

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

**In Re: Student and the Barnstable Public Schools**

**BSEA # 2104905**

**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 in the above-entitled matter on April 8, 13, and 14, 2021 via a remote videoconferencing platform before Hearing Officer Alina Kantor Nir. Both parties were represented by counsel. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother	
Father	
Grandfather	
Michael Turner	Attorney for Parents
Meghan Hammond	Director of Special Services, Riverview School (Riverview)
Chrissy Jaeger	Teacher, Riverview
Christina Birkhoff	Teacher, Riverview
Pamela Switzer	Advisor, Riverview
Joan Stein	Attorney for the Barnstable Public Schools (Barnstable)
Eric Bruinooge	Director of Secondary Special Education, Barnstable
Pamela Troutman	Coordinator of Special Education, Barnstable Intermediate School
Christina Graham	Special Education Teacher, Barnstable
Ann Penni	Teacher, Barnstable
Kelli Skiba	Board-Certified Behavior Analyst, Barnstable
Kelly Perry	Special Education Teacher, Barnstable
Stacy Camposano	Coordinator of Special Education, Barnstable High School
Alexander Loos	Court Reporter

The official record of the hearing consists of documents submitted by the Barnstable Public Schools (Barnstable) labeled S-1 through S-22, documents submitted by Father<sup>1</sup> labeled P-1 through P-23, and approximately twenty-five hours of recorded oral testimony and argument. A transcript of the proceedings was sent to the Parties, and, pursuant to a joint extension request by the parties which was allowed by the Hearing Officer, the record remained open until May 24,

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<sup>1</sup> Throughout the Decision, I will refer to Parents separately as “Mother” or “Father” except where their testimony is consistent.

2021 for submission of written closing arguments. On May 25, 2021, Parents requested to submit a response to Barnstable's closing argument. Said request was opposed by Barnstable, and on May 26, 2021, the Hearing Officer denied the request, since the record had closed on May 24, 2021.

### **ISSUES IN DISPUTE:**

The issues for this Decision are as follows:

- I. Whether the Individualized Education Programs (IEPs) developed by Barnstable for the 2020-2021 school year (Student's eighth grade), including the IEP for the period beginning 12/19/2019 to 12/3/2020 and the IEP for the period beginning 2/5/2021 to 2/7/2022, as amended, were and are reasonably calculated to provide Student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE).
- II. If not, whether Father's unilateral placement of Student at Riverview School (Riverview) was appropriate such that Father is entitled to reimbursement for the period of Student's placement for said school year as well as for prospective placement at Riverview.

### **RELEVANT PROCEDURAL HISTORY:**

This matter was filed with the BSEA by Student's father ("Father") on December 29, 2020 and assigned to Hearing Officer Amy Reichbach. On March 29, 2021, the case was reassigned to Hearing Officer Alina Kantor Nir. At the start of the Hearing, Student's mother ("Mother") clarified that she was not a party to the matter and was not represented by Father's counsel, Attorney Michael Turner; instead, she was attending the Hearing solely as a witness. That said, Mother indicated that she agreed with Father's position that the IEPs developed by Barnstable for the 2020-2021 school year were and are not reasonably calculated to provide Student with a FAPE in the LRE, and that Riverview was appropriate, such that Father<sup>2</sup> is entitled to reimbursement for the period of Student's placement for said school year as well as for prospective placement at Riverview. (Mother)

### **FACTUAL FINDINGS:**

#### **Overview:**

1. Student is a social, dynamic, 14-year-old, eighth grade student. (Mother; Father; Bruinooge; Troutman; Graham) She is eligible for special education and related services under the autism (primary) disability category. (S-1B; S-2; S-18; Bruinooge)
2. Student attended Barnstable beginning in the 2015-2016 school year until the fall of 2020 when she was unilaterally placed by Father at Riverview School (Riverview) located in East Sandwich, Massachusetts.<sup>3</sup> (Mother; Father; Bruinooge; Troutman)

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<sup>2</sup> At Hearing, neither parent clarified whether reimbursement is sought by both parents or solely by Father. Since Father filed the instant appeal, I will refer to him as bearing the burden of persuasion.

<sup>3</sup> Although Student currently attends Riverview, she remains enrolled at Barnstable. (S-10; Camposano)

3. Until March 2020, Student resided with Mother and spent every other Friday and the “occasional Wednesday” with Father. (Father; Mother; Grandfather; Graham; S-2)
4. Since March 2020, Student has been residing with Father. (Father; Grandfather; Graham)
5. Parents share educational decision-making rights. (S-10; Mother; Father)
6. Student’s educational needs include specially designed systemic instruction in ELA and mathematics, taught by a special education teacher in a small group setting, aligned with the Common Core; meaningful access to a wide range of academic content; ongoing systemic social skills training and coaching; ongoing speech/language therapy; continued behavioral support and intervention; and opportunities for peer interactions. (P-1; S1-B-F; P-2; S-3; S-8; P-10-P-16; Camposano; Bruinooge; Troutman; Graham; Mother; Father; Grandfather)

#### Formal Assessments - Student’s Cognitive and Academic Profile

7. In the fall of 2018, as part of a three-year re-evaluation, Student was assessed in the areas of achievement, communication, occupational therapy, physical therapy, autism, educational, observation, and psychological. (S-1A)
8. Barbara King, MS, MPA, CCC-SLP conducted the speech and language assessment. (S-1B; P-14) Student was described as a verbal communicator with a communication impairment that significantly impacts her ability to communicate functionally and socially. Although motivated to communicate with peers, Student struggled to navigate social interactions without staff support. (S-1B; S-1E; P-14; Graham) Formal testing revealed below average ability in expressive and receptive skills and comprehension, with a relative strength in receptive language skills. Student’s fundamental language skills were in the very low range as were her pragmatic language abilities. Her memory deficits and difficulty with concentration, focus and attention impacted her ability to follow directions, listen critically, and comprehend literal level as well as more complex and abstract verbal and non-verbal language concepts. Nevertheless, when in a structured setting that provided Student with consistent, simple expectations, scaffolding from staff, predictable routines and environmental supports, she demonstrated a relative intrapersonal strength in her language comprehension, and the ability to relay personal information, request preferred items, understand and formulate basic sentence structure and follow directions within predictable and familiar routines. Speech and language services were recommended. (S-1B; P-14)
9. Michelle Cole, M.Ed. conducted Student’s educational evaluation. On the Woodcock-Johnson IV Test of Achievement, Student demonstrated skills in the very low range in all composite areas including reading, reading comprehension, writing and math. Recommendations included a substantially separate classroom, 1:1 and small group instruction, and modification to the curriculum to allow Student access at the entry levels. (S-1C; P-10)
10. Lynn Cullity, OTR/L, completed the occupational therapy assessment. Student demonstrated a lack of social awareness; benefited from quiet; required strategies to relax her muscles; and, struggled with visual perception, visual motor integration, and motor coordination. Her handwriting was legible, and her keyboarding skills were at a basic level but improving. Recommendations included developing Student’s sensory appropriate activities and leisure skills. (S-1D; P-12)
11. Wendie Holland, Ph.D. completed the psychological report. Findings from the SRS-2 and MIGDAS-2 supported an autism disability category diagnosis. Although peer driven, Student required a high level of support to navigate social situations and group work. Student’s impulsive and aggressive episodes were of great concern. Changes in routine caused her anxiety. Student’s adaptive skills were in the extremely low range in the school setting, but

Parents' reports were significantly discrepant with the school's findings and reflected stronger adaptive skills. Recommendations included substantial support and interventions directed towards her social functioning, behavioral functioning, cognitive flexibility and affect regulation. (S-1E; P-13)

12. Mary Lou Lescarbeau, PT, DPT, conducted the physical therapy evaluation. Student demonstrated functional gross motor skills, and PT services were no longer indicated. (S-1F; P-15)
13. The Educational Assessment: Part B was completed by Susan Soares, a general education teacher. Student attended her class with a paraprofessional who "extensively modified" the work. Student required frequent prompting to stay on task and to participate in a reciprocal conversation but enjoyed being with her peers. Although Student enjoyed some typical age-appropriate activities, she also watched Sesame Street on the iPad. (S-2)
14. On March 27, 2019, Barnstable proposed, and Mother accepted an extended evaluation to assess Student's cognitive functioning. (S-4; P-17) On the WISC-V, Student's FSIQ was 56 (extremely low). Student's Verbal Comprehension Index, Visual Spatial Index and Fluid Reasoning Index standard scores were in the 60s. Student struggled to understand directions on working memory subtests and tended to perseverate on specific answers. Her working memory was a significant area of weakness (SS=45), but Student's processing speed was an area of relative strength (SS=77). In addition, Student was able to perform complex tasks that tapped both into working memory and retrieval of long-term information. For instance, given the evaluator's birthdate, Student was able to calculate when the examiner graduated from high school and college and retrieve this information in the future. Recommendations included pre-teaching and chunking new information, graphic organizers, and repetition.<sup>4</sup> (S-4; P-16)
15. No formal testing of Student has been conducted since March 27, 2019. (Grandfather) At Hearing, Father, Grandfather, and Student's advisor from Riverview disputed Barnstable's finding of Student's FSIQ to be 56 and asserted that it was between 60 and 70. (Father; Grandfather) Father and Grandfather testified that Student's posts on social media<sup>5</sup>, her social network, and her self-care skills evidence her higher functioning level.
16. Pamela Switzer is Student's advisor at Riverview. She is a clinical counselor and has a master's degree in clinical and counseling psychology. Ms. Switzer has not conducted any formal assessments of Student. She opined that Student functions between 60 and 70, which is higher than her WISC-IV score. As grounds thereof, Ms. Switzer indicated that Student "is able to transition independently and really adapt to the environment." (Switzer) Student's memory is a strength as she is able to recall personal information provided to her by peers and staff. (Switzer; Jaeger; Birkhoff; Mother; Father; Grandfather)

## **2018-2019 School Year: Student's Sixth Grade**

### **Transition to Barnstable Intermediate School**

17. Student transitioned to Barnstable Intermediate School (BIS) for Sixth grade. She was assigned to Ms. Christina Graham's substantially separate classroom. (Mother; Graham; Bruinooge; Troutman) Ms. Graham is Department of Elementary and Secondary Education licensed in special education and elementary education. She recently retired after 30 years of

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<sup>4</sup> It is unclear from the record whether any changes were made to the then current Sixth Grade IEP following this assessment.

<sup>5</sup> There was no documentary evidence offered or admitted into evidence in support of this assertion.

- teaching. (Graham) Father and Mother described Student's classroom as "remote" and "isolated" in the school building (Father; Mother)
18. BIS does not have an after-school care program. (Father) It also has limited opportunities for after school activities. (Graham; Father)
  19. Ms. Graham's substantially sperate classroom was a flexible setting, frequently evolving based on students' needs. (Bruinooge; Graham)
  20. Father and Barnstable disagree as to the classroom that Student was slated to attend for sixth grade. Parents testified that Student was slated to begin sixth grade in a different substantially separate classroom, but her placement was changed to accommodate the disparate number of students in the various substantially separate classrooms. As a result, Student ended up attending the "lower functioning classroom." (Father; Mother; Grandfather) This led to feelings of distrust on behalf of the Parents. (Father; Mother).
  21. Dr. Pamela Troutman is the Coordinator of Special Education at BIS. She holds Department of Elementary and Secondary Education licenses in guidance counseling, school psychology, assistant principal/principal, and special education administration. She has a master's degree in counseling psychology and an advanced graduate degree (CAGS) in school psychology, as well as a doctorate in education. Dr. Troutman testified that prior to Student's transition from elementary school to BIS, a multidisciplinary team reviewed Student's IEP and observed Student. Student was assigned to a substantially separate classroom with a small student to staff ratio. When the assignment was made, Student required a lot of support, and Ms. Graham's class was deemed the appropriate placement. (Troutman)
  22. Dr. Eric Bruinooge is the Director of Secondary Special Education in Barnstable. He has a Ph.D. in school psychology and has worked in Barnstable for twenty years in a variety of roles. He participated in many of Student's IEP meetings since she transitioned to Barnstable in 3<sup>rd</sup> grade. Like Dr. Troutman, he explained that Student was not slated to attend a different substantially separate classroom; the other substantially separate classroom is an "intensive resource room." However, Student's placement in Ms. Graham's classroom did not dictate where and with whom Student spent her school day; Student participated in some classes in Ms. Graham's classroom, but also attended general inclusion social studies and science accompanied by peers from the intensive resource room. (Bruinooge)
  23. Ms. Graham was Student's teacher for both sixth and seventh grade at BIS. (Graham)
  24. During sixth grade, Student received services pursuant to a fully accepted IEP for the period from November 1, 2017 to December 3, 2018. Student's IEP included goals and services in the areas of receptive and expressive language skills, social communication/behavior, English Language Arts, mathematics, visual motor coordination, and gross motor. (P-8)
  25. At some unspecified time during Student's sixth grade, Student applied to Riverview but was rejected due to her maladaptive behaviors. (Graham)
  26. Student's transition to BIS was accompanied by an increase in challenging behaviors (i.e., aggression, teasing); such an increase was typical for Student during times of transition. (Father; Mother; Bruinooge; Graham; Skiba) Mother also attributed some of Student's difficulties during this time period to puberty. (Mother) Due to Parent's concerns regarding Student's transition to BIS, at Barnstable's suggestion, Mother toured the NECC Partnership Program but did not find it appropriate for Student. (Troutman; Mother)
  27. By all accounts, Mother and Barnstable worked collaboratively during Student's time in the district. (Mother; Graham; Bruinooge; Troutman; S-19) Mother is a board member of the Barnstable SEPAC, and Parents are good advocates for Student. (Mother; Bruinooge; Troutman) During Student's time at Barnstable, Parents participated in all Team meetings;

Mother was always present, and Father participated via telephone when he was not present in person. Grandfather also attended several Team meetings. (Graham)

28. The Team convened on December 12, 2018 to review the results of Barnstable's three-year re-evaluation, to determine eligibility and to develop an IEP. Student was found to have continued eligibility under the disability category of Autism. At that time, Mother reported being "overall happy" with Student's progress. She voiced concerns regarding Student's safety especially without access to 1:1. Mother also questioned whether Student required a more restrictive setting. (S-2)
29. During Student's two years at BIS, the same multi-disciplinary team worked with Student, except for the speech and language pathologist. (Troutman) During this time period, a behavior support plan was implemented which greatly reduced Student's interfering behaviors. (Skiba; Mother; Graham) Prior to the introduction of a behavior intervention plan, Student's maladaptive behaviors impacted her ability to participate in general education classes. (Graham; Troutman; Skiba)

#### The Sixth/Seventh Grade IEP (12/12/2018 - 12/3/2019)

30. Via Notice dated December 12, 2018, Barnstable proposed, and Father accepted, the IEP for the period beginning 12/12/2018 to 12/3/2019 (Sixth/Seventh Grade IEP), with placement in the substantially separate classroom located at the Barnstable Intermediate School. (S-2; P-7) A BCBA from NECC was added to Student's service delivery to address behavioral challenges, including physical aggression. (S-2; P-7; Skiba; Graham) Goals were proposed in the areas of Communication, ELA, Math, OT, and Behavior. Per a 5 day cycle, services were proposed as follows: Grid A – Consultation, SLP, 1x30/monthly; Consultation, Special Education Teacher, 1x150/monthly; Consultation, OT, 1x30/monthly; Consultation, BCBA, 1x90/monthly; Grid B – Transitions, Special Education Staff, 1x45; Academic Support, Special Education Assistant, 1x15; Academic Support, Special Education Assistant, 1x30; Grid C – Communication, SLP/SLPA, 2x30/week; ESY, SLP/SLPA, 1x0/0 days<sup>6</sup>; ESY, Special Education Staff, 1x720/week, ELA, Special Education Teacher, 1x120; Math, Special Education Teacher, 5x120; Fine/Visual Motor, COTA, 1x50; Behavior, BCBA<sup>7</sup>, 5x390. (S-2; P-7)

#### Student's Progress During the 2018-2019 School Year

31. Ms. Graham testified that Student's relationships with peers in the substantially separate classroom varied; for instance, she did not engage with the more cognitively challenged students but perseverated on the attention of other students in the classroom. (Graham)
32. Kelli Skiba of the New England Center for Children (NECC) consults to Barnstable. She is a Board-Certified Behavior Analyst (BCBA) with a master's degree in severe special education. She also holds a professional Department of Elementary and Secondary Education license in special education. In January 2014, Ms. Skiba began consulting with Ms. Graham and the paraprofessionals in the substantially separate classroom and developed a formal reinforcement program for Student. (Skiba) This program was implemented consistently

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<sup>6</sup> Based on the exhibits, it appears that no speech and language services were proposed for ESY as part of the Sixth/Seventh Grade IEP.

<sup>7</sup> Dr. Troutman testified that "BCBA" was entered in error for the type of personnel. The BCBA consulted to the staff who then provided the direct service. (Troutman)

across Student's school day<sup>8</sup>. (Skiba; Graham; S-15) Student understood and learned the contingencies of her reinforcement program quickly, and her behaviors changed as a result. Behavioral data demonstrates a sharp decrease in Student's challenging behavior (aggression, teasing and inappropriate comments). (S-15; Skiba; Graham) Mother testified that Barnstable did good job" during the 2018-2019 school years, when Student became self-regulated. (Mother)

## **2019-2020 School Year: Student's Seventh Grade**

### November 2019 - Student's Progress

33. Student was very popular at BIS. (Troutman) She still has "lots and lots of friends" at Barnstable. (Mother)
34. Mother testified that she often observed Student's program at BIS. (Mother) Neither Grandfather nor Father formally observed the classroom at any time. (Graham) Grandfather however reported observing Student when he drove her to school on four or five occasions. (Grandfather)
35. Student's November 2019 Progress Report reflects progress across all goals and objectives. (Graham; S-3; S-5; P-7; P-10) She had mastered several communication objectives and had begun to address a variety of questions from peers. (S-3; P-7; Graham). Student also made great progress in reading and was reading at a K/1 level. She had mastered all the Dolche words and could use them in sentences and was beginning to work on Frye words. She continued to work on writing complete sentences with appropriate sentence structure, capitalization, and punctuation. Student also made great progress on her math objectives; she was also working on entry level seventh grade curricular content. She could add up shopping expenses and determine how much money she needed; she could also demonstrate a ratio in a visual format. (Graham; S-3; P-7) Because Student did not gravitate to new activities easily, the occupational therapist helped introduce her to new leisure activities and incorporated them into her routine. In preparation for standard MCAS, she worked on typing. (Graham; S-3; P-7) Student's rates of maladaptive behaviors decreased "drastically" and became "negligible". (S-3; P-7; P-10; Skiba; Graham) Student's behavioral progress allowed her to participate in more novel activities and experiences, especially in the general education environment. (Graham; S-3; P-7; S-5; P-10; S-15) Student's social skills improved greatly when her maladaptive behaviors decreased. (Skiba; Graham; Troutman). Student continued to access a reinforcement plan, and Ms. Skiba testified that, in her professional opinion, the decrease in Student's behaviors was directly a result of the implementation of the behavior intervention plan. (Graham; Skiba)
36. In November 2019, Student was attending only Math and ELA in Ms. Graham's classroom. (Troutman; Graham) In the general education setting, Student participated in homeroom, electives, science and social studies. She transitioned with general education peers, ate lunch in the cafeteria and participated in "walk and talk," a social time period after lunch. (Troutman; Graham)

### Development of Seventh/Eighth Grade IEP (12/19/2019 - 12/3/2020)

37. On December 11, 2019, Barnstable proposed an IEP for the period beginning 12/19/2019 to 12/3/2020 (Seventh/Eighth Grade IEP). (S-5; P-6) The Seventh/Eighth Grade IEP covered the remainder of Student's seventh grade and the first half of eighth grade. (S-5; Graham)

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<sup>8</sup> In fact, it was implemented until the school closure in March 2020.

Mother and Grandfather attended and participated in the Team meeting. Father did not attend. (S-6; P-6; Father)

38. The Seventh/Eighth Grade IEP describes Student as follows:

Due to her disability of Autism, [Student] often has restricted areas of interest and conversation which impacts her across the curriculum. She demonstrates significant delays in the areas of communication and academic skills. Sensory regulation, fine motor skills, socialization and behavior issues affect Student's ability to access the general curriculum. Her rate of learning is below the grade level of general education peers. In order to access the curriculum, [Student] requires extensive behavioral support and content modifications. According to the Mass Curriculum Frameworks, [Student] is currently working at the entry level of the curriculum. She requires scaffolding and visual cues. Distractibility and limited attention span often impact her learning. As a result of her disability, [Student] requires supports that address her current level of communication, her social pragmatic and social interactions needs that result from her preoccupation with scheduled events and inflexible thinking and social situations. Student requires behavioral interventions, strategies and supports to address many behavioral difficulties including a behavior plan to support her interactions with both adults and peers. [Student] needs 1:1 for behavioral support.

Her comprehension and expression of spoken language is significantly impaired. She has considerable difficulty understanding what is said to her. [Student] has difficulty following directions, answering questions and conversing with others. [Her] sensory motor system impacts her ability to regulate sensory input – she seeks tactile stimulation (fingertip pressure on arms) but can get overwhelmed in a larger environment. Her upper body can become tense and [she] has difficulty relaxing. [Her] learning style requires that new gross motor activities be broken down into components, demonstrated and practiced. She may require help to move her body into the proper positions initially as she learns the required motor plan... [Student] is vulnerable to being bullied and/or to being identified as a bully. (S-5; P-6)

39. The Seventh/Eighth Grade IEP offered Student 1:1 support for behavior. Accommodations included "1:1 and very small group," and methodology called for "individualized and small group instruction." (S-5; P-6; Graham) It included goals in the areas of Communication, ELA, Math, and Behavior. Because Student benefitted from inclusion opportunities, B Grid services were proposed. (Penni; Graham)

40. Per a 5 day cycle, services were proposed as follows: Grid A – Consultation, SLP, 1x30/monthly; Consultation, Special Education Teacher, 1x30/monthly; Consultation, OT<sup>9</sup>, 1x15; Consultation, BCBA, 1x90/monthly; Grid B – Learning Support, Special Education Staff, 1x90/monthly; Independence, Special Education Staff, 5x45; Grid C – Communication, SLP/SLPA, 2x30 (until the conclusion of the 2019-2020 school year); SLP/SLPA, 2x30 (beginning with the 2020-2021 school year); ESY, SLP/SLPA, 1x30/3days; ESY, Special Education Staff, 3x240; ELA, Special Education Teacher, 1x120; Math, Special Education Teacher, 5x120; Behavior, BCBA, 5x390. MCAS with

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<sup>9</sup> In preparation for high school, occupational therapy services transitioned from direct to consult model. (Troutman) The record does not indicate whether Parents objected to the change in service delivery, but Father subsequently accepted the IEP on April 16, 2020. (S-5; S-6; P-6)

accommodations was proposed<sup>10</sup>. Placement was proposed in the substantially separate classroom (BIS and Barnstable High School, respectively). (S-5; P-6)

41. Mother did not sign the Seventh/Eighth Grade IEP due to typos therein; she was also concerned that the placement was “different” from what was described at the IEP meeting.<sup>11</sup> (Mother)
42. On March 6, 2020, the Seventh/Eighth Grade IEP was repropoed after certain typographical errors were corrected. (S-6; P-6) On April 16, 2020, Father accepted the Seventh/Eighth Grade IEP. (Father; S-5) Father testified that he was “pressured” to do so, having been told that if he did not, Student would not receive special education services. (Father) However, due to the delay in signing the Seventh/Eighth Grade IEP, the Team continued to implement the Sixth/Seventh Grade IEP by providing Student with the same services delineated therein; if goals had been met, staff “continue[d] to enrich things” while waiting for acceptance. (Graham)

#### Implementation of Seventh/Eighth Grade IEP

43. Per her Seventh/Eighth Grade IEP, Student received direct instruction in Ms. Graham’s classroom for ELA and Math. There were 6 to 8 students in the classroom, one of whom was nonverbal. There was variability in the academic skills of students in the substantially separate classroom. For example, in seventh grade, Student was working on addition, carrying, subtracting, borrowing and money skills, but another student in the class was working on division. (Graham).
44. Father and Barnstable disagree about the implementation of Student’s Seventh/Eighth Grade IEP. Father opined that although Student was supposed to have 1:1 support throughout her day, she often did not as paraprofessionals’ attentions were diverted towards poorly behaving students. Student was utilized as a social role model, but, in turn, she often mimicked maladaptive behaviors. (Father; Grandfather) However, school staff testified that Student was supported by a rotating staff member throughout her school day; nevertheless, Student did not require 1:1 support at all times and could often access instruction in a small group setting (1:2). (Graham; Troutman; S-5; S-6; P-6) Paraprofessionals offered Student accommodations and modifications to allow her access to the entry levels of the seventh-grade social studies and science curriculum. They also supported Student’s communication goal and facilitated her interaction with peers. (Graham; Penni)
45. Father and Barnstable disagree about the duration of Student’s participation in inclusion. Father opined that although Student had inclusion services on her Seventh/Eighth Grade IEP, she spent less than thirty minutes in the general education setting each day and was not “allowed to interact” with the general education students. Relegated to the back of the classroom, Student was “isolated.” He opined that removal from the general education classroom was “telling [Student she was] separate and should be isolated.” (Father; Grandfather). However, school staff testified that it was extremely rare for Student not to participate in her general education classes. (Graham; Penni) Ms. Ann Penni was Student’s Seventh grade science teacher. Ms. Penni has experience teaching students with IEPs in her general education classroom. (Penni) Ms. Penni worked closely with Ms. Graham and the paraprofessionals from Ms. Graham’s classroom to modify instruction for Student. Although

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<sup>10</sup> Although the IEP now reflected MCAS with accommodations, Student did not participate in standard MCAS testing during the 2019-2020 school year as they were cancelled due to the COVID-19 pandemic. (S-6; P-6; S-8; S-9)

<sup>11</sup> Mother did not elaborate as to the differences between the two proposals.

most science curriculum is hands-on and required no modification, written assignments and assessments were modified significantly for Student. Student's progress in science was based on modified assignments and assessments. With modifications, Student could demonstrate mastery of seventh grade science standards. (Penni; Troutman; S-13) Student completed her assessments in a different setting than her peers. (Graham; S-2). To a passerby, Student would not have stood out in her inclusion science class. Student was one of many students who required modifications and/or accommodations in science class. (Penni) Student sat in the middle row with three to four general education students. Her paraprofessional sat a little to the side of Student. (Penni; Graham; Troutman) Student occasionally required quiet redirection by her paraprofessional, but she was not disruptive. (Penni)

46. Father and Barnstable disagree about BIS' assignment of homework to Student. Father testified that BIS did not assign Student any homework. (Father; Grandfather) However, Ms. Graham testified that during Student's time at BIS, Student was provided a homework folder daily which she completed while attending the YMCA after-school. (Graham).
47. Father and Barnstable disagree about Student's access to after school activities at BIS. Father testified that he was told that Student could not partake in such activities due to her behaviors. (Father). Dr. Bruinooge, Dr. Troutman and Ms. Graham testified that it was never brought to their attention that Student was refused participation in any after-school activities at BIS. (Bruinooge; Troutman; Graham) Ms. Graham explained that Student could have participated in any available after-school program. Ms. Graham would have arranged for support and supervision for Student, as she did when Student attended two dance socials. (Graham)

#### Spring 2020 – Remote Instruction

48. On March 13, 2020, Barnstable closed due to the COVID-19 statewide emergency. (Troutman; Graham; Penni) At the time of closure, Student's rates of maladaptive behaviors were extremely low (i.e., her rates of aggression were zero and teasing was nearly zero). (S-3; S-20; Skiba; Graham) Student was reading at a first grade/mid-first grade level. (Graham; S-5; S-6; P-6).
49. During the spring of 2020, remote instruction changed frequently depending on the State directive. (Graham; Troutman; Penni). Student's Team met often during the school closure to plan for the provision of special education services. (Troutman; Graham)
50. Together with Student's Team, Ms. Graham developed an individual remote service plan to implement the Seventh/Eighth Grade IEP. (Graham; S-20) Ms. Graham addressed Student's ELA, Math and Behavior goals through 1:1 work with Student and assignments which Grandfather helped Student complete. (Graham; Grandfather; S-20). Student's speech and language pathologist addressed Student's Communication goal; she communicated with Parents via email, posted activities and participated in Zoom meetings. (S-20; Grandfather) The occupational therapist provided video modeling and activities and participated in virtual classrooms. (S-20) Science and social studies were not reflected on Student's remote service plan because they were general education classes. (Graham) Instead, general education teachers set up Google classrooms, to which Student had access for science and social studies. (Graham; Penni)
51. Some students did not participate in remote sessions. (Graham; Father; Grandfather; Camposano; Troutman) Father and Barnstable disagree as to the reason for the nonattendance of Student's peers at virtual sessions. According to Father, Student was the "only" student from Ms. Graham's class who did any remote work because her cognitive

ability enabled her participation, and other students were “less able.” (Father; Grandfather) According to Barnstable, Student was able to participate fully due to the support of Grandfather. (Graham; Grandfather). However, not all students had that level of support. (Graham; Camposano) In addition, Ms. Graham met with students individually via Zoom. (Graham; Troutman; S-20)

52. Father and Barnstable disagree about Student’s access to general education virtual classrooms during remote instruction. According to Father, Student was “not allowed” into general education math class,<sup>12</sup> and she was not “welcome” in science. (Father; Grandfather) General education teachers were “surprised” to see Student during Zoom sessions. They were “happy” when she submitted assignments because they “were not used to having much contact with her.” General education assignments were not geared towards Student. (Grandfather). However, according to Barnstable, when schools first closed, State-directives stressed that students should not be pressured to complete schoolwork; hence, all general education work was optional. Zoom check-ins were available to clarify assignments, but most students attended them for a social “connection.” Student checked in with Ms. Penni via Zoom during that time. Assignments were posted for all students on Google Classroom but were modified for Student by the special education teacher. (Penni)

#### Student’s Progress on the Seventh/Eighth Grade IEP during the Second Part of the 2019-2020 School Year

53. Student made progress on all of her Seventh/Eighth IEP goals during remote instruction. (Graham; Grandfather; Father; S-20) Student “blossomed” during the shutdown.<sup>13</sup> (Father; Grandfather) Grandfather was a “huge part” of Student’s success as he was able to redirect and support her with assignments. (Graham; Father; Grandfather) Student benefitted from the absence of distractions. (Grandfather) Father and Grandfather testified that 1:1 support was necessary for Student as evidenced by her success during remote instruction in the spring of 2020. (Father; Grandfather)
54. Student’s progress during remote instruction led Father and Grandfather to believe that the BIS program was inappropriate for Student; they felt that Barnstable would not allow Student to reach her “full potential.” (Father; Grandfather)

#### Peer Grouping at BIS

55. Father and Barnstable disagree regarding the appropriateness of Student’s peers at BIS. According to Father, Student’s peers in the substantially separate classroom were “much lower functioning” than Student who was verbal and was not confined to a wheelchair. (Grandfather; Father) The lower functioning students were “more severe kids, pre-, nonverbal, [with] behavioral issues.” (Father) Student was “clearly different,” the “highest functioning”<sup>14</sup>, “most social and communicative,” and “physically more active”. (Father; Grandfather) The BIS program did not focus on academics but rather on social-emotional development. Student’s placement at BIS with low functioning peers reflected Barnstable’s low expectations for Student. Barnstable set low expectations for students because it made it “easier to deal” with them, and the District’s expectation was that Student would be in “life-

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<sup>12</sup> Pursuant to Student’s Seventh/Eighth Grade IEP, Student did not participate in general education math. (S-20)

<sup>13</sup> In her rejection of the Eighth/Ninth Grade IEP, as revised, Mother actually shared concerns that Student had regressed during the remote period. (S-19) However, that view was not supported by any other witness.

<sup>14</sup> Father testified that he had additional knowledge of many of the students in the class since he “knew them” from other activities. (Father)

long care.” There was a discrepancy between how Student’s family and Barnstable perceived Student’s “capability.” (Father; Grandfather; Graham; Bruinooge) Student’s independence in self-care and her performance during remote instruction was a sign of her high cognitive ability, although she still had “serious” and “significant issues” with her comprehension. (Father) However, according to Barnstable, Student was “in the middle” of her peer group in terms of her cognitive and academic abilities. (Graham; Bruinooge; S-17)

#### June 2020 - Transition Meeting

56. In Barnstable, eighth grade students attend Barnstable High School (BHS). (Camposano) The Team convened on June 5, 2020 to discuss Student’s transition (Camposano; S-6; P-6) Parents and Grandfather attended. (S-6; P-6) Ms. Stacy Camposano is the Special Education Coordinator at BHS. She participated in Student’s June 2020 meeting. At that time, the COVID-19 pandemic made it impossible to predict what school would be like in the fall of 2020. Had it been a typical year, the Team would have discussed course recommendations and whether the Seventh/Eighth Grade IEP needed amending based on the Team’s recommendation.<sup>15</sup> (Camposano) However, Student’s accepted Seventh/Eighth Grade IEP could be implemented fully at BHS. (Camposano; Bruinooge; Perry)
57. During this meeting, Parents did not raise concerns regarding Student’s BIS or BHS programs. (Camposano)
58. According to Ms. Graham, Ms. Penni, Dr. Troutman, and Dr. Bruinooge, Student’s needs were met at BIS, where she received a FAPE in the LRE, and her needs could be met at BHS as well. (Graham; Penni; Troutman; Bruinooge; Camposano)

#### ESY 2020

59. ESY services were offered to Student for the summer of 2020, but Student did not participate. (Graham; Father; P-23)

#### **2020-2021 School Year - Student’s Eighth Grade**

##### September 2020 – Unilateral Placement and Team Meeting to Discuss Unilateral Placement

60. On September 2, 2020, Barnstable received Father’s written notice of Student’s unilateral placement at Riverview beginning in the 2020-2021 academic school year. Father indicated that BHS was an inappropriate placement for Student for several reasons: due to the remote nature of public schools, there were limited opportunities for social interaction; Barnstable did not have opportunities for “after school education”; Student was capable of making significant progress, as evidenced by her experience during remote instruction; and Student’s private speech and social skills therapist<sup>16</sup> recommended Riverview. They requested placement at and funding for Riverview. (S-7) Dr. Bruinooge responded to Father immediately to set up a Team meeting to allow the Team to consider Parents’ concerns and make any changes to the IEP if necessary, as well as to discuss next steps. (S-21)
61. On September 22, 2020, the Team convened to discuss placement. (S-8; P-9; Camposano) Parents were present. (S-8; P-9) Also present were Ms. Graham, Dr. Troutman and Dr. Bruinooge. (S-8; Camposano; Bruinooge; Troutman; Graham)

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<sup>15</sup> Also prior to the COVID-19 related school closure, tours were arranged for students and parents, and students participated in a mock high school day. (Troutman; Perry)

<sup>16</sup> This speech therapist did not testify at Hearing.

62. At the meeting, the Team engaged in a meaningful discussion regarding Parents' concerns. (Camposano) Parents argued that Riverview offered Student "more" and was "more appropriate". Riverview focuses on academics and offers a more "comprehensive" in-school program as well as after-school opportunities for social interactions with a community of similar peers so as to enable Student to meet her full potential. (S-8; S-9; Camposano; Father) On the other hand, Barnstable's programs lacked academic rigor and had low expectations for Student. (Father; Camposano; S-8; S-9) BHS does not have an "autism class that [is] a perfect fit" for Student. Student's program had inappropriate peers and promoted little interaction with neurotypical peers. Student's science and social studies curriculum was not properly modified so as to allow Student "to engage in a meaningful way."<sup>17</sup> (S-8; S-9; Camposano; Mother)
63. Father acknowledged that Student had made "tremendous gains in some areas" and had "come a long, long way while at Barnstable." (Father) Parents did not object to Student's goals and services; placement alone was their concern. (Camposano)
64. On September 29, 2020, Barnstable declined to fund placement at Riverview arguing that BHS's Foundations program offered supports and services comparable to those provided to Student at BIS where Student had made "dramatic" progress. (S-8; S-9; Camposano; Troutman; Graham; Bruinooge) Central to the Team's decision was the concept of LRE. (Camposano; Troutman)

#### Foundations Program at BHS

65. Barnstable began the 2020-2021 school year remotely, but after approximately 3 weeks, high needs students, like Student, were offered four days of in-person instruction and one day of remote instruction. (Camposano) Because teachers had received a lot of training, remote instruction during the 2020-2021 school year "looks very different"; it is more organized and includes synchronous learning. (Penni; Camposano)
66. Students at Barnstable's special education programs are grouped according to educational needs, PLEPs, service delivery, staff experience with students, and staff observations rather than on cognitive assessment scores or any single assessment tool. (Bruinooge; Troutman; Camposano) Similar educational needs often translate into similar cognitive abilities. (Bruinooge) As a result, the cognitive and educational profiles of students at BIS and Foundations are similar. At BIS, Student was educated alongside students in Ms. Graham's class but also with some students from the intensive resource room, and these select students from the intensive resource room accompanied her to general education science and social studies. Both groups (i.e., those from Ms. Graham's class and those from the intensive resource room) would be Student's peers in Foundations. (Bruinooge; S-17) Student's cognitive profile and academic abilities are commensurate with those of the other students in the Foundations program. (Camposano; Bruinooge)

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<sup>17</sup> At this Team meeting, Mother reported that her rejections to the then-current IEP were not considered by the Team. However, Barnstable has no record of a rejected IEP. (Camposano; S-9) According to school records, Mother communicated with Ms. Graham via phone and email on 2/25/20 regarding typographical errors in the IEP. Subsequently, BIS staff made the requested edits. The revised IEP was mailed to Parents on 2/28/20. A signed and fully accepted IEP with accepted placement signed by Father was received by Barnstable on April 16, 2020. (S-9; Camposano) Mother was also frustrated that Student missed SLP services during the summer. The missed ESY SLP services were a result of a miscommunication; while Mother was inquiring about a time change for said services, on June 24, 2020, Father declined them and all ESY services. (S-9; P-22; P-23; Camposano) Nevertheless, Barnstable proposed compensatory services for the missed sessions. (S-9)

67. Foundations is a flexible program where Student's schedule would be driven by her IEP, not by her assignment to Foundations. (Bruinooge; Camposano; Perry) It is a cohesive and comprehensive, substantially separate program of study for students with moderate to intensive special needs, offering a range of academic courses addressing Common Core standards, preparing students for participation in MCAS or MCAS-alt and developing practical literacy and numeracy skills. (S-16; Camposano; Bruinooge; Perry) Foundations students also participate in courses to develop essential skills for daily living and postsecondary living and employment. (S-16; Camposano; Perry) Courses are taught by three Department of Elementary and Secondary Education licensed special education teachers with support from teacher assistants, personal care assistants, and other related service providers. (S-16; Perry; Camposano)
68. The program has only been formally in existence since the 2020-2021 school year; in prior years, content was taught in three separate substantially separate classrooms. (Camposano) Although there were always multiple pathways at BHS, Foundations made said pathways more systematic and explicit while enhancing opportunities at BHS for students with disabilities. (Bruinooge) The new structure allows for vertical and horizontal alignment of content and for consistency and comprehensiveness. (Camposano; Bruinooge) Courses offered in Foundations allow students access to different levels of classes for academics, prevocational/vocational skills, and life skills, as well as to different classmates and teachers. (Camposano; Bruinooge).
69. Students have many options both within the Foundations courses and within the high school as a whole. Foundations students are not limited to Foundations courses and can participate in any classes at the high school with support, as needed.<sup>18</sup> Course selections may change if too challenging or not challenging enough for a student.<sup>19</sup> Because of the increased rigor in eighth grade, some students transition from push-in to pull-out services. When students first transition to the high school, they may have increased paraprofessional support which may then be faded as students' comfort increases with classroom transitions and building navigation. (Perry)
70. At BHS, students report to their first class upon arrival which begins with a "mini-homeroom."<sup>20</sup> They transition from class to class with their peers and with paraprofessional support, as needed. For related services, students are not pulled from core content classes but rather from electives. (Camposano; Perry; S-16) Electives include ceramics, culinary arts, fine arts, technology, video production, graphic design, yoga, etc. (Camposano) Students also participate in PE/Wellness, and most students take 1-2 inclusion classes. (Camposano; Perry) Students have opportunities to interact with general education peers in the "natural ebb and flow" of the high school as well as during classes, electives, lunch and after-school activities. (Camposano; Perry)
71. Currently, there are 25 students in the Foundations program. (Camposano) There are three sections, and there are approximately 7 students per class. The number of paraprofessionals varies based on students' needs, but each class usually includes at least one paraprofessional. Peers within the program are multi-grade and include eighth, ninth and tenth grade students. (Camposano; Perry; S-16) There is variability in students' cognitive and academic abilities;

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<sup>18</sup> Students may also participate in a "standard level" substantially separate special education core content class if they require different pacing. Standard level classes are C Grid services outside of the Foundations program. (Perry)

<sup>19</sup> The Team may reconvene to make certain changes. (Perry)

<sup>20</sup> Prior to COVID-required scheduling adjustments, student reported to homeroom first. (Perry)

compared to Student, some are higher, and others are lower. (Camposano; Bruinooge; Perry; S-17) Student is in the “middle” of the peer group. (Bruinooge; S-17)

72. Foundations students have access to all activities and extracurricular opportunities at BHS. (Camposano; Perry; S-16; S-22) Currently, with support, some students participate in track, photography, and basketball. (Camposano). In the past, students participated in football, drama, and Best Buddies. (Perry)
73. Even if there had been no Foundations program, Student’s IEP could have been implemented at BHS. (Camposano; Bruinooge)

#### Development of Eighth/Ninth Grade IEP (12/1/2020 to 11/30/2021)

74. The Team convened again on December 1, 2020 for Student’s annual review. Riverview staff were invited to attend but did not. Parents and Grandfather attended. Parents reiterated that they wanted Student to participate in all content area classes with non-disabled peers, with appropriate support; to receive increased specialized support; and to be held to a high standard. (S-11; Camposano)
75. Ms. Camposano opined that it is “tricky” to develop an IEP for a student who has never attended the program. (Camposano). As such, Progress Reports from Riverview were reviewed together with Barnstable’s last accepted IEP, and Barnstable’s June 2020 Progress Reports informed the developments of Student’s PLEPS, goals, objectives, and services. (Camposano; Bruinooge; P-5; S-10) The Team also discussed Student’s access to special education during the school closure in the spring of 2020 and determined that she received and accessed services and did not demonstrate regression of skills during said period. As such, no COVID-19 compensatory services were found to be necessary.<sup>21</sup> (P-5; S-10; Camposano)
76. Via Notice dated December 8, 2020, the District proposed an IEP for the period beginning 12/1/2020 to 11/30/2021 (Eighth/Ninth Grade IEP) with placement in a substantially separate classroom at BHS. (P-5; S-10) Current performance levels on goals were updated with information from Riverview. (P-5; S-10; Camposano; Father) Goals were proposed in the areas of ELA (reading and written expression), Mathematics, Independence (self-advocacy, safety) and Communication (including pragmatics).<sup>22</sup> Per a 5-day cycle, services were proposed as follows: Grid A: Consultation, SLP, 1x30/month; Consultation, Special Education Teacher, 1x30/month; Consultation OT/COTA, 1x15/month; Consultation, BCBA, 1x30/month; Grid B: Independence, Special Education Staff, 8x50; Grid C: Communication, SLP/SLPA, 1x30<sup>23</sup>; ELA, Special Education Teacher, 4x50; Math, Special Education Teacher, 4x50; Independence, Special Education Staff, 19x50; ESY, Special Education Staff, 3x240.<sup>24</sup> (P-5; S-10)
77. Based on Student’s present levels of performance, the Team proposed that Student receive specially designed instruction for ELA and Math, delivered by a special education teacher in a small group setting and that concepts and standards related to science and social studies be addressed through participation in multi-disciplinary courses called “Foundations of

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<sup>21</sup> Mother disputed this and indicated that “[like] many students during COVID, [Student] regressed in the academic setting.” (S-19) Father did not assert any claims for compensatory services.

<sup>22</sup> Ms. Camposano testified that she wrote the academic goals for Student’s Eighth/Ninth Grade IEP based on the performance levels that were submitted by Riverview and those from BIS. She also incorporated Student’s “broader” areas of need as identified by the Team in September 2020. The related service providers wrote the related service goals for Student’s Eighth/Ninth Grade IEP. (Camposano)

<sup>23</sup> Based on the exhibits, it appears that no speech and language services were proposed for ESY. (S-10)

<sup>24</sup> Foundations social studies and science classes are C Grid services.

Mathematics and Science”<sup>25</sup> and “Foundations of ELA and Social Studies”, respectively.<sup>26</sup>

The Team also proposed that Student’s Independence Goal be addressed through participation in a “Skills for Life” class and throughout the school day. Inclusion support was proposed for all classes, including electives, to facilitate Student’s participation and engagement. The Team proposed MCAS with a combination of standard and non-standard accommodations for ELA, Math and Science. ESY was proposed to prevent regression and a transition plan was developed. (P-5; S-10; Camposano; Bruinooge)

78. On December 30, 2020, Mother rejected the IEP and placement. As grounds thereof, she indicated that the IEP did not support inclusion; the goals were “void” of an appropriate curriculum in the general education environment; the projected graduation date was incorrect; consults in speech were inadequate and inappropriate; the data to support goals was outdated and inappropriate; goals were not based on Student’s unique needs; placement with low functioning students was not appropriate; and remote learning did not allow for the proposed IEP to be implemented. In the body of the document, she noted that Riverview assessed Student’s reading to be at a Pre-K level and that Student required direct occupational therapy services and increased speech and language services. (P-5; S-10)
79. Father testified that the Eighth/Ninth Grade IEP was “adapted in some ways, which was good” but that the program model remained inappropriate for Student. (Father)

Eighth/Ninth Grade IEP, Revised (2/5/2021 to 2/7/2022)

80. The Team convened again on February 5, 2021 to review the rejected portion of the Eighth/Ninth Grade IEP.<sup>27</sup> (Camposano; P-3; P-4; S-11) At the meeting, Mother indicated that Student requires additional special education services and increased inclusion opportunities. (Camposano)
81. In response to Mother’s concerns, Barnstable proposed updates to the Eighth/Ninth Grade IEP. SLP services increased from 30 minutes to 60 minutes per week. An occupational therapy goal and direct occupational therapy services (1x30) were added. Present levels of performance were updated to reflect progress reports from Riverview and the Kennedy Donovan Center for Child Development (Donovan Center)<sup>28</sup>. Objectives were added to the Communication Goal. (P-3; P-4; S-11; Camposano)
82. The Team declined to indicate in the IEP how Student’s goals will be implemented during remote learning and indicated that this would be addressed through a COVID-19 Special Education Learning Plan.<sup>29</sup> (P-3; P-4; S-11; Camposano)
83. The Team declined to place Student in general education core content classes for the purpose of making her placement meet the criteria for partial inclusion, asserting that the substantially

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<sup>25</sup> If Student required Foundations math but not science, her schedule could have accommodated that course selection. (Perry; Bruinooge)

<sup>26</sup> Ms. Camposano testified that there seemed to be a difference in opinion between Parents in terms of Student’s access to general education science and social studies; Mother wanted a more inclusive model, but Father was looking for increased specialized support. (Camposano)

<sup>27</sup> It is unclear from the records whether Father attended the February 2021 meeting.

<sup>28</sup> Mother obtained support for Student at the Donovan Center through the Department of Development Services. (Mother) Staff from neither Riverview nor the Donovan Center were present at the Team meeting, owever, Mother provided the Team with progress notes.

<sup>29</sup> Ms. Camposano testified that this was per DESE guidance. Camposano

- separate classroom placement was an inclusive program that provided Student with meaningful interaction with general education students.<sup>30</sup> (P-3; P-4; S-11; Camposano)
84. As a result of the February 5, 2021 meeting on February 11, 2021, the District proposed an IEP for the period beginning 2/5/2021 to 2/7/2022, with goals in the areas of Communication, ELA, Math, Independence and OT. Services proposed per a 5 day cycle included the following: Grid A: Consultation, SLP, 1x30/month; Consultation, Special Education Teacher, 1x30/month; Consultation OT/COTA, 1x15/month; Consultation, BCBA, 1x30/month; Grid B: Independence, Special Education Staff, 8x50; Grid C: Communication, SLP/SLPA, 2x30; ELA, Special Education Teacher, 4x50; Math, Special Education Teacher, 4x50; Independence, Special Education Staff, 19x50; Occupational Therapy, OT, 1x30. ESY continued to be proposed as were MCAS with accommodations. Placement was proposed in the substantially separate program at BHS. (P-3; P-4; S-11)
85. On February 19, 2021, Mother rejected the Eighth/Ninth Grade IEP, as revised, and the placement at BHS. She requested an opportunity to observe Foundations. (P-3; Camposano; Mother) Based on Mother's conversation with other parents, she did not feel that the placement was appropriate, her assumption being that Foundations students were too low functioning, and the program focused on life skills. (Mother; P-3; S-11)
86. Father was under the impression that should Student return to Barnstable, she would need to be re-evaluated. (Father) Ms. Camposano testified that no new assessments have been proposed or discussed; the Team felt confident that they had enough information to develop a program for Student, and they would evaluate how she "functioned in that program before making any different decisions." (Camposano)

#### Parents' Observation of Foundations

87. Via a virtual platform, on March 11, 2021, Parents observed a Foundations of Math and Science classroom for approximately thirty minutes. (Camposano; Bruinooge; Mother; Father; Perry) Parents observed a science lesson on an eighth-grade standard. Ms. Perry activated prior knowledge with vocabulary review, showed a video, led a discussion of the video, had students sing and provided visual references. Students were engaged, answered questions, danced and participated in a discussion. (Camposano; Bruinooge; Perry)
88. Kelly Perry teaches Foundations of Math and Science, as well as two other Foundations courses, at BHS. Ms. Perry is a Department of Elementary and Secondary Education licensed special education teacher with a master's degree in moderate disabilities education. She has taught in many different programs at BHS. Ms. Perry is not personally familiar with the BIS program, but she has several students who matriculated from BIS into her program. (Perry)
89. Ms. Perry aligns her courses to the Common Core but modifies work based on students' needs. At the start of the school year, she meets with general education teachers, reviews their lesson plans and assignments and modifies them to meet the needs of her students. Each student is assigned a case manager (typically one of the three special education teachers in the Foundations program), and the case manager consults weekly with the general education teachers and paraprofessionals to review progress and determine what instruction or assignments need to be modified. The number of paraprofessionals in the room depends on the number and the needs of students, and paraprofessionals rotate in and out of the classroom as do students. (Perry)

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<sup>30</sup> Ms. Camposano testified that without additional information regarding Student's functioning at the high school, Parents' request for a partial inclusion placement could not be accommodated by the Team. (Camposano)

90. Most students in Ms. Perry's classroom are approximately at the 3<sup>rd</sup> to 5<sup>th</sup> grade level and have cognitive scores in the 60s range, although there are some students who are lower, and some who are higher. Students who require more functional math instruction would not be appropriately placed in Foundations of Math and Science but rather in a different Foundations math course. In the Foundations of Math and Science class, students range in mathematical abilities (i.e., some students are working on coin values while others can balance a checkbook). In addition, some students participate in MCAS-Alt while others participate in MCAS with accommodations. Ms. Perry described her students as "pretty even-keeled." (Perry)
91. Ms. Perry grades students on individual expectations. (Perry) For example, during the observed lesson, she offered students two options of varying difficulty to demonstrate content mastery. (Perry; Bruinooge; Camposano)
92. Dr. Bruinooge and Ms. Camposano opined that Student would have been appropriately placed in Ms. Perry's class. (Bruinooge; Camposano) All instruction and activities were presented with multiple access points. (Perry; Camposano)
93. Dr. Bruinooge testified that he could imagine Student in Ms. Perry's classroom because the students in the class were either the same or of similar profile to the students with whom Student had been grouped at BIS, both in Ms. Graham's ELA and math classes and in the general education science and social studies classes, which Student had attended with peers from the intensive resource room. (S-17; Bruinooge)
94. Father testified that Ms. Perry's classroom included a "wide range of disabilities" and estimated the student to staff ratio there to be 12:1. The class was "doing higher level of work," but it was "too big." The students were too distracting. There was little student interaction during Ms. Perry's "lecture" and insufficient personalized attention. In his opinion, Student was unprepared "for this level of class" with "no aides" to maintain students' focus. (Father) Mother was concerned that the students in Ms. Perry's class engaged in work avoidance, a behavior that she believed was being reinforced. Mother was also concerned that Student would spend 60% of her day in a self-contained classroom. (Mother)
95. On March 17, 2021, Barnstable re-proposed the Eighth/Ninth Grade IEP which was originally issued on February 11, 2021, with a corrected date of graduation.<sup>31</sup> The Foundations program was again proposed as a placement for Student. (Camposano; S-18) On March 24, 2021, Mother rejected the placement,<sup>32</sup> indicating that it was "a self-contained classroom that would reinforce Student's maladaptive behaviors and would not support her academic, social and emotional functioning." (S-18) She requested placement at Riverview. (S-19) The Team did not reconvene following Mother's last rejection because, by then, a Hearing on the matter was scheduled. (Camposano)

#### Riverview School Placement

96. Meghan Hammond is the Director of Special Services at Riverview and has been for eight years. She works with families and school districts to develop IEPs. Ms. Hammond testified that Riverview services approximately 27 special education day students "like Student" who have "an IQ lower than average"; do not have significant mental health or emotional issues;

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<sup>31</sup> Ms. Camposano testified that ASPEN repeatedly overrode the graduation date which accounted for the error. (Camposano)

<sup>32</sup> In her rejection of the IEP, Parent checked off "I reject the following portions of the IEP" and wrote "PLACEMENT." She also checked off that she refused the placement on PL1. (S-18)

and are learning disabled. Riverview students are “kind, gentle and naïve.” There are no general education students at Riverview. Riverview follows the Massachusetts Curriculum Frameworks and modifies the curriculum based on the writing, reading and math abilities of its students. (Hammond) Riverview’s “goal is to have students be as independent as they can be in all areas.” (Hammond; Jaeger) At Riverview, Student “will make the progress that she can make to be as independent as she can be.”<sup>33</sup> (Hammond)

97. Riverview uses a rubric for admission; Student was admitted to Riverview based on information provided by Parents as well as an interview with Student. (Hammond; Father) Neither Ms. Hammond nor Father could identify the specific documents relied upon in the admission process for Student.<sup>34</sup> (Father; Ms. Hamond) Upon admission, Riverview conducts informal assessments on the basis of which they write an IEP. (Hammond)
98. Currently, Student attends Riverview in person from 8:10AM to 3:00PM; she then attends after school activities from 3:00PM to 4:45PM. (Hammond; Father) During the 2020-2021 school year, Riverview has, at different times, transitioned between in-person and remote instruction. (Mother; Father; Hammond; Jaeger; Birkhoff; Switzer) During times of remote instruction, Riverview’s remote learning lasts throughout the school day. (Mother; Father; Grandfather) Parents reported that Student accesses remote instruction mostly independently. (Mother; Father) However, Student also receives support with remote access from the Donovan Center 2 days per week for 5 hours per day while she is learning remotely from school.<sup>35</sup> (Mother; P-1) Although Student exhibited some behaviors during the transition to remote instruction, these were “extinguished” when she began to receive behavioral support from the Donovan Center. (Mother; P-1) Student’s February 8, 2021 progress report from the Donovan Center notes that Student benefits from a behavior support plan; consistent routine and expectations; frequent reinforcements; sensory breaks; staff support in identifying and utilizing coping strategies during challenging behavior; clear, systematic instruction adapted for her learning style; and instruction in social and leisure skills. Student’s goals focus on communication (conversation skills, identifying others’ feelings), organization (agenda), and behavior (hand flapping, crossing eyes). Her progress is described as “adequate.” Following school break, her interrupting behaviors increased. Negative behavior also increased while working remotely with school services. Home services were recommended. (P-1)
99. Student transitioned well to Riverview. (Switzer; Birkhoff; Jaeger; Mother; Father) She has made friends whom she references by name and with whom she texts and communicates on social media. (Grandfather; Father)
100. Student is part of a pod of 15 students aged 12 to 15. Classes maintain a 1:6 teacher-to-student ratio. Student “fits” with her peer group both socially and academically. (Hammond; Switzer; Jaeger; Birkhoff) Student is happy, engaged and appropriate with peers; she is also commensurate in her academic, social and cognitive skills with her peers. (Birkhoff; Switzer; Jaeger; Mother; Father)

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<sup>33</sup> Ms. Hammond had no specific academic knowledge of Student and had only observed Student in passing during breaks and after school activities. (Hammond) She could not describe Student’s current grade-level functioning. (Hammond)

<sup>34</sup> Barnstable has not reviewed the application submitted for Student by Father. In addition, Father did not submit the application or any accompanying documents for consideration as exhibits. As such, it is unclear when Father applied for Student’s admission or what documents Riverview considered or relied upon in its admission of Student.

<sup>35</sup> This support is provided by the Department of Developmental Services and is center-based. Student also attends the Donovan Center on Saturdays. (Mother)

101. Student has made progress socially and behaviorally since attending Riverview. (Mother; Father; Grandfather; Switzer; Jaeger; Birkhoff; P-2) Since the start of the 2020-2021 school year, through the use of a token economy system, in the moment redirection, and scaffolding, Student has significantly decreased her attention-seeking behavior and increased social interactions. (Birkhoff; Switzer; Jaeger) Whereas in November 2020 Student still only initiated conversations with adults, by February she was initiating conversations with peers though she still required supports to stay engaged in the conversation. (P-2)
102. Pamela Switzer is Student's advisor at Riverview. She is a clinical counselor and has a master's degree in clinical and counseling psychology. Ms. Switzer sees Student twice per week, both individually and in a social skills group, and she also consults with Student's Riverview team once per week. (Switzer) Ms. Switzer has not administered any assessments to Student. Based on her observations and data collected during sessions, Ms. Switzer opined that since beginning at Riverview, Student has made an estimated 75% improvement in her ability to interact with peers, 90% improvement in her reduction of attention-seeking behavior, 30-50% improvement in her ability to read the room, and 25% improvement in her ability to engage in whole body listening. Student continues to work on these skills in a larger group setting (i.e., during the after-school program) as well as on controlling stimming behavior. (Switzer; P-2)
103. Christina Birkhoff is Student's math teacher at Riverview.<sup>36</sup> According to Ms. Birkhoff, Student is making progress, her attention being most notable. (Birkhoff) Student has made progress on some IEP objectives (i.e., identifying elapsed time, locating and entering the correct date on a calendar) and limited progress on others (i.e., solving word problems, determining the total for items and choosing the appropriate currency). (P-2) Student can add and subtract with regrouping. She is still working on making change and using the correct mathematical operation, as well as on functional math skills, word problems and time telling skills. (Birkhoff; P-2)
104. Christina Jaeger is Student's writing, reading and history teacher at Riverview. Ms. Jaeger has a preliminary license in moderate special needs. In writing, Student is working on writing complete sentences, expanding her sentences and self-editing. She has shown progress overall. When Ms. Jaeger assessed Student on the Fountas and Pinnell in September 2020, she was at level B (PreK-K); currently, Student is at level E (first grade, 2<sup>nd</sup> grade for decoding). (Jaeger; P-2) Student's Progress Report dated February 12, 2021 demonstrates that, for some reading objectives, such as responding to why questions and identifying the beginning, middle and end of a story, as well as on the in history/generalization goal, Student has made limited progress. (P-2)
105. In March 2021, Ms. Camposano and Dr. Bruinooge observed Student at Riverview during a science class.<sup>37</sup> The class worked on a second-grade standard using second grade instructional materials. (Camposano; Bruinooge) Class began with independent reading on the computer. The classroom teacher circulated among the students and offered them support. He then provided an assignment asking students to recall and write down three facts from the reading. (Camposano)
106. Student's behavior was appropriate throughout the observation. She responded well to teacher prompting and check-ins, but without the teacher's direct support, she "finger

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<sup>36</sup> Ms. Birkhoff was also Student's science teacher, but Student transitioned to a different science class at some point during the school year. (Birkhoff) No testimony or documentary evidence was offered regarding Ms. Birkhoff's education and work experience.

<sup>37</sup> Having met with her advisor, Student arrived late to class. (Camposano; Bruinooge)

stimmed” and seemed to lose focus. (Camposano; Bruinooge) She required significant support during the teacher during one activity. (Bruinooge)

107. Limited interaction was observed among students in class. (Camposano) There was no class discussion encouraged as part of the lesson. (Bruinooge; Camposano) At various times during class, students got up to get water and to use the bathroom. (Bruinooge)
108. Student’s peers at Riverview appeared similar to the “higher students” in Ms. Graham’s class and to the “typical students” in Ms. Perry’s Foundations of Math and Science at BHS. (Bruinooge)
109. According to Father, Riverside was “built for” Student. (Father) Student’s self-confidence has increased, and her anxiety has decreased. (Mother; Grandfather) Unlike Barnstable, where Student was “escorted” by a paraprofessional, Riverview is an “inclusive” environment. (Father) To Father, inclusion does not equate to inclusion in the mainstream; Parents want Student to be included with “peers she can model after... [w]hether they have IEPs or not.” (Father)
110. Father opined that the main difference between Riverview and Barnstable is “expectations.” (Father; Grandfather) At Barnstable, Student’s FSIQ drove her IEPs, despite the fact that Student was “capable of more” than her FSIQ suggested. (Father; Grandfather) On the other hand, Riverview perceives Student as capable of independence. (Father; Grandfather; Mother) Father opined that the goal should be to reduce the gap between students with autism and neurotypical peers, and he did not believe that this was going to happen for Student at Barnstable. (Father)

## **LEGAL STANDARDS:**

### **1. Free Appropriate Public Education in the Least Restrictive Environment**

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).<sup>38</sup> To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the regular education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum."<sup>39</sup>

The IEP must be individually tailored for the student for whom it is created.<sup>40</sup> When developing the IEP, the Team must consider parental concerns, strengths, disability related needs, recent evaluations, present level of achievement, academic, developmental and functional needs, and

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<sup>38</sup> Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (d)(1)(A).

<sup>39</sup> See 20 USC§1401 (9), (26), (29); 603 CMR 28.05(4)(b); *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012); *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1<sup>st</sup> Cir. 2019) (quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017)); *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F. 3d 18 (1st Cir. 2008); *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F. 3d 279 (1st Cir. 2008); *In Re: Chicopee Public Schools*, BSEA # 1307346, 19 MSER 224 (Byrne, 2013).

<sup>40</sup> *Andrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

the student's potential for growth.<sup>41</sup> The IEP must be reviewed no less than once a year (the annual review) to consider the information available on the student including progress, lack of expected progress toward goals and the general curriculum, evaluative information, information provided by the parents and the anticipated needs of said student.<sup>42</sup> The Team must consider the requirements of the general education curriculum, and the need for specially designed instruction and/or related services to allow the student to progress effectively in the content areas of the general education curriculum.<sup>43</sup> 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."<sup>44</sup>

At the same time, FAPE does not require a school district to provide special education and related services that will maximize a student's educational potential.<sup>45</sup> The educational services need not be, "the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."<sup>46</sup> Although parental participation in the planning, developing, delivery, and monitoring of special education services is central in IDEA, MGL c. 71B, and corresponding regulations,<sup>47</sup> schools are obligated to propose what they believe to be FAPE in the LRE, "whether or not the parents are in agreement."<sup>48</sup> The educational authorities carry the "primary responsibility for formulating the education" to be provided to the disabled student and for selecting the educational method most appropriate to meet the student's needs.<sup>49</sup> In addition, schools have considerable professional discretion and flexibility in how they fulfill their responsibilities as long as the goals and objectives of the IEP can be met and the student can make effective progress.<sup>50</sup>

The Massachusetts special education regulations define "progress effectively" to mean:

mak[ing] documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.<sup>51</sup>

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<sup>41</sup> 34 CFR 300.324(a)(i-v); *Andrew F.*, 137 S. Ct. at 999; *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

<sup>42</sup> 34 CFR 300.324(b)(ii)(A-E).

<sup>43</sup> 603 CMR 28.05 (4)(b).

<sup>44</sup> *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

<sup>45</sup> *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n.21 (1982) ("Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.").

<sup>46</sup> *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948-949 (1st Cir. 1991).

<sup>47</sup> *Rowley*, 458 U.S. at 208 ("Congress sought to protect individual children by providing for parental involvement . . . in the formulation of the child's individual educational program").

<sup>48</sup> *In Re Natick Public Schools*, BSEA #11-3131, 17 MSER 55 (Crane, 2011).

<sup>49</sup> *Lessard*, 592 F.3d at 270 (quotations and citations omitted).

<sup>50</sup> *See In Re: Dennis-Yarmouth Regional School District*, BSEA #03-4447, 10 MSER 64 (Putney-Yaceshyn, 2004) ("Case law generally allows the school district discretion to determine the appropriate methodology of the education services so long as the student is able to make meaningful and effective progress") (internal citations omitted).

<sup>51</sup> 603 CMR 28.02(17).

In *Andrew F.*, the Supreme Court explained that “appropriate progress will look different” depending on the student.<sup>52</sup> For instance, for a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>53</sup> The Court’s use of terms such as “ambitious” and “challenging” simply underscored its main holding that IEPs must allow for progress that is appropriate in light of the student’s circumstances.<sup>54</sup> With respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level, the child’s educational program must be “appropriately ambitious” and give the child a “chance to meet challenging objectives.”<sup>55</sup> Nevertheless, a student may be advancing from grade to grade and not receiving FAPE.<sup>56</sup> An individual analysis of student’s progress on his/her areas of need is key.<sup>57</sup> Hence, as the Fifth Circuit eloquently stated, “A disabled child’s development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child’s inability to maintain the same level of academic progress achieved by his nondisabled peers.”<sup>58</sup> Rate of progress on IEP goals must be assessed given the child’s circumstances.<sup>59</sup>

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.”<sup>60</sup> The Massachusetts special education regulations require that students be “educated in the school that he or she would attend if the student did not require special education” unless some other arrangement is dictated by the IEP.<sup>61</sup> This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that “removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved

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<sup>52</sup> *Andrew F.*, 137 S. Ct. at 992.

<sup>53</sup> *Id.*

<sup>54</sup> See *C.D. by & through M.D. v. Natick Pub. Sch. Dist.*, 924 F.3d 621, 631 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 1264, 206 L. Ed. 2d 254 (2020). See also *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 992, 197 L. Ed. 2d 335 (2017) (“A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect.”).

<sup>55</sup> *Andrew F.*, 137 S. Ct. at 992.

<sup>56</sup> See 34 CFR 300.101(c)(1): “Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”

<sup>57</sup> *Andrew F.*, 137 S. Ct. at 1001 (“The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue”); see also *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 809 (Eighth Cir. 2011) (explaining that the court would not compare the student to her nondisabled peers since the key question was whether the student made gains in her areas of need).

<sup>58</sup> *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000); see also *H.C. ex rel. M.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 528 F. App’x 64, 67 (2d Cir. 2013) (“To the extent [the parents] argue that the gap between [the child] and her peers was growing in terms of reading ability, . . . a child’s academic progress must be viewed in light of the limitations imposed by the child’s disability.”).

<sup>59</sup> See *G.D. by & through Jeffrey D. v. Swampscott Pub. Sch.*, No. 19-CV-10431-DJC, 2020 WL 3453172, at \*5 (D. Mass. June 23, 2020).

<sup>60</sup> 20 U.S.C. § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

<sup>61</sup> 603 CMR 28.05(6).

satisfactorily.”<sup>62</sup> In *C.D. v. Natick Public School Dist.*, the First Circuit noted that consideration of the least restrictive environment requirement involves weighing the preference for mainstreaming together with assessing the “potential placements’ ‘marginal benefits’ and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.”<sup>63</sup> “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”<sup>64</sup> Removing a child from the mainstream setting is permissible when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting ...”.<sup>65</sup>

In Massachusetts, there are additional standards relevant to services for children on the autism spectrum. Chapter 57 of the Acts of 2006, entitled An Act To Address The Special Education Needs Of Children With Autism Spectrum Disorders and amending M.G.L. c. 71B, § 3, provides in relevant part:

Whenever an evaluation indicates that a child has a disability on the autism spectrum, ... the Individualized Education Program (IEP) team ... shall consider and shall specifically address the following: the verbal and nonverbal communication needs of the child; the need to develop social interaction skills and proficiencies; ... and other needs resulting from the child’s disability that impact progress in the general curriculum, including social ... development.

In response to this statute, the Massachusetts Department of Elementary and Secondary Education (DESE) issued Technical Assistance Advisory SPED 2007-1: Autism Spectrum Disorder (Advisory) on August 25, 2006, “to provide guidance on the ways that the Individual Education Program (IEP) Team may effectively frame complete and thorough discussions of the strengths and needs of a student with Autism Spectrum Disorder (ASD).”<sup>66</sup> The Advisory notes that “[i]mpairment in communication is one of the defining characteristics of ASD; therefore communication skill development should be addressed as an essential piece of the student’s IEP” and notes the relevance of “the student’s ability to use and understand non-verbal communication (e.g., eye gaze, facial expression, gesture).”<sup>67</sup>

*a. Placement*

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<sup>62</sup> 20 U.S.C. 1412(a)(5)(A); see also 71 Fed. Reg. 46,586 (2006) (“The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child’s educational placement must be determined on an individual case-by-case basis depending on each child’s unique educational needs and circumstances, rather than by the child’s category of disability”).

<sup>63</sup> 924 F. 3d at 631 (internal citations omitted), citing *Roland M.*, 910 F2d at 992-993.

<sup>64</sup> *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008).

<sup>65</sup> *Pachl v. Seagren*, 453 F.3d 1064, 1068 (Eighth Cir. 2006) (internal citation omitted).

<sup>66</sup> Technical Assistance Advisory SPED 2007-1, which may be found at: [http://www.doe.mass.edu/sped/advisories/07\\_1ta.html](http://www.doe.mass.edu/sped/advisories/07_1ta.html).

<sup>67</sup> *Id.*

A proposed placement must be based on a student's IEP and hence must be able to provide the services delineated therein.<sup>68</sup> Placement decisions must be individually determined on the basis of each student's abilities and needs and each student's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.<sup>69</sup> A school district has the "responsibility first to develop fully the IEP for purposes of determining the appropriate special education and related services, and only then to select an appropriate placement that would be able to actually deliver those IEP services."<sup>70</sup> Hence, a proposed placement that cannot provide a student with an opportunity to receive the special education and related services described within the IEP cannot offer the student a FAPE.

### *b. Implementation of the IEP*

Where an IEP has been accepted, the analysis shifts to implementation. To provide a FAPE, a district must implement a student's IEP with all required components.<sup>71</sup> The First Circuit has indicated that noncompliance that affects the provision of an educational benefit amounts to a denial of FAPE.<sup>72</sup> In order to prevail in a failure-to-implement case, a parent must demonstrate that the school district has materially failed to implement a child's IEP.<sup>73</sup> To do so, the parent must prove more than a minor or technical gap between the IEP and the district's implementation thereof; *de minimis* shortfalls are not enough, and a material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a student's IEP.<sup>74</sup> In addition, a district can establish substantial compliance by showing that the student made progress toward achieving her goals, showed improvement in her grades, and received passing scores on state assessments.<sup>75</sup>

### *c. Reimbursement for Private Placement*

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<sup>68</sup> See 34 CFR 300.116 and 603 CMR 28.05(6) ("At the Team meeting, after the IEP has been fully developed, the Team shall determine the appropriate placement to deliver the services on the student's IEP").

<sup>69</sup> Federal Register vol. 71, no. 156, p. 46588 (August 14, 2006)

<sup>70</sup> See *In Re: Sutton Public Schools*, BSEA # 09-7983 (Crane, 2010) ("even though Cotting may be an excellent school with a number of qualities that may be appropriate and useful to Student's education in general, Cotting cannot be an appropriate placement for Student because it is not willing or able to implement the IEP that Sutton proposed for Student").

<sup>71</sup> See 34 CFR 300.323(c) and 603 CMR 28.05(7)(b).

<sup>72</sup> See *Roland M.*, 910 F.2d at 994.

<sup>73</sup> *Colón-Vazquez v. Dep't of Educ.*, 46 F. Supp. 3d 132, 144 (D. P.R. 2014) (implementation failure cases require an analysis of whether the deviations from the IEP's stated requirements were "material" in that there was more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP and focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld) (internal citations omitted).

<sup>74</sup> See *Ross v. Framingham Sch. Comm.*, 44 F. Supp. 2d 104, 118 (D. Mass. 1999) ("when presented with a claim that a school district failed to implement a student's IEP, a district court must determine whether the alleged failure to implement the IEP deprived the student of her entitlement to a 'free appropriate public education,' as defined under the applicable federal and state prescriptions").

<sup>75</sup> See, for example, *A.P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2d Cir. 2010, *unpublished*) (despite a Connecticut district's failure to fully implement the IEP of a 14-year-old student with a nonverbal learning disability, it was not obligated to reimburse his parents for his private school tuition).

When parents elect to place a student unilaterally in a private school notwithstanding the availability of a FAPE through the school district, parents retain responsibility for the cost of that education.<sup>76</sup> However, parents who enroll a student in a private school without the consent of or referral by the school district may obtain reimbursement if a hearing officer finds both that the school district "had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate" for the student.<sup>77</sup> To be reimbursed, once the District's IEP is deemed inadequate, parents' chosen placement need not provide FAPE, provided that the school chosen by the parents is "otherwise proper" under the IDEA or "appropriately responsive to [the child's] special needs."<sup>78</sup> As clarified by the First Circuit court of Appeals:

In *Burlington*, the Supreme Court reasoned that because parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement, they are entitled to reimbursement of the expenses of that placement if it turns out they were right in choosing it. Implicit in this reasoning is the notion that parents rightfully decide on a private placement when it addresses, at least in part, their child's special educational requirements, while the IEP does not. . . .

As we have recognized, a private placement need provide only *some element* of the special education services missing from the public alternative in order to qualify as reasonably calculated to enable the child to receive educational benefit. Nor must the placement meet every last one of the child's special education needs. But the reasonableness of the private placement necessarily depends on the nexus between the special education required and the special education provided.<sup>79</sup>

## 2. Burden of Persuasion

In a due process proceeding, the burden of proof is on the moving party that is seeking relief. If the evidence is closely balanced, the moving party will not prevail.<sup>80</sup>

### **APPLICATION OF LEGAL STANDARD:**

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<sup>76</sup> See 34 CFR 300.148.

<sup>77</sup> 34 CFR 300.148(c); 20 USC § 1412(a)(10)(C)(ii); see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 (2009) (explaining that § 1415(i)(2)(C)(iii) authorizes "reimbursement when a school district fails to provide a FAPE and a child's private-school placement is appropriate"). See also *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 8 (1993) (parents entitled to reimbursement only if federal court concludes public placement violated IDEA and private placement was proper; court is to consider all factors in fashioning equitable relief); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 349 (1985) (parents may be reimbursed for private special education if court ultimately determines private placement was proper).

<sup>77</sup> *Florence County District Four, et al. v. Shannon Carter, et al.*, 510 U.S. 7, 8 (1993) ("Trident's failure to meet § 1401(a)(18)'s definition of a "free appropriate public education" does not bar Shannon's parents from reimbursement, because the section's requirements cannot be read as applying to parental placements").

<sup>78</sup> *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 14 and *Matthew J. v. Massachusetts Department of Education, et al.*, 988 F. Supp. 380, 391 (1998).

<sup>79</sup> *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 24, 25 (1<sup>st</sup> Cir. 2007) (internal quotations and citations omitted; emphasis in original).

<sup>80</sup> *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).

In the instant case, it is not disputed that Student is a student with a disability who is entitled to special education services under state and federal law. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**, above.

Where Father is the moving party, he bears the burden of proof.<sup>81</sup> To prevail, he must first prove, by a preponderance of the evidence, that the IEPs proposed by Barnstable for the 2020-2021 school year did not offer Student a FAPE in the LRE. I note at the outset that in judging the appropriateness of the IEPs, I consider only whether they were appropriate at the time that they were proposed.<sup>82</sup> Furthermore, Father must prevail on the first element before I address the question of whether Riverview was "otherwise proper" or "appropriately responsive" to Student's special needs.<sup>83</sup> After careful consideration of the evidence presented at Hearing, and the thoughtful arguments of counsel for both parties, it is my determination that Father has failed to carry his burden of proving that the IEPs Barnstable developed for Student for the 2020-2021 school year did not provide her with a free appropriate public education.

There is no dispute that Student was, at all times pertinent to this Decision, a student with special education needs entitled to receive a free, appropriate public education under 20 U.S.c. § 1400 *et seq* and M.G.L. c.71B. The Parties' primary disagreement centers on the location of where specialized services appropriate to address Student's learning needs should be addressed. Specifically, Barnstable argues that Student's needs may be met in the substantially separate program in the school district, whereas Father asserts that Student's needs require placement at Riverview. In addition, although the Parties agree that Student is a young woman with autism who requires substantial support and services, there is some disagreement as to her cognitive profile, mainly her full-scale IQ. (Father; Grandfather; Switzer; S-4; P-16) I will address the latter in the context of my discussion of the primary issues relating to appropriate services and placement for eighth grade and prospectively.

While the Seventh/Eighth and Eighth/Ninth Grade IEPs are examined separately below, I note some of my overarching reliability and credibility findings at the outset. By all accounts, Parents were active and meaningful participants in the decision-making process at Barnstable. They were collaborative members of appropriately composed IEP Teams for the time period in question (December 2019 through March 2021). (Mother; Troutman; Bruinooge) Barnstable was at all times responsive to parental concerns. (Mother; Troutman; Camposano) No evidence was proposed to suggest that Team meetings did not result in IEPs that reflected both parental input and staff input regarding appropriate programming for Student. (Troutman; Bruinooge; Camposano; Graham; Mother; Skiba)

Father's claim that he was pressured to sign IEPs for fear of Student being denied special education services is disingenuous. (Father) Parents did, in fact, delay acceptance of the Seventh/Eighth Grade IEP for approximately three months during the 2019-2020 school year, and Student continued to receive services pursuant to a stay-put IEP until the proposed IEP was signed and accepted. (Graham; S-5) Furthermore, by all accounts, Parents were strong advocates for Student and enjoyed a collaborative relationship with Barnstable. (Mother; Troutman;

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<sup>81</sup> See *Schaffer*, 546 U.S. at 62.

<sup>82</sup> See *Roland M.*, 910 F.2d at 992.

<sup>83</sup> *Florence County District Four*, 510 U.S. at 14.

Graham; Bruinooge) No assertions have been made by Father that Barnstable was not responsive to Parents' concerns or that Parents did not have an opportunity to meaningfully participate in the Team process; to the contrary, Barnstable entertained different programs in response to Mother's concerns, and IEPs were frequently revised in response to parental input. (Mother; Troutman; Camposano; P-5 S-8; P-9; S-10; S-11) There is no evidence to suggest that Parents were coerced into accepting any IEP, and I take Parents' signatures on all IEPs during the relevant time period to signify their full and informed consent to the goals, services and programs delineated therein.<sup>84</sup> (S-5)

I now turn to the question of whether the IEPs promulgated for Student's 2020-2021 school year were and are reasonably calculated to provide Student with a FAPE in the LRE so as to allow her to make meaningful progress in the general education curriculum commensurate with her abilities.<sup>85</sup>

I. The Seventh/Eighth Grade IEP Was Reasonably Calculated to Provide Student with a FAPE in the LRE.

First, I note that the Seventh/Eighth Grade IEP was fully accepted by Father. (Father; S-5) This IEP was developed to address Student's needs for the second part of seventh grade and the first part of eighth grade. (S-5; Graham) Because of the configuration of Barnstable's school buildings, the Seventh/Eighth Grade IEP proposed two placements; in seventh grade, Student would continue to attend the substantially separate classroom at BIS, and in eighth grade, she would attend the substantially separate classroom at BHS, later named Foundations. (S-5; Camposano) Both placements were accepted by Father. (S-5; Father) Father subsequently unilaterally placed Student at Riverview prior to her attending the BHS program. (Father; S-5; S-7) It is within this context that I assess the appropriateness of the Seventh/Eighth Grade IEP.

A. The Seventh/Eighth Grade IEP Was Tailored to Address Student's Individual Needs.

When the Team convened to develop the Seventh/Eighth Grade IEP, it relied on then-available information. This information was properly gleaned from the results of the tri-annual assessments conducted in 2018, progress reports from the previous IEP (IEP dated 12/12/2018 to

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<sup>84</sup> When consent is required under the IDEA, it must be "fully informed" to be valid. Consent means that:

- a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in his native language, or through another mode of communication;
- b. The parent understands and agrees in writing to the carrying out of the activity for which her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- c.
  1. The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
  2. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).
  3. If the parent revokes consent in writing for his child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

34 CFR 300.9; 20 USC 1414(a)(1)(D).

<sup>85</sup> See *Andrew F.*, 137 S. Ct. at 1001.

12/3/2019), and parental and staff input. (S-1B; S-1C; S-1D; S-1E; S-2; P-7; P-10; P-12; P-13; P-15) Specifically, Barnstable's 2018 re-evaluation of Student demonstrated deficits in the areas of communication (expressive and receptive skills, comprehension), academics (reading, mathematics, writing), sensory, and behavior. (S-1-B; S-1-C; S-1-D; S-1-E; S-2; P-7; P-10; P-12; P-13; P-15) These results served as the basis for Student's present levels of educational performance, and the corresponding goals and services in the Sixth/Seventh Grade IEP. (S-2; P-7)

By all accounts, Student made progress on the goals and objectives of her Sixth/Seventh Grade IEP. (Graham; Skiba; Mother; Troutman; S-3; P-7; P-10; S-15) Nevertheless, she continued to require a highly structured, specialized program, with opportunities for meaningful inclusion. (Graham; Troutman; S-1B; S-1C; S-1D; S-1E; S-2; P-7; P-10; P-12; P-13; P-15) Hence, for the Seventh/Eighth Grade IEP, goals were proposed in Student's areas of need, which were identified as Communication, ELA, Math, and Behavior. (S-5; Graham) To address said needs, Barnstable proposed consult services, inclusion support, behavioral support, direct instruction in math, ELA, and communication. In addition, extended school year services were proposed to address regression and recoupment issues. Student continued to receive both individualized 1:1 and very small group instruction. (S-5; Graham)

There were no contrary, expert recommendations available to the Team when it developed the Seventh/Eighth Grade IEP for the remainder of seventh grade and the beginning of eighth grade.<sup>86</sup> Furthermore, the record does not suggest that Parents voiced any concerns or suggested that Student required a different program until Father's unilateral placement of Student at Riverview in September 2020. (S-7) I therefore find that the Seventh/Eighth Grade IEP as recommended by Team members contained the type, level and setting of special education and related services that had allowed Student to make effective progress in the past and was appropriate.

1. Barnstable Implemented the Seventh/Eighth Grade IEP During the 2019-2020 School Year.

In the instant matter, Father asserts that although Student's IEP called for a 1:1 aide throughout her school day and inclusion in the general education classes for science and social studies, she received neither consistently. (Father) I examine each claim separately.

Father alleges that Student was not provided with 1:1 support during her time at BIS because paraprofessionals assigned to Student were often distracted by more behavioral students and attended to them instead. (Father) As grounds for his assertion, Father testified that Student "blossomed" during remote learning when she was finally provided with 1:1 individualized support by Grandfather. (Father; Grandfather) He argued that this dedicated 1:1 attention resulted in Student's success. (Father; Grandfather) However, the plain language of Student's Seventh/Eighth Grade IEP does not provide for a dedicated 1:1 aide but rather for "1:1 for behavior support" and, for methodology, "1:1 and very small group" instruction. (S-5; S-6; P-6; Graham) Ms. Graham and Dr. Troutman both testified that although Student was supported, at all times, by a staff member from Ms. Graham's class, the staff members rotated. (Graham; Troutman)

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<sup>86</sup> See *In Re: Sudbury Public Schools BSEA*, # 05-4726 and # 05-4827 (Crane, 2005) (Parents did not meet their burden of persuasion when there was no testimony from a physical therapist or other expert regarding what physical therapy services should have been provided).

In addition, although Student required substantial support for behavior when she first transitioned into BIS, her needs for such intensive support were reduced as the behavior intervention plan resulted in decreased maladaptive behaviors. (Skiba, Graham; Troutman) For academic instruction, Student benefitted from both 1:1 and small group instruction, depending on the material being presented. (Graham)

Father also alleges that Student was often denied access to general education classrooms and that when she did attend, she was seated in the back of the room and thus isolated from other students. (Father) However, Father produced no credible evidence to contradict the testimony of multiple school witnesses who testified to the contrary. (Penni; Graham; Troutman) Neither Father, Mother<sup>87</sup> nor Grandfather observed Student in her general education classrooms. (Father; Grandfather; Graham) The only testimony presented to support Student's non-participation in general education classes was Father's and Grandfather's experience during remote learning instruction in the spring of 2020 when general education teachers were allegedly "surprised" to see Student in their classes. (Father; Grandfather) This testimony is speculative at best.

In contradiction to Father's and Grandfather's speculative testimony, Ms. Penni and Ms. Graham testified that it was rare for Student to miss her scheduled time in the general education environment, especially once her behaviors stabilized with the behavior intervention plan developed by Ms. Skiba. (Graham; Penni; Skiba) In fact, once Student's maladaptive behaviors decreased and her pro-social and communication skills improved, she was able to spend increased time in general education. (Graham; Penni; Skiba; Troutman) Prior to school closure, Student spent only Math and ELA blocks in Ms. Graham's substantially separate classroom; the remainder of the school day was spent in general education with paraprofessionals from Ms. Graham's classroom. (Graham; Troutman) Not only was Student highly motivated by her time in general education, but Ms. Penni also found Student's participation in general education to be so beneficial that she recommended inclusion science for eighth grade. (Penni; Graham; Troutman; S-5) I also find credible Ms. Penni's testimony, that despite the confusion and everchanging state directives as to what remote instruction should consist of during the spring of 2020, Student was allowed access to the remote science classroom for social opportunities and that she spoke to Student via Zoom in the spring of 2020. (Penni) Although Grandfather testified that Student was not welcome in general education math, Student was not participating in general education math in seventh grade but rather received direct instruction in math in Ms. Graham's classroom pursuant to her IEP. (Grandfather; Graham; S-5)

In the present matter, there is no evidence of a significant deviation from Student's Seventh/Eighth Grade IEP or that noncompliance (if any) impacted Student's ability to make meaningful educational progress and to have thus been denied a FAPE. Father has not offered specific dates for missed services, nor has he identified the portion of Student's time at BIS, including during remote instruction, her IEP was not implemented appropriately.<sup>88</sup> Even if Student was, on occasion, instructed outside of a 1:1 ratio or small group basis, or was unable to participate in general education inclusion classes, there is no evidence to suggest that such

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<sup>87</sup> I note that Mother testified to observing Student informally in her substantially separate classroom. (Mother)

<sup>88</sup> See *In Re: Springfield Public Schools*, BSEA #2007894, 26 MSER 275 (Reichbach, 2020) ("Parent has offered no evidence from which I may conclude that the 2017-2018 IEP was not implemented").

failure to implement was material.<sup>89</sup> This is especially true in light of Student's continued progress on her IEP goals.<sup>90</sup> (S-3; P-7; P-10; S-20; Graham; Troutman; Bruinooge)

I therefore find that Father did not present sufficient evidence to demonstrate that Barnstable failed to implement Student's accepted Seventh/Eighth Grade IEP at BIS.<sup>91</sup>

2. For the 2020-2021 School Year, the Seventh/Eighth Grade IEP Could Have Been Implemented at BHS.

For the 2020-2021 school year, Student would have transitioned to eighth grade at BHS pursuant to the Seventh/Eighth Grade IEP calling for a mixture of direct services and inclusion support. (S-5; Camposano; Penni; Graham; Bruinooge; Troutman) In considering the appropriateness of Barnstable's Seventh/Eighth Grade IEP, I must review whether Barnstable's proposed placement at BHS would have provided Student with an opportunity to receive the special education and related services described within the fully accepted IEP; and if not, whether this denied Student FAPE.

Foundations is specifically designed for and populated by students of moderate to intensive special needs who require a structured, but flexible program, that can provide both direct instruction and support as well as supported inclusion opportunities. (S-16; Perry; Bruinooge; Camposano) Foundations features approximately seven students per class. (Camposano; Perry) Leveled courses are offered within Foundations to ensure that students are grouped appropriately per skill level and need. (Camposano; Bruinooge) Special education teachers instruct Foundations students using methodologies appropriate to the unique needs of the populations being served. (Perry; Bruinooge; Camposano) The program features a high staff to student ratio; classrooms are staffed by a special education teacher with significant experience and expertise, and with paraprofessionals, whose number depends on students' needs. Moreover, the program includes access to a BCBA, speech and language pathologists, and occupational therapists. (Camposano; Perry) Mainstream opportunities are available, and most Foundations students participate in one or two inclusion classes. (Perry; Camposano) General education curricula are modified for Foundations students by a case manager and special education staff, who accompany students to general education classes, as needed. (Perry; Camposano) The case managers and special education teachers coordinate programming to ensure that pre-teaching and review can occur within the specialized setting and that instruction and assignments are appropriately modified. (Perry).

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<sup>89</sup> See *In Re: Henry v. Everett Public Schools*, BSEA# 06-2597 (Beron, 2006) (where special education teachers did not go into each academic class once per week but did periodically assist Henry in his academic classes and check with his regular education teachers to see if the accommodations were implemented, parent did not present any evidence that the lack of a special education teacher one day per week was more likely than not the cause of Henry's deficits in written expression).

<sup>90</sup> Student's progress is reviewed later in this Decision.

<sup>91</sup> See *Colón-Vazquez v. Dep't of Educ.*, 46 F. Supp. 3d 132, 144 (D. P.R. 2014) (citing 20 U.S.C. § 1401(9)(D)) ("To provide a free and appropriate public education to a student with disabilities, the school district must not only develop the IEP, but it also must implement the IEP in accordance with its requirements"); see also *R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (noting that courts cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education where "there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit").

Multiple witnesses testified that the Foundations program, housed in a large high school with students of varying abilities and learning styles, is flexible and could accommodate Student's educational needs and interests. (Bruinooge; Camposano; Perry) There is no evidence to support a finding that Student's Seventh/Eighth Grade IEP, which called for consultation services in occupational therapy, speech and language therapy, special education and behavior, inclusion support in the general education classroom for science and social studies, and direct pull-out services in communication, behavior, math, and ELA could not be implemented within Foundations.<sup>92</sup> (S-5; P-6; Camposano; Perry; Bruinooge)

The evidence establishes that both at Foundations and even in the absence of a program "named Foundations", BHS had the capacity to implement the Seventh/Eighth Grade IEP during the 2020-2021 school year as well as to make any adjustments needed to reflect Student's changed need, interests, and/or growth.<sup>93</sup> (Bruinooge; Camposano; Perry) I therefore find that Student's Seventh/Eighth Grade IEP could have been implemented in the Foundations setting at BHS.

3. Student Was Not Entitled to After-School Care at Public Expense, and She Was Not Denied Access to Extra-Curricular Activities.

Amongst Father's critiques of the appropriateness of Barnstable's programming was the absence of an after-school program for Student. Father also asserted that Student was denied access to after school activities. (Father) These concerns are distinct and require separate analysis.

I ascribe little weight to Father's testimony regarding the absence of after-school care at BIS and BHS. Father did not present any evidence suggesting that Student required after-school programming in order to receive a FAPE, nor do any of the IEPs in evidence indicate such a need. (S-2; P-3; P-4; S-5; S-6; P-5; P-6; P-7; P-8; S-10; S-11) Although Student may very well benefit from after-school care, there was no evidence offered that such is an educational need; in fact, such need is wholly undocumented and is not supported by Student's Seventh/Eighth Grade IEP which was accepted by Father.<sup>94</sup>

Father's claim that Student was denied access to available after school activities is different from the claim that Student was not offered after-school care at Barnstable, though. Under both the IDEA and Section 504 of the Rehabilitation Act of 1973 (Section 504) and their implementing regulations, districts must provide students with an equal opportunity to participate in extracurricular activities and nonacademic services.<sup>95</sup> Additionally, the IEP must include any supplementary aids and services that the student will need to participate in an activity, should the

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<sup>92</sup> In contrast, see *In Re: Sutton Public Schools*, BSEA # 09-7983 (Crane, 2010) (Sutton "provided evidence regarding some of the excellent qualities of Cotting that would be relevant to Student's placement there, but Sutton produced no probative evidence to dispute Parents' evidence that Cotting could not or would not implement Student's IEP").

<sup>93</sup> Although Father raised implementation concerns, these focused on actual implementation of IEP services rather than the program's ability to implement said services. However, as discussed in the **Legal Standards** section, an IEP that cannot be implemented at a proposed placement cannot offer a student a FAPE. Hence, I examine the issue in this Decision.

<sup>94</sup> See *Y.F. v. New York City Dep't of Educ.*, 659 F. App'x 3, 5 (2d Cir. 2016) (parents' complaints were "untethered from the IEP's requirements" and having conceded the adequacy of the IEP, Parents could not then complain that the placement school did not provide services not required by the IEP).

<sup>95</sup> See 34 CFR 300.307(a) and 34 CFR 104.37.

student choose to do so.<sup>96</sup> While the IDEA does not require school districts to provide nonacademic services and extracurricular activities to students with disabilities, districts are required to take the steps necessary to afford students an equal opportunity for participation in these activities under Section 504<sup>97</sup>. Participation in extracurricular activities and nonacademic services is an issue of accessibility and equal opportunity; thus, Section 504 requires school districts to provide such nonacademic services and activities in the manner necessary to afford students with a disability an equal opportunity for participation.<sup>98</sup>

In the instant matter, no after-school care exists at BIS. As such, Student was not denied access thereto.<sup>99</sup> In addition, I find that Student had access to the limited offerings of extra-curricular activities at BIS. Ms. Graham testified that Student attended two socials with staff support during her time at BIS. (Graham). There is no reason to believe that Ms. Graham would not have arranged for similar staff support to allow Student to participate in any other extra-curricular activity had Student expressed an interest. (Troutman; Graham)

I therefore find no evidence substantiating Father's claim of a denial of access to extra-curricular activities at BIS.

#### B. The Seventh/Eighth Grade IEP Included Appropriately Ambitious Goals for Student.

Father argues that Barnstable set low expectations for Student.<sup>100</sup> (Father; Grandfather) As grounds thereof, he asserts that the BIS program lacked academic focus; did not provide Student with homework; and focused instruction on social goals. (Father; S-7) Father also argues that Barnstable's low expectations are reflected in the peer group provided for Student in her BIS placement and at the proposed Foundations program. (Father)

At the heart of Father's argument that Barnstable's proposed program was under-ambitious is his belief that Barnstable's assessment of Student's FSIQ is an underrepresentation of her cognitive ability. (Father; Grandfather; Switzer; S-4) Student's cognitive ability was assessed by Barnstable at Mother's request in 2019. (S-4) Results suggest that Student's FSIQ is 56 and that Student's working memory was a significant area of weakness (SS45). (The evaluator, however, noted that Student had difficulty understanding the directions for the working memory subtests.) (S-4)

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<sup>96</sup> See 34 CFR 300.107(a); see also 71 Fed. Reg. 46,583 (2006).

<sup>97</sup> See 71 Fed. Reg. 46,583. (2006).

<sup>98</sup> See 34 CFR 104.37(a)(1); see also *Winooski (VT) Sch. Dist.*, 46 IDELR 172 (OCRI, Boston (VT), 2006) ("School districts have an obligation under [Section 504] to 'provide nonacademic and extracurricular services in such manner as to afford [students with disabilities] an equal opportunity for participation in such activities,' which can include providing them the assistance they need to participate effectively in the extracurricular activities in question, even if the extracurricular activities are not listed in the student's IEP or Section 504 plan").

<sup>99</sup> In contrast, see *Birmingham Public Schools*, 66 IDELR 58 (SEA MI 2015) (where the student had an existing IEP that described the purpose for certain supplementary aids and services as enabling the student "to participate in nonacademic environments," "all school environments" included the before- and after-school program, and the district was obligated to take steps to facilitate the child's participation by either implementing the IEP or convening a new IEP team meeting to address the student's anticipated needs but in doing neither, the district violated state law and the IDEA).

<sup>100</sup> See *Andrew F.*, 137 S. Ct. at 992 (the child's educational program must be "appropriately ambitious" and give the child a "chance to meet challenging objectives").

Although Father asserts that Student's potential is greater than her FSIQ results on the WISC-V, he offered no recent cognitive testing or testimony at Hearing by a qualified psychologist or neuropsychologist to dispute Barnstable's evaluation results. Father's witnesses testified to Student's increasing skillset, but none had the expertise to testify credibly and persuasively as to her FSIQ or cognitive potential. (Switzer; Jaeger; Birkhoff; Mother; Father; Grandfather) Although Ms. Switzer testified that Student's IQ appears closer to 70, she conducted no formal assessment to confirm her suspicion. (Switzer) In his lay interpretation of Student's scores, Father referenced what he perceived as contradictions in Barnstable's testing results as they relate to Student's impressive memory skills. (Father; Grandfather) However, without a qualified expert to identify whether the testing results on the working memory subtest were in fact discrepant from reality, and the implications of any such discrepancy, if it exists, said observation regarding Student's memory and the WISC-V results are speculative at best. I am thus not persuaded that the results of the formal testing were inaccurate. In this regard I have not failed to consider Student's interactions with peers at Riverview, her social media postings, her well-developed self-care skills, and adaptability within her environment. However, I do not find these attributes to be evidence on which I can base a finding that Barnstable's formal testing reflects an underestimation of Student's cognitive ability. (Father; Grandfather; Switzer)

I further note that even if the results of Barnstable's cognitive testing of Student are an understatement of her cognitive ability, Father still failed to offer any evidence that the programming proposed by Barnstable was not commensurate with Student's higher cognitive potential. Specifically, Father does not dispute the appropriateness of any specific goals or objectives in Student's Seventh/Eighth Grade IEP. (Father; Camposano; S-7; S-8; S-9; S-10) Instead, Father's dispute centers on placement. (Camposano; Father; S-7; S-8; S-9; S-10; S-19) Father argues that Barnstable's programs lack academic rigor but he did not offer any evidence to identify what additional academic rigor Student requires.

In the absence of contrary testimony, I find that Student's goals on her Seventh/Eighth Grade IEP were properly ambitious and commensurate with Student's potential.

### C. Student's Peer Groupings at BIS and BHS Were and Are Appropriate.

Father asserts that Student's placement was inappropriate, in part, because Student was the highest functioning student in her substantially separate class at BIS. (Father; Grandfather). In support of this assertion, Father and Grandfather point to their own limited observations of Student's peers. (Father; Grandfather) To highlight Student's superior cognition to that of her classmates, they point to the fact that some students in Ms. Graham's classroom were nonverbal, others were confined to a wheelchair, and many did not participate in remote instruction. (Father; Grandfather)

Because the cognitive appropriateness of the students at BIS and BHS are of pivotal concern to Father, I have given the issue serious and careful consideration. In reaching the conclusion that the student groupings in both programs provide (and provided) appropriate classmates and learning peers for Student, and I am unable to give much weight and credibility to the lay testimony of Father, Mother and Grandfather as to the cognitive and academic abilities of Student and Student's peers.

Father presented no expert testimony defining an appropriate peer group for Student. Instead, he testified that BIS and BHS offered inappropriate peers for Student, whereas Student's Riverview peers are now appropriate. (Father) I do not place much weight on the observations of Father and Grandfather on this issue; neither has the expertise to assess the cognitive or academic abilities of the students they observed in passing during pick-ups and drop-offs or during remote instruction. (Father; Grandfather) Neither conducted any formal observations of Student in her academic environment at BIS (Graham; Father; Grandfather) Nor is their personal knowledge of said peers from off-campus activities relevant without additional expert testimony.

Although Parents observed the Foundations program at BHS, their testimony regarding the student population and the rigor of the environment at Foundations was contradictory and hence unpersuasive. On the one hand, Parents testified that based on prior knowledge of students in the program, the peer group was "lower functioning" and the programming focused on life skills. (Father; Mother; S-10; S-11; P-3) On the other hand, they asserted that the observed class was too rigorous; that Student would not be able to follow the instruction; and that Student would require more support than was available. (Father; Mother; S-19) Parents advocated both for more inclusion and for increased specialized support and restrictiveness in placement. (Father; Mother; Camposano; S-10; S-11; P-3)

I credit the testimony of Ms. Graham, a special educator with decades of experience, as to the cognitive and academic configuration of the student body in her classroom; Ms. Graham worked with Student daily and opined that Student was not the highest functioning student in her class and that her peer grouping was appropriate. (Graham) In the absence of any expert testimony to the contrary, I found the peer cognitive summary compiled and testified to by Dr. Bruinooge, to be helpful and persuasive that Student's cognitive ability did not render the proposed Barnstable program inappropriate.<sup>101</sup> (Bruinooge; S-17)

In addition, I find that Barnstable offered credible testimony that placement decisions are made based on multiple variables and factors, not limited solely to IQ.<sup>102</sup> Instead, students are grouped based on common goals, services, and needs. (Bruinooge; Perry; Camposano; Troutman) Given the absence of any other evidence, Father is unpersuasive in his assertion that the groupings at BIS and BHS are inappropriate, and I find that Student was and would have been appropriately grouped at Foundations with students in her age range, with similar levels of performance, academic, social and behavioral needs, cognitive ability and academic skills.<sup>103</sup>

D. The Seventh/Eighth Grade IEP Was Reasonably Calculated to Allow Student to Make Effective Progress Commensurate with her Potential.

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<sup>101</sup> In contrast, see *In Re: Student v. Concord Public Schools*, BSEA # 2100891 (Berman, 2021) ("it is unclear from the record whether there would be appropriate peers for Student in the ACCESS classroom").

<sup>102</sup> "No single procedure may be used as the sole criterion for ...determining an appropriate education program for a child." 34 CFR 300.532.

<sup>103</sup> See *In Re: Tewksbury Public Schools*, BSEA #01-1100, 6 MSER 311 (Sherwood, 2000) (it may be that Student is cognitively at the top of his group but this does not render the grouping inappropriate); in contrast, see *In Re: Boston Public Schools and John S.*, BSEA #053476, 11 MSER 172 (2005) ("experts are unanimous in asserting that language and social skill development is critical for John, yet Boston ensures that only one of the proposed peers offers John opportunities for developing his social and communication/language skills")

By all accounts, Student made effective progress on the goals and objectives of the Seventh/Eighth Grade IEP during the second part of her seventh grade at BIS. (Father; Grandfather; Skiba; Graham; Troutman; Bruinooge; Penni; S-20; S-8; S-9) I found the testimony of Ms. Graham and Ms. Skiba especially revealing. According to Ms. Graham, by the end of seventh grade, Student had met many of her IEP goals, indicating demonstrable improvement, and Ms. Skiba testified that Student's maladaptive behaviors had been practically extinguished. Their testimony was supported by data. (S-20; S-15) Even during the period of remote instruction, Student made progress on her goals and objectives. (Father; Grandfather; Graham; S-20; S-10)

Although when starting at Riverview, Student demonstrated lagging social skills, attentional difficulties, attention-seeking behavior, and decreased reading abilities as compared to her previous progress reports from Barnstable, I do not find this persuasive evidence of lack of effective progress on the Seventh/Eighth Grade IEP. (Mother; Father; Switzer; Birkhoff; Jaeger; P-2; S-3; P-7; P-10) Student's Seventh/Eighth Grade IEP offered Student extended school year services to prevent regression and recoupment issues, but Student did not participate in ESY in 2020. (Father) It is therefore not surprising that Student's skills regressed to some extent during the summer months. Based on Riverview's progress reports, Student has recouped said skills in the three months that she has been attending school and is now performing at the same levels as the at end of the 2019-2020 school year. (Mother; Father; Switzer; Birkhoff; Jaeger; compare P-2, P-7, and P-10, S-3 and S-20) Moreover, Student's lagging skills at the beginning of her 2020-2021 school year may also be due, in part, to her transition to a new school.

I further note that Father did not offer any expert testimony regarding the effectiveness of Student's progress on the Seventh/Eighth Grade IEP.<sup>104</sup> Based on the demonstrative progress Student achieved during the 2019-2020 school year, even with remote instruction, I can reasonably conclude that she would have likely continued to make similar progress with similar educational interventions during the ensuing 2020-2021 school year.<sup>105</sup>

I therefore find that the full weight of the evidence supports a finding that the Seventh/Eighth Grade IEP was reasonably calculated to allow Student to make effective progress commensurate with her potential.

E. The Placements Proposed in Student's Seventh/Eighth Grade IEP are the LRE as They Allow Student to Be Educated With Other Students Who Do not Have Disabilities to the Maximum Extent Appropriate.

Father argues that Student requires an "inclusive" environment. (Father) He testified that Student's inclusion opportunities at Barnstable were in fact isolating and that her removal from the general education setting for some of the instruction suggested to Student that she was not

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<sup>104</sup> See *In Re: Nauset Regional School District and Massachusetts Department of Developmental Services*, BSEA # 1300562, 19 MSER 152 (Crane, 2013) (there was no reliable or credible expert testimony regarding what should be considered a reasonable rate of meaningful progress within the context of the student's learning potential, and Parents do not have sufficient expertise to testify as experts regarding the education needs of the student, which is not to suggest that Parents do not have a great deal of expertise regarding Student)

<sup>105</sup> See *In Re: Holliston Public Schools*, BSEA No. 1910125, 26 MSER 1 (Berman, 2020) ("Parents presented the Team with no evaluation or other information that would support a different IEP or placement than the one proposed").

wanted. (Father; Grandfather) He distinguished this from her experience at Riverview where she is included in all available activities. (Father) Father further argues that Riverview is “more appropriate” as it offers Student a more comprehensive program. (Father; Grandfather; Mother)

Although Father’s desire that his daughter have the best education is both understandable and commendable, hearing officers are bound by a legal standard that is more “moderate.”<sup>106</sup> Student is not entitled to a program that is “more” appropriate but only to one that is appropriate.<sup>107</sup> In addition, federal and state special education laws demand that Student is educated with her non-disabled peers to the greatest extent possible; her removal is only appropriate where the nature and severity of her needs is such that she cannot be appropriately educated in that setting.<sup>108</sup> Both the BIS program and the substantially separate model at BHS are less restrictive than Riverview, as the latter only services students with disabilities. Provided that Student is able to make educational progress at Barnstable’s less restrictive in-district program, Student is not entitled to a different placement even if it would more nearly enable her to reach her full potential.<sup>109</sup>

Here, the testimony of Ms. Penni, Ms. Graham, and Dr. Troutman suggest that Student was receiving benefit from her participation in the substantially separate classroom with inclusion opportunities in the general education setting. (Penni; Graham; Troutman) With proper supports and modified curriculum, she was able to expand and generalize her skill set in that setting. (Penni; Graham; Troutman) There is no evidence to the contrary.

Therefore, I find that the Seventh/Eighth Grade IEP was reasonably calculated to offer Student a FAPE in the LRE.

II. The Eighth/Ninth Grade IEP, as Revised, Is Reasonably Calculated to Provide Student with a FAPE in the LRE.

When developing the Eighth/Ninth Grade IEP, Barnstable had little information beyond what it had known about Student in the fall of 2020. Parents provided progress reports from Riverview, but no Riverview staff attended the Team meeting in December 2020. (Camposano) In addition, Riverview’s progress reports for Student confirmed Barnstable’s observations about Student’s educational needs. (P-2; P-5; S-10) The Team acknowledged Parents’ input, and again developed

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<sup>106</sup> See *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993) (“Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential”)(citation omitted); see also *In Re: Nauset Regional School District and Roy*, BSEA #1900585, 24 MSER 247 (Oliver, 2018) (“While I empathize with Parents’ desire for Roy to remain in his home school community and participate seamlessly in the extracurricular activities of varsity tennis and mountain biking club, I cannot let such factors undermine Roy’s right to receive FAPE”).

<sup>107</sup> See *Lenn*, 998 F.2d at 1086 (“The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP”).

<sup>108</sup> See 20 U.S.C § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c); see *Lenn*, 998 F.2d at 1086 (“The IDEA also articulates a preference for mainstreaming. Translated into practical application, this preference signifies that a student who would make educational progress in a day program is not entitled to a residential placement even if the latter would more nearly enable the child to reach his or her full potential”) (internal quotations and citations omitted).

<sup>109</sup> See *Lenn*, 998 F.2d at 1086.

a program with specialized supports which offered Student a combination of direct instruction in a substantially separate classroom and inclusion opportunities. (P-5; S-10)

Father testified that this IEP was an “improvement” but still inappropriate for Student. (Father) Nevertheless, he doubted that Barnstable would implement it as written. (Father) I give little weight to Father’s assertion in this regard, especially since courts have generally held that speculation that a school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement.<sup>110</sup> Moreover, Father’s short observation of the proposed BHS program is his sole experience therewith; he has no credible evidence to support such an assertion.

Mother rejected the Eighth/Ninth Grade IEP and placement in Foundations, asserting that the general education curriculum was not appropriately modified, and that Student required additional direct services. (P-5; S-10) Mother asserted that Student should not be placed with low functioning peers. (P-5; S-10). Subsequently, in response to Mother’s rejection of the Eighth/Ninth Grade IEP and placement, the Team again reconvened and, responsive to Mother’s input and concerns, made significant changes to its proposal, adding direct services and amending objectives to IEP goals. (Camposano; compare S-10 and S-11) Placement remained a substantially separate classroom.<sup>111</sup> (S-11; Camposano) Mother again rejected the IEP and placement, noting the program’s focus on life skills and inappropriate peers as grounds thereof.<sup>112</sup> (P-3)

The clear weight of the evidence at Hearing supports the conclusion that the Eighth/Ninth Grade IEP, as revised, was reasonably calculated to provide special education services appropriately targeted to Student’s learning needs as identified by a variety of sources, including the Parents, and that said services were/are sufficient to permit Student to continue to make meaningful, measurable progress in the acquisition of targeted skills in the general curriculum, and to allow her to participate in the mainstream of her community school life alongside her typical peers. Father has presented no evidence in the form of evaluation reports or witness testimony to the effect that Barnstable’s proposed IEPs for Student’s eighth grade were and are inappropriate to meet her special education needs. Nor has Father presented any credible expert educator recommendations for a more restrictive setting for Student. Similarly, no credible evidence in the form of evaluation reports or witness testimony demonstrates ineffective progress at

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<sup>110</sup> See *M.O. v. New York City Dep’t of Educ.*, 793 F.3d 236, 243-4 (2d Cir. 2015). In addition, the fact that a school has failed to provide services to students in the past is not a non-speculative basis for concluding that the school lacked the capacity to implement a particular student’s IEP; see also *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 195 (2d Cir. 2012); see also *Y.F. v. New York City Dep’t of Educ.*, 659 F. App’x 3, 5 (2d Cir. 2016).

<sup>111</sup> See *In Re: Maynard Public Schools*, BSEA # 1900813, 25 MSER 22 (Putney-Yaceshyn, 2019) (“The IDEA recognizes that Student’s abilities and needs change frequently, which is why IEPs are required to be reviewed at least annually. It is not necessary (or appropriate) to make programmatic decisions based upon speculation about a student’s future needs. If, in the future, Student is not able to meet the demands (in reading or other areas) his Team will convene to consider and address the need at that time. IEPs are to be written according to a student’s then-current needs”)

<sup>112</sup> See *In Re: Arlington Public Schools and Xaylen*, #20-08870 (Byrne, 2021) (parents failed to show how or why a program similar to that in which Xaylen had previously demonstrated success, but more tightly coordinated and intensive, would not produce similar results in 2019-2020 and 2020-2021).

Barnstable’s program during Student’s seventh grade or suggests that a program other than what was proposed by Barnstable for eighth grade was indicated for Student.<sup>113</sup>

### CONCLUSION:

Based on the reasoning above, Father has not carried his burden of proof in this case. Instead, I find, based upon the record before me, that the IEPs proposed for Student during the relevant timeframe were and are reasonably calculated to ensure that she receives a free appropriate public education in the least restrictive environment. In light of my finding, I need not address whether Father’s unilateral placement of Student at Riverview was reasonably calculated to provide her with a FAPE in the LRE.<sup>114</sup> Hence, Father’s request for an order approving reimbursement and public funding for Student’s 2020-2021 placement at Riverview and for prospective placement is hereby denied.

### ORDER

The Individualized Education Programs developed by the Barnstable Public Schools for Student were and are reasonably calculated to provide a free, appropriate public education to Student in the least restrictive setting. There is no evidence to support a finding that Student requires a specialized school setting such as Riverview School to receive a free, appropriate public education; therefore, Parents are not entitled to reimbursement for expenses incurred for Student’s placement at Riverview School.

By the Hearing Officer,

s/s Alina Kantor Nir  
Alina Kantor Nir

June 21, 2021  
Date

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<sup>113</sup> In contrast, see *In Re: Douglas Public Schools*, 56 IDELR 28, (Crane, 2010) (“Where Student’s progress over many years has been de minimis, and where a different educational structure, in combination with an appropriate peer group, is necessary to increase Student’s educational potential for learning so as to allow him to make effective progress, ... Massachusetts and federal FAPE standards require Douglas to provide a different educational structure”)

<sup>114</sup> See *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 8.