

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

Student v. Swansea Public Schools

BSEA # 2205000

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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

PROCEDURAL HISTORY

Parents requested a hearing in the above-noted matter on December 22, 2021, which was scheduled for January 26, 2022. Swansea's unopposed request to postpone the Hearing was allowed for good cause and the Hearing was scheduled to proceed on March 16 and 17, 2022. A Pre-Hearing Conference was held on February 28, 2022. Parents' assented to request to postpone the Hearing until April 27, 28, and 29, 2022 was allowed for good cause. The Hearing was held on April 27 and 28, 2022. The Parties' request for an extension until May 27, 2022 for submission of closing arguments was allowed. Parents submitted their closing argument on May 27, 2022. Swansea's closing argument was received on May 31, 2022. There was no objection to the late submission and the record closed on May 31, 2022.

Those present for all or part of the hearing were:

Mother	
Julie Garell	Director of Student Services, Swansea Public Schools
Andrew Raposo	Principal, Espirito Santo School
Tracy Vale	Private auditory verbal therapist/speech language pathologist
Adrienne Shine	Private teacher of the deaf
Julie Carreiro	Preschool teacher, Espirito Santo School
Evelyn Rankin	Speech language pathologist/teacher of the deaf, READS Collaborative
Maria Bushell	Preschool Teacher, Swansea Public Schools
Courtney Lopes Finnerty	Speech language pathologist, Swansea Public Schools
Julie Garell	Director of Student Services, Swansea Public Schools
Ginny Brennan	Advocate, Parents
Kimberly Rozak	Attorney, Swansea Public Schools
Alexander Loos	Court Reporter
Catherine Putney-Yaceshyn	Hearing Officer

The official record of this hearing consists of: Parents' exhibits marked P-1 through P-19; Swansea Public Schools' exhibits marked S-1 through S-29; and approximately 10.5 hours of recorded oral testimony.

ISSUES

1. Whether Swansea Public Schools complied with the relevant timelines in conducting its evaluation of Student upon receipt of the referral from early intervention.
2. Whether Swansea Public Schools utilized comprehensive and appropriate assessments in determining whether student was eligible for special education services.
3. Whether Swansea Public Schools erred in determining that Student was not eligible for special education on November 10, 2021.
4. If the answer to number 3 is yes, whether Student is entitled to compensatory services.
5. Whether Swansea Public Schools erred in determining that Student was not eligible for special education on April 1, 2022.
6. If so, whether Student is entitled to compensatory services.
7. Whether Parents are entitled to reimbursement for the purchase of a microphone for Student's private preschool classroom.
8. Whether Swansea Public Schools is required to provide Student with a HAT system for use in the classroom.

SUMMARY OF THE EVIDENCE

1. The student (hereinafter, "Student") is a 3-year-old student residing within the Swansea Public School District (hereinafter, Swansea). He has been diagnosed with bilateral mild to moderate sensorineural hearing loss. Student utilizes binaural Oticon OPN BTE hearing aids on a full-time basis. (P-1, S-3) He was parentally placed at the Espirito Santo School pre-school in Fall River, Massachusetts in late August 2021 and attends two full days per week. (Mother, Carreiro, P-9, S-5)
2. Tracey Vale, M.S. CCC-SLP, LSLs Cert. AVT (audio visual therapist), has been providing auditory visual therapy to Student since he was four months old. Her January 10, 2021 summary, written when Student was 2 years, 5 months old, noted that his hearing age was calculated at 26 months. (P-5, S-2) She submitted the report to People Incorporated, Student's Early Intervention provider, who provided it to Swansea. (Vale) Ms. Vale described how Student's hearing loss makes it difficult for him to access speech in noise, from a distance, and when sounds are co-articulated. She emphasized that his hearing aids

do not correct his hearing loss and he is at significant risk for mishearing spoken language in a classroom setting. She concluded that Student is improving his understanding and use of language consistently, but requires further skilled therapy to continue to develop his speech skills. Ms. Vale made a number of recommendations for Student including: a structured preschool setting, use of amplification at all times; use of a hearing assistive technology (HAT) system to assist Student's access to the curriculum; speech and language services provided by a clinician experienced in hearing loss; staff training; checking his hearing aids daily; at least 2 staff to be trained to perform listening checks; accommodations for background noise; pre and post teaching of vocabulary as needed; frequent comprehension checks; extra processing time during lessons; development of self-advocacy skills; strategic seating in the classroom and within the school building; using his name to gain his attention prior to giving instructions; use of peer names prior to allowing them to add to discussions; repeating what others have said; and acoustical accommodations. (P-5)

3. People Incorporated sent a referral for Student to Julie Garell, Swansea's Director of Student Services, on February 2, 2021. The cover letter stated that an initial Transition Planning Conference had already been held, and that a follow up meeting could be scheduled, as Swansea's participation would be important to discuss the evaluation process and develop a plan for a smooth transition. The referral noted Student's diagnosis of bilateral hearing loss, indicated that he was gaining more conversational language but remained delayed, and stated that he was receiving speech services from Tracey Vale. (P-3)
4. Dr. Garell testified, "Unfortunately, People Inc held their TPC [transition planning conference] meeting without us." She conceded that the letter explained that a follow up meeting could be scheduled. Dr. Garell never sought to schedule a follow up meeting. Upon receiving the referral, Swansea sent Parents proof of residency forms that were required by the district. (Garell) Mother returned the residency forms sometime in April. (Garell, Mother)
5. Swansea received a copy of Student's Individual Family Service Plan (IFSP). Dr. Garell was not certain of the date it was received, but it appears that it was faxed on April 15, 2021. (Garell, S-25) The first page indicated that Tracy Vale was providing services to Student. The IFSP noted that Parents' greatest concern was Student's hearing as it affects his education. It included Student's diagnosis of hearing impairment and noted that concerns/priority included Student expanding expressive language and hearing skills. His service delivery plan called for individual speech language pathologist services at home 2 x 30 minutes per week. (S-25) Dr. Garell and Danielle Costa, the Assistant Director of Student Services, reviewed the IFSP and noted student's third birthday was in July, and Swansea would not have staff available to evaluate him over the summer. and Swansea decided to inform Parents that they would accept the IFSP and provide Student with speech twice per week when he turned three. (Garell)
6. Swansea issued an N1 dated May 10, 2021. It sated that Swansea was proposing to accept and adopt Student's IFSP of speech and language services: 2x/week for 30 minutes beginning on July 26, 2021 and running through the week of August 12, 2021. The services would resume the week of August 31, 2021 and would be provided at the "Service Provider

Location.” It noted that a speech language service provider would contact Parents to set up Student’s speech sessions. (S-26)

7. Mother did not understand what Swansea meant by accepting the IFSP and requested a meeting. (Mother)
8. At Parents’ request, Swansea scheduled a meeting which it referred to as an IFSP Parent Meeting on July 7, 2021. (S-28, Garell) Parent had believed the meeting was an eligibility meeting. (Mother) The Team meeting notes indicated that Parent had requested a meeting to discuss the IFSP regarding transition to an educational setting. The notes stated that Swansea had not been invited to the Transitional Planning Conference. It summarized the discussion including that Dr. Garell explained what a 504 plan was and stated that Espirito Santo School should take the recommendations of Boston Children’s and Tracy Vale and implement what they think Student would need to access the curriculum at their school. Danielle Costa explained that Swansea would go through the evaluation process in the fall and that the 45 day date would be October 22, 2021. The meeting notes indicated that Mother would process the meeting and decide if she wanted Student to receive services through his IFSP or be evaluated in the fall. (S-28)
9. Dr. Garell testified that she became aware at the July meeting that Student had been receiving AVT therapy services through Early Intervention. Although she was aware that the services documented as home services provided by a speech language pathologist 2 x .5 hours per week were AVT therapy, she did not propose that the speech services Swansea would provide to Student would be a continuation of the AVT services Student was receiving from Early Intervention. (Garell)
10. Parent filed a PRS complaint on July 8, 2021. (S-29) Parents’ concerns included a request for an evaluation and appropriate services to help transition to the educational setting, including a HAT system, AVT, and an educational audiologist. It indicated that if Swansea evaluated Student for an IEP and provided the above accommodations, it would resolve the complaint. (S-27)
11. Dr. Garell sent an email to Mother, George Haile at DESE, John Robidoux, and Danielle Costa to summarize her understanding of the status of the matter and what Swansea planned to do. It stated that during the July 7, 2021 meeting, participants reviewed the Children’s Hospital report and Ms. Vale’s notes. Dr. Garell explained to the participants that both reports outlined accommodations and would be supported by the school Student attended via a 504 plan. She reiterated that Swansea would provide Student 2 x 30 minutes of speech services as outlined by his IFSP. (S-29)
12. In an email dated July 16, 2021, Mother informed Dr. Garell that Parents were declining to accept that IFSP and requesting a formal evaluation. Danielle Costa replied on July 16, 2021 stating that she would send a Consent to Evaluate form and asking Mother to sign and return it at her earliest convenience. (S-29)

13. On July 26, 2021, Mother emailed George Haile and informed him she had not received the consent form from Swansea. She emailed him again on July 28, 2021, stating, “Still no evaluation consent form as of today.” (S-29)
14. In an email dated July 29, 2021, George Haile of DESE, informed Dr. Garell that he had sought clarification of the regulations and determined that, “Even if you agree to implement the IFSP, you still must under child Find, provide notice and the evaluation consent form. It’s not either/or. It’s “We’ll agree to implement the IFSP AND we’ll evaluate.” (S-29)
15. Dr. Garell testified that Swansea had not sent the consent to evaluate form out because the regulation requires it to be sent within five school days and Swansea was not in school. She stated that Swansea sent the consent form within five days of school starting on August 31¹. (Garell)
16. Caitlin Shanahan, Au.D., CCC-A, Pediatric Audiologist, Boston Children’s Hospital, wrote an Audiology Communication Report, dated July 6, 2021. The report noted that Student’s “hearing loss is communicatively significant in a classroom setting as he may not hear well enough to perform to his full academic potential.” It went on to state that it would be expected that Student would experience hearing difficulty in all listening situations, and particularly when listening in the presence of background noise and at increased distance from the speaker. The report contained a number of recommendations that Ms. Shanahan suggested be included in Student’s IEP. Her recommendations included: use of his hearing aids; providing Student with a HAT system; use of an Oticon EduMic; including an educational audiologist as part of Student’s educational team; consultative services from a teacher of the deaf; preferential seating; communication strategies such as pairing auditory information with visual examples; being mindful of auditory fatigue; teachers checking in with him throughout day to ensure he has heard and understood auditory information; and speech and language evaluation/therapy. (P-4, S-3)
17. Tracy Vale conducted an assessment on August 6, 2021 and wrote a report. She administered the Test of Auditory Comprehension of Language-Fourth Edition (TACL-4) to further probe Student’s grammatical comprehension. She noted that Student performed below age level skill in comprehending grammatical morphemes, but that his vocabulary and ability to comprehend elaborated phrases and sentences was at grade level. She wrote, “This indicates he has better comprehension at the word and sentence level which allows him to take advantage of context.” He performed more poorly with respect to grammatical morphemes. (P-6, S-4)
18. The record is silent as to when Swansea sent Parents the Consent to Evaluate or when it was returned by Parents.
19. Courtney Lopes Finnerty, MA CCC-SLP, conducted an evaluation of Student on September 22, 2021 and wrote a report dated September 30, 2021. Ms. Finnerty observed Student in his classroom and administered the Preschool Language Scales-5 (PLS-5) and the Photo Articulation Test-3 (PAT-3). On the PLS-5 Student received a standard score of 86, in the

¹ The record does not contain a copy of the consent to evaluate form.

18th percentile, in auditory comprehension; a standard score of 97, at the 42^d percentile, in expressive communication; and a total language score of 91, at the 27th percentile. Scores within 85-115 are considered to be in the average range. Ms. Finnerty reported that Student participated and completed all tasks. His expressive and receptive language abilities fell within the average range, and she found that Student understood greater than 80% of the time during conversational exchanges. Based upon her classroom observation, Student was able to access curriculum given his current accommodations. Ms. Finnerty recommended that Student's preschool teacher gain his attention prior to communicating to ensure that he has full access to the auditory message and that his teacher do "check ins" throughout the day. She recommended that he continue to wear his hearing aids and follow up with his audiologist. (S-5, P-9)

20. Ms. Finnerty observed Student and spoke to Student's preschool teacher, Ms. Carreiro, for an hour to an hour and a half in October 2021. She noted that part of the purpose of her observation was to determine if the recommendations in the audiology report were in place, and whether or not the preschool was making accommodations for Student's hearing loss. Ms. Finnerty does not have extensive experience working with students with hearing loss.² She observed that Student did not look to other students to see what they were doing after the teacher gave instructions. Rather, he did the task without looking at others which indicated that he understood the directions without having a visual cue. She did not observe his gravitating to his cousin, but saw him play with another student next to him. She did not observe Student's hearing loss impacting his accessing the curriculum or interacting socially. She had no concerns. (Finnerty)
21. At Swansea's request, Evelyn Rankin, MS CCC-SLP (and teacher of the deaf), and Sheral Drake, M.Ed, Teacher of the Deaf, conducted a Functional Listening Evaluation (FLE) to determine how much auditory information Student is able to access in a variety of classroom situations. The assessment was done on September 30, 2021 and October 18, 2021. Student was shy during the initial assessment and reluctant to participate with two non-familiar people. Mother accompanied Student to the second session, and he was able to complete it. Student was very alert and attentive. He sought visual access by shifting his body to see the face of the examiner. He used facial expression and body movement to indicate he wanted repetition of a stimulus item. He was aware when he missed a sentence and indicated that with body language. Ms. Rankin concluded that based on the assessment results, Student is missing a significant amount of information even when he is using his hearing aids. She reported, "Even when provided auditory breaks, being alerted to listen by calling his name before saying a phrase and visual support, [Student]'s performance was not above 60%." The report stated that Student's "hearing loss is considered to be educationally and communicatively significant because it impacts his ability to access the curriculum within the school setting." Ms. Rankin concurred with the Children's Hospital report which recommended use of a personal HAT. Ms. Rankin concurred with the Children's Hospital

² She described working with one student with cochlear implants at another job over 16 years ago and working with a student with cochlear implants at some time in Swansea. She also noted that she has previously consulted with Tracy Vale on a few students with hearing impairment and has been the point person to ensure teachers knew how to correctly use FM systems. She also took some classes relating to hearing loss as part of her Master's degree program. (Finnerty)

report's recommendation for an educational audiologist to provide staff training and monitor Student's auditory access in the classroom. Based on the results of the FLE, Ms. Rankin and Ms. Drake also concurred with the Children's Hospital audiologist that Student requires a consult with a teacher of the deaf to determine how well he is accessing the curriculum. Ms. Rankin's report noted, Student is "in the critical language learning years for development of foundational language skills and also pre-literacy skills." The teacher of the deaf could also assist staff in monitoring Student's performance for signs of auditory fatigue and to ensure he has the requisite background knowledge to understand lessons and discussions. The report explained, "Given [Student]'s scores from the FLE and looking closely at his errors, it is clear that he is not hearing the whole message." It went on to note that it is important that those working with Student be trained to recognize signs that he may have missed information and to do regular check-ins to ensure that he grasped the whole lesson. Ms. Rankin and Ms. Drake wrote that Student did not ask for repetition of information during the assessment, stating that he needs to develop self-awareness and self-advocacy skills to identify when he may have missed parts of the auditory message, recognize auditory fatigue and gain independence caring for his hearing equipment. Their report recommended pre-teaching targeted vocabulary and post review of vocabulary on an ongoing basis to compensate for Student's reduced access to incidental conversations of peers and family members. Additionally, the report recommended Student receive a speech language evaluation and speech and language services, with an emphasis on his ability to listen to increasingly complex and lengthy amounts of information. Finally, the report recommended that Student receive assistance with hearing aid maintenance and ensuring his hearing aids are on after gym class or physical activity. (P-13, S-6)

22. Swansea held an eligibility meeting on November 10, 2021. The participants included Dr. Garell, Courtney Finnerty (speech language pathologist), Maria Bushnell (preschool teacher), Evelyn Rankin (teacher of the deaf/speech language pathologist), Mother, Tracy Vale (speech language pathologist/auditory verbal therapist), Andrew Raposo (principal, Espirito Santo), Meaghan Burr (special education teacher, Espirito Santo) and Ginny Brennan, Parents' advocate
23. Ms. Rankin presented her report and discussed that Student was demonstrating a pattern that is often seen in deaf and hard of hearing children, that is, his skills were within normal limits (as assessed by Ms. Finnerty), his expressive language was at a higher percentile than his comprehension, revealing that he was struggling to comprehend. (His receptive language skills were on the borderline of normal and his expressive skills were a little higher.) (Rankin) Ms. Vale also reviewed her reports and explained that Student was having trouble understanding grammatical morphemes. (Vale) Ms. Finnerty was of the opinion that Student was not eligible for special education because his testing showed that he did not have a speech language disorder and his language and articulation was within age appropriate norms. (Finnerty) Dr. Garell testified that some of the Team members thought Student did require services and that some members "did not understand the eligibility criteria." (Garell)
24. The Team Meeting Summary Sheet contains the names of the participants, the special education eligibility form used by the Team, indicates the Student has a sensory disability

(hearing loss), states that he is making effective progress in school and that he was found not eligible for special education services. It does not contain any summary of the Team's discussion. (S-11)

25. Tracey Vale observed Student for one hour at the Espirito Santo School on or before February 3, 2022, and wrote a report dated February 3, 2022. She reported that students were instructed to raise their hand and Student did not, even when prompted. During morning announcements, students were told to put their hands over their hearts (presumably for the Pledge of Allegiance). Student did not comply initially. However, he looked around and saw the other students with their hands over their hearts and placed his hand there. Ms. Vale observed an art lesson during which Student sat at a table with other students. He watched as the teacher demonstrated how to crinkle paper, but did not crinkle his own paper. Either the teacher or assistant saw that he was not doing it and explained the activity to him again, but did not have the Edu Mic. He watched and crinkled a piece of paper and glued it like he had been instructed. At the end of the project, the other children had multiple crinkled pieces of paper glued to their project. Student's papers were all flat except for the one staff had helped him with. Ms. Vale did not think he understood the directions as he did not complete the project correctly and he is a perfectionist. She further noted that Student did not talk at all during the art lesson. Based on her experience with students with hearing loss, she assumed he was concentrating so hard on what to do that he could not also have a side conversation as some of the other students were.

Ms. Vale described another instance in which Student could not find his cup. His teacher said she would get him some water and he replied, "Huh?" During snack time another student said he had an apple and Student acknowledged that he had heard by adding a comment about his snack. Ms. Vale observed Student's interactions with his cousin in the classroom. Both Mother and Ms. Carreiro testified that Student was very reliant on his cousin. When students were told to go the rug, Student would not go until his cousin went to the rug. Ms. Vale observed that Student looks at his cousin a lot. (Vale)

26. Adrienne Shine has a Master's degree in deaf education and is licensed as a an oral/aural and ASL teacher of the deaf. She is also licensed in early childhood education with and without disabilities. Ms. Shine has worked as a teacher in a school for the deaf for the past 17 years and as a paraprofessional in a school for the deaf for ten years. She has worked at the preschool level for ten years. Parents contacted her about doing an independent observation to look at Student's challenges and successes within the classroom setting as it pertains to his hearing loss.

Ms. Shine observed Student in his preschool class for two hours on February 7, 2022. She described her observations as follows. While the class was engaged in a whole group activity Student often looked to his peers when directions were given before he would initiate the activity. He was relying on visual cues a lot unless engaged in a familiar routine. Student did not seem to converse very much with his peers. He engaged in parallel play rather than cooperative play with language. Student did not initiate a choice at "choice time." He waited to see what his cousin was going to do and followed her. She observed that although he looked up at the sound of his teacher's voice, he often missed the question

or peer response because he was “searching for the teacher and following the cues of peers.” She observed that when students were directed to look at the clock, Student followed the general area of where his peers were looking but seemed unsure of what he was looking for. When he was asked a direct question, he waited for the peers at his table to answer before he did.

Ms. Carreiro sat with Ms. Shine while the students engaged in free play. She filled out the SIFTER³ and provided Ms. Shine with further information about Student and his classroom performance. She assisted Ms. Shine in completing the academic portions of the Hearing Itinerant Service Rubric⁴, which involved areas Ms. Shine had not observed. Student obtained a score of 57 on the Rubric, which correlated to requiring direct services twice per week. Ms. Shine conceded that the Rubric was subjective, but stood by the results, with the exception of one area where she stated Student may have scored a three, when she had assigned a score of four⁵. The change from a three to a four would not have impacted her recommendations for direct services. (P-8, S-24)

Ms. Shine recommended that Student have direct service from a teacher of the deaf two times per week. This recommendation was based on her experience working in a preschool with students with hearing loss. She noted that the teacher of the deaf could pre-teach the vocabulary so that Student would have access to all the content that he might not be hearing as a typical hearing child would. Student could practice auditory listening skills with the teacher of the deaf (she noted that if a student cannot hear the sound he/she cannot read or write it) and work on increasing vocabulary. The teacher of the deaf could provide post-teaching to allow for review of key concepts and clarification of misconceptions. Ms. Shine also recommended that Student continue with speech language therapy, preferably with a person who is AVT trained or has extensive experience working with deaf children. She suggested that an AVT speech language therapist provide consultation in addition to the direct services; and that Student have Remote Microphone Hearing Assistive Technology and that a daily listening check of the system be performed. She went on to recommend that an educational audiologist consult on classroom acoustics, technology, training and on-going consult as needed for troubleshooting. In addition, a number of recommendations for instructional and classroom accommodations were made, including visual aids, check-ins for understanding, highlighting key points, repeating or rephrasing information when necessary, preferential seating, gaining Student’s attention before providing instruction, repeating peers’ questions, and reducing background noise in the classroom. (P-8)

Ms. Shine expressed the opinion that Student is eligible for special education, requiring services from a teacher of the deaf to do pre and post teaching of new content. She stated that he is very hesitant with new, unfamiliar content and does not know how to self-advocate or express if he is not hearing something or understanding something he has heard. (Shine)

³ I take administrative notice that SIFTER stands for Screening Instrument for Targeting Educational Risk.

⁴ The Rubric is completed with the classroom teacher to determine how the student’s hearing loss affects his/her performance across various aspects of the curriculum. (P-8)

⁵ Each response is scaled of 1-5, with 5 being more involved and needing service and 1 indicating the child is independent and able to complete the tasks independently. (P-8)

27. Julie Carreiro has been a preschool teacher at Espirito Santo for 20 years and taught at another school for ten years prior to that. She has never worked with a child with hearing loss. Ms. Carreiro first became aware of Student when Parents toured the school last summer, but had not yet decided if Student would attend. Tracy Vale provided some training to her on Student's hearing loss and on the use of the technology that Parents provided. She showed her how to use the devices, charge the batteries, and do the "Ling sounds." Student's cousin is in the class and Student relies upon her throughout the day. He looks at her all the time. His cousin often speaks for him when Ms. Carreiro asks Student a question. Ms. Carreiro often calls the students individually to come to the rug for a lesson. If she calls Student before his cousin he does not get up or he will stand there waiting until his cousin is called. He follows her cues. If students finish their work and Ms. Carreiro tells them they can go play, Student will not get up until his cousin does. Then he will follow wherever she goes. Recently Ms. Carreiro observed Student and cousin playing in the same area. When his cousin moved to another area, he kept looking over his shoulder at her instead of continuing to engage in his chosen activity. Ms. Carreiro described Student's cousin as his voice when he does not have it or he cannot hear. Ms. Carreiro is never sure that Student can hear her. She does not know what he hears and what he does not hear. Student does much better in class when the teacher or assistant are near him. He requires a higher level of support and prompting than other children in her class. (Carreiro)

Ms. Carreiro testified that at the beginning of the year when she was asked to complete the educational assessment form, she did not have an understanding of Student's hearing loss and how it impacted him. When she was asked to fill out the educational assessment B prior to the April 2022 meeting, she noted that the questions were not geared toward a three year old, and does not believe the assessment form reflected Student's actual presentation in her classroom. Student often will participate in a group discussion if everybody is sitting at the edge of the rug and everybody is quiet and she asks each child a question, but he does not necessarily communicate with other students when they are sitting and working at the tables. He mostly plays by himself, does not seek out peers, never initiates play or engages in cooperative play with communication, and gravitates towards areas where there are small groups. Ms. Carreiro further reported that he never asks her to repeat anything, and does not express verbally when his ear is hurting, He is not comfortable walking on the stairs by himself, but unlike other students, he does not ask for help unless prompted by an adult. (Carreiro)

In Ms. Carreiro's opinion, Student has attention difficulties in the classroom. She described him mostly as an observer who will later participate. (Carreiro)

28. Maria Bushell has been the special needs preschool teacher in Swansea for 21 years. She observed Student for one hour at Espirito Santo on March 31, 2022. The purpose of her observation was to see how or if Student's hearing loss impacted his ability to access the curriculum and make effective progress. She has never worked with a student with hearing loss. She concluded that Student was able to follow directions and complete the tasks required of him. She observed an activity in which the teacher was demonstrating stringing beads and Student was stringing his own beads, but observed that Student did not talk to other students during the beading project, although other students were talking to one

another. Ms. Bushell further noted that Student did speak to peers during snack, and opined that his communication skills were age appropriate because he was looking at his peers, smiling, and talking about his snack. While this witness observed that Student did not speak a lot to his peers, she did not view this as an indication of the existence of a communication or listening deficit. While she did not have any concerns based on her observation, Ms. Bushell acknowledged that given her lack of experience and training in working with students with hearing loss it is “not completely” possible for her to be sensitive to the needs of such students. (Bushell)

29. Dr. Garell observed Student at Espirito Santo and spoke to his classroom teacher on or around March 28, 2022. Dr. Garell does not have any educational or professional background in working with students who are hard of hearing. She has never taught preschool, but has overseen students three years and over as part of her duties as Director of Student Services. Dr. Garell reported she did not observe Student looking at his cousin at the table or at the rug. She saw Student completing assignments in advance of others and being the first one to line up for gym. She did not observe him looking for visual cues from others. She confirmed that Ms. Carreiro told her that she was uncomfortable filling out the educational assessment form because it did not seem appropriate for a three year old and she did not believe it accurately represented Student. (Garell)
30. The Team convened on April 1, 2022 to review Ms. Shine’s report, recent observations made by Swansea, and to re-visit eligibility. Ms. Shine believed her recommendations were dismissed. (Shine) The Team found that Student was making progress with his letters and colors, and could cut and color. The Swansea-based Team members believed he was developing appropriately for a three-year old in preschool, (Shine) and concluded that he had the ability to make effective progress in the general education program and to access the preschool curriculum. (Garell)
31. Dr. Garell testified that she was aware of Ms. Rankin’s report stating that Student was missing about 40 percent of the information presented to him during the assessment. She stated that “they” would provide him with visuals and repetition and other ways to access the curriculum in addition to through hearing. (Garell)

FINDINGS AND CONCLUSION:

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”⁶ The right to a FAPE for all students with a disability is guaranteed by both federal and state law through the IDEA, M.G.L. c. 71B, and their corresponding regulations⁷. To benefit from the rights and protections provided by these laws and regulations, however, a child must first be deemed eligible. If a student is found eligible, the Team must then develop an IEP

⁶ 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)

⁷ 20 USC 1400, *et seq.*; M.G.L. c. 71B; 34 CFR 300.000, *et seq.*; 603 CMR 28.00 *et seq.*

setting forth the special education and related services that meet the special education needs of the student⁸.

The federal and Massachusetts eligibility standards for special education are similarly structured in that each requires that a student meet two prongs to be found eligible: first, the student must have one or more of the requisite disabilities; and second, as a result of the disability(ies), the student must require special education or related services. Student must be considered eligible for special education services if he meets either the state or the federal eligibility standards.⁹

The federal special education regulations define a child with a disability as follows:

The term “child with a disability” means a child--

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

34 CFR 300.0.

Further, 34 CFR 300.8(5) states that a Hearing Impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child’s educational performance but that is not included under the definition of deafness in this section.

Similarly, The Massachusetts special education regulations define an eligible student as a

person aged three through 21 who has not attained a high school diploma or its equivalent, who has been determined by a team to have a disability(ies), and as a consequence is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service. An eligible student shall have the right to receive special education and any related services that are necessary for the student to benefit from special education or that are necessary for the student to access the general curriculum. 603 CMR 28.02(9).

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005). In this case, Parents are the party seeking relief, and as such bear the burden of persuasion.

⁸ 603 CMR 28.02(11); 603 CMR 28.05(3).

⁹ See *Winkelman v. Parma City School Dist.*, 127 S.Ct. 1994, 2000-2001 (2007) (“education must . . . meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (IDEA “does not displace the states from their traditional role in setting their own educational policy”; state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

There is no dispute with respect to Student's areas of need and profile, generally. The disagreement in the instant matter centers on whether Student is eligible for special education services and whether Swansea acted within prescribed timelines in assessing Student and convening the Team.

ISSUE I Whether Swansea Public Schools complied with the relevant timelines in conducting its evaluation of student upon receipt of the referral from early intervention

People Incorporated, Student's Early Intervention provider, sent its referral to Swansea on February 2, 2021, well in advance of Student's third birthday (July 25, 2021). Upon receipt of the referral, Dr. Garell sent Parents residency forms for them to complete. Parents returned the residency forms some time in April. The record does not contain a copy of the signed forms, so the exact date cannot be ascertained. Parents then requested an evaluation in July 2021. Swansea did not send the consent to evaluate form to Parents until after school started on August 31, 2021. Massachusetts special education regulations require that

Upon referral, school districts **shall** evaluate children who are two and a half years of age and who may be receiving services through an early intervention program. An initial evaluation shall be conducted in order to ensure that if such child is found eligible, special education services begin promptly at age three. (emphasis added)

603 CMR 28.04(1)(d).

Dr. Garell testified that because Parents made a written request for an evaluation in the summer, when school was not in session, Swansea was not obligated to send the Parents the consent form until within five days of school starting. Her understanding of the law is incorrect. First, the district's obligation to evaluate Student arose when the February 2021 referral from People Incorporated was received, not when Parent requested an evaluation in July. Further, in addition to the above regulatory language, the Massachusetts Department of Elementary and Secondary Education (DESE) has issued a document entitled *Frequently Asked Questions: Transition from Early Intervention to Special Education*. As part of its answer to question number 8, the guidance states,

Part C of the IDEA includes the requirements and procedural safeguards for the provision of services for infants and toddlers birth up to, but not including the third birthday. Part B of IDEA specifies the requirements and procedural safeguards for children age 3 through 21. The timelines of Part B of IDEA and the Massachusetts Special Education regulations apply to all children age three through twenty-one. Therefore, specific timelines such as the five school-day written notice the school must send to the parent upon receipt of the referral along with the consent form to evaluate the child does not apply because the child is not yet 3 years old. Special education law requires that districts, upon receiving a referral from EI, complete an evaluation and make a determination of eligibility and, if the child is determined eligible implement the IEP by the child's third birthday. (DESE *Frequently Asked Questions: Transition from Early Intervention to Special Education*, March 2014, revised and updated November 2014)

Since Student had not yet turned three, it was erroneous for Swansea to apply the timelines from Part B of the IDEA and wait to send Parents the consent to evaluate until within five days of school starting. It should have sent the consent to evaluate form in sufficient time to allow the evaluation to be completed by the Student's third birthday.

Even after Mother filed a PRS complaint and Swansea was advised by George Haile of its obligation to evaluate Student despite having proposed to accept Student's IFSP, Swansea failed to provide Parents with the consent forms required to begin the evaluation process. This error caused considerable delay in completing the evaluation, in contravention of the statutory intent to provide a seamless transition for students turning three.

ISSUE II Whether Swansea Public Schools utilized comprehensive and appropriate assessments in making its eligibility determination.

Swansea conducted a speech and language evaluation of Student, completed by Courtney Finnerty, that assessed his expressive and receptive language, observed Student in his classroom and also completed an Educational Assessment Part A and Part B. Ms. Finnerty is a qualified speech language pathologist, but has no specialized training or expertise in children with hearing loss. An Educational Assessment Part B was also completed by Student's preschool teacher, Ms. Carriero. Ms. Carriero has no training or experience working with children with hearing loss, and had only known Student for slightly over one month at the time she completed the form. Thus, nobody with expertise in hearing loss completed an Educational Assessment of Student. At Parents' request, Swansea contracted with READS Collaborative for Ms. Rankin to complete a functional listening evaluation. Ms. Rankin does have credentials, experience and expertise in the area of hearing loss and how it impacts students

Massachusetts regulations require that the LEA provide an assessment in all areas related to the suspected disability. 603 CMR 28.04(2)(a)(1).

Similarly, federal regulations require that in conducting the evaluation, the public agency must—
Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent (34 CFR 300.304(b)(1))

Further,

Each public agency must ensure that—
The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (34 CFR 300.304(c)(4))

Based on the foregoing, I find that Swansea utilized comprehensive and appropriate assessments to the extent that it acceded to Parents' request to conduct the functional listening evaluation.

ISSUE III Whether Swansea Public Schools erred in determining that Student was not eligible for special education on November 10, 2021.

The Massachusetts special education regulations define an eligible student as a

person aged three through 21 who has not attained a high school diploma or its equivalent, who has been determined by a team to have a disability(ies), and as a consequence is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service. An eligible student shall have the right to receive special education and any related services that are necessary for the student to benefit from special education or that are necessary for the student to access the general curriculum. 603 CMR 28.02(9).

Massachusetts special education regulations further address eligibility at 603 CMR 28.05(2)(a)(1) as follows.

If the student has one or more of the disabilities defined at 603 CMR 28.02(7) and if, as a result of the disability(ies), the student is unable to progress effectively in the general education program without the provision of specially designed instruction, or is unable to access the general curriculum without the provision of one or more related services, the Team shall determine that the student is eligible.

Sensory impairment is one of the impairments listed as a disability and includes, in relevant part

Hearing Impairment or Deaf - The capacity to hear, with amplification, is limited, impaired, or absent and results in one or more of the following: reduced performance in hearing acuity tasks; difficulty with oral communication; and/or difficulty in understanding auditorily-presented information in the education environment. The term includes students who are deaf and students who are hard-of-hearing. 603 CMR 28.02(7)(d)(1).

When the Team convened on November 10, 2021 to determine whether Student was eligible for special education services it had Caitlin Shanahan's audiology report, Tracy Vale's reports including, her brief speech and language assessment; Evelyn Rankin's (speech language pathologist/teacher of the deaf) report; Courtney Finnerty's speech language report, and the Educational Assessments completed by Ms. Finnerty and Ms. Carreiro. Additionally, Ms. Vale, and Ms. Finnerty were present to present their findings and recommendations. All of the Team members with expertise in providing services to students who are hard of hearing believed that Student was eligible for special education and made similar recommendations for the kinds of services he required.

Based upon the foregoing, it is difficult to see how the Team concluded that Student is not eligible for special education. Perhaps the most striking findings from the reports submitted for the Team's consideration was Ms. Rankin's determination that even when Student was provided with auditory breaks, visual support and was alerted to listen by his name being called, Student's performance was not above 60%. Ms. Vale explained that he is missing 40% of the available auditory information at any given time in a sentence or a phrase or a story. It is difficult to imagine how the Team could have reasonably concluded that he was making effective progress

or was able to access the general curriculum when Ms. Rankin's unrebutted functional listening evaluation results demonstrated that Student missed such a significant amount of information even when using his hearing aids and with accommodations provided. The Team seemingly dismissed the recommendations of Ms. Vale and Ms. Rankin, who had evaluated Student and had expertise in providing services to students with hearing loss, and instead relied on the findings of Ms. Finnerty's speech language evaluation (which did not include assessments pertaining to Student's hearing loss) and the Educational Assessments filled out by a teacher and speech language pathologist who lacked significant experience working with students with hearing loss. The overwhelming information available to the Team supported a finding that Student was eligible for special education.

ISSUE IV If so, whether Student is entitled to compensatory services.

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

In the case at hand, I have determined that Swansea erred in finding Student ineligible for special education services. Therefore, Student is entitled to compensatory services to put him in the position he would have been in if Swansea had found him to be eligible prior to the 2021-2022 school year.

Parents have not presented any evidence as to what services would compensate Student for the services he was not provided during his first year of pre-school. Thus, I am unable to craft an appropriate remedy. Therefore, I am sending this issue back to the Team to determine what services would appropriately compensate Student for Swansea's failure to find him eligible for special education services. Since I have found that none of the Swansea based Team members possess the requisite expertise in educating children with hearing loss, Swansea shall ensure that the Team includes members with the necessary expertise to determine appropriate compensatory services for a pre-school student with hearing loss. Swansea shall be responsible for paying consultant fees to any necessary Team member(s) who are not Swansea employees.

ISSUE V Whether Swansea Public Schools erred in determining that Student was not eligible for special education on April 1, 2022.

In addition to the information that the Team had at the November meeting, which I found sufficient to find Student eligible for special education, the April 2022 Team also had an observation report from Adrienne Shine (teacher of the deaf), an Educational Assessment B from

Ms. Carreiro¹⁰, and Educational Assessment B forms from Ms. Bushell and Dr. Garell. Although Dr. Garell and Ms. Bushell observed Student in his preschool placement, I note that neither of them has experience working with students with hearing loss. Ms. Shine, on the other hand, is a licensed teacher of the deaf and is also certified in early childhood education and special education. Her opinion was that Student required direct services from a teacher of the deaf two times per week for pre-teaching of vocabulary and for practice of auditory listening skills as well as post-teaching for review of key concepts and clarification of misconceptions. She also recommended that Student continue with direct speech language therapy, preferably with a person who is AVT trained or has extensive experience working with deaf children. She also recommended consultation from the AVT trained speech pathologist. She recommended providing Student with a Remote Microphone Hearing Assistive Technology. Finally, she recommended an educational audiologist consult on classroom acoustics, technology, training and on-going consultation and suggested a number of instructional and classroom accommodations. There was no appropriately credentialed and experienced Team member who disagreed with Ms. Shine's recommendations. Therefore, given that the only other new information the April 2022 Team had before it did not provide probative information for determining eligibility, as it was not offered by staff with expertise in hearing impairment, I find that Swansea erred in finding Student was not eligible for special education in at the April 1, 2022 meeting.

ISSUE VI If so, whether Student is entitled to compensatory services.

I find that Student is entitled to compensatory education for the services that he missed due to Swansea's erroneous determination that he was not eligible for special education. As discussed above, Parents have not presented any evidence as to what services would compensate Student for the services he was not provided during his first year of pre-school. Thus, I am unable to craft an appropriate remedy. Therefore, I am sending this issue back to the Team to determine what services would compensate Student for Swansea's failure to find him eligible for special education services. Swansea shall ensure that the Team includes members with the necessary expertise to determine appropriate compensatory services for a pre-school student with hearing loss. Swansea shall be responsible for paying consultant fees to any necessary Team member(s) who are not Swansea employees.

ISSUE VII Whether Parents are entitled to reimbursement for the purchase of a microphone for Student's private pre-school classroom

At the outset, it is important to note that students who are unilaterally placed by parents in a private school do not have an individual right to special education and related services under the IDEA. However, districts must conduct Child Find, determine proportionate share of IDEA funds, and provide equitable services to parentally placed private school students who attend private schools located within the district without regard to where the child resides. Districts have an obligation to provide parentally placed private school students with disabilities the opportunity for equitable participation in the services that the district has determined after

¹⁰ Additionally, Dr. Garell had had an opportunity to speak to Ms. Carreiro and was aware that Ms. Carreiro had been uncomfortable filling out the educational assessment form because she thought it was not appropriate for a three year old and did not think it represented Student.

consultation to make available to its population of parentally placed private school children with disabilities. *Medford Sch. Dist. #549C*, 113 LRP 49886 (SEA OR 11/26/13). In this case, the parent alleged, among other things, that the district violated IDEA regulations when it refused to provide the student with assistive technology, such as an iPad and FM system, to address his disability. The SEA disagreed. It argued, persuasively, that students who are unilaterally placed by parents in a private school do not have an individual right to special education and related services under the IDEA. Rather, a district must provide a parentally placed private school child with an equal opportunity to participate in the services it has made available for its population of unilaterally placed private school students with disabilities. Thus, Parents are not entitled to reimbursement from Swansea for the microphone purchased for Student's use in his private preschool.

ISSUE VIII Whether Swansea Public Schools is required to provide Student with a "HAT" system for use in the classroom.

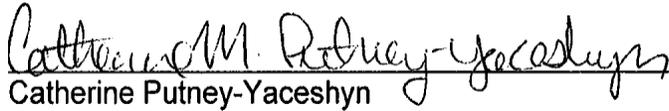
For the reasons stated with respect to *Issue VII* above, Swansea is not required to provide Student with a "HAT" system for use in the classroom. However, after Swansea reconvenes the Team to draft an IEP for Student and makes a placement recommendation, it will be required to provide Student with a "HAT" system if Parents agree to place Student at Swansea's proposed placement.

ORDER

1. Based upon the foregoing, I find that Swansea did not comply with the relevant timelines in conducting its evaluation of Student upon receipt of the referral from Early Intervention. Swansea is ordered to provide training to Dr. Garell and Danielle Costa in appropriate referral and evaluation procedure.
2. I find that Swansea utilized comprehensive and appropriate assessments in making its eligibility determination.
3. I find that Swansea erred in determining that Student was not eligible for special education on November 10, 2021 and on April 1, 2022. The Team shall reconvene to draft an IEP for Student. The Team shall utilize the recommendations of Ms. Vale, Ms. Shine, and Ms. Rankin in determining service delivery since there were no other recommendations from service providers with expertise in deaf/hard of hearing education, nor any countervailing expert opinions that their recommendations were not appropriate.
4. I find that Student is entitled to compensatory services for the time period from when he turned three until the end of the 2021-2022 school year. Since Parents have not provided evidence as to what would appropriately compensate Student for what he has lost, the Team will convene to determine appropriate compensatory services as described above.

5. Parents are not entitled to reimbursement from Swansea for the purchase of a microphone for use in Student's private preschool class.
6. Whether Swansea is required to provide Student with a "HAT" system is dependent on where Student attends school next year.

So ordered by the Hearing Officer,


Catherine Putney-Yaceshyn

Dated: July 8, 2022