

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

In Re: Student v. Haverhill Public Schools

BSEA No. 2005314

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766” (MGL c. 71B), the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

The Student in the instant case is a five-year-old girl with multiple physical and developmental disabilities that affect virtually all areas of her functioning. Student is medically fragile, particularly with respect to her breathing. If Student contracts an ordinary infection such as a cold or the flu, she risks potentially life-threatening respiratory complications.

On December 4, 2019, Parent filed a hearing request with the Bureau of Special Education Appeals (BSEA) in which she alleged that the Haverhill Public Schools (Haverhill or HPS) had failed to deliver certain agreed-upon home based services, had failed to offer Student a free, appropriate public education (FAPE) for the 2018-2019 school year, and had committed procedural violations that deprived Student of FAPE and precluded Parent’s meaningful participation in the Team process. Parent sought an order directing Haverhill to provide Student with compensatory services.

Parent’s hearing request also alleged that the proposed IEP for the 2020-2021 school year was inappropriate, and requested an order for additional evaluations and “an appropriate IEP and placement.” Later in December of 2019, Parent clarified that she was seeking a private day school placement at New England Pediatric Care (NEPC). Haverhill agreed to Parent’s request and referred Student to NEPC, which accepted her application. Haverhill and NEPC also agreed to additional terms regarding scheduling as well as funding for Student’s private duty nurse. This offer of placement was not contingent on waiver of compensatory claims.

Upon receipt of Parent’s hearing request, the BSEA scheduled an initial hearing date of January 10, 2020.¹ The parties made several requests to postpone the hearing for reasons such as witness unavailability and settlement efforts. Each request was granted for good cause. On June 12, 2020, Haverhill filed a *Motion for Partial Summary Judgment* with respect to Parent’s prospective claims for the 2020-2021 school year. Parent filed a response asserting, in essence, that she wished to preserve her

¹ This matter was originally assigned to hearing officer Amy Reichbach. The case was reassigned, for administrative reasons, to the undersigned hearing officer on June 14, 2020.

compensatory claims. On June 24, 2020, I issued a ruling that granted Haverhill's *Motion* with respect to Parent's request for prospective relief in the form of an "appropriate IEP and placement."

The hearing was held on July 9, 14 and 17, 2020 via Zoom video conference. Both parties agreed to proceed with the Zoom platform. Parent appeared *pro se* on behalf of herself and Student. Haverhill was represented by counsel. Both parties had an opportunity to examine and cross-examine witnesses as well as to submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until August 4, 2020 to submit written closing arguments. On that date, the BSEA received the parties' written arguments and closed the record.

The record in this case consists of Parent's Exhibits P-1 through P-15, School's Exhibits S-1 through S-62, as well as the transcript of witness testimony produced by a court reporter. Those present for all or part of the proceeding were the following:

Parent	
Heather Azzarito	School Nurse, Haverhill Public Schools (HPS)
Maria Barry	Team Chair, Facilitator, Moody Preschool, HPS
Sandy Basiliere	Occupational Therapist, HPS
Anne Coogan	Lead Speech/Language Pathologist, HPS
Thomas David	Teacher of Visually Impaired, HPS
Mary Fournier	Physical Therapist, HPS
Pamela MacDonald	Director of Special Education, HPS
Molly Markos	Special Education Teacher, Moody School, HPS
Thomas Martin, M.D.	Physician/Pulmonologist, Boston Children's Hospital
Judith Nesson	Out of District Coordinator, HPS
Amanda Platner, Psy.D.	Clinical Psychologist, Franciscan Children's Hospital
Francine Rosenberg	Executive Director, North Shore Education Consortium
Amy Rogers, Esq.	Counsel for School
Jocelyn Brisebois	Counsel for School
Alison Sexson	BSEA Intern, Observer
Sara Berman	BSEA Hearing Officer
Carol H. Kusinitz	Registered Professional Reporter

ISSUES PRESENTED

The issues for hearing are the following:

1. Whether the Haverhill Public Schools (HPS) failed to provide Student with special education and related services to which she was entitled during some or all of the following time periods, and if Student is entitled to compensatory services as a result: February 8, 2018 to June 27, 2018; September 1, 2018 to June 1, 2019; summer 2019; and September 26, 2019 to the date of the hearing.

2. Whether, during the 2018-2019 and 2019-2020 school years, HPS committed procedural violations that resulted in a denial of FAPE or deprived Parent of the opportunity for meaningful participation in the Team process as follows:
 - (A) whether HPS failed to conduct comprehensive and complete individualized evaluations;
 - (B) whether HPS failed to allow Parent to participate meaningfully in the process of developing Student's IEP and making educational decisions;
 - (C) whether HPS failed to ensure attendance of all necessary members at Team meetings;
 - (D) whether HPS failed to allow Parent to review Student's educational records;
 - (E) whether HPS predetermined Student's IEP and/or placement;
 - (F) whether HPS failed to send prior written notice when it refused to propose an alternative placement and home-based services for Student.
3. Whether the IEP covering the period from March 2018 to March 2019 was reasonably calculated to provide Student with FAPE, and, if not, whether Student is entitled to any compensatory services as a result.
4. Whether the IEP covering the period from March 2019 to March 2020 was reasonably calculated to provide Student with FAPE, and, if not, whether Student is entitled to compensatory services as a result.

POSITION OF PARENT

Student has not received educational services for two years because Haverhill has failed to offer her appropriate programming. Beginning with Student's transition from Early Intervention, Haverhill has failed to fully recognize, consider, evaluate, and address all of Student's multiple, complex medical and educational needs or to modify her educational environment to meet those needs. Specifically, HPS' initial evaluation of Student in 2018 was inadequate. The IEP for the 2018-2019 school year that was developed after this evaluation did not reflect all of Student's medical and educational disabilities or address her needs. HPS failed to modify Student's IEP to reflect her inability to physically attend school for medical reasons. Haverhill failed to provide Student with home-based services to which she was entitled.

Additionally, Haverhill's Team meetings were flawed. Although Parent attended Team meetings, she was unable to actively participate in decision-making. Finally, the testimony of Haverhill's witnesses at hearing was self-serving, and did not demonstrate concern or advocacy for Student's unique needs or civil rights.

POSITION OF SCHOOL

At all relevant times, Haverhill has provided Student with evaluations that were comprehensive and appropriate in light of her significant disabilities. Additionally, the IEP for the 2018-2019 school year, and the proposed placement at the Moody School

were tailored to Student's unique educational and health-related needs, including her need to be educated at home during cold and flu season. Parent presented ostensibly no evidence to the contrary. Procedurally, HPS adhered to all relevant state and federal requirements and Parent did not prove otherwise.

In an effort to resolve this matter, as well as to meet Student's needs, Haverhill has offered regular and compensatory services in her neighborhood school and at home, and also offered specialized out of district public and private day placements. As of the hearing date, Student had not yet begun attending school, partially because Parent had rejected and/or did not avail herself of reasonable offers of placements and services. Moreover, if Student failed to receive any home based services to which she was entitled, this was entirely due to Parent's failure or refusal to participate in such services.

SUMMARY OF THE EVIDENCE

1. Student is a five-year-old child with disabilities who is a resident of Haverhill. Her eligibility for special education and related services from the Haverhill Public Schools pursuant to the IDEA and MGL c. 71B is not in dispute. Student's assigned school is the Moody Elementary School. Student has received some home-based services from HPS, but has never attended classes at the Moody School.
2. Student is a sweet, eager child who likes to be social and vocalize with her family and caregivers. She loves music, and responds to Parent's voice and to hearing her nickname, as well as to musical and switch-operated toys. Student demonstrates readiness to learn when she is properly positioned and her vision needs are appropriately accommodated. (S-1, P-3, S-8)
3. Student has multiple, physical, neurological, and developmental challenges, including severe cerebral palsy, cortical visual impairment, intractable epilepsy, a compromised immune system, chronic lung damage, recurrent respiratory distress, and severe, global developmental delays. Student is fed a special diet through a gastrostomy tube ("G-tube"). She receives medications and breathing treatments throughout the day. Student is non-verbal and non-ambulatory, and uses a wheelchair for mobility, as well as a variety of assistive or supportive devices and equipment such as AFOs, seating supports, and an augmentative communication device. Student receives approximately 58 hours per week of home-based nursing services, funded by her insurance, and is eligible for additional nursing hours. (Martin, Platner, P-2)
4. Student is highly vulnerable to severe, potentially life-threatening respiratory illness and has been hospitalized for such issues approximately 5 times. During one such hospitalization, in 2016, Student spent one month in the intensive care unit at Boston Children's Hospital. Common viral infections such as colds and flu are a major trigger for Student's respiratory crises. As a result, Student's pulmonologist, Dr. Thomas Martin, has stated that she should not be educated in a school building during

the viral season of approximately September to June because of the risk of exposure to respiratory illness. (Parent, Martin, P-2, S-13)

5. Prior to reaching the age of three, Student received home-based early intervention (EI) services, consisting of weekly visits from a physical therapist (PT), occupational therapist (OT) and teacher of the visually impaired (TVI), and biweekly visits from a nurse and social worker. (P-3)
6. In August 2017, Student's EI provider referred Student to HPS to prepare for her transition to school upon reaching her third birthday in February 2018. (Barry, P-3) On or about November 17, 2017, HPS followed up with a "preplanning meeting" in Student's home attended by Parent, Student's private nurse, Maria Barry, the HPS Special Education Facilitator for the Moody Preschool, and Heather Azzarito, the Moody school nurse. (Parent, Barry, Azzarito). After discussion of Student's health conditions as well as the health-related supports that she would need at school, HPS proposed an initial special education evaluation for Student. (Barry, P-1, S-1)
7. Haverhill conducted its initial special education evaluation of Student on December 8, 2017 in the preschool classroom at the Moody School. The evaluation was of the "arena" type, meaning that professionals from different disciplines worked as a team to assess Student's needs and functioning. Student's evaluation was conducted by a physical therapist (PT), an occupational therapist (OT), a speech and language pathologist (SLP), and a special education teacher. The evaluation was observed by Parent, Student's private duty nurse, the Moody School nurse, and Student's PT from Early Intervention. Student was placed on floor mats for some or all of the evaluation. Prior to Student's arrival, staff cleaned the floor mats, sanitized materials to be used, and dimmed the room lighting to avoid triggering a seizure. (Fournier, Basiliere, Coogan S-1, P-3,)
8. The evaluation instruments included the Hawaii Early Learning Profile, ("HELP"), which is a criterion-based checklist designed to aid curriculum planning; the Early Learning Accomplishment Profile ("EarlyLAP" or "ELAP"), which is a criterion-referenced observation tool to assess young children's skills in six different domains (gross motor, fine motor, language, cognition, social-emotional, and self-help); and the Receptive Expressive Emergent Language Scale-3 ("REEL 3"). The evaluation also included interviews with Parent and observation of Student. (S-1, P-3) Additionally, a teacher of the visually impaired (TVI) assessed Student's use of her vision via observations at home and at the Moody preschool as well as by reviewing Student's records and interviewing Parent and Student's then-current TVI from Early Intervention. (S-2)
9. The HELP and ELAP assessments showed that Student had weaknesses in the areas of muscle tone, head control, core strength and stability and shoulder stability. She was unable to bring her arms to midline, had minimal volitional movement of her

arms, and had not yet developed a grasp reflex. The REEL-3 indicated that Student had significant delays in expressive and receptive language, scoring at approximately the one-month level. The vision assessment showed that Student was at the beginning stages of having a consistent visual response to stimuli and of integrating vision with function. In general, Student was functioning at the one to five-month level across all domains. (Basliere, Fournier, Coogan, S-1, S-2, P-3).

10. Meanwhile, in a letter dated December 27, 2017, Student's pulmonologist from Boston Children's Hospital, Dr. Thomas Martin, wrote a letter in which he stated: "...we have been struggling with [Student's] tendency to get very ill, often with respiratory distress, with every viral respiratory infection. Several recent infections have lead [sic] to a requirement for hospitalization in this young girl who has fairly bad chronic lung damage and a poor ability to cough...We have tried every medical method to mitigate this problem, with limited success. I have therefore recommended that [Student] reduce her exposure to respiratory viruses by staying home from preschool and receiving her care and education in the somewhat safer environment of her home for the coming 4-6 months." Dr. Martin provided this letter to Parent, to be forwarded to Haverhill. HPS never received this letter, however. (Parent, Martin, P-8, Barry)
11. The Team convened on January 9, 2018 to consider the above referenced evaluations, but, as stated above, did not have the above-quoted letter from Dr. Martin in its possession. In addition to HPS staff and Parent, some of Student's EI providers also attended the meeting, including her TVI. A representative from MassStart, Student's home nursing agency, also attended the meeting. The Team determined that Student was eligible for special education under the category of global developmental delay and issued an IEP covering the period from February 10, 2018 to February 10, 2019. (Barry, S-7)
12. The N-1 form accompanying this initial IEP stated that HPS was proposing a program consisting of OT, PT, and speech-language services in a substantially separate preschool classroom at the Moody School. The N-1 further proposed that up to the first quarter of the IEP period would be spent slowly increasing Student's time in the preschool classroom while gathering data on the impact of Student's medical condition on her functioning in that setting. Student would initially attend school for 90 minutes per day, 2 days per week. The Team would then reconvene to draft goals based on the data collected, but also would meet in March 2018. According to the N-1, Parent objected to Student not having access to peers with like disabilities, and felt that the school environment was not compatible with Student's needs. (S-6, P-4)
13. The IEP proposed a gradual introduction to school-based instruction for Student, beginning with 2x15 minutes per week each of OT, PT, and vision services. Depending on Student's response, the amount of time in school would be gradually increased, and peers would slowly be introduced. During this period, the

speech/language pathologist would observe Student and gather information on the types of communication devices that might be appropriate for her. The Team would reconvene in late March to review data and amend the IEP, if appropriate. Additionally, the Team planned to add a communication goal, and benchmarks, and direct speech/language services to the service delivery grid based on data gathered by the speech/language pathologist. Initially, the therapists would use a co-treatment model with Student. (S-8, Coogan, Markos)

14. The proposed placement was the Language Cognition Classroom (“LCC”), a substantially separate preschool classroom at the Moody School. At relevant times, this classroom housed 5 other students in the morning session and three others in the afternoon session. The peers all had significant disabilities. Some were non-ambulatory and there were peers with 1:1 nurses. (S-8, Markos)
15. The service delivery grid included, in Grid A, 1x30 minutes/month of consultation by the OT, and 1x60 minutes/month by the PT. Grid C included OT, 2x30 minutes/week; PT, 2x30 minutes/week; and vision therapy, 3x60 minutes/week; 1:1 nursing, 4x150 minutes/week; 1:1 instructional assistant 4x150 minutes/week; classroom instruction by a special education teacher 4x150 minutes/week; and extended year services (ESY). Under “Additional Information,” the IEP proposed a gradual, incremental increase in the frequency and duration of Student’s school attendance and a reconvening of the Team no later than April 2018. (S-8)
16. In conjunction with the initial IEP, the school nurse for the Moody School, Heather Azzarito, developed an Individualized Health Care Plan (IHCP) for Student, based on information gathered from Student’s nurse from MassStart. Ms. Azzarito testified that normally, Student’s IHCP, which is a fluid document, would have been fully developed by including additional information from Student’s physicians and from Parent and finalized after Parent accepted Student’s placement. In this case, in February 2018, Parent did not accept the Moody placement and did not authorize Ms. Azzarito to contact Student’s medical providers; therefore, the IHCP was not finalized at that time. The IHCP was revised at later dates, however. (Azzarito)
17. The initial IEP contained goals in Classroom Readiness (including reacting to and activating toys with a staff member and one peer); Vision (increasing her ability to integrate vision with function by looking at various objects and materials); and Motor Skills (improving head and arm control). The IEP contained multiple accommodations for Student’s disabilities, including, for example, reduction of auditory and visual stimuli and clutter, use of reduced lighting (to prevent seizures), provision of a tablet with Internet access, and multisensory instruction. Her physical needs were to be accommodated with a range of adaptive equipment such as standers, adaptive seating, mats, an accessible building, and use of a lifting system once Student reached a weight limit. (S-6)

18. On January 28, 2018, Parent rejected the proposed IEP and refused the placement offered. Parent requested a meeting to discuss the rejected IEP. (S-8) While Parent did not state the reasons for the rejection on the IEP document itself, Parent had exchanged emails with Maria Barry, the Special Education Facilitator for the Moody Preschool, in which she had stated that she did not believe that the Moody School was an appropriate setting for Student. Parent also asked detailed questions about such issues as playground accessibility, cleanliness, temperature control and ventilation within the LCC classroom (since poorly ventilated rooms could trigger Student's seizures). Ms. Barry addressed most of these questions in responsive emails to Parent. (S-8)
19. On January 30, 2018, HPS representatives visited Parent and Student at home to further assess her current medical condition and, as stated in an N-1 form issued on that date, "to begin to develop medically based criteria for her attendance in school." The N-1 elaborated that at the initial meeting held on January 9, 2018, both Parent and Student's home-based team felt that Haverhill's proposed placement would not meet Student's needs because of the complexity of her medical conditions. The purpose of the home observation was to assess and address these concerns.
20. After discussion, the Haverhill representatives determined that they had misunderstood the concerns of Parent and the home based team. Specifically, Parent did not feel that Student's medical condition required a gradual start to school attendance or a shorter school day; rather, she felt that the Moody School environment would trigger illness because of lack of cleanliness, poor air quality, and exposure to other children. Based on the meeting, HPS shared hygiene protocols with Parent and agreed to incorporate specific cleaning procedures in Student's IHCP. HPS also determined that Student would not require a reduced schedule, and offered to reconvene the Team to draft an IEP consistent with the parties' new understanding of Student's needs and Parent's concerns. (Parent, Barry, S-9)
21. The Team reconvened on March 1, 2018 to attempt resolution of the rejected portions of the initial IEP. Parent attended the meeting. On or about March 7, 2018, HPS issued an IEP covering March 1, 2018 to March 1, 2019. Under "Parent and/or Student Concerns," the IEP stated that Parent sought a full-time program with like peers together with access to inclusion opportunities and a home-based program during winter months to prevent illness and consequent loss of instructional time, classroom modifications including a changing table in a private area and dimmable lights to prevent seizures. Rather than having the School collect medical data on Student, Parent favored allowing Student to "self-discover and see how far she can go on a daily basis." Parent expressed concern about the qualifications of Student's teacher and paraprofessional, and about whether Student would have access to similarly-situated peers, as well as about whether HPS would address Student's communication and self-advocacy needs. Parent's vision for Student as set forth in

the Vision Statement was for Student to be an integrated member of her preschool, and, eventually, a contributing and respected member of the larger community with skills to participate and to self-advocate. (S-11)

22. The IEP issued on March 7, 2018 contained the same goals as the original IEP; however, the “Classroom Readiness” goal in the original IEP appears to have been renamed “Functional Communication.” The service delivery grid added 1x60 minutes/week and 1x30 minutes/month, respectively, of vision and speech/language consultation in Grid A, and 2x15 minutes/week of speech/language services in Grid C. On March 26, 2028, Parent rejected this IEP, refused the placement, and requested an additional meeting to discuss the rejection. (Parent, S-11)
23. During the Team meeting of March 1, 2018, Parent disclosed Dr. Martin’s concerns about Student’s school attendance during the cold and flu season because of Student’s vulnerability to respiratory illness during that time. Parent requested home-based services during the winter months and provided consent for Haverhill staff to contact Student’s treaters, including Dr. Martin. (Parent, Barry)
24. In a letter to Dr. Martin dated March 6, 2016, Team facilitator Maria Barry asked for a telephone conference to include Dr. Martin, the school nurse and herself to discuss the above-referenced concerns. She also asked Dr. Martin for written orders containing his recommendations. (Barry, Martin, S-12)
25. Dr. Martin responded in a letter dated March 21, 2018, in which he stated that Student “should be kept home from school if possible until September 2018 because of her history of repeated respiratory tract infections several of which led to hospitalizations and one led to a very prolonged intensive care stay.” The letter went on to state that “the choices before [Student]” were the program offered by HPS, or an unnamed private school. (Martin, S-14)
26. With respect to the HPS program, Dr. Martin’s letter stated that “[t]he mother has been into the school building, if not to the classroom...and observed that the staff do not engage in regular handwashing, the rooms appear dusty and dirty, and the staff members there placed [Student] on the floor during an observational session. The room will not be equipped with a lift, nor with a changing table...The mother ...has received no assurances that the aide or other workers will have been properly trained and certified.” The letter further described an unnamed private school that would provide more instructional hours than the public school, specialized educators, as well as nursing staff, a feeding specialist, and an accessible playground. (Martin, S-14)
27. Dr. Martin concluded that “the best option for [Student’s] intellectual development and social development is clearly one that would combine the private school option during the warmer months with home schooling during the viral season...” (Martin, S-4)

28. Dr. Martin did not observe the proposed Moody School program himself. The statements in his letter regarding the cleanliness and available equipment, as well as staff qualifications were based on Parent's report during a clinic visit on or about February 16, 2018. (Martin, P-2)
29. In response to the letter of March 21, 2018, Ms. Barry sent Dr. Martin a request to complete a Physician's Statement for Home Hospital Education. Dr. Martin did not return this form until May 2018. (Barry, Martin, Parent, S-17)
30. Meanwhile, on March 29, 2018, the Team reconvened to discuss Parent's concerns with the IEP issued on March 7, 2019 and rejected on March 26, 2018. On or about April 2, 2018, the Team issued an IEP which revised the service delivery grid to reflect a full day placement in the LCC class. (S-15)
31. On April 23, 2018, Parent refused the placement offered in the IEP of issued on April 2, 2018, but "accept[ed] the therapeutic services." Parent requested a meeting to discuss the rejected portion of the IEP prior to allowing Student to attend school to receive services. (Barry, Parent, S-15)
32. Meanwhile, on April 4, 2018, Dr. Eric Bucher, Student's primary care pediatrician, completed a Physician's Statement for Temporary Home or Hospital Education for Student. The form stated that "the provision of services (on a day-to-day basis) should be based on mother's report of [Student's] status medically to tolerate and/or participate in therapies." When the Team facilitator sought more information from Dr. Bucher, a staff person from the doctor's office told her that Dr. Bucher was not comfortable with writing more specific information regarding Student's ability to attend school, and was not willing to change the statement. (Barry, S-13, P-9)
33. On or about May 18, 2018, HPS conducted a telephone conference with Student's pulmonologist, Dr. Martin, to discuss his view of Student's ability to attend school. In addition to Dr. Martin, participants included Parent, Team Facilitator Maria Barry, and Haverhill's Assistant Director of Special Education, John Demanche. Dr. Martin testified that during this conversation, he discussed the possibility of Student attending school during the summer months. Neither Ms. Barry nor Dr. Martin could recall a definitive statement to this effect, however. (Martin, Barry)
34. On May 23, 2018, Dr. Martin completed a Physician's Statement for Temporary Home or Hospital Education. The form stated that Student would need services at home for more than 14 days, and further stated the following: "The girl has an impaired cough reflex which puts her at risk of sudden and severe respiratory decompensation due to viral respiratory infections. She had a prolonged ICU stay for one such illness in November of 2016....She should not be in proximity to more than

2-3 other young children from other families during the respiratory virus season.”² In response to the portion of the Statement form that asked when Student was expected to return to school, Dr. Martin responded “to be determined.” Between approximately March 23, 2018, when HPS sent Dr. Martin a Physician’s Statement form, and May 23, 2018, when he finally completed the form, no HPS representative contacted Parent to tell her that Dr. Martin had not responded, and did not inform Parent that Dr. Bucher’s Physician’s Statement did not contain enough information to support home-based services. Student received no home-based services during that period of approximately two months. (Parent, Martin, Barry, P-9, S-32)

35. Upon receipt of Dr. Martin’s letter, Haverhill decided to set up home-based services. (Barry)
36. On June 20, 2018, HPS convened a Team meeting to review Dr. Martin’s letter of May 23, 2018. Parent attended the meeting, and Dr. Martin attended by telephone. As a result of the meeting, HPS proposed an amended IEP covering June 20, 2018 to February 2019. This IEP added therapeutic services to Student’s ESY program, which previously had consisted only of classroom experience plus 1:1 nursing and paraprofessional services. The proposed ESY program consisted of 150 minutes/4 days of classroom experience, 1x30 minutes/week each of speech/language therapy, OT and PT, and 2x30 minutes/week of vision therapy. The total duration of the ESY program was from July 2 to August 9, 2018. Based on Dr. Martin’s opinion, shared at the Team meeting, that Student was healthy enough to attend school during the summer and would benefit from the social interaction with peers, the ESY services would be provided in the Moody School. (Parent, S-21)
37. On July 10, 2018, Parent accepted only the therapeutic services (OT, PT, speech/language, and vision services), but rejected the remaining services and also refused the placement in the substantially separate Moody School classroom. Parent also requested another Team meeting in 3 weeks to discuss updated medical information. According to the N-1 form accompanying the proposed IEP, Parent also rejected the omission of a private 11-month program, rejected the absence of services between the end of the school year and the start of ESY programming, and rejected the School’s plan to collect data to inform future service planning. (S-21)
38. Student received extended school year (ESY) services in the form of PT, OT, speech/language, and vision services, approximately twice weekly, beginning on or about June 7, 2018. (Coogan, Basiliere, Fournier, Barry, Parent, S-34). The record is unclear as to where services were delivered, but it appears that for at least some of that period, OT and PT took place at home and speech/language services were

² During cross-examination by Haverhill’s counsel, Dr. Martin testified that Student could attend school during the cold and flu season if she was not near more than 2 to 3 other children. (Martin)

provided at the Moody School. (Fournier, Basliere, Coogan) The time period from June 2018-August 31, 2018 is not at issue in this hearing, however.

39. On July 31, 2018, Dr. Martin completed a third Physician's Statement for Temporary Home or Hospital Education in which he reiterated prior information regarding Student's respiratory issues and further stated that "her exposure to other students during the viral season (Sept. 1 to May 1) should be avoided by providing home education. When she does attend school during the late spring and summer, her exposure should be limited to a setting where no more than 4 students are in her room." (Martin, S-22)
40. In or about August 2018, Parent requested an opportunity to view Student's records. There is no dispute that HPS made records available to Parent. (Barry, Parent)
41. Upon receipt of the above referenced Physician's Statement, Ms. Barry scheduled a Team meeting for September 24, 2018, so that the Team could discuss home-based services during the school year. (Barry, Parent, S-23) Moody School staff attempted to set up services to begin September 1, 2018, prior to the Team meeting; however, Parent declined to allow services until after the meeting because she felt that the proposed schedule "would not work for [Student]." (Barry, Parent, P-11)
42. The Team convened on September 24, 2018. Parent requested that services be delivered between 11:00 AM and 3:00 PM because Student tended to be sedated from her medications at other times. Parent also requested that each therapist work with Student separately from the other therapists, rather than using a co-treatment model. The school-based Team members agreed to Parent's requests. Finally, the Team also agreed to provide Student with compensatory service hours corresponding to the period from September 1, 2018 until commencement of home-based services. (S-25)
43. Student began receiving home-based related services in September 2018 (for PT and OT) and October 2018 (speech/language and vision therapies). These services continued until approximately May 28, 2019. (Barry, Coogan, Basliere, Fournier, David, Parent, S-34)
44. Initially, Student received PT and OT services 3x30 minutes per week, with the third session deemed a compensatory service referred to above. Once Student had exhausted the compensatory sessions, she received 2x30 minutes/week each of PT and OT. (Parent, Fournier, Basliere, S-34)
45. During the 2018-2019 school year, Parent cancelled approximately 10-12 sessions of OT and/or PT. Ms. Fournier and Ms. Basliere each cancelled approximately one session. Ms. Fournier and Ms. Basliere testified that Student received all OT and PT services to which she was entitled, and Parent provided no information to the contrary. (Fournier, Basliere, S-34)

46. Beginning in early October 2018, Student began receiving 2x15 minutes/week of speech/language therapy. During the course of the 2018-2019 school year, Parent cancelled approximately 13 speech sessions and refused services approximately 4 times. The speech/language therapist cancelled approximately 4 sessions. Taking into account make-up sessions offered by the speech/language therapist, Student missed a total of two, 30-minute sessions of speech/language therapy. (Coogan, S-34)
47. Student's home-based vision services also began in October 2018. Initially the TVI, Thomas David, met with Student 4 times per week for 60 minutes to make up for services missed in September 2018. Once services had been made up, Student received vision therapy 3x60 minutes per week until February 2019, at which time, they were reduced to 4x30 minutes/week pursuant to a new IEP, which will be discussed *infra*. (David, S-34) Multiple sessions were cancelled by both Parent (usually due to Student's illness or medical appointments) and the teacher (usually for sick or personal days). (S-36) Mr. David testified that Student received all services to which she was entitled. (David)
48. On November 6, 2018, Student underwent an independent evaluation at Franciscan Children's Hospital. This evaluation, which Haverhill had agreed to fund at Parent's request, consisted of assessments in the areas of general development, speech/language, and occupational and physical therapy. (Parent, Platner, S-3)
49. The developmental assessment was conducted by Amanda Platner, Psy.D., who administered the Mullen Scales of Early Learning and had Parent complete the Adaptive Behavior Assessment Scale (ABAS). All scores fell in the "very low" or "extremely low" range, corresponding to an age equivalent of three months or less. Dr. Platner stated that Student met criteria for global developmental delay, and recommended placement in a structured classroom with peers with similar profiles, and a low teacher-student ratio. She noted that given her diagnosis, Student needs to maximize her exposure to educational experiences, particularly in the area of speech/language even if she is physically unable to attend school. (Platner, S-4)
50. The OT assessment consisted of observation, as Student's low cognitive levels precluded standardized testing. The evaluator recommended continued direct OT services at their then-current level of 2x30 minutes/week, together with consultation. The PT assessment also recommended 2x30 minutes/week of service.
51. The speech/language evaluation estimated Student's receptive and expressive language skills to be at the one-month to three-month level. The evaluator found it concerning that Student lacked functional play skills, since for a child of Student's age and developmental level, basic language skills are primarily acquired through play. The evaluator recommended at least three, 30-minute speech/language sessions

per week, focused on expressive and receptive language as well as play skills, using a multi-sensory, total communication approach. At least two such sessions should be individual. The third session could be with a small group of peers, if Student's health permits. Further recommendations included use of appropriate augmentative communication devices. (S-4)

52. The Team convened on February 8, 2019 to conduct an annual review and consider the Franciscan evaluation reports, which HPS providers found to be consistent with the District's assessments. Parent was accompanied by an advocate at this Team meeting. (Parent, Barry, Fournier, Basiliere, Coogan, S-25, S-26)
53. On the same date, HPS issued an IEP covering February 8, 2019 to February 8, 2020. This IEP contained goals in functional play skills (an area emphasized in the Franciscan speech/language report), communication, head control/shoulder stability, and visual efficiency. The service delivery grid provided the following: Grid A, 1x60 minutes/month of consultation for PT and 1x30 minutes per month, each, for OT and vision; Grid C, 2x30 minutes/week, each, for OT and PT, 4x30 minutes/week for vision services, 4x375 minutes per week of classroom instruction with a 1:1 nurse and paraprofessional and 2x30 minutes/week for functional communication with a speech/language therapist. The IEP also provided for extended school year (ESY) services from July 1, 2019 to August 8, 2019 consisting of consultation in Grid A as well as 4x150 minutes/week of paraprofessional support and 1:1 nursing as well as 2x30 minutes/week, each, of functional communication, OT, and PT and 4x30 minutes/week of vision therapy in Grid C. (S-26)
54. According to the N-1 form accompanying this IEP, HPS agreed with Franciscan's recommendation for educational services during months when Student could not attend school for medical reasons, and proposed up to two hours per week of home tutoring. However, it declined to provide a third, small-group speech language session, and deferred consideration of that service until Student physically returned to school in the spring. (S-26)
55. On March 13, 2019, Parent rejected Haverhill's refusal to provide a third weekly speech/language session as recommended by Franciscan, and refused the proposed placement because "it does not follow the IEE recommendations." Parent requested a Team meeting to discuss the rejected portions of the IEP. (Parent, S-26)
56. Meanwhile, Maria Barry attempted to secure a home tutor for Student but was unable to do so. As a result, Student did not receive the home tutoring that HPS had agreed to provide from February 8, 2019 to June 1, 2019. (Barry) Student did continue to receive OT, PT, speech/language and vision services during that period (Barry, Fournier, Basiliere, Coogan, David, S-34)

57. On March 27, 2019, the Team convened to discuss the partially-rejected IEP. HPS proposed continuing home-based services until May 2019. Parent expressed her disagreement with Haverhill's decision not to provide a third weekly speech/language session as recommended by Franciscan. Haverhill did not issue a new or amended IEP as a result of the meeting. (Parent, S-61)
58. On March 31, 2019, Parent filed a hearing request with the BSEA. This matter was assigned BSEA No. 1908876. Parent withdrew this hearing request on or about August 6, 2019.
59. On April 26, 2019, Dr. Martin provided Haverhill with a Physician's Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons. On the form, Dr. Martin checked boxes indicating that it was medically necessary for Student to remain at home for a period of at least 14 days or "on a recurring basis that will accumulate to at least 14 days over the course of the current school year." Dr. Martin designated June 1, 2019 as the expected date for Student to return to school, effectively extending his prior recommendation for Student's home instruction by one month. (Martin, S-28)
60. Haverhill agreed to keep Student's home-based services in place until June 11, 2019, on which date the parties had scheduled mediation in an effort to resolve BSEA No. 1908876. As a result of this mediation, Haverhill made referrals to three out of district programs for the summer of 2019: the Kevin O'Grady School, New England Pediatric Care (NEPC), and The Professional Center. Kevin O'Grady had the ability to accept a student for a summer placement only, but the other two programs did not. (Parent, Nesson) Haverhill was willing to explore placement at Kevin O'Grady for the 2019-2020 school year as well. (S-37)
61. The Kevin O'Grady School, operated by the North Shore Consortium, is a specialized public day program serving students aged 3 to 22 with severe disabilities. Students at Kevin O'Grady are grouped by age, developmental level and need, and are served by multidisciplinary teams of teachers and related service providers. (Rosenberg)
62. On June 28, 2019, the Kevin O'Grady School agreed to accept Student into its Foundations program, which serves young children with severe disabilities, for the summer of 2019. Student did not attend the summer session, however. (Parent)
63. For the remainder of the summer of 2019, Student continued to receive related services (PT, OT, speech/language, vision) but did not receive educational tutoring services. (Parent)
64. On July 19, 2019, Kevin O'Grady accepted Student for the 2019-2020 school year, with a start date of August 28, 2019. On July 25, 2019, Haverhill issued a placement page offering Student a day placement at Kevin O'Grady from August 28, 2019 to

August 28, 2020. In light of Parent's concern that she would lose private duty nursing if Student attended Kevin O'Grady, arrangements were made for the private nurse to attend school with Student. Also, in consideration of Student's medical needs and Parent's wishes, Kevin O'Grady and Haverhill agreed to a modified schedule under which Student would attend Kevin O'Grady during the warm months and receive home-based instruction from Haverhill during the viral season. Parent never accepted this placement, claiming that she had not been involved in its development, and Student never attended Kevin O'Grady. (Barry, Parent, Rosenberg)

65. On August 6, 2019, which was the date that Parent withdrew the hearing request in case no. 1908876, Haverhill's counsel wrote a letter to Parent in which she stated the following: "Yesterday, in a conference call with the hearing officer, you stated that you would like for [Student] to be placed at New England Pediatric Care Center for medically fragile children. While the district's proposed placement remains a day placement at the Kevin O'Grady School...the district would be willing to offer another option to fully resolve this dispute." The letter went on to state that if Parent was interested in long term care at NEPC, and was willing to seek and accept funding from the Department of Public Health for the residential component, Haverhill would fund the day school placement. The letter also offered one year of compensatory services "from and after Student's 22nd birthday." (Parent, S-37, S-61)
66. During August 2019, Parent and Haverhill's Director of Special Education, Pamela MacDonald, exchanged emails in which Parent discussed multiple areas of dissatisfaction with HPS, and also discussed Student's programming for the 2019-2020 school year. (S-37)
67. On September 13, 2019, Haverhill agreed to continue offering home-based services because Parent had neither sent Student to the Moody School, responded to the offers of the Kevin O'Grady School and NEPC, nor submitted a new Physician's Statement. (Parent, S-37)
68. On September 26, 2019, Student's primary care pediatrician, Dr. Eric Bucher, sent Haverhill a Physician's Affirmation of Need for Temporary Home or Hospital Education for Medically Necessary Reasons. The form listed Student's various diagnoses, stated that she needed "appropriate modifications for her disabilities as well as intractable epilepsy," and indicated that she began confinement at home on September 1, 2019 and was expected to return to school on March 1, 2019.³
69. The Team convened on October 17, 2019 to discuss the above-referenced Affirmation of Need from Dr. Bucher. Shortly thereafter, Ms. MacDonald informed Parent, who

³ The March 2019 date appears to be an error. I infer that the doctor intended to provide the date of March 2020.

had left the Team meeting early, that HPS was ready to begin home services. On October 30, 2019, Ms. MacDonald emailed Parent a proposed schedule of home-based services comprising PT, OT, vision therapy, speech/language, and “vision/academic.”⁴ (S-37)

70. Ms. MacDonald explained that “vision/academic” services would consist of work with Student on her “functional play skills goal,” which “would be the focus of [Student’s] educational program if she were attending school. This service would be delivered by an identified teacher who held a license in severe disabilities, and who also was qualified as a CVI⁵ endorsed vision specialist.(S-37)
71. Parent responded on November 4, 2019, accepting the proposed services while objecting to the substitution of one-half hour of “functional play skills” for 2 hours per week of “educational services,” and reiterating her request for compensatory tutoring services dating back to February 2019.
72. On November 14, 2019, Parent notified the Team facilitator, Maria Barry, that she objected to aspects of the in-home services schedule and continued to object to the substitution of “functional play” for “educational” services, as well as to the use of a TVI to provide both vision and functional play services. Parent also requested a schedule of compensatory therapeutic services (corresponding to an alleged delay in initiating services in November 2019), as well as for compensatory tutorial services. Parent stated that she did not want HPS staff to begin home services until a compensatory services schedule was in place. (Parent, S-37)
73. Notwithstanding the above, HPS service providers went to Student’s home on approximately ten occasions during November and December 2019, but Parent refused to let them in to provide services. (Parent, Basiliere, Coogan, Fournier, David, S-60)
74. On December 5, 2019, Parent filed the hearing request that is the subject of this Decision. Between approximately December 27, 2019 and April 3, 2020, the parties negotiated an agreement⁶ resulting in HPS offering Parent a half-day or full-day placement, at Parent’s election, at NEPC for the period March 2020 to March 2021. As stated above, as a result of this offer, which, on information and belief, Parent has not rejected, HPS requested, and the undersigned hearing officer granted, a Motion for Summary Judgment with respect to prospective claims in this matter.

⁴ Ms. MacDonald also stated that the Kevin O’Grady School remained available as a placement option for Student, with no conditions attached to that placement.

⁵ Cortical Vision Impairment

⁶ As set forth in the Ruling on Haverhill’s Motion for Partial Summary Judgment, NEPC conducted its own evaluations, NEPC agreed to allow Student’s private duty nurse to accompany her to school, and Haverhill agreed to provide Student with home-based services in the afternoons if Student elected the half-day option. (Nesson, Rosenberg)

75. In spring 2020, HPS issued a remote learning plan for Student, and has followed up with emailed offers of support. (Parent, Barry, Markos, Basliere, Coogan, Fournier) The record does not contain a written remote learning plan.

DISCUSSION

Legal Framework

Substantive Components of FAPE

There is no dispute that Student is a school-aged child with a disability who at all relevant times was eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B (“Chapter 766”). Student is entitled, therefore, to a free appropriate public education (FAPE), which “comprises ‘special education and related services’--both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.” *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).⁷ Student’s IEP, which is “the primary vehicle for delivery of FAPE, *C.D. v. Natick*, 18-1794 at 4, quoting *D. B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012), must be “reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances.” *C.D. v. Natick*, 18-1794 at 4, quoting *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

While Student is not entitled to an educational program that maximizes her potential, she is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. *C.D. v. Natick*, 18-1794 at 12-13; *D.B. v. Esposito*, 675 F.3d at 34-35; *Johnson v. Boston Public Schools*, 906 F.3d 182 (1st Cir. 2018). See also, *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982); *Town of Burlington v. Dept. of Education (“Burlington II”)*, 736 F.2d 773, 789 (1st Cir. 1984). Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. *Andrew F.* 137 S. Ct. at 1000, *Rowley*, 458 US at 202; *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F3d 18, 29 (1st Cir. 2008); *D.B. v. Esposito*, 675 F.3d at 34-35. Within the context of each child’s unique profile, a disabled child’s goals should be “appropriately ambitious in light of [the child’s] circumstances, *Andrew F.* 137 S. Ct. at 1001; *C.D. v. Natick*, 18-1794 at 14.

Finally, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more

⁷ In *C.D.*, the First Circuit reiterated its formulation of FAPE set forth in earlier cases, *i.e.*, educational programming that is tailored to a child’s unique needs and potential, and designed to provide “‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); *Burlington II, supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012)

restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, “the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement.” *C.D. v. Natick, 18-1794* at 5-6, quoting *Roland M. v. Concord School Committee*, u910 F.2d 983 (1st Cir. 1990).

Procedural Components of FAPE

Student is entitled not only to the substantive components of FAPE as outlined above, but she and Parent also are entitled to procedural protections designed to support the parent-school collaboration envisioned by federal and state special education statutes. Parents are full members of the Team that develops IEPs, which are the blueprints for providing services for eligible students, 20 USC §1414(d)(1)(b)(i). Parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations.

Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Rowley, supra*, the Supreme Court stated “...Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon the measurement of the resulting IEP against a substantive standard.” See also: *In Re Framingham Public Schools and Quin*, 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Notwithstanding the above, it is well settled that although parents are Team members, entitled to fully participate in the IEP development process and to have their views considered, they are not entitled to dictate the terms of an IEP. On the contrary, a school is not required to negotiate with parents to reach a result with which parents agree, if by doing so they propose an IEP that the school believes is not appropriate for the child. Rather, schools are obligated to propose what they believe to be FAPE in the LRE, whether or not the parents are in agreement. *In Re Natick Public Schools*, 17 MSER 55, 66 (Crane, 2011); *In Re: Andover and Quincy Public Schools*, BSEA No. 1602494 (Berman, 2017).

If parents disagree with the district on what constitutes an appropriate IEP and/or placement for a child, the IDEA and Massachusetts law provide detailed mechanisms for dispute resolution, *i.e.*, mediation with a trained mediator who assists the parties in negotiating a legally-binding agreement, and due process hearings, where both parties submit evidence to an impartial hearing officer who adjudicates the dispute and issues a written decision. Both of these processes enable parents and school districts to resolve disputes in a structured manner with the assistance of a neutral third party. 20 USC §1415; 34 CFR §300; MGL c. 71B§2A; 603 CMR 28.08.

Remedies—Compensatory Services

An award of compensatory services is one remedy available to a hearing officer to make a student whole if a school district fails to implement accepted portions of an IEP, or commits other procedural violations that result in a denial of FAPE to an eligible student, or if a school district prevents parents from meaningfully participating in the Team process. *Pihl v. Mass. Department of Education*, 9 F.3d 184 (1st Cir. 1993). An award of compensatory services is in the nature of an equitable remedy. *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (1st Cir. 2006).

As such, a hearing officer must “balance the equities” by considering the reasonableness of both parties’ conduct and the resultant impact on the student when deciding if compensatory services are warranted in a given situation. Hearing officers may deny compensatory services if parents unreasonably obstruct the IEP process or otherwise interfere with the ability of the school district to fulfill its obligations. See *C.G. and B.S. v. Five Town Community School District, et al.*, 513 F.3d 279 (1st Cir. 2008), citing *Roland M. v. Concord School Committee*, 910 F.2d 983 at 987 (1st Cir. 1993); *Murphy*, 22 F.3d at 1197; *In Re: Andover and Quincy Public Schools, supra*.

Burden of Proof

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. In the instant case, as the moving party, Parent bears this burden. That is, in order to prevail in her claim for compensatory services, Parents must prove, by a preponderance of the evidence, that the IEP for the 2018-2019 school year was not reasonably calculated to provide Student with FAPE, and that Haverhill committed procedural violations that resulted in a denial of FAPE to Student, or excluded Parent from meaningful participation in the Team process, all as set forth in the statement of *Issues Presented*, above. *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).

Analysis

To determine whether Parent has met her burden of persuasion in this matter, I will examine the evidence with respect to each of the issues subject to hearing.

1. Did Parent demonstrate, by a preponderance of evidence, that HPS failed to provide Student with special education and related services to which she was entitled during some or all of the following time periods, and, if so, is Student is entitled to compensatory services corresponding to that period?

February 8, 2018 to June 27, 2018

As stated in the Summary of Evidence, above, Haverhill proposed Student’s initial IEP in early January 2018, approximately one month before Student’s third

birthday. Parent rejected that IEP and refused the proposed placement on January 28, 2018. After a Team meeting on March 1, 2018, Haverhill proposed a second IEP and placement, which Parent rejected on March 26, 2018. HPS proposed a third IEP on April 3, 2018. On April 23, 2018, Parent accepted the related services in the third IEP, but would not consent to actual service delivery until yet another Team meeting had been convened. Student finally began receiving related services on or about June 7, 2018.

It is axiomatic that a school district cannot deliver initial special education services to a student in the absence of parental consent. 34 CFR 300.300(b)(1). Haverhill not only had no obligation to provide Student with services between February and June 2018, it was precluded by federal and state law from doing so. *Id.* For this reason alone, Parent is not entitled to compensatory services corresponding to the period from February 8, 2018 to June 27, 2018.⁸

Notwithstanding the above, Parent appears to argue that Haverhill was required to provide home-based services during some or all of the period referred to because of Student's medical condition, and because HPS failed to do so, Parent had no choice but to reject the proffered services and, especially, the Moody School placement. Parent's position is without merit for several reasons.

First, prior to March 1, 2018, Haverhill had no knowledge that Student's medical condition might require home-based education during the winter months. As stated in the Summary of Evidence, above, Student was under the care of a Boston Children's Hospital pulmonologist, Dr. Thomas Martin, since before her enrollment in HPS. On or about December 27, 2017, Dr. Martin wrote a letter outlining Student's respiratory issues and clearly recommending home instruction for Student "for the coming 4-6 months," *i.e.*, from January 2108 to either April or June of that year. Dr. Martin testified that he had provided Parent with this letter, with the understanding that Parent would convey it to HPS.

Maria Barry testified that HPS never received the letter, however. Parent presented no evidence to the contrary. Further, Parent presented no evidence that she did not have this letter in her possession at the time of the initial Team meeting in January 2018, or at any later time, or that she could not have shared the letter with Haverhill prior to the Team meeting of March 1, 2018, or that she even had raised the issue of a need for a home program before that date.

Clearly, Haverhill had no responsibility to offer home-based programming between February 8 and March 1, 2018 where it had no knowledge that it might be necessary or recommended. As such, Haverhill owes no compensatory services corresponding to this time period, even assuming, *arguendo*, that Parent would have accepted such services if offered, and that the only reason for Parent's refusal of services was that they were not home-based.

⁸ Additionally, I note that Student actually did receive the services to which Parent consented between approximately June 7 and June 28, 2018.

The situation becomes more complicated after the Team meeting of March 1, 2018. As stated in the *Summary of Evidence*, in response to outreach from Haverhill, Dr. Martin provided two documents supporting home-based instruction for Student: a letter dated March 23, 2018 and a Physician's Statement form on May 23, 2018. The latter stated that Student could not be educated with more than 2 or 3 other children, but did not clearly state that Student could not attend school, and Dr. Martin's testimony indicated that attendance under such conditions might be acceptable for Student.

The School was unable to reach Dr. Martin during the two-month period between receipt of these documents. Haverhill did not inform Parent of its difficulty in reaching Dr. Martin, and did not inform her that neither Dr. Martin's letter of March 21, 2018 nor a subsequent letter dated April 4, 2018 from Student's pediatrician was adequate to support the request for home-based instruction. I find that while, generally, Haverhill made reasonable efforts to secure relevant information from Dr. Martin, its apparent inaction and failure to contact Parent for two months between March and May 2018 was not reasonable and supports Parent's claim for compensatory service, but only for the period from April 23, 2018, when Parent first consented to services, and June 7, 2018, when service delivery began.

September 1, 2018 to June 11, 2019⁹

The testimonial and documentary record reflects that Haverhill provided related services (OT, PT, speech/language, and vision services) as scheduled throughout this period.¹⁰ With the exception of two, 30-minute speech/language therapy sessions, any services that were missed were made up at a later date.

Tutoring services, proposed in the IEP covering February 8, 2019 to February 8, 2020, and accepted by Parent on March 9, 2019, were not provided between the date of acceptance and June 11, 2019 because Haverhill was unable to locate a provider. I find that Student is entitled to compensatory tutoring services corresponding to the period from March 9 to June 11, 2019, calculated on the basis of the accepted portion of the pertinent IEP.

Beginning on June 11, 2019, Haverhill made multiple attempts to offer Parent compensatory services outside of the mediation context, in an effort to resolve its dispute with Parent.¹¹ Parent has not availed herself of these offers. It is beyond the scope of this decision to analyze the various settlement offers at that point in time and to assess whether Parent's rejection of those offers at this point in the case was reasonable under

⁹ The original statement of issues refers to June 1, 2019 as the end date of this period; however, by agreement, Student's home-based services for the 2018-2019 school year were extended to June 11, 2019. As such, the issue of compensatory services will be analyzed in the context of this time frame.

¹⁰ Although services did not actually begin until October 2018, at least partially because Parent did not want services to start until after a September Team meeting, and was not available for such meeting until September 24, Haverhill provided "make up" sessions corresponding to the period between September 1 and September 24, 2018.

¹¹ The parties have engaged in three mediations, but offers within mediation sessions are confidential and may not be disclosed or used as evidence in due process hearings.

the circumstances. The fact remains that Parent did not, at that juncture, appear to actively impede the district's attempts to fulfill its obligations, per *C.G. and B.S. v. Five Town Community School District, et al., supra*. Student was entitled to tutoring services between March 9 and June 11, 2019 and did not receive them; therefore, she is entitled to compensatory tutoring services, consistent with the amount of service set forth in the accepted IEP issued on February 8, 2019, corresponding to the above-referenced time period. She also is entitled to two compensatory sessions of speech/language therapy.

Summer 2019

Student was medically cleared to attend school during the summer of 2019. She had the option of attending an ESY program at the Moody School or the summer program at the Kevin O'Grady School. Student did not attend either program. No compensatory services are owed for this period.

September 26, 2019 to the present.

The record shows that Haverhill made several programs available to Student between September 26, 2019 and the present. On July 25, 2019, as a result of mediation, Haverhill offered Student placement at the Kevin O'Grady School for the 2019-2020 school year (August 28, 2019-August 28, 2020). Parent never sent Student to this program. Subsequently, the District offered to fund a day placement at NEPC in the event that Parent was seeking long term care at that facility.

During August and September 2019, Haverhill's Director of Special Education, Pamela MacDonald, made multiple attempts to discuss service options for Student, and to propose programming that Parent might find acceptable, including the Kevin O'Grady placement and home instruction, the latter of which was offered on September 4, 2019. In October 2019, after a Team meeting which Parent left early, Haverhill formally proposed a schedule of home-based services for Student, scheduled to begin on November 4, 2019. Parent ultimately agreed to this schedule on or about November 4, 2019. Providers began going to Parent's home on November 15, 2019; however, despite her earlier agreement, Parent refused to allow the providers into her home to work with Student from that date through December 2019.

Although Haverhill stopped attempting to provide home-based services in mid-December 2019, it began, at that point, to work towards securing a day placement at NEPC, based on Parent's representation that she wanted such placement for Student. The referral process involved securing additional evaluations. As of the hearing date, Parent had been offered a half-day or full-day placement at NEPC, with Parent having the ability to elect either option, depending on her assessment of Student's needs. Parent has not disputed her preference for NEPC or the appropriateness of that placement.

Finally, Haverhill witnesses testified that it provided Student with a remote learning plan and materials from the date of school closure in March 2020 to June 2020. Parent provided no evidence to the contrary.

Parent offered no evidence that Haverhill failed to offer Student educational and related services during the period outlined above, or that any of the proposed services—home-based, at Kevin O’Grady, or NEPC—were inappropriate. She did not dispute her refusal to allow Haverhill staff to provide home-based services to Student or to avail herself of the immediately available alternative placement at Kevin O’Grady. In the face of this repeated refusal, Haverhill’s discontinuing of its attempts to provide services was not unreasonable, especially in light of its continuing to offer additional options for Student’s programming. In contrast to the period between April and June 2018, Parent, by refusing entry to service providers, ostensibly because the District had not offered a compensatory services schedule that was acceptable to her, actively impeded Haverhill in fulfilling its obligations to Student. As such, responsibility for Student’s failure to receive services during this period lies squarely with Parent. *C.G. and B.S. v. Five Town Community School District, et al., supra.* In balancing the equities of the situation, no compensatory services are owed for this period.

2. Did HPS commit procedural violations during the 2018-2019 and 2019-2020 school years that denied Student a FAPE or deprived Parent of meaningful opportunities to participate in the Team process ?

Evaluations:

Student’s initial “arena” type evaluation assessed Student in all areas of need, and included input from those who knew Student best at that time: Parent and EI providers. Parent presented no evidence to support her claim that this evaluation was not comprehensive and appropriate in light of Student’s age and profile.

Parent subsequently requested an IEE by Franciscan Children’s Hospital, which Haverhill funded without objection. Witnesses at the hearing testified, without contradiction, that the findings and recommendations of the Franciscan evaluators were consistent with those of HPS, and, in fact, Haverhill incorporated many, if not most, of those findings and recommendations into Student’s subsequent IEP. Parent has not met her burden of demonstrating that Haverhill’s evaluations were inadequate or inappropriate, or, that if they were, that any errors were not cured by its funding of the IEE.

Parental Participation:

The overwhelming weight of the evidence is that Parent was an active and knowledgeable participant in the Team process, which entailed 10 Team meetings and a “pre-planning” meeting prior to Student’s third birthday. The record shows that Parent received advance notice of Team meetings, which were frequently rescheduled to accommodate her needs. She received N-1 forms after each Team meeting. Haverhill solicited and considered the participation and input not only of Parent, but also of Student’s EI providers, private nurse, outside medical providers, and the independent evaluators from Franciscan Children’s Hospital.

That Parent disagreed with the result of many of the Team meetings does not mean that she was not fully involved in the process of planning for Student's special education programming. Parent has a right to participate in Team meetings and to provide input, and she did so here. She does not have the right, however, to dictate the outcome of the Team process. As stated above, Haverhill's obligation was not to negotiate an IEP that was completely to Parent's liking, but to propose an IEP that, in its view, would provide Student with FAPE, taking Parent's opinions into account.

Finally, I acknowledge that Parent frequently felt that her concerns for Student were not heard or understood, or that decisions were made unilaterally. I do not doubt Parent's sincerity or her determination to zealously advocate for her child's rights; however, the record simply does not support a conclusion that Parent did not have an opportunity for meaningful participation.

Participants at Team meetings

Parent alleged that Haverhill erred in allowing Maria Barry, the Team facilitator, to also serve as the special educator at meetings following the initial eligibility meeting. Ms. Barry is also a special educator, and was allowed to have dual roles at Team meetings, pursuant to 34 CFR 300.321(a)(5). Parent has presented no evidence to suggest that Ms. Barry's serving two functions at Team meetings denied Student a FAPE, or deprived Parent of the opportunity to participate as a Team member.

Student Records

Parent did not dispute that Haverhill provided her with a copy of Student's educational records, to which she was entitled under 34 CFR 300.501 and 300.610-624, after her request for same in or about August 2018. Parent has not demonstrated any error by Haverhill in this regard.

Predetermination

Parent presented no evidence that Haverhill predetermined any of the services and/or the placement which it offered to Student after the initial eligibility meeting. There is no evidence on the record that HPS decided on Student's services or placement before hearing from Parent, EI providers, and evaluators at the initial Team meeting, and without considering their contributions. Moreover, after the initial Team meeting, upon learning that Haverhill staff may have misunderstood Parent's concerns, the Team met again and adjusted the proposed IEP to better reflect Parent's position. Lastly, Haverhill was under no obligation to consider or propose the entire universe of possible placements for Student if HPS Team members believed that a particular placement—here, Moody preschool—could meet Student's needs. The claim of predetermination is without merit.

Prior Written Notice

The documentary record shows that Parent received N-1 Forms documenting and Haverhill's proposals to act, refusals to act, and options that were considered and rejected by the Team. Parent has presented no evidence to the contrary, and does not prevail on this claim.

3. Were the IEPs for the period March 2018-March 2019 reasonably calculated to provide Student with FAPE?

The IEPs covering the 2018-2019 school year¹² were appropriate, and Parent has failed to meet her burden of demonstrating otherwise. She has no entitlement to compensatory services based on the IEPs and proposed placements at issue.

The initial IEP, issued on January 9, 2018, was based on a preplanning meeting, at which Haverhill conversed with Parent, nurse, and EI providers and observed Student in the natural environment of her home, followed by a multidisciplinary, arena-style evaluation that involved some standardized measures coupled with observation of Student. The resulting IEP was based on both formal evaluative measures and extensive input from Parent, the private nurse, and EI providers who knew Student well. The initial IEP took Student's medical and developmental concerns into account and based on Haverhill's understanding of Student at the time, proposed a gradual introduction to the school environment. Parent rejected this IEP, but presented no witnesses and no documentary evidence such as outside evaluations that stated that the IEP was inappropriate.

After Parent rejected the initial IEP, Haverhill representatives made a home visit to clarify Parent's concerns, reconvened the Team, and, on or about March 1, 2018, issued a second IEP that addressed those concerns by, *e.g.*, proposing a full-day program, increasing frequency and duration of services, adding speech/language goals, and offering placement in the substantially separate classroom. Upon learning from Parent that Student would need home instruction during the winter months, HPS immediately sought medical information from Dr. Martin in an effort to accommodate this need.

I find that this second IEP was also appropriate, as was the third IEP, issued on March 29, 2018, which corrected a clerical error in the service delivery grid. The March IEPs addressed all of Student's known special needs and reflected both prior evaluations and additional input from Parent. Again, Parent presented no evidence to the contrary.

The fourth IEP, issued in June 2018, proposed summer ESY services for Student based on the medical determination that Student was able to attend school during the summer months. Parent presented no evidence that this IEP was inappropriate.

¹² The statement of issues refers to IEPs covering March 2018 to March 2019. In this decision, I will also address the initial IEP issued in January 2018 to provide context.

4. Were the IEPs covering March 2019-March 2020 reasonably calculated to provide Student with FAPE?

As with the prior school year, the IEPs at issue during the 2019-2020 school year were appropriate, and Parent has not met her burden of proving otherwise. Haverhill's fifth IEP, developed on or about February 8, 2019, was based on both prior evaluative information and the reports from the IEE conducted by Franciscan Children's Hospital. Services and accommodations incorporated recommendations from the Franciscan evaluators, which were consistent with those of HPS providers. Dr. Amanda Platner, the clinical psychologist who had conducted a psychological assessment of Student and overseen or participated in additional assessments did not criticize or otherwise comment on the appropriateness of the IEP issued in February 2019 or on the appropriateness of the proposed Moody School placement. Parent presented no other evidence suggesting that the IEP and placement were inappropriate.

Finally, Haverhill's proposal for the Kevin O'Grady School for summer 2019 and then for the 2019-2020 school year provided Parent with an appropriate placement option for Student, as an alternative to the Moody School, if Parent so chose. This placement, as proposed, would have afforded Student an intensive, specialized preschool program during months when Student was able to attend school, coupled with home-based instruction and services during the cold and flu season. Again, Parent was dissatisfied with the manner in which this placement was offered, but presented no evidence that it would have been inappropriate in any way.

The IEPs for both the 2018-2019 school year and 2019-2020 school year, outlined above, were reasonably calculated to provide Student with FAPE. Each IEP was based on evaluative and medical information available to the Team at the time, as well as on extensive input from Parent and, where relevant, from Student's outside medical provider and evaluators from Franciscan Children's Hospital. Each IEP contained goals that were designed to afford Student "meaningful benefit," and were "appropriately ambitious in light of [Student's] circumstances," *Andrew F. supra*, 137 S. Ct. at 1001; *C.D. v. Natick, supra*, 18- 1794 at 14.

CONCLUSION AND ORDER

Based on the foregoing, Parent is entitled to compensatory services as follows:

1. For the period from April 23, 2018 to and including June 6, 2018: Parent is entitled to compensatory services in the area of OT, PT, speech/language and vision therapy. The number of hours of service shall be equal to the number of hours set forth in the accepted portion of the IEP covering that period, that would have been provided from April 23 to and including June 6, 2018 if the accepted portions had been fully implemented.
2. For the period from March 9, 2019 to and including June 10, 2019: Parent is entitled to compensatory tutoring/special education services in the amount of the number of hours set forth in the accepted portion of the IEP covering February 8, 2019 to February 8,

2020. Parent also is entitled to one compensatory hour of speech/language services corresponding to two missed 30-minute sessions occurring during that period.

3. Compensatory services shall be scheduled and delivered at mutually-agreeable times and locations. If the parties are unable to reach agreement, services shall be delivered as soon as practicable after Student's twenty-second (22nd) birthday. *See Pihl v. Mass. Department of Education, supra*, 9 F.3d 184 (1st Cir. 1993).

Except for the foregoing, Parent has not met her burden of persuasion under *Schaffer v. Weast, supra*, 546 U.S. 49, 44 IDELR 150 (2005), and is not entitled to further compensatory services.

By the Hearing Officer,

/s/ Sara Berman

Dated: September 14, 2020

