, the IEP must include a statement of measurable annual goals and a description of how the child’s progress toward meeting the annual goals will be measured.⁸ According to the United States Court of Appeals for the First Circuit, this description must include “objective criteria with which to measure progress toward those goals.”⁹ Massachusetts FAPE standards require, similarly, that an IEP be “reasonably calculated to confer a meaningful educational benefit in light of the child’s circumstances,”¹⁰ and designed to permit the student to make “effective progress.”¹¹

Evaluating an IEP requires viewing it as a “a snapshot, not a retrospective. In striving for ‘appropriateness, an IEP must take into account what was . . . objectively reasonable . . . at the time the IEP was promulgated.”¹² The same is true for amendments to the IEP.

B. *Burden of Proof*

Although generally, the burden of persuasion lies with the party that files the *Hearing Request* before the BSEA, in this matter, the non-moving party is the one challenging the IEP. As such, Parents bear the burden of proving that the school district’s proposed IEP does not provide Martin with a FAPE.¹³

⁴ 20 U.S.C. § 1400 (d)(1)(A).

⁵ *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008); see 20 USC § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

⁶ *Andrew F. v. Douglas Cty. Reg’l Sch. Dist.*, 137 S. Ct. 988, 999 (2017); *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

⁷ *Andrew F.*, 137 S. Ct. at 999.

⁸ 20 U.S.C. § 1414 (d)(1)(A)(ii-iii).

⁹ *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23 (1st Cir. 2008).

¹⁰ *C.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 624-25 (1st Cir. 2019).

¹¹ 603 CMR 28.05(4)(b) (IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”).

¹² *Roland M. v. Concord Sch. Comm.*, 910 F.2d, 983, 992 (1st Cir. 1990) (internal quotations and citations omitted).

¹³ See *Schaeffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that the burden of proof in an administrative hearing challenging an IEP falls on the party seeking relief); *Esposito*, 675 F.3d at 35 & n.3 (recognizing that where a school system seeks to challenge an IEP, it bears the burden of persuasion, but stating, regarding this holding from *Schaeffer*, “We understand this to mean that a school system does not incur the burden of proof merely by preemptively seeking an administrative determination that a proposed IEP would comply with the IDEA, as in this case. In that instance, the school system is defending the adequacy of the IEP, not challenging it.”)

II. With One Exception, NMRSD's Proposed IEP is Reasonably Calculated to Provide Martin with a FAPE

Since Martin was identified initially as eligible for special education, in or about December 2014, North Middlesex has convened annual meetings, conducted the required three-year reevaluation, offered and conducted additional evaluations at parent request, and proposed IEPs to address Martin's Specific Learning Disability in a partial inclusion setting. Although Parents partially accepted the IEP proposed for the period from 10/26/17 to 10/25/18, they rejected subsequent IEPs, including amendments thereto. Parents have never accepted services proposed by the Team for Martin, electing instead to homeschool him and requesting the continuation of an Orton-Gillingham tutorial that was arranged, and provided, outside of the Team process.

Evaluations of Martin over time have consistently indicated weaknesses in Martin's cognitive efficiency, notably working memory and processing speed. NMRSD has consistently proposed both support in the general education setting and pull-out instruction, as well as a battery of accommodations, to assist Martin in accessing the curriculum and making effective progress. The IEP most recently proposed for Martin provides inclusion support in academic assistance and math, and pull-out direct services in reading, ELA and OT. As described by NMRHS special education department chair Margaret Desilets, these courses appear appropriate for a student with Martin's profile. The reading course, in particular, consists of the multiple components recommended for Martin by everyone who has evaluated him.

I find, however, that the second reading goal proposed by the Team for Martin is too vague. Neither "satisfactory" comprehension nor "appropriate" fluency describes a measurable annual goal.¹⁴ Moreover, none of the benchmarks lists a specific target, and nowhere in the goal are there objective criteria by which to measure Martin's progress toward comprehension and fluency.¹⁵

CONCLUSION

Parents have failed to meet their burden to prove that the IEP proposed by North Middlesex for the period from 05/03/2019 to 05/03/2020 is not reasonably calculated to provide Martin with a free appropriate public education in the least restrictive environment, except as to the lack of measurability of the second reading goal.

ORDER

North Middlesex Regional School District is hereby directed to reconvene Martin's Team within thirty days of the receipt of this decision to rewrite his second reading goal such that is measureable and contains objective criteria by which to measure his progress.

¹⁴ See 20 U.S.C. § 1414 (d)(1)(A)(ii).

¹⁵ See 20 U.S.C. § 1414 (d)(1)(A)(iii); *Lessard*, 518 F.3d at 23.

By the Hearing Officer:

Amy M. Reichbach

Dated: January 29, 2020