COMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: BOSTON PUBLIC SCHOOLS

& BSEA #1706472

ULANI[1]

DECISION

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C.§1401 *et seq.* and 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on April 25, 27 and 28, 2017 at the Bureau of Special Education Appeals in Boston, MA before Hearing Officer Lindsay Byrne. The Boston Public Schools was represented by attorney Jeannette Sedgewick. The Parent was represented by advocate Noreen Curran.

The official record of the Hearing consists of exhibits introduced by the School marked S-1 through S-15; exhibits introduced by the parent marked P-1 through P-10; and approximately 10 hours of recorded testimony and argument. The Parties' request to continue the Hearing pending submission of written closing statements was granted. Closing statements were received from both parties on May 24, 2017 and the record closed on that date.

ISSUES:

1.) Whether the 2016-2017 Individualized Education Program ("IEP") developed in June 2016 calling for Ulani's placement in substantially separate program at Excel High School was reasonably calculated to provide a free appropriate public education to Ulani?

2.) Whether the 2016-2017 IEP developed in November 2016 calling for Ulani's placement in the New Mission High School is reasonably calculated to provide a free appropriate public education to the Student?

[1] "Ulani" (and its derivative initial) is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student and family in documents available to the public.

3.) If not, whether the Student is entitled to compensatory special education services as a result of Boston's failure to offer an appropriate program to her during the 2016-2017 school year?

4.) Whether placement in the Learning Prep School is the least restrictive special education program that can appropriately address the Student's current special learning needs?

FINDINGS OF FACT

1. Ulani is a fifteen year old resident of Boston. She was found eligible for special education services as a preschool student due to a communication impairment. Later, in elementary school, Boston's evaluations concluded that she met the criteria for intellectual impairment and/or specific learning disability. The most recent psychological evaluation conducted by Boston, completed in June 2015, yielded results consistent with previous intelligence and academic testing. School Psychologist Jennifer Medeiros-Crabbe testified that while Ulani's full scale IQ score fell within the borderline range[2], the subtest results revealed a significant 28 point difference between the highest score: Verbal Comprehension, which fell in the average range, and the lowest: Perceptual Reasoning, which fell in the extremely low range. As a result of this difference Ms. Medeiros-Crabbe concluded that Ulani was more appropriately categorized with a specific learning disability than with an intellectual impairment. Ms. Medeiros-Crabbe also noted that, in keeping with previous observations by Boston, Ulani reported clinically significant symptoms of anxiety. The 2015-2016 IEP developed in response to the Medeiros-Crabbe evaluation changed Ulani's diagnostic category to specific learning disability ("SLD"). The evaluator and the Team recommended that Ulani remain in the small, structured self-contained program she had been attending as she was comfortable and making progress. (Medieros-Crabbe; S-10; S-2; P-2). The Parent rejected the proposed 2015-2016 IEP but did not pursue formal dispute resolution. Ulani completed 8th grade in the Lyndon Elementary School program during the 2015-2016 school year.

2. The Team reconvened on June 20, 2016 to develop an IEP for the 2016-2017 school year. Ulani's 2015-2016 Lyndon School teacher reported that she made progress in all areas, participated in class activities and instruction, was engaged and motivated, got along well with peers and adults and had excellent attendance. (S-10) Ulani met all criteria for promotion to the 9th grade. Promotion involved relocating to a Boston High School. The Team determined that Ulani would benefit from a special education program at the high school level that provided services that were substantially similar to those she successfully accessed at the Lyndon Elementary School. The Team then determined that an appropriate intensive special education program was available at West Roxbury Academy. The Parent rejected that option stating that it was too far away. The Team identified a similar special education program at Excel High School in South Boston. The Parent objected to the racial composition of the school. The Parent requested that Ulani be retained at the Lyndon School. The Team demurred. The Parent then requested an Independent Educational Evaluation. (Neilson; Ms. U.)

2 The Report does not state a number value. S-10

3. After the June 20, 2016 Team meeting Boston proposed an IEP for the 2016-2017 school year calling for Ulani to attend the Excel High School. The IEP stated:

> [Ulani] is a cooperative, thoughtful student who is eager to learn and shows perseverance. [Ulani] presents as organized and focused on task completion. Academically, [Ulani] shows strengths in vocabulary and listening comprehension of grade level stories. [Ulani] is a competent communicator who can ask questions, clarify information and request help. . . . [Ulani] enjoys helping others. [Ulani] also enjoys swimming, traveling and making friends.

KEY EVALUATION RESULTS:

> [Ulani] continues to make progress in her academic setting. In ELA she is challenging herself this year by choosing more difficult books for her independent reading. She is able to summarize and paraphrase what she has read and what has been read to her. She is still working on trying to put these ideas into her own words. She is still challenged by making inferences and logical conclusions about the reading done in class and what she has read independently. She does much better with literal interpretations as opposed to abstract interpretations. She is making connections between different things read in class to her own personal experiences. [Ulani] has shown more focus in her writing and is able to complete Type 1 – Type 3 writing independently. She is working on self- editing and making sure that what she has written makes sense when she reads it out loud to herself. [Ulani] is participating more in class discussions in Science and Social Studies. She is able to find evidence in the text to support her answers to questions. [Ulani] is making great progress in math this term. She is able to state the order of operations independently. She is able to solve problems using order of operations as long as it involved (sic) whole numbers. She is able [to] determine which operation to use when solving word problems. She can identify when a word problem requires multi-steps in order to complete. She is able to add, subtract, multiply and divide fractions and she is working on simplifying fractions. She is more confident in doing the cross-canceling to simplify rather trying to simplify after the problem has been solved although she still requires reminders of how to do this skill. [Ulani] is able to determine the diameter, radius and circumference of a circle.
> [Ulani] attends speech and language therapy. [Ulani] continues to be motivated student who completes all work, participates in class and displays good self-advocacy skills. [Ulani] recalls narratives, vocabulary and concepts learned from previous lessons with minimal verbal and visual cueing. Over the past IEP period {Ulani] has achieved all communication objectives.

(P -5)

The June 2016 IEP proposed direct special education services to be delivered in a small, substantially separate setting:

> 180 minutes per day, 5 days per week devoted to reading/writing skills;
> 60 minutes per day, 5 days per week, devoted to math;

45 minute sessions, 2 days per week, of Speech-Language therapy to address communication skills;
30 minutes, one time per week with a counselor to address self-regulation skills

The June 2016 IEP increased the direct special education and related services to be delivered to Ulani by adding one hour of direct speech language services, 45 minutes of direct service from a Reading specialist once per week, and 25 minutes per month of consultation between the Parent and the special education teacher. The IEP continued to offer door to door transportation and extended year services. (P-5)

4. Ulani did not attend the summer program to which she was entitled under her "stay put" IEP during the summer 2016. (Ms. U.)

5. June Jacquard, the Special Education Program Director at Excel High School, described the substantially separate classroom program designed for students with specific learning disabilities ("SLD") to which Ulani was assigned. Ms. Jacquard testified that it is a small classroom program of 10-12 students, all of whom have specific learning disabilities and require individualized instruction and modifications. The program follows the Massachusetts Curriculum Frameworks using modified materials. Ninth grade students receive their core academic instruction in English, math, history and science in a cohesive group from teachers who are certified in both special education and subject content. Ninth grade students also take prescribed "electives": a full year course in computers, one semester of health and one semester of leadership. Elective courses are integrated with non-disabled students. If a student's IEP calls for additional direct reading instruction, which Ulani's does, it takes place during the elective period and uses the Wilson program. All students at Excel High School participate in a daily "help" period. Students select their "help" teacher. Based on that selection students with and without disabilities may be grouped together. The tenth grade self-contained program for students with specific learning disabilities is substantially similar to Excel's ninth grade program. According to Ms. Jacquard, every student at Excel is expected to continue their education beyond high school.

Ms. Jacquard did not participate in the June 2016 Team meeting that developed the proposed 2016-2017 IEP for Ulani. She reviewed the IEP, however, and concluded that the substantially separate specific learning disabilities program at Excel High School would be appropriate for Ulani and that Ulani's IEP could be implemented at Excel High School. Ms. Jacquard noted that the student profile and key evaluation summary sections of Ulani's proposed IEP describe a student with characteristics very similar to those currently attending the SLD program. The SLD program provides the type and method of direct, systematic reading instruction that is contemplated in the IEP. It also has the appropriately licensed and certified staff available to provide the direct speech-language therapy and the psychological services listed on the proposed IEP. Ms. Jacquard testified that Excel High School staff in general, and those in the special education program in particular, have experience with students with anxiety. The necessary personnel, services and environmental supports are in place at Excel High School to address those needs. (Jacquard)

6. Ms. U. did not visit Excel High School and did not contact any Excel High School administrator to discuss Ulani's potential participation in the special education program there. (Ms. U.; Jacquard)

7. Ulani did not attend the Excel High School program. Ms. Jacquard telephoned Ms. U. in September, 2016 to check on Ulani's attendance. Ms. U. informed her that Ulani would not be attending Excel. Ulani has not attended any school day in the Boston public schools after completing the 8th grade at the Lyndon School in June 2016. (Jacquard; Ms. U.)

8. Michael Losche, Boston's Assistant Director for Special Education responsible for high school programs, testified that he spoke to Ms. U. in mid-August. They discussed a variety of high school placement and visitation/observation options. Ms. U. declined to visit any high school programs.

9. At the request of a relative of Ulani's who is employed by the Boston Public Schools, Boston arranged to provide 10 hours per week of home tutoring to Ulani in the form of direct instruction in the Wilson Reading Program. Boston has not pursued a truancy complaint. Boston did not require the submission of a physician statement to support delivery of home tutoring. (Neilson; Losche; Ms. U. 603 CMR 28.03 (3) (c).)

10. The Center for Children with Special Needs at Tufts Medical Center conducted a multi-disciplinary independent evaluation of Ulani on 8/23 and 9/7/16. The independent evaluation results are consistent with Boston's previous assessments of Ulani's neuropsychological, academic and communication functioning. (S-12; P-3 (marked). cf. S-11; S-10; S-2; P-2; S-3; S-5) Neuropsychologically, Tufts describes Ulani as a "slow learner" with scores on standardized tests of intellectual potential clustered in the extremely low range but with low average scores on subtests involving language use. Due to the outlying, stronger verbal scores, Ulani's relatively competent adaptive functioning, and her clinically significant anxiety, Tufts determined that Ulani is appropriately categorized as having a specific learning disability, a nonverbal learning disability, and a generalized anxiety disorder. The Tufts team recommended:

: placement in a highly structured, small group setting with similarly functioning peers

: consistent attention to improvement of language skills across academic subject area;

: consistent intervention to improve executive functioning skills and social pragmatics;

: preference for "verbally-based" approaches to instruction;

: specific modifications and accommodations to Ulani's learning characteristics, non-verbal learning disability and anxiety such as teacher directed instruction, routine, repetition, review, rehearsal, predictability, breaks, social scripts, explicit instructions, reduced demand for visual-motor production, etc.

: therapy outside of school using a cognitive-behavioral approach.

(S-12; P-3 (marked).) The Tufts report was available to Boston by mid-October 2016.

11. The Team reconvened on November 3, 2016 to consider the results of the Tufts evaluation. At the Parent's request none of the Team members had any prior experience teaching or evaluating Ulani. The Team was co-chaired by Michael Losche (¶ 8) and Andrea Alves Thomas, Manager of Special Education Compliance for Boston Public Schools. Mr. Losche testified that the Parent's concerns were: a proper diagnosis, a good IEP and a good placement. (Losche) The Team accepted the findings and recommendations of the Tufts evaluation. The Team determined that the appropriate disability identification already appeared on Boston's proposed IEP and therefore there was no need for a change. The Team also determined that the type of placement recommended by Tufts for Ulani: a small, substantially separate, language based program with counselling support for students with specific learning disabilities, was available within the Boston Public Schools. Understanding that the Parent refused a potentially appropriate program and placement at Excel High School the Team discussed alternate programs and placement. The Team settled on the New Mission High School due to its Level I status small class sizes, Wilson certified teachers and outstanding graduation outcomes. The Team also determined that the New Mission High School program was the least restrictive, appropriate educational option for Ulani. (Alves-Thomas) The Parent disagreed saying that no Boston public high school could meet Ulani's needs. She requested that Boston place Ulani at the private, Learning Prep School. The meeting then ended abruptly.

12. On November 15, 2016 Boston sent a proposed, revised 2016-2017 IEP to the Parent. (S-9; S-3; P-5) The revised IEP contained an additional 45 minute individual session with a reading specialist to take place outside of regular school hours in an attempt to address any deficits related to Ulani's failure to attend school during the fall 2016. The November 2016 IEP proposed delivering Ulani's special education program at the new Mission High School. Otherwise there were no substantive alterations to the IEP originally proposed in June 2016.

13. Ulani regularly and independently attends her daily two hour Wilson tutoring sessions at the public library. She also participates in a competitive swimming program and a crew program 2-3 times a week for 3 hours each. Ulani meets with friends from those activities five to six times a week. (Ms. U.) Ms. U. testified that while Ulani continues to have significant anxiety she has not arranged any form of treatment for Ulani's anxiety. (Ms. U.)

14. The Wilson Reading Tutor, Marcia Soden, a retired Boston Public School teacher, testified that Ulani has made a "great deal" of progress in the Wilson program since they began working together in September 2016. When tutoring began on September 16, 2016 Ulani was functioning overall at a fifth grade reading level. (step 1). At the time of the hearing in April 2017, Ulani could independently access Wilson controlled materials at the 8th grade level. Ms.

Soden stated that with support Ulani can understand 9th grade material and is able to access a 9th grade curriculum independently and with support from a tutor. (Soden; P-9; S-13; S-14) Without support Ulani can operate independently at a 7th grade level. Ms. Soden gives Ulani homework in essay writing, Reading and Science. Ulani completes assignments diligently. (Soden)

15. Ms. U. and Boston Public School special education administrators had several discussions, both in person and by telephone, during November and December 2016 and January 2017 to address differences of opinion on an appropriate high school placement for Ulani. None of the meetings was "productive" (Neilson; see also Ms. U.) Ms. U. rejected the November 2016 IEP on December 15, 2016. Ms. U. did not visit the New Mission High School at that time.

16. A mediation was held on January 24, 2017. It did not resolve the substantive disagreement about Ulani's placement. On February 13, 2017 Boston filed a request for Hearing. The Hearing was scheduled to take place on March 3, 2017. The Parent requested a postponement and the hearing was rescheduled to March 9, 2017. Ms. U. visited the New Mission High School on March 30, 2017. Ms. U. testified that Ulani learns well with computer-based instruction but that she has limited access to technology in the Boston Public Schools. She observed a 9th grade class using history content with Wilson Reading materials and instruction. She concluded that it was not sufficiently specialized and too low a reading level for Ulani. (Ms. U.)

17. Naia Wilson-Akubude, the Headmaster of the New Mission High School, described the special education program available for Ulani there. She testified that New Mission is a very small, supportive learning community dedicated to family engagement and professional development. New Mission is a "Level I" "Commendation" High School that has achieved a 98% graduation rate. The goal is for all students to pursue post-high school education. For the class graduating in June 2016 all students, including all students who had received special education services at New Mission, were enrolled in post-secondary education. According to Dr. Wilson-Akubude, the small size of the school, and of the classes, is key to improving student self-confidence, ameliorating anxiety, and accelerating growth in student learning. The school also does many team building exercises, provides advisory classes for all students, engages all students in a daily "connection activity" and requires a "reflection" activity at the conclusion of each school day. Sixty five percent of the teachers hold special education licensure and the building has counselors and support services available for any student.

Dr. Wilson-Akubude testified that there is at each grade level a substantially separate classroom program designed for students with specific learning disabilities. The students in 9th and 10th grades follow their respective grade level curriculum in the four core academics with the accommodations and supports set out in their IEPs. Teachers are dual-certified in special education and the appropriate subject area. Two of the four 9th grade teachers are also certified in the Wilson Reading Program. Classroom instruction is multisensory, emphasizing visual supports and metacognitive strategies. All teachers use a smart board. Each student receives a school-provided chromebook. A computer based reading program, Achieve 3000, provides individually targeted practice and remediation as necessary as a supplement to classroom

instruction. Individual Wilson program tutoring is available to any student whose IEP calls for it. A speech-language therapist also provides direct individual, group or classroom consultation services to any student whose IEP calls for it. The school-based special education providers meet weekly to plan and share information.

There are currently 5 students in the 2016-2017 9th grade substantially separate specific learning disabilities program ("SLD"). There are 8 or 9 students currently in the 10th grade cohort. Dr. Wilson-Akubude testified that the individualization of instruction, materials and support available in accordance with students' IEPs makes the SLD program "language based."

Dr. Wilson-Akubude read both the 2016 Tufts Evaluation report and the 2016 IEP proposed for Ulani. She testified that the 9th grade specific-learning disability classroom would be appropriate for Ulani and that New Mission High School could deliver all the services and accommodations outlined in the proposed IEP. (Wilson-Akubude)

18. Catherine Mason, a child development specialist, administered portions of the Kaufman Test of Educational Achievement and the Comprehensive Test of Phonological Awareness to Ulani as part of the Independent Educational Evaluation conducted by the Center for Children with Special Needs at Tufts Medical Center in September 2016 (S-12; P-3 (marked).) She found that Ulani's academic functioning ranged from a 2.4 grade level in Math Concepts to a 5.4 grade level in Math computation. Reading scores clustered at the 4th grade level. Ms. Mason found that Ulani's academic achievement results reflected her underlying "Language Disorder and other Learning disabilities" and that with intensive, specialized instruction Ulani had the potential to develop higher level academic skills. (S-12; p.35) At hearing Ms. Mason testified that, with appropriate instruction, Ulani had the potential to make a half year's academic progress in a year. (Mason)

As part of the IEE Ms. Mason conducted an observation of the substantially separate learning disability classroom New Mission High School proposed for Ulani. Ms. Mason visited New Mission twice: March 21, 2017 and April 3, 2017 for a total of approximately 4 hours. During the visits Ms. Mason observed about one hour of direct instruction in the classroom. She declined an offer to visit a third time.

In her observation report Ms. Mason summarized the IEE Team's recommendations:

- Placement in a highly structured, predictable, and small group setting with students with similar language, social, and academic needs.
- All classes should be language-intensive.
- The use of research validated instruction techniques and an understanding of learning differences was determined to be critical. She needs a setting where student needs are addressed quickly and comprehensively in a success-oriented, non-competitive, and individualized manner.
- The program should actively engage her in the learning process and assist her in generalized prior knowledge to new content and skills.
- She should work on reading, writing, and language skills across subjects while she learns basic subject content.

. Specific interventions for executive functioning, independent living, and social skills/pragmatics should be integrated throughout the curriculum and across the school day. There also should be opportunities for typical, age-appropriate extracurricular and social experiences.

(P-10)

Ms. Mason observed an English class in which the students were reading and listening to "Of Mice and Men" stopping frequently for teacher directed discussion. They also used the computer based reading/writing comprehension program Achieve 3000. There were visual supports throughout the classroom. She also observed the History class taught using Wilson Program techniques to support the content instruction. She concluded that the New Mission teaching staff had a solid understanding of each student's functioning and needs and high degree of commitment to them. She reported that the classroom environment was structured and supportive. Ms. Mason wrote that the proposed New Mission classroom was, however, insufficiently language reading and writing intensive for Ulani. She also found that instruction based on the 9th grade common core curriculum would be inaccessible to Ulani and therefore insufficiently individualized to hear learning needs. (P-10)

Ms. Mason did not discuss Ulani with any Boston teacher or administrator during the evaluation process. She has not observed Ulani in any setting outside of the testing environment (Mason)

19. The family visited the Learning Prep School in the Fall 2016 and applied for admission. Ulani participated in a trial placement and was offered a spot in the 9th grade on November 2, 2017. (P-6)

20. Cynthia Manning, the principal of the High School at the Learning Prep School described the program at the state approved private special education school. She testified that 134 students attend Learning Prep High School. Two are African American. About two thirds of the students carry a primary diagnosis of language learning disability; one third of the students carry a primary diagnosis of Asperger's disorder. The sudents have a variety of academic functioning levels ranging from 2nd grade to post-high school. The "typical" student is 3-4 years behind non-disabled age/grade peers. Students are homogenously grouped in class by similarity in academic skill level, social/emotional profile, level of independence, and expressive/receptive language functioning. The largest class has 8 students though most classes have 5-6 students. All 9th grade students participate in two English language Arts classes per day, along with 1 period each of math, science and social studies. Each class follows the same sequential organizational structure. Most high school cohorts do not need a systematic reading program. If one is needed the Orton-Gillingham program is used. Every student uses a google Chromebook. There are no opportunities for inclusion with typical age/grade peers. (Manning)

LEGAL STANDARDS

Once determined to be eligible for special education, a school age child with a disability is entitled to an educational program and related services that is tailored to her/his unique needs and potential and is designed to produce "meaningful educational benefit" and "demonstrable improvement" in the educational, behavioral and personal skills identified as special needs. 34 C.F.R. 300.300 (3) (iii); *North Reading School Committee v. BSEA*, 480 F. Supp. 2nd 489 (D. Mass. 2007), Citing *Lenn v. Portland School Committee*, 998 F.2nd 1083 (1st Cir. 1993). Whether an educational benefit is "meaningful" must be determined in the context of the individual student's "circumstances" and potential to learn. *Endrew F. v. Douglas County*, 137 S. Ct. 988 (2017); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3rd 18 (1st Cir. 2008). A student's goals should be appropriately ambitious…just as advancement from grade to grade is appropriately ambitious for most students in a typical classroom. *Endrew F.*, *supra* and be reasonably likely to measurably advance the student toward the goal of increased learning and independence. *D.B. v. Esposito*, 675 F.3d 26 (1st Cir. 2012)

IDEA eligible students are entitled to be educated in the "least restrictive environment", which offers the greatest amount of integration in and/or exposure to the mainstream of typical school life that is feasible while maintaining appropriate special education services. Students should be placed in segregated educational settings, such as private day schools, only when the nature or severity of the disability is such that the student cannot receive a free appropriate public education in a less restrictive setting. *School Committee of the Town of Burlington v. Dept. of Education of Mass*, 471 U.S. 359 (1985)

In a typical due process proceeding to determine whether a school district has offered or provided a free appropriate public education to an IDEA-eligible student the burden of proof is on the party seeking to change the *status quo*. *Schaffer v. Weast*, 546 U.S. 49 (2005) In this matter, while the school requested the Hearing, it is the Parent who is seeking a change in the *status quo* to a more restrictive placement for the student.

In a mixed matter, such as this one, the burden is allocated more evenly. Each party must prove by a preponderance of credible evidence that its position is supported by both the facts and the law. Thus Boston must demonstrate that the IEPs it developed for Ulani for the 2016-2017 school year were based on all the pertinent information the Team had access to at the time the IEP was developed and that the goals, services and placement set out in the IEP were reasonably calculated to provide a meaningful educational benefit to Ulani in light of her unique circumstances. Boston must also show that the IEPs it developed for Ulani provided her with the greatest exposure to the general education setting, activities, curriculum and peers that is possible while still delivering the necessary special education services. As the Parent is seeking a publicly funded, private, special education day school placement for Ulani she must prove: first, that the IEPs developed by Boston were not reasonably calculated to assure a free appropriate public education to Ulani; second that Ulani's special learning needs and characteristics are so unique and/or serious that they cannot be addressed in anything other than a fully segregated educational environment; and third that the private school chosen by the Parent can appropriately address the student's unique learning needs. *Florence County School*

District Four v. Carter, 510 U.S.7 (1993); *Burlington, supra; Matthew J. v. Mass. Department of Education*, 989 F. Supp 387 (D. Mass. 1998)

Should the Parents prove at hearing that a public school has failed in its duty to develop and/or implement an appropriate IEP for an eligible student the Parents may request that the Hearing Officer order an individually tailored remedy for the lapse. Here, the Parent is seeking two remedies: compensatory special education services for Boston's alleged failure to develop and implement an appropriate IEP for Ulani during the 2016-2017 school year; and a publicly funded placement in a private special education day school. An award of compensatory services is an equitable remedy. *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (lst Cir. 2006). The conduct of the Parents may be a relevant factor in determining whether an award of compensatory services is warranted. *C.G. ex rel B.S. Five Town Community School District*, 513 F.3d 279 (lst Cir. 2008) citing *Roland M.*, *supra.*

Compensatory services may be available to make a student whole if a school district commits procedural violations that result in a denial of FAPE to an eligible student. *Pihl v. Mass. Department of Education*, 9 F. 3d 184 (lst Cir. 1993). On the other hand, compensatory relief will not generally be awarded for merely technical, *de minimis* violations that do not result in a denial of FAPE or preclude parents from meaningful participation in the Team process. *Murphy v. Timerlane Regional School Dist*., 22 F.3d 1186, 1196 (1st Cir. 1994), quoting *Roland*, *supra*.

Prospective relief in the form of a publicly funded, private, special education day placement may be available to Parents who demonstrate at hearing both that the IEP and/or placement offered by the public school cannot meet the student's identified learning needs and provide a meaningful education benefit, and either cannot be reasonably modified to ensure its appropriateness or was the result of a significantly flawed development process that denied the student and/or Parents substantial procedural rights and resulted in educational harm. Furthermore the Parents must show that the alternate placement they propose for the student can appropriately address the student's special learning needs. *Florence County, supra.*

FINDINGS AND CONCLUSIONS

There is no dispute that Ulani is a student with special learning needs and is thus entitled to receive a free appropriate public education pursuant to M.G.L. c 71B and 20 U.S.C. 1401 *et seq*. Indeed the Parties agree on all pertinent facts concerning Ulani's learning challenges and strengths. (See ¶ 3, 10) They agree on the characteristics of an appropriate special education program . (See ¶ 10) They even agree that the constellation of direct special education and related services set out in the disputed IEPs meet the recommendations of all the experts who evaluated Ulani.

The sole disagreement lies in where those services should be delivered. After careful consideration of all the evidence presented at the hearing, and the arguments of the Parties' representatives, it is my determination that Boston has demonstrated by far more than a preponderance of the evidence that the IEPs it developed for Ulani in June 2016 and November

2016 were reasonably calculated to ensure a free appropriate public education in the least restrictive setting consistent with that goal. My reasoning follows:

It is important to note at the outset that the evaluations conducted by Boston and by Tufts yielded a consistent portrait of a student with significant neuropsychological challenges and associated symptoms of psychological stress who is achieving academic skills in a manner and a rate that is congruent with those challenges. Ms. Mason speculated that, with a year of intensive special education support, Ulani could be expected to make a half year's academic progress. Her evaluation report, conducted after completion of the 8th grade, noted that Ulani was functioning overall at approximately 4th grade level. Ulani's 8th grade teachers reported that she made steady progress in the acquisition of academic skills in all areas. There is no contrary information in the record. Therefore I find that Ulani had been making appropriate progress in light of her circumstances and potential in a substantially separate special education classroom within a Boston public school up until she was held out of school by her Parent in June 2016.

Turning to the issues presented for Decision here:

I. June 2016 IEP

When the Team met in 2016 it determined, based on Ulani's previous evaluations, teacher reports and class performance that a substantially separate special education program similar to the one in which she demonstrated success during her 2015-2016 8th grade year, would continue to be appropriate for her in a high school setting. Boston therefore proposed an IEP for the 2016-2017 school year that built upon the 2015-2016 IEP, retaining the specialized academic instruction methods, times and setting while increasing services in both speech-language and reading. (compare S-2 and S-3) No Team member objected to the type, level or frequency of special education service outlined in the June 2016 IEP. The Team chose placement at Excel High School. While the Parent objected to that placement she offered no substantive educational support for her objection. No evaluation or expert witness testimony contradicted the Team's decision that Excel High School would be an appropriate high school placement for Ulani. Ms. Jacquard's testimony was thorough, credible and convincing. (¶ 5) It established that the IEP developed by the Lyndon School Team could be appropriately implemented in the 9th Grade substantially separate learning disabilities classroom located at Excel High School. There is no evidence to the contrary in the record. Given that the uncontested record shows that Ulani made progress commensurate with her potential in a substantially similar elementary program there is no logical reason to suppose she would not continue to achieve similar results in the equivalent high school program. Therefore I find that the 2016-2017 IEP developed by Boston in June 2015 offered Ulani a special education placement and services consistent with her learning needs and the contemporaneous recommendations of all professionals who worked directly with her or supervised her educational journey.

II. November 2016 IEP

When the Team met in November 2016 to consider the results of the Independent Educational Evaluation conducted by Tufts there was no disagreement about the type, level,

intensity or frequency of direct special education services Ulani required in order to derive a meaningful educational benefit from school. (Ms. U.; Losche; Alves-Thomas; S-7, P-4) No one at the Team, and nothing in the Tufts evaluation report, recommended changing any service listed on the service delivery grid of the June 2016 IEP. (Cf. P-5 and S-3; Ms. U., Alves-Thomas; S-12, P-3) The Parent insisted that the uncontested services could not be delivered in a Boston High School. Though there was no evidence before the Team to support the Parent's assertion, in light of the Parent's continued refusal to permit Ulani to attend school, the Team decided that a change of placement from Excel High School to New Mission High School would be appropriate. (¶ 11) I find that the Team's attempt to address the Parent's concerns by changing the location of service delivery from Excel High School to New Mission High School was a generous and flexible response to Ulani's difficult situation.

I further find that clear preponderance of the credible evidence supports the Team's November 2016 placement decision. The substantially separate learning disabilities program described by Dr. Wilson-Akubude contains all the elements of an appropriate special education program for Ulani as determined by the two different Teams, June and November 2016, and the independent evaluators:

- a small, highly structured, language intensive, comprehensive classroom program in a supportive community;
- appropriately trained and certified teachers and staff delivering individualized instruction;
- focus on development executive skills, programmatic skills, and metacognitive strategies;
- opportunities for integration with age-appropriate typical peers.

(¶ 17, 10) There is no credible evidence to the contrary. The Parent argued that Ms. Mason's March 2017 observations of the New Mission High School program established that it would not be appropriate for Ulani. I disagree. The reports authored by Ms. Mason describe a special education program at New Mission High School that consistently offers the services and staff recommended by the Tufts evaluation team and outlined in both the November and June 2016 proposed IEPs. Her conclusion, at the end of a generally positive program description, that New Mission High School could not meet Ulani's learning needs appears startlingly unsupported by her observations. (P-10) Ms. Mason's testimony at hearing was even less persuasive. She had difficulty remembering details about her visits to New Mission High School, displayed unwarranted hostility to questions posed by Boston and the Hearing Officer and offered positive comments about the private school sought by the Parent though she had not observed program there in several years. Therefore I accord the opinion of Ms. Mason about the New Mission High School learning disabilities program minimal weight.

As the Parent offered no evidence other than Ms. Mason's testimony to support her contention that the New Mission High School special education program is not appropriate for Ulani and that she requires placement in a private special education day school, I find that the

Parent did not carry her burden of showing by a preponderance of the evidence either that Ulani's learning needs are of a type or severity that cannot be appropriately addressed in a public school program or that Boston has failed to develop or offer an IEP and placement that is reasonably calculated to ensure the delivery of a free appropriate public education to Ulani.

On the other hand, I found the Boston witnesses, Dr. Wilson-Akubude, Ms. Jacquard, Ms. Neilson, Ms. Medeiros-Crabbe, Mr. Losche and Ms. Alves-Thomas, to be thoughtful, candid, knowledgeable and sympathetic to Ulani. Each testified within his/her sphere of expertise and experience and each fully explained the basis and reasoning behind the recommendations made (¶ 2, 5, 8, 11, 17.) I credit their testimony in full. Therefore, I find that Boston has demonstrated by the clear and substantial preponderance of evidence that the IEP and placement it offered as a result of the November 3, 2016 Team meeting is carefully tailored to address Ulani's individual learning needs, to provide all recommended special education services in the least restrictive educational environment consistent with that goal, and to continue to ensure that Ulani derives a meaningful educational benefit in light of her unique circumstances and potential.

III. Compensatory Services

As I have determined that both the June 2016 and November 2016 IEPs developed by Boston offered Ulani a free appropriate public education throughout the 2016-2017 school year the Parent is not entitled to the compensatory services she requested. I note that by removing Ulani from school in June 2016 the Parent did not permit her to benefit from the extended year services, or other special education supports available to her, pursuant to the last agreed upon IEP. The fact that Boston arranged for individual out-of-school tutoring for Ulani throughout the 2016-2017 school year, though it was not required to do so, further tips the equities of this matter in Boston's favor. To the extent that Ulani has experienced any educational harm as a result of her extended absence from an appropriate special education program, the fault does not lie with the Boston Public Schools.

IV. Placement at Learning Prep School

Having determined that Boston's IEPs calling for Ulani's placement in 2 substantially separate learning disabilities programs within a Boston Public High School were, and are, appropriate for Ulani. I do not reach the Parent's request for a publicly funded placement at the Learning Prep School.

CONCLUSION

The June 2016-2017 IEP calling for Ulani's placement in a substantially separate learning disabilities program at Excel High School was reasonably calculated to provide a free appropriate public education to her.

The November 2016- June 2017 IEP calling for Ulani's placement in a substantially separate learning disabilities program at New Mission High School is reasonably calculated to provide a free appropriate public education to her.

By the Hearing Officer

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Lindsay Byrne
Dated: June 16, 2017