

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

DECISION

STUDENT v. HAMILTON-WENHAM REGIONAL SCHOOL DISTRICT

BSEA #2104633

BEFORE

HEARING OFFICER

ALINA KANTOR NIR

MARY ELLEN SOWYRDA, ATTORNEY FOR THE SCHOOL

MELISSA S. DRAGON, ATTORNEY FOR THE PARENTS

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

In Re: Student and Hamilton-Wenham Regional School District BSEA # 2104633

DECISION

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

A hearing was held via a virtual platform on May 27, June 4, June 14, and July 12, 2021 before Hearing Officer Alina Kantor Nir. Both parties were represented by counsel. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother	
Father	
Melissa Dragon	Attorney for Parents
Karen Bengner	Attorney for Parents
Peter Chubinsky	Child and Adult Psychiatrist
Ruthanne Paulson	Private Tutor
Mary Ellen Sowyrda	Attorney for the Hamilton-Wenham Regional School District (Hamilton-Wenham)
Laura Meade	Educational Director, Pathways Academy
Laura Rice	Director, Dearborn Academy STEP Program
Stacy Bucyk	Director of Student Services, Hamilton-Wenham
Marguerite Mitchell	Hearing Officer, BSEA (observer)
Carol H. Kuzinitz	Court Reporter

The official record of the hearing consists of documents submitted by the Hamilton-Wenham Regional School District (“Hamilton-Wenham” or the “District”) and marked as Exhibits S-1 to S-19; documents submitted by the Parents and marked as Exhibits P-1 to P-71; approximately four days of oral testimony and argument; and a four-volume transcript produced by a court reporter. A transcript of the proceedings was sent to the Parties, and pursuant to a joint extension request by the Parties which was allowed by the Hearing Officer, the record remained open until July 29, 2021 for submission of written closing arguments.

RELEVANT PROCEDURAL HISTORY:

The current decision is being issued following two previous decisions relative to the same parties. On January 5, 2018, Hearing Officer Rosa Figueroa issued a decision involving these

parties in the matters of BSEA #17-07353 and #18-04291¹ (2018 BSEA Decision) in which Hamilton-Wenham prevailed. On December 4, 2020, Hamilton-Wenham filed a Hearing Request (BSEA# 2104095) seeking substitute consent to authorize the District to proceed with a three-year re-evaluation for Student. The matter was originally assigned to Hearing Officer Amy Reichbach. On December 18, 2020, the Parents filed this Hearing Request (BSEA #2104633) alleging denial of a free and appropriate public education to Student and seeking, in part, reimbursement for tuition for their unilateral placement of the Student during the 2019-2020 and 2020-2021 school years. The matters were consolidated on December 29, 2020 and subsequently reassigned to Hearing Officer Alina Kantor Nir on January 19, 2021. Following multiple postponements, which were granted for good cause, the matters were bifurcated via an Order issued on February 25, 2021.

On June 22, 2021, I issued a decision in the matter of BSEA #2104095 granting substitute consent to Hamilton-Wenham to conduct a three-year evaluation to include a psychological assessment, a speech and language assessment, academic achievement testing and an educational assessment.

In the instant Decision, I am bound by the doctrines of res judicata and collateral estoppel.² I therefore have considered both decisions only for purposes of providing relevant background information and guidance herein, and make factual findings based thereon where relevant and appropriate.

ISSUES IN DISPUTE:

- A. Whether the IEP and placement proposed for the period from 6/11/2019 to 6/10/2020 (Ninth Grade IEP) was reasonably calculated to provide Student with a FAPE in the LRE;
 - a. If I find that the answer to the above-referenced question is no, then whether:
 - i. Chapel Hill Chauncy Hall (CHCH) was an appropriate placement for him, thus entitling Parents to reimbursement for the 2019-2020 school year; and/or
 - ii. Parents are entitled to compensatory services in the form of reimbursement for medical and/or educational services privately provided by Parents to Student; and/or
 - iii. Parents are entitled to a different remedy.
- B. Whether the IEP and placement proposed for the period from 11/18/2020 to 11/17/2021 (Tenth Grade IEP) is reasonably calculated to provide Student with a FAPE in the LRE;

¹ The matters were consolidated by Hearing Officer Rosa Figueroa and a single decision was issued.

² See *Gonzalez-Pina v. Rodriguez*, 407 F.3d425, 429 (1st Cir. 2005); *Breneman v. U.S. ex rel. F.A.A.*, 381 F.3d 33, 38 (1st Cir. 2004); *Kobrin v. Board of Registration in Medicine*, 444 Mass. 837 (2005); *In Re: Taunton Public Schools*, BSEA # 1601127, 21 MSER 244 (Reichbach, 2015); *In Re: Montachusett Regional Vocational Technical School*, BSEA # 1907993, 25 MSER 57 (Figueroa, 2019); *Carlette v. Charlette Bros. Foundry, Inc.* 793 N.E. 2d 1268 (Mass.App.Ct. 2003); *In Re Neville & Sutton Public Schools*, 13 MSER 352 (2007).

- a. If I find that the answer to the above-referenced question is no, then whether:
 - i. Austin Preparatory School (Austin Prep) is an appropriate placement for him, thus entitling Parents to reimbursement for the 2020-2021 school year; and/or
 - ii. Parents are entitled to compensatory services in the form of reimbursement for medical and/or educational services privately provided by Parents to Student; and/or
 - iii. Parents are entitled to a different remedy.

FACTUAL FINDINGS:

Background:

1. Student is a tenth grade, 16-year-old who was unilaterally placed at Austin Prep in Reading, Massachusetts³ by Parents for the 2020-2021 school year. (Mother) Student resides with Mother in South Hamilton, Massachusetts. (S-5) Student has a strong relationship with Parents, who adopted him from Russia at a young age. He is funny, articulate, and hard-working. Student loves learning and is especially interested in science, technology and current events. (P-14B; P-15B; P-18B; P-18C; P-45; P-53; P-57; Mother; Chubinsky; Meade; Paulson; Rice)
2. Student is eligible for special education services under the Communication (Expressive Language Disorder) and Health (mild ADHD, Post-Traumatic Stress Disorder secondary to bullying) disability categories. (S-5; S-8; P-8A; S-9; Chubinsky)
3. Student last attended in-district programming at Cutler Elementary School in South Hamilton, Massachusetts in the fourth grade, pursuant to a fully accepted IEP for the period from 11/18/2014 to 11/17/2015. (P-8; P-9; Mother) This IEP was later rejected by Parents during its term when Student's Team determined that Student was struggling socially and proposed supporting services. (P-11)
4. At some time during Student's fourth grade, Parents removed Student from Cutler Elementary School due to ongoing concerns relating to Hamilton-Wenham's response to bullying issues raised by Parents. (P-16; P-16A; P-16-E; Mother) The alleged bullying and the District's response thereto had a profound impact on Student, and during this time, Student developed anxiety, sleep disruptions, and obsessive-compulsive symptoms. (P-18A; P-18D; Mother; Chubinsky) Said symptoms were later the basis for Student's diagnosis of Post-Traumatic Stress Disorder (PTSD) secondary to bullying.⁴ (Chubinsky)
5. Throughout Student's academic career, Parents engaged in numerous attempts to place and maintain Student in a school setting. (P-7E; P-7F; P-26; P-28; P-33; P-34; P-37; P-43; P-44; P-55; P-61) For fourth, fifth, sixth, seventh and part of eight grades, Student was, at times, home-schooled. At other times, he briefly attended unilateral placements in general education private schools. Parents removed Student from some unilateral placements due to concerns regarding bullying and/or mistreatment by administration,

³ I take notice of Austin Prep's location as indicated on its website, which may be found at <https://www.austinprep.org>.

⁴ Dr. Chubinsky explained that PTSD is "any kind of extreme trauma to a child" that "overwhelms the child's defenses." (Chubinsky)

and Student was asked to leave by several placements due to the programs' inability to support Student. (P-1; P-7A; P-7B; P-7C; P-7D; P-15; P-15A p.1-3; P-23; P-33; P-37; P-43; P-44; P-48; P-49; P-69; Mother)

6. Hamilton-Wenham has engaged in an aggressive referral process on behalf of Student. (P-7G; P-17A; P-27; P-30; P-31; P-32; P-37; P-47; P-50; P-55; P-63; P-64)
7. Mother testified that Student's placements have failed because Student was not properly supported in any of the placements. (Mother)
8. To date, Parents have not shared with Hamilton-Wenham any records or information from Student's unilateral placements.⁵ (Bucyk)

History of Evaluations:

2009-2010 - Independent Neuropsychological Evaluations:

9. Janice Schwartz, Ed.D., conducted independent neuropsychological evaluations of Student in June 2009 and December 2010, respectively. (P-9; P-10) In 2009, Dr. Schwartz diagnosed Student with a Communication Disorder. By 2010, Student had made progress in his speech and language, but Dr. Schwartz continued to endorse a Communication Disorder due to "problems with syntax and pragmatic (social) language" which "impact[ed] his social interactions with peers and adults and hinder[ed] him in behaving in a more mature manner." (P-10)

2013- Re-Evaluation:

10. In 2013, Student was assessed by Hamilton-Wenham as part of his three-year re-evaluation. At that time, Student's reading skills were in the average range, but his written expression scores fell in the low end of average. His comprehension and average decoding skills were impacted by Student's failure to monitor accuracy. In addition, he struggled with math computation and math facts. (S-11) No concerns were noted in the areas of occupational therapy and physical therapy. (S-13) Student's receptive and expressive language skills were delayed and were further impacted by inattention. (S-14)
11. As a result of the re-evaluation, Student was found eligible for special education pursuant to the Communication and Health Disability categories. At that time, he had a group of friends and enjoyed school. (P-8A)

2014/2015 - District Funded Neuropsychological Evaluation:

12. On or about December 2, 2014, Hamilton-Wenham proposed a Psychological Evaluation to assess Student's social emotional functioning and to determine whether Student required additional supports or services. (P-9; P-10) Subsequently, Hamilton-Wenham utilized Dr. Janice Schwartz, Parents' independent evaluator, to conduct a neuropsychological evaluation of Student. (P-9; P-10) Results demonstrated average cognitive ability, but communication skills continued to impact Student's social abilities.

⁵ The only exception is that Parents shared Student's first semester report card from CHCH with the Superintendent of Schools for Hamilton-Wenham when they met with her at the end of 2019. (Mother)

Student continued to experience difficulty in social situations and with executive function.⁶ (P-10)

2016⁷ – District Funded Neuropsychological Evaluation:

13. In August 2016, following a referral from Hamilton-Wenham, Nancy Roosa, PsyD, an independent evaluator from Neuropsychology and Education Services for Children and Adolescents (NESCA), completed a neuropsychological evaluation of Student. At that time, Student was not in school. Assessment results demonstrated overall average cognitive functioning. Notable was Student's average score on the Verbal Comprehension Index, especially in the context of his diagnosis of a Communication Disorder. Student's math skills ranged from low average to below average. Writing and spelling skills were in the low average range, but reading skills were in the average range. Student demonstrated difficulty with executive functioning and behavioral regulation. High levels of anxiety impacted his pragmatic judgment skills. He also demonstrated difficulty in verbally discussing and resolving social conflicts. Dr. Roosa made the following diagnoses: Generalized Anxiety Disorder, ADHD-Combined Type, and Social Pragmatics Communication Disorder. Dr. Roosa recommended a safe learning community with no tolerance for bullying, where Student could develop his expressive language. Other recommendations included access to a school-based counselor, opportunities for facilitated peer interactions, focused instruction in verbal pragmatics, academic support in math and written expression, and supports for difficulties with language processing and executive function skills. (S-10)
14. Parents and their private providers disagreed with Dr. Roosa's diagnosis of Social Pragmatics Communication Disorder. (P-6; P-7F; S-8; S-9; P-16; P-55; Mother; Chubinsky; Paulson) Parents and Dr. Chubinsky believed that the diagnosis suggested that Student had a "light" version of autism spectrum disorder which they disputed. (Chubinsky; Mother) Dr. Chubinsky opined that Student's impacted scores in subtests assessing interpersonal relationship were the result of recent bullying. (Chubinsky)

2017– Independent Psychiatric Evaluation:

15. In January 2017, Parents referred Student to Dr. Peter Chubinsky, M.D., who conducted a psychiatric evaluation⁸ of Student. (P-16) At that time, Student was being home-schooled. Dr. Chubinsky is Board Certified in child and adolescent psychiatry, with a private psychiatric practice in Brookline, Massachusetts. (S-21; Chubinsky) Dr. Chubinsky is also a clinical associate in psychiatry at Cambridge Hospital and is a member of several professional societies. He has over 40 years of experience. (S-21)

⁶ Other than to state that Student learned "best in a multimodal manner," Dr. Schwartz made no programming recommendations in her report. Instead, she recommended that "these findings" be "combine[d]... with teacher reports from [Student's] classes to ascertain how his ADHD and current feelings of insecurity at school impact[ed] both his classroom academic performance as well as social functioning." (P-10)

⁷ Also in 2016, Student was assessed by Speech Therapy Group following a referral from Dr. Schwartz. Student was then in fifth grade and was being homeschooled. Findings included a moderate language disorder, primarily receptive with mild difficulty in expressive language, secondary to an executive function disorder and a mild articulation disorder. (P-20) It is unclear whether the report was shared with Hamilton-Wenham.

⁸ It is unclear what testing instruments were utilized during this evaluation.

16. Dr. Chubinsky has never administered any formal assessment using testing instruments to Student. (Chubinsky)
17. Dr. Chubinsky diagnosed Student with a Communication Disorder, ADHD and PTSD secondary to bullying. (P-16; Chubinsky) According to Dr. Chubinsky, Student's PTSD was the result not only of bullying but also of a "system" that failed to reassure him of his safety. Student's ADHD, executive function difficulties and "longstanding language disorder" interfered with his access to instruction. Dr. Chubinsky recommended speech and language services and a program with small classes, a "strong anti-bullying atmosphere," and communication supports. Psychiatric services and counseling were recommended "outside of school in part due to [Student's prior] negative experience." Dr. Chubinsky observed that Landmark School was appropriate for Student. (P-16; P-7F)

2017- Independent Speech and Language Assessments:

18. In 2017 Student underwent additional independent speech and language assessments. At the time of the assessments, Student was being homeschooled and was not receiving any special education services.
19. A May 2017 assessment by Beverly Montgomery, M.S., CCC-SLP, confirmed "strong social knowledge" and mostly intact social communication skills, but found persisting difficulties in highly nuanced, advanced interactions; specifically, Student was vulnerable in social interactions with peers because of the continually changing, rapid pace of input and output and the level of integration required at his age. Student was also vulnerable to a "flight response" when presented with situations or tasks that were anxiety provoking.⁹ A small, nurturing, and structured program with no tolerance for bullying and a challenging curriculum delivered in a manner that is responsive to vulnerabilities in attention, working memory, executive function and language was recommended. In addition, Student was found to require structured social opportunities and direct instruction in "learning to learn" strategies. (S-8) A Communication Goal and intervention for expressive language deficits were indicated. (P-15D)
20. A subsequent June 2017 assessment by Meghann Ridley, M.S., CCC-SLP, did not endorse a Social Communication Pragmatic Disorder but rather an Expressive Language Disorder which impacted Student's ability to keep up with rapid interactions. Student's social pragmatic skills were vulnerable when Student's emotions were heightened. A structured program designed to meet the needs of students with language disorders and average intellectual functioning, a small class size, direct instruction and reinforcement of language skills across Student's day, direct speech and language services, and a weekly social skills group were recommended. (S-9)

2018 - BSEA Decision Relative to the IEP for the Period 10/19/2017-10/18/2018

21. The 2018 BSEA Decision found Student to present with an expressive language disorder, ADHD, PTSD, mild executive function and social communication deficits, and anxiety

⁹ Similarly, on or about the same time, Cathy Goldstein Mullin, LICSW, who worked with Student for approximately eighteen months, observed in a letter she wrote on behalf of Parents that Student's "defense takes the form of silliness, obstinacy, or flight." (P-53)

secondary to PTSD. Hearing Officer Figueroa found that Student, who was “vulnerable in social situations,” required a small group program with supports and services delineated in the 10/2017-10/2018 IEP. While the Decision rejected a private general education school placement for Student, it did not preclude an agreement between the Parties to place Student at a private special education school as long as said placement was readily available to Student, and ordered the TEAM to reconvene within 8 weeks following Student’s placement.

22. The 2018 BSEA Decision did not, as Parents assert, “set aside” the disputed diagnosis.¹⁰ Hearing Officer Figueroa made a finding of fact as to the Parties’ “understanding” of what would be included in the referral packets at that time, but she did not order Hamilton-Wenham to exclude the 2016 Neuropsychological Report from future referrals
23. Stacy Bucyk is the Director of Student Services for Hamilton-Wenham.¹¹ Ms. Bucyk understood the 2018 Decision to require a public or private special education placement for Student. Following the 2018 Decision, Hamilton-Wenham sent referral packets to multiple schools, including Landmark School (Landmark). Student was declined admission to Landmark. (P-27; P-31; P-47; P-65; P-67; Mother; Bucyk)
24. Mother testified that Landmark denied admission to Student because Dr. Roosa’s report was part of the referral packet. (Mother)
25. According to Ms. Bucyk, Landmark declined admission to Student because Student has not been diagnosed with dyslexia, and previous testing did not support phonological deficits or decoding and/or encoding difficulties. (S-9; P-9; P-10; S-10; S-11; P-19; Bucyk)
26. While the 2018 Decision was pending, Parents continued to pursue school options on their own, such as school choice and private general education programs.
27. Although Hamilton-Wenham made several referrals, no program was identified as appropriate.¹² (Bucyk)
28. On or about the beginning of January 2018, Student was unilaterally placed by Parents at Hillside School¹³ (Hillside) in Marlborough, Massachusetts, but Student was asked to leave after eight days because staff were unable to support him.¹⁴ (P-33; Mother; Chubinsky) Subsequently, Student was out of school for an extended period of time due to the “trauma from being rejected” from Hillside as well as from a bout of influenza. (Mother; P-25; P-33)
29. In February 2018, Ms. Bucyk filed a report with the Department for Children and Families (DCF) pursuant to M.G.L. c. 119 §51A (51A Report) to obtain agency support to find Student a school placement. (P-29; Bucyk)

¹⁰ The Decision indicated that Hamilton-Wenham was “willing to set aside the social pragmatic communication disorder diagnosis given by Dr. Roosa in 2016.” (emphasis added)

¹¹ Ms. Bucyk has been in her current role for four years. Previously, she worked as an Administrator of Special Education and Pupil Personnel, a principal, a team chairperson, and a literacy specialist. Ms. Bucyk holds multiple licenses through the Department of Elementary and Secondary Education (DESE). She has participated in numerous Team meetings with Parents but has only met Student briefly on two occasions. (Bucyk)

¹² Parents did not provide consent for referral to some of the programs proposed by Hamilton-Wenham. (Bucyk)

¹³ Hillside School is a general education private school. (Bucyk)

¹⁴ Dr. Chubinsky opined that Student was triggered at Hillside when the school attempted to administer a math placement test. Dr. Chubinsky was frustrated with Hillside as their social worker was aware that Student had been out of school for almost two years, and that “it might [have] take[en] [Student] a while to settle in.” (P-23; Chubinsky)

2018-2019 - Eighth Grade:

September 2018-December 2018:

30. During periods when Student was not enrolled in school, he worked with Ruthanne Paulson, a private tutor. Ms. Paulson tutored Student beginning in the fall of 2017 until the fall of 2019. Ms. Paulson holds a Department of Elementary and Secondary Education license as an elementary school teacher. She worked at Landmark School from 1985 to 1987 as a language arts teacher and believes that Landmark would be an appropriate placement for Student. (Paulson) According to Ms. Paulson, during the time period when she worked with Student, he was performing at grade level in most areas, including reading. (P-15; P-15B; P-70; Paulson) Ms. Paulson opined that Student does not have autism but rather dyslexia.¹⁵ She recommended a small class size, accommodations for testing, help with executive functioning and organization of written work, a “compassionate buddy,” a “peer group to assist with integrating back into classroom/peers,” a mentor for check-ins, decoding and encoding supports, a “counseling component,” and social pragmatic instruction. (P-15; P-15B; Paulson) Ms. Paulson neither administered any assessments to Student nor did she observe him at any school setting.¹⁶ She indicated that updated testing would be helpful in programming for Student as it would “give more definitive answers to his needs.” (Paulson)
31. Parents persisted in their attempts to place Student, and in September 2018, he started at Masconomet Regional High School and Middle School (MASCO) in Boxboro, Massachusetts pursuant to his 10/2017-10/2018 IEP. (P-37; P-39; Mother; Bucyk) Two weeks later, Student was asked to leave MASCO after two short-term suspensions were imposed for leaving the premises and destruction of property, respectively.¹⁷ (P-7C; P-7D; P-7H; Mother; Bucyk) According to MASCO, the program did not have an appropriate cohort for Student. In addition, MASCO felt that Student required a higher level of therapeutic supports than MASCO could offer. (Bucyk)
32. Student was “traumatized” by the experience at MASCO and suffered a “breakdown.” (Mother; Paulson)
33. A Team meeting took place at MASCO in October 2018, but no IEP was developed at that time because the Team believed that additional information was required.. Hamilton-Wenham proposed an extended evaluation. Parents, however, felt that there was sufficient information from Ms. Paulson. (Mother; Bucyk; Paulson)

¹⁵ Ms. Paulson testified that Student skipped words when reading. (Paulson)

¹⁶ Ms. Paulson testified that she has no current knowledge of Student’s current special education needs and that her current recommendations, including placement at Landmark, rely on information about Student’s functioning and abilities as she observed them between fall 2017 and fall 2019. (Paulson)

¹⁷ At Hearing, there was a dispute as to Student’s termination date from MASCO; Ms. Bucyk testified that it was October 13, 2018, but Mother testified it was October 1, 2018. Regardless, Student stopped attending prior to the date of termination. (Bucyk)

34. Following another 51A Report filed by Hamilton-Wenham, DCF began Care and Protection proceedings (C&P) against Parents.¹⁸ (P-7E, Case Dictation Information); P-29; P-38; P-41; P-42; P-46; Mother; Bucyk)
35. With pressure from the Juvenile Court, Parents agreed to have Student participate in an extended evaluation. (P-46; Mother; Bucyk) Hamilton-Wenham referred Student to the Dearborn Academy STEP Program (Dearborn) and to Pathways Academy. Dearborn accepted Student in December 2018. (Bucyk)
36. Student and Parents blamed Hamilton-Wenham for the filing of the C&P and for “destroying his education” by continuing to rely on Dr. Roosa’s report. (P-55; Mother)

December 2018 – February 2019: Extended Evaluation:

37. Beginning on December 10, 2018 through February 27, 2019, Student participated in an extended evaluation at Dearborn, a therapeutic assessment program in Arlington, Massachusetts.¹⁹ (P-19; Rice; Bucyk)
38. Laura Rice, LICSW, is the Director of Dearborn and has been in that position for 10 years. (Rice) Ms. Rice first became acquainted with Mother when she toured the program. Mother reported to Ms. Rice that there was lack of clarity regarding Student’s needs and that he had been labeled as a “problem.” (P-62; Rice)
39. Dearborn is a therapeutic milieu where staff and students engage in relational work; it is not a behavioral program which means staff “stay away from the word no” and instead engage in conversations regarding available options. At Dearborn, social pragmatics supports are embedded throughout the day. Dearborn classrooms are staffed by a special education teacher, a specialist who possesses a bachelor’s degree, and a social worker. Dr. Xenia Johnson, a psychiatrist, consults to the program.²⁰ (Rice)
40. Ms. Rice meets with staff every day to discuss the students in the program. In addition, there are weekly staff meetings and case conferences regarding each student as (s)he proceeds through the program. (Rice)
41. Ms. Rice testified that she got to know Student well during his tenure at Dearborn. (Rice) Ms. Rice often worked with Student when he struggled or needed to talk. (Rice)
42. According to Ms. Rice, as Student’s assessment at Dearborn progressed, it became clear that he needed a program that could meet his therapeutic needs. (Rice) Student’s social and academic presentation at Dearborn was characterized by inconsistency and unpredictability, and Student struggled significantly. (P-19; Mother; Chubinsky; Rice) He demonstrated social/emotional challenges when relating to others and inconsistent relationship-building skills. (Rice) Specifically, he struggled to appropriately incorporate himself into peer interactions and was often off-putting and overwhelming to others. He often missed social cues and misperceived conversations. He was resistant to processing events, self-reflection, perspective taking, and monitoring and regulating his own

¹⁸ The C&P was filed on the same day as Mother went to visit the Dearborn STEP program. (P-46; P-62) For the duration of the C&P, both Parents and Student were represented by counsel, respectively. Student was also assigned a *Guardian Ad Litem*. (Mother; Bucyk)

¹⁹ This program is not licensed by the Department of Elementary and Secondary Education (DESE) as a placement because students attend it for assessment purposes only. This is typical of assessment centers in Massachusetts. (Rice)

²⁰ Ms. Rice testified that when a student is placed at Dearborn for assessment, parents sign a Dearborn-generated consent to the psychiatrist’s consultation services. (Rice)

behaviors especially when he was emotionally dysregulated. Student left the program twice. He also required extensive academic and executive function support (such as breaking down assignments and initiating and engaging in each step thereof), which he often declined. (P-19; Rice)

43. According to Ms. Rice, without social pragmatic supports, Student would be “misunderstood” as his intentions are not always apparent in his presentation. Even with interventions and supports, Student struggled to build and maintain relationships. Without executive function and academic supports, his anxiety would increase. (Rice; P-19)
44. Student did not want to be at Dearborn. (Rice; Mother) During Student’s time at Dearborn, he was “overwhelmed” and stressed by the C&P, thinking that if he “did not cooperate and complete this process, as expected, he would be removed from the home.” At some point, Student “tried to ingest pills” at home due to concerns about being removed. (P-15A p.1; P-59; Mother; Chubinsky) Student had no prior or subsequent attempts of self-harm.
45. According to Dr. Chubinsky, Dearborn retraumatized Student and retriggered his PTSD. As such, the behaviors witnessed by Dearborn staff were in fact manifestations of Student’s PTSD. (P-1; P-6; Mother; Chubinsky)
46. Ms. Rice testified that students arrive at Dearborn as “high-risk”; they do not become high risk because of the program. (Rice)
47. Dearborn did not conduct any formal testing of Student’s cognitive functioning, executive function or speech and language skills. The clinical portion of the assessment involved observations of Student. The consulting psychiatrist consulted with staff and observed Student in the classroom setting to get a “complete picture” of him. The only standardized testing tool utilized by Dearborn during Student’s period of attendance there, was the Kaufman Test of Educational Achievement-3rd Edition (KTEA-3)²¹ on which Student demonstrated mostly average reading skills and some average math skills, although a math composite score could not be derived as Student refused to complete the test. Dearborn’s testing did not endorse a dyslexia diagnosis. (P-19; Rice)
48. As a result of the extended evaluation, the following diagnoses were made: Generalized Anxiety Disorder, Persistent Depressive Disorder, and Expressive Language Disorder. (P-19)
49. Dearborn made several recommendations, primary of which was a therapeutic school and classroom setting with a high staff to student ratio, as well as executive function and social pragmatics supports. (P-19; Rice) The extended evaluation report concluded that:
Student’s lack of skills to effectively manage his emotions and address the source of his distress, often leave him feeling disempowered and vulnerable.... It is imperative that Student be provided with opportunities to experience consistent, predictable empathetically attuned containment in order to become more integrated with his internal experience. Student will require continued consistent therapeutic supports in both academic and social settings in order to make substantial progress towards gaining independent, internal skills to help him manage difficult feelings. (P-19)

²¹ According to the Dearborn Report, the KTEA was administered to Student in September 2018. This appears to be an error since Student participated in the extended evaluation beginning in December 2018. (P-19)

50. The Dearborn report did not reference Student's experience with bullying nor Student's diagnosis of PTSD secondary to bullying. (P-19; Mother; Chubinsky) According to Dr. Chubinsky, Dearborn failed to identify any of Student's PTSD triggers. (Chubinsky)
51. Ms. Rice testified that the Dearborn report is a snapshot and that, in developing their report, Dearborn staff reviewed all past evaluative reports and information but identified only those diagnoses which were observed at Dearborn. (Rice)
52. Dr. Chubinsky disputed Dearborn's diagnoses for Student, especially that of Generalized Anxiety Disorder. He opined that Student's presentation might have appeared consistent with anxiety or depression but only because Student's primary disability of PTSD was not considered when making these additional diagnoses. (Chubinsky)
53. According to Dr. Chubinsky, because the extended evaluation report did not acknowledge Student's primary diagnosis of PTSD, its recommendations were inappropriate for Student.²² These recommendations were appropriate for a student with autism, not PTSD. Dr. Chubinsky believed that Student did not require a "structured" therapeutic setting, in-school counseling, life skills/social pragmatics coaching, or social pragmatics groups. He testified that such services would make Student feel stigmatized especially as he would be grouped with students who "have a lot more problems" and who are "lower" functioning. (Chubinsky)
54. Dr. Chubinsky acknowledged that Student has some academic weaknesses but deemed them to be "not extreme." He testified that although socially Student "has some issues," when Student is not anxious, "he comes across a pretty normal kid his age." (Chubinsky) Dr. Chubinsky opined that "most of the time"²³ Student has age-appropriate peer interactions, although "maybe" he seems "a little younger" because of his limited social experience with similarly aged peers. (Chubinsky)
55. On or about February 2019, the Team convened at Dearborn to review the extended evaluation report.²⁴ Also present at the meeting was Student's *Guardian Ad Litem*, Ann Crowley, who was assigned to Student pursuant to the C&P. (Bucyk; Mother)
56. Following the Team meeting in February 2019, Hamilton-Wenham made several referrals to therapeutic programs, and Student was accepted at Pathways Academy.²⁵ Although the IEP included with the referrals was the 10/2017-10/2018 IEP, the referral letter indicated that Student required a therapeutic placement to support his social/emotional skill deficits.²⁶ (P-7G; P-30; P-32; P-64; Bucyk) Although Dr. Roosa's Neuropsychological Report was included in the referral packets, Dr. Chubinsky's letters identifying Student's PTSD were not. (P-64; Mother)

March 2019-June 2019: Pathways Academy:

²² Dr. Chubinsky testified that it was "ridiculous to speak about recommendations without the right diagnosis." (Chubinsky)

²³ Dr. Chubinsky has not observed Student in any social setting outside of his psychotherapy sessions. (Chubinsky)

²⁴ The report was reviewed by the Team but then revised based on Parents' feedback and reissued to the parties. The recommendations remained unchanged. (S-7; P-19; Bucyk) Ms. Rice testified that although Dearborn makes recommendations at the conclusion of the assessment process, the Team then determines where and how to implement them. (Rice)

²⁵ Student was denied admission to several programs. For instance, Dearborn Academy did not find him appropriate due to his externalizing behaviors. (Bucyk)

²⁶ The referral letter noted that although the 10/2017-10/2018 IEP was included in the referral packet, it did "not clearly define [Student's] therapeutic needs." (P-64)

57. Student began attending Pathways Academy (Pathways) in March 2019. Mother testified that because of the ongoing C&P, she had no choice but to place Student at Pathways. According to the Juvenile Court's order, Parents had to "be positive" and support the placement. (P-29; Mother)
58. Student did not want to attend Pathways, and Mother and Student counted down the days left until the end of the school year. (Mother)
59. Pathways is a year-round, therapeutic day school located on the grounds of McLean Hospital in Belmont, Massachusetts. It is licensed as a special education school by the Department of Elementary and Secondary Education. Laura Meade is the Educational Administrator at Pathways and has been for nine years. She has a bachelor's degree in psychology, a Master of Science in education, a graduate certificate in special education administration, and an MBA in educational leadership. She holds many licenses from the Department of Elementary and Secondary Education. (Meade)
60. Pathways offers a gentle, trauma-informed, therapeutic approach to education. Applied Behavior Analysis (ABA) is not utilized. Rather, social pragmatic instruction is emphasized. Most Pathways students have had negative school experiences prior to attending Pathways. Pathways staff utilize a collaborative problem-solving approach with students rather than punitive measures. Staff remain flexible while students develop skills. There are no rigid academic expectations and, as such, teachers utilize students' interests when developing multi-modal instruction. Cartoons, role playing, and games are utilized by staff to maintain students' interests. (Meade)
61. As a student transitions to Pathways, staff spend a lot of time building rapport. Pathways has a very high staff to student ratio (1:2). There are four students, one certified special education teacher, and one teacher's assistant in each classroom. Because of this ratio, staff are able to attend to in-the-moment social coaching, thereby being responsive to any instances of bullying or other situations that may arise. Students also participate in month-long instruction on bullying and weekly direct instruction in social pragmatics. Pathways also provides social pragmatic support throughout the day. (Meade)
62. Psycho-educational training is available for parents, and Pathways staff often consult with outside therapists. Access to counseling support, breaks, check-ins, multi-modal instruction, a predictable schedule, and pacing of schoolwork are built into the program. (Meade)
63. The great majority of students at Pathways have an Autism Spectrum Disorder diagnosis. Ms. Meade testified that "in general" the Pathways student has "more [of an] Asperger's or [a] non-verbal learning disability profile." Most students at Pathways have average to above average scores on psychoeducational evaluations. They are very able and high functioning. Some could easily function in a regular school setting but for their anxiety and/or prior negative experiences in such settings. At Pathways, supports are embedded so that it is "not abnormal to need support." It is a low stress therapeutic setting so as not to retraumatize students who have previously suffered trauma. (Meade)
64. At Pathways, Students do not receive letter grades but are able to earn diplomas and go to college. (Meade)
65. Pathways is not a life-skills program. Students participate in a life skills class where they work on transition planning goals. In addition, most students attend ESY. (Meade)

66. Ms. Meade testified that while doors to the school are locked to the outside, they are not locked from within. (Meade)
67. Mother testified that Pathways resembled a “locked down facility” with screaming students who were “rocking and banging their heads.” According to Mother, one student was nonverbal. Student described his peers as “mentally disturbed.” (Mother)
68. Mother testified that Student suffered “emotional regression” due to his experience with bullying, and “by throwing him in a classroom where kids are autistic,” Hamilton-Wenham further “alienate[d]” and “humiliate[d]” him. (Mother)
69. No IEP was developed prior to Student’s start date at Pathways in March 2019. (Mother; Meade; Bucyk) Ms. Meade testified that for admission, Pathways requires the most current signed IEP, evaluations and progress reports. A new IEP need not be developed prior to starting, and most Teams reconvene one month after the start date to develop a new IEP. (Meade)
70. For Student, Pathways utilized the 10/2017-10/2018 IEP and provided the services delineated therein, except that B-Grid services were provided in the C-Grid. (Meade; Bucyk) This IEP did not propose transportation as a related service for Student. (P-39),²⁷ nor did it provide for ESY services. A placement page identifying the placement as “TBD” was executed by Mother on February 23, 2018. (P-39) Ms. Meade testified that this placement page was acceptable to Pathways. (Meade)
71. The 10/2017-10/2018 IEP did not include any goals relating to social pragmatic skill deficits. According to the 10/2017-10/2018 IEP, Student was able to navigate social relationships. (P-39; Meade)
72. In addition to the services delineated in the 10/2017-10/2018 IEP, Student received social skills instruction and support as these are embedded in the Pathways program. (Meade)
73. During Student’s time at Pathways, Ms. Meade observed Student daily, met with him a couple of times, supervised his teachers directly, and met with the staff supporting him on a weekly basis. (Meade)
74. According to Ms. Meade, the recommendations made in the Dearborn report were appropriate for Student, and Pathways had the capacity to implement them. Ms. Meade opined that social pragmatic instruction and support was important for Student due to his past difficulties with bullying and peer struggles in other settings. In addition, Pathways staff observed Student’s difficulties with social pragmatics; Student often misperceived and mishandled social situations and could be “off-putting.” Although Student possessed some social skills, he needed continued support and direct instruction in this area as he was unable to apply his knowledge into practice consistently. Pathways teachers found Student “well suited for the instruction that was going on [but he] was unable, for whatever reason, to access it.” Student “fit in well with the other kids,” “presented similar to many of [the] students,” and was “working on some of the same things” as they were. Student’s history of repeated school failures was echoed in the experiences of his peers. Student’s peers were similarly aged²⁸, although Pathways classrooms may include

²⁷ When Student attended Pathways, Hamilton-Wenham contracted with Action Ambulance to provide transportation for Student to and from school. (P-60; Bucyk)

²⁸ See 603 CMR 28.06(6)(g) (“Instructional group sizes in all programs approved under 603 CMR 28.09 shall be limited to those outlined in 603 CMR 28.06(6)(d), and no such instructional groups shall have an age range greater than 48 months”).

instructional groups with students whose birthdays are within 48 months of one another. (Meade)

75. Student was shamed by his placement at Pathways. It made him feel “subhuman.” (Mother) He challenged the appropriateness of Pathways or any therapeutic program for himself (i.e., “I shouldn’t be at this school”). He frequently discussed staff incompetence (i.e., “None of the teachers here actually teach academics the way they should”), and he distinguished himself from his peers (i.e., “I’m not autistic”). At times, he also made inappropriate racist comments. (P-14; Meade)
76. Ms. Meade testified that social pragmatics instruction and support is salient for Student especially in light of his history of bullying in multiple settings, and staff observations of him, including her own, evidenced social skill deficits. In her opinion, Student’s social skills made him vulnerable to bullying, and in an unsupported environment, Student’s comments make him susceptible to “backlash” from peers. (Meade)
77. Ms. Meade testified that she was aware that Pathways was not Parents’ “first choice” and that there was tension between the parties. When she met with Student, he told her that he did not belong at Pathways and that the other students at Pathways had a higher level of need. Student was not “persuadable in that it was an okay place to be.” To Ms. Meade, this resonated with Parents’ position regarding the placement. She opined that when parents resist a program, it often “leaks through” to the student, and students “take their cue from the parents.” (P-14A; S-18; Meade)
78. While at Pathways, Student was mostly “closed off to the Pathways experience.” (Meade) Progress Reports dated May 31, 2019²⁹ indicate that Student was minimally engaged except in a few classes where he contributed to class discussions. Academically, he engaged in self-directed activities unless the topic was of interest to him.³⁰ Although Student appeared to be on grade level in some subjects, in others, his written output was minimal, making it difficult to assess his then-current academic functioning. Socially, Student often attempted to be humorous but “fell flat.” He made inappropriate comments and was often misunderstood by peers. (S-19; Meade) Student also refused to engage in speech and language services while at Pathways as he felt that he did not require said services. (S-19; Meade)
79. Mother disputed that Student made any academic, social or emotional progress while at Pathways. She testified that there was no academic learning, and Student often complained that he watched cartoons or drew during the school day. (Mother)
80. According to Dr. Chubinsky, Student made some academic progress in some areas during his tenure at Pathways. However, socially, Student regressed. Dr. Chubinsky formed his opinion regarding social regression based on his conversations with both Parents and Student as well as “data” from Pathways which described Student as engaging in “strange” behaviors which, in his opinion, were not typical of Student and were

²⁹ The August 2019 Progress Report did not provide any useful information since Student did not attend Pathways for ESY, as he had already been enrolled at CHCH. There was dispute at Hearing as to whether Parents received the progress reports. Ms. Meade testified that the May 2019 progress reports were provided to Parents via email in June 2019 and that the August 2019 progress reports were provided via same in September 2019. (Meade)

³⁰ Due to his strong resistance to the placement, Student was allowed to self-direct much of his work at Pathways. He brought his own textbooks to school because he wanted more “book learning.” (Mother; Meade) Ms. Meade testified that staff hoped that with time Student would engage more with the classroom materials and instruction, which he was able to do when interested in the topic. (S-19; Meade)

symptomatic of Student's regression.³¹ Dr. Chubinsky testified that Student is a "very different person when he is traumatized." Specifically, Student begins acting "much younger." (Chubinsky)

81. Parents reported that during this time Student developed ties, became snippy and angry, and would often cry. Student was frightened by his peers who behaved in unexpected ways. (Mother; Chubinsky)
82. According to Dr. Chubinsky, the C&P "added a whole level of anxiety to [Student's] anxieties" and contributed to Student's emotional regression; Student was worried that he would be "taken away," which was "especially hard" for an adopted child. (Chubinsky)
83. Dr. Chubinsky testified that as Student's tenure at Pathways neared its end and Student was reassured that he would be attending a "normal school," Student began to improve emotionally. (Chubinsky; P-12)
84. As the school year came to an end, Pathways staff found Student to be "slowly easing into the Pathways routines." (S-19; Meade). Student was more polite and demonstrated improved conversational skills. He was more accepting of the program and understood that everyone was working on the same skills. (Meade) In May 2019, Student's Team Leader and ELA Teacher, Bridget Ryan³², described Student as an engaging, curious and thoughtful student who freely shares his opinions and knowledge. She also described him as engaging with peers during breaks as well as in work activities of his own choice. (P-14B)
85. Ms. Meade opined that with the right supports, Student's prognosis was excellent. (Meade)
86. Ms. Meade opined that because Student did not like to feel singled out or to have "so many eyes on him," Student could "use a less restrictive setting" with a larger class size (10 students). (P-14; Meade) Still Pathways offered Student a "great cohort." Except for the fact that Student did not want to be at Pathways, he was a "great fit" for Pathways, and Pathways was a "good fit" for him. (Meade)
87. According to Parents and Student's private service providers, Student was very unhappy at Pathways, and the placement "damaged his self-esteem." (Mother; Chubinsky; P-14A; P-15; P-15A p. 1; P-15C; P-18) Student felt marked by "labels that did not apply" to him. (P-18C)
88. Ms. Meade opined that having up-to-date testing is "very important" because, without it, programming is "less informed." She also testified that two years have passed since she has observed Student and he could be presenting differently now. (Meade)
89. According to Student's *Guardian Ad Litem*,³³ Parents' "sabotage of Pathways deprived [Student] of FAPE, educational continuity and the benefit of a program well suited to his needs." However, because of the "impossibility of extracting [Student] from the mindset that every school was out to get him, [the C&P judge] did not order him to remain at Pathways." (P-14A; S-18)

2019-2020 - Ninth Grade:

³¹ Pathways staff did not distinguish such behaviors as atypical. (P-14; Meade)

³² Ms. Ryan did not testify at Hearing. She submitted a letter of recommendation for Student to CHCH. (P-14B) Ms. Meade testified that Pathways provided the letter because Student wanted to attend CHCH, and Pathways wanted to support Student. Neither Ms. Meade nor Ms. Ryan knew much of the program except for what Parents described. (Meade)

³³ Anne Crowley, Student's *Guardian Ad Litem*, did not testify at Hearing.

IEP For The Period 6/11/2019-6/10/2020, As Revised On August 21, 2019 (Ninth Grade IEP):

90. On June 11, 2019, the District convened a Team meeting at Pathways with Parents and Dr. Chubinsky in attendance.³⁴ (P-51) This meeting was difficult to schedule due to the many attorneys involved, and Parents wanted their expert, Dr. Chubinsky, present as well. (Meade; Bucyk)
91. At the June 2019 meeting, Mother notified the Team that Student had been accepted at CHCH. Mother testified that CHCH was appropriate for Student because it had special education resources such as small classes, special education teachers, a school psychologist, and emotionally “healthy” peers. According to Mother, although Team members agreed that CHCH could be appropriate for Student, and Ms. Ryan had even written Student a letter of recommendation to CHCH, the District refused to fund the program because they believed that Pathways was appropriate. (Mother) Ms. Bucyk testified that the Team had no information regarding CHCH except that it is considered a general education private school and is not an approved or even an unapproved private special education school. (Bucyk)
92. Following the meeting, Hamilton-Wenham proposed an IEP for Student for the period 6/11/2019-6/10/2020 with goals in the areas of Pragmatics, Class Participation/Executive Functioning Skills, Expressive Language Skills³⁵, and Transition Skills. Student’s disability categories were noted as Communication (Expressive Language Disorder) and Health (ADHD). (P-51; S-6)
93. The impact of Student’s disability was described as follows:

[Student’s] expressive language disorder may affect his word retrieval skills and his ability to formulate and organize his expressive language across all content areas especially with written open response questions and lengthy open ended oral discourse. [Student’s] health disability (Mild ADHD) may impact him across all areas of the curriculum and throughout his school day. He may show difficulty with sustained attention to details and/or may show difficulty sustaining attention in a large group setting. He also may evidence moderately weak working memory, resulting in a limited ability to work carefully, systematically and strategically to complete tasks. Student requires therapeutic supports and access to a trusted adult to process any issues that might come up throughout the school day....

... [Student] struggles with social pragmatic skills which have a significant impact on how he interacts with, and is received by his peers. He does not demonstrate self-monitoring skills on a regular basis, and, at times, it is unclear if [Student] is aware of the extent to which his behavior

³⁴ Also present were the C&P attorneys for Student and Parents. (P-51)

³⁵ Although the servicing speech and language pathologist and Student’s teachers at Pathways did not “see the need for an expressive language goal,” the Team declined to remove speech and language services without additional information, especially as Student had refused to attend most speech and language sessions and was due for a re-evaluation. (P-54; S-19; Bucyk) Ms. Bucyk testified that the Team intended to gather additional information and make a decision regarding the need for continued speech and language services once this information was known. (Bucyk)

impacts others. Student often makes jokes in order to relate to peers but has trouble adjusting his comments to the audience at hand. [Student] requires adult monitoring and support to navigate social interactions successfully as well as to utilize strategies to gain positive attention. At times, when experiencing frustration, [Student] may slam a door or storm out of a room. [Student] requires therapeutic supports and access to a trusted adult to process any issues that might come up throughout the school day. (P-51; S-6)

94. The methodology proposed by the Team in the IEP included, in part, “direct social pragmatics instruction across a variety of settings.” The IEP included the following direct services: Pragmatics (3x45min/week), Sensory Integration Modulation Access (28x15min/week), Academic Skills (22x45min/week), Transition Planning (1x45 min/week), and Speech and Language Therapy (2x45min/week). ESY was also proposed. The Team proposed placement in a private special education day school with the proposed location to be at Pathways Academy. (P-51; S-6) Ms. Bucyk provided Parents with the Ninth Grade IEP before the end of June. (Bucyk)
95. Ms. Bucyk testified that when drafting the Ninth Grade IEP, the Team relied not only on Student’s diagnoses but also on available data and his presentation at school. She opined that a student’s needs are the “drivers,” and a student with ADHD or a Communication Disorder may still need more intensive supports and services based on presentation and need. (Bucyk)
96. Parents responded on July 26, 2019, partially rejecting the Ninth Grade IEP.³⁶ (P-52; P-68) Parents disagreed with portions of the Student Strengths and Key Evaluation Summary, the Pragmatics Goal, and omission of a Math Goal, in addition to the inclusion of ESY, pragmatics and speech and language therapy services. (P-52; P-68; Mother)
97. According to Mother, the Ninth Grade IEP described someone who is not her son. (Mother)
98. Dr. Chubinsky called the IEP a “sham.” In his opinion, the IEP, “like the [IEPs] before it, has misled the programs that [Student] attended ... [and] impeded programs like Pathways, Hillside³⁷, and Dearborn from seeing his problem and helping him with his anxiety instead of criticizing him when it emerges.” (P-12)
99. According to Dr. Chubinsky, the “main problem” with the IEP was its failure to acknowledge “first and foremost” Student’s PTSD diagnosis. Instead, the proposed IEP described a student with “massive sorts of deficits” with which Student does not present except when he is “acutely symptomatic from his PTSD.” Dr. Chubinsky explained that shifts in Student’s behavior (i.e., being social and cooperative at times and inappropriate at others) are expected in someone who is being “triggered.” Without the context of Student’s PTSD, Student’s behaviors are perceived as autism-related. (Chubinsky) However, Student has not been diagnosed with autism. (P-12; P-69; Chubinsky; Mother; Meade; Bucyk)

³⁶ Parents also refused to consent to the re-evaluation. (P-4; P-6; P-12)

³⁷ Parents had placed Student at Hillside unilaterally, and there is no evidence that Hillside was aware of or had access to any IEP from Hamilton-Wenham.

100. Ms. Meade opined that she is unsure whether an autism diagnosis is appropriate for Student.³⁸ She observed that “[s]ometimes students don’t have that official diagnosis but may still have some social communication difficulties ...[where] their very role in interactions puts them at risk for bullying.” (Meade)
101. Ms. Bucyk testified that some of the programs to which Student had been referred raised concerns regarding a possible autism diagnosis for Student.³⁹ (P-17A; Bucyk)
102. According to Dr. Chubinsky, because Student’s primary diagnosis is PTSD secondary to bullying, he requires “an entirely different approach” than that utilized by Pathways. Student requires staff reassurance when becoming “upset and anxious.” He requires an environment where “any anxiety symptoms are treated as only that, and he is offered some time to adjust to his new environment.” The Ninth Grade IEP “ignored” Student’s academic and social capabilities and strengths. Student did not require “class pullouts.” He is a “normal” young man who should be encouraged to function at a “high level.” Pathways is overly restrictive and lacks “normal high school experiences.” Dr. Chubinsky testified that there are no “higher functioning” students at Pathways. (Chubinsky; P-12)
103. Dr. Chubinsky agreed that Student has a communication disorder and mild ADHD “that make for occasional misunderstanding or odd remarks in his social interactions but these are rare. The problem that has made difficulties at school is Post-Traumatic Stress Disorder.” (P-12) Dr. Chubinsky recommended that Student attend an “academically oriented school” with “small classes” and “normal” students so that he can have “normal friendships.” (P-1; P-12; Chubinsky) According to Dr. Chubinsky, Pathways is “not an environment where [Student] can overcome his social anxiety.” (P-1; P-12; Chubinsky) Dr. Chubinsky testified that the problem with providing Student with a more structured setting or with “more services than [he] needs” is the impact on Student’s self-esteem when “being pulled out of class for various kinds of services.” (Chubinsky; P-1; P-12)
104. Pathways expected that Student would attend their ESY session, but Parents removed Student on June 11, 2019, before the start of the ESY session, after he received a certificate of completion⁴⁰ at an annual achievement ceremony. Pathways continued to hold a seat for Student during the summer of 2019 since at the time Student was unenrolled, Parents had not confirmed his enrollment in any other school program for the summer of 2019 or the 2019-2020 school year. (Meade; Bucyk)
105. On August 21, 2019, the Team met to review the rejected portions of the Ninth Grade IEP. Parents attended with their attorney. The revised IEP included Parents’ concerns and amended Student’s diagnosis to indicate that Student had “mild” ADHD and “PTSD secondary to bullying as diagnosed by Dr. Chubinsky.” At Parents’ request, the Team made several changes to the IEP. For instance, a Mathematics Goal was added. The

³⁸ Ms. Meade testified that based on her twenty years of experience working with students with social challenges, it is “the nature of the social challenges that put [Student] at risk for bullying, not really picking up subtle cues ... which is why [Student was] accepted ... at Pathways without an autism diagnosis.” (Meade)

³⁹ The documentary evidence does not include rejection letters from prospective school placements except for an email dated April 13, 2018 to Parents from the SAIL Program at Manchester Essex Memorial School Education Program. Said email was sent following Student’s “shadow day” at SAIL, and indicated that Student would not be offered admission, noting that he “has significant needs and requires a program offering substantial social emotion supports,” and that the current peer group would not be appropriate for him. (P-7E; P-17A)

⁴⁰ Mother understood this ceremony to signify that Student had completed the program. (Mother)

Team also removed the Transition Skills Goal. (S-4; S-6; P-51) Although the District rejected Parents' request to change Student's direct speech and language service to a consult, it proposed, as part of its re-evaluation, to conduct speech and language testing to determine Student's continued need for said service. (S-4; S-6; Bucyk)

106. The Ninth Grade IEP, as revised during the August 21, 2019, Team meeting, was reissued to Parents on September 6, 2019, along with a Consent to Evaluate Form. This was one of several attempts by Hamilton-Wenham to obtain consent for a re-evaluation of Student. (S-1; S-2; S-3; S-4; Bucyk) The IEP included the following direct services: Mathematics (4x45/5 days), Academic Skills (22x45/5 days), Sensory Regulation (28x15/5 days), and Speech/Language (2x45/5 days). ESY was again proposed as well as placement at Pathways Academy. (S-4; S-6; P-51) In addition, Hamilton-Wenham offered to send referral packets to other DESE approved programs, such as SEEM Educational Collaborative Campus Academy High School, Northshore Collaborative Upper Academy, Marblehead Public Schools, Farr Academy, The Arlington School, New England Academy, Beacon High School, The Victor School, and CASE Collaborative Colebrook High School. Hamilton-Wenham provided Parents with a Release to Communicate Form which would allow the District to send referral packets to these additional programs. (S-4) Parents did not sign the form. Ms. Bucyk indicated that no language-based programs were offered because prior testing did not support such a placement. (Bucyk)
107. The Key Evaluations Summary of the Ninth Grade IEP, as revised, did not reference Dr. Chubinsky's 2017 psychiatric evaluation. (S-4; S-6; P-51)
108. At the August 21, 2019 Team meeting, Parents reported that they had unilaterally placed Student at CHCH and requested public funding for said placement. Hamilton-Wenham rejected this request. (P-2; S-4; P-13; Mother; Bucyk)
109. Ms. Meade testified that she had informed Hamilton-Wenham that Student would continue to have a spot available to him at Pathways. (Meade; Bucyk)
110. Both Ms. Bucyk and Ms. Meade testified that the Ninth Grade IEP was appropriate for Student based on his identified needs and prior school challenges. (Meade; Bucyk)
111. On October 26, 2019, finding the Ninth Grade IEP faulty because it "centered" on Student's 2016 Social Pragmatic Communication Disorder, Parents again partially rejected it. They also rejected Pathways, asserting that Student "responded negatively" to a therapeutic setting with students who have "significant special needs or emotional disabilities." (P-13; Mother)

Unilateral Placement for Ninth Grade: CHCH:

112. CHCH is not approved by the Department of Elementary and Secondary Education as a private special education school.
113. Dr. Chubinsky and Student's other private service providers, Pip Nielson, MS, LMHC, NBCC, and Noah Erikson, LMHC, endorsed CHCH.⁴¹ (P-12; P-15; P-15A p.2; P-15C; Chubinsky)
114. Student began attending CHCH in the fall of 2019. (Mother)
115. At some time during the 2019-2020 school year, Student began boarding at CHCH in order to avoid the long commute to and from school. (Mother; Chubinsky)

⁴¹ Neither Pip Nielson nor Noah Erikson testified at Hearing.

116. Student experienced some success at CHCH. Dr. Chubinsky noted that Student's confidence increased, and Mother opined that Student made academic progress. However, although he liked his peers and the consistency of school, as the school year progressed, he began to struggle significantly. (P-7I; P-14C; P-15A p.3; P-40; P-49; Chubinsky; Mother) Mother testified that things became "hard" for Student when CHCH was informed of DCF's involvement with the family.⁴² (P-41; P-49; Mother) Mother was rejected from the Parent Teacher Association (PTA), and the family was "blacklisted." At school, Student was told that he "could be disruptive sometimes" and was asked to "work in a separate area" so that other students could "focus." (Mother) Student also experienced "continued taunting and bullying" and felt "not motivated," "disconnected" and "intimidated," as he did not feel that the bullying incidents were "properly resolved." Mother testified that after the bullying incidents occurred, Student's "confidence was shattered," and the events "triggered his trauma history." (P-7I; P-15A p.3)
117. Parents attributed Student's struggles at CHCH to having contracted mononucleosis. Mother too became infected. (P-24; Mother; Chubinsky) Dr. Chubinsky testified that Student's experience at CHCH raises concerns about its appropriateness as a placement for Student. Dr. Chubinsky opined that there was a "breakdown on the management side" at CHCH and neither the mononucleosis outbreak nor the social/emotional needs of the students were "managed" appropriately. He acknowledged that these "events [would] take time to heal." However, Dr. Chubinsky also opined that it was unclear whether Student felt unmotivated and "disconnected" from CHCH because of the mononucleosis or from his bullying experience there. (Chubinsky)
118. According to Dr. Chubinsky, although the trauma suffered by Student at CHCH was "harmful," it was "not as extreme and harmful" as his previous experience at Hamilton-Wenham. Although it was "teasing and taunting," it was "mild compared to what happened in the past."⁴³ (Chubinsky)
119. In contrast, Noah Erikson, Student's treating therapist at that time, opined that Student was "struggling and stressed" and suffered "irrevocable damage" because of the "continued taunting." (P-15A p.3; Mother)
120. Mother disagreed with Mr. Erikson's opinion. She could not recall how the bullying incidents were resolved but testified that it was not a "big deal"; "boys will be boys"; there is bullying "wherever you go"; and the key is "how it's handled." Mother opined that "there are no bullying-free environments." (Mother)
121. Student's *Guardian Ad Litem* spoke to CHCH when Student had been in attendance for four months, and it was "clear" from the "CHCH records that he was struggling" and that CHCH "did not have adequate services or experience with situations like [Student's] and that his tenure there would not be successful." (S-18)
122. According to Ms. Bucyk, Student's experience at CHCH followed an established "pattern of reporting, in almost every school placement, bullying incidents or reports of

⁴² The C&P was dismissed in January 2020. (Mother)

⁴³ Dr. Chubinsky did not learn of the bullying at CHCH until later. Dr. Chubinsky had some communication with CHCH; in October 2019, he advised CHCH that Student should not participate in a foreign language class due to his anxiety. He also recommended that Student be provided with extra time to complete his schoolwork and be allowed to focus on developing his core academic skills and "making solid relationships with his peers." However, around the time when Student began to struggle with the bullying incidents, Dr. Chubinsky was mostly responsible only for Student's medication as opposed to treating him therapeutically and was not actively aware of what was occurring with Student at CHCH. (Chubinsky; P-22)

- bullying incidents from the family,” and she was concerned about the “type of support services [that appeared to be] lacking to support bullying incidents at the school and to make students feel confident that it was taken care of appropriately.” She opined that Student’s social pragmatic deficits impacted his experience at CHCH. (Bucyk)
123. In March 2020, Mother hired an executive function coach to work with Student. (Mother)
124. Also in March 2020, Mother, through her advocate, reached out to Hamilton-Wenham to inform the District that she was seeking a new placement for Student and was planning to place him at Austin Prep. According to Mother, Hamilton-Wenham refused to fund Austin Prep but proposed New England Academy and Ipswich Public Schools, both of which she found inappropriate; New England Academy serviced students with autism, and the principal at Ipswich was the father of the student who had bullied Student in fourth grade. (P-5; P-7F; Mother; Chubinsky⁴⁴)
125. Ms. Bucyk testified that during her conversation with Mother’s advocate she discussed that Hamilton-Wenham would not fund a private general education placement for Student. Ms. Bucyk stressed the importance of evaluating Student and noted that, based on the results of the re-evaluation, Hamilton-Wenham would consider proposing other programs as an alternative to Pathways. Ms. Bucyk also testified that although at its inception New England Academy served students with autism, the school currently serves students with anxiety, trauma and obsessive-compulsive disorder (OCD). (Bucyk)
126. In May 2020, Hamilton-Wenham invited Parents to attend an annual IEP meeting which was scheduled for June 8, 2020. Ms. Bucyk provided Parents with a Consent for Release of Information and Communication to allow Hamilton-Wenham to receive information from CHCH in preparation for the annual review as well as to be able to invite a member from CHCH to the meeting. (S-3; Bucyk)
127. On May 21, 2020, Parents declined to participate in the Team meeting. As grounds thereof, they cited the “pandemic” and the conclusion of Student’s school year.⁴⁵ As a result, no meeting was held in June 2020.⁴⁶ (P-7; Mother; Bucyk)
128. Parents did not provide consent for Hamilton-Wenham to communicate with CHCH. (Bucyk)
129. Student completed the school year at CHCH. (Mother; P-24)
130. Student did not return to CHCH for Tenth grade. (Mother) Dr. Chubinsky opined the bullying was partially the reason for Student’s non-return to CHCH. (Chubinsky). Mother indicated the commute was prohibitive. Mother also testified that Parents were “threatened” by CHCH to pull Student out. (Mother)
131. No staff from CHCH testified at Hearing.

2020-2021 - Tenth Grade:

⁴⁴ Dr. Chubinsky also pointed to the absence of school-based speech and language services at New England Academy as one reason for its inappropriateness for Student. (P-7F) Beverly Montgomery who had evaluated Student’s speech and language in 2017 also found New England Academy inappropriate, arguing that the school served students with an identified social or emotional disability that did not describe Student. (P-15D)

⁴⁵ Parents also declined a re-evaluation of Student which Hamilton-Wenham again proposed. (S-1; P-4) Mother testified that Student has undergone “a lot” of assessments in the last three years. (Mother)

⁴⁶ Ms. Bucyk testified that because of the COVID-19 state mandated shutdown, DESE allowed school districts to postpone annual Team meetings with parental consent. (Bucyk)

IEP for the Period 11/18/2020-11/17/21 (Tenth Grade IEP):

132. On October 20, 2021, Hamilton-Wenham again invited Parents to an annual review scheduled on November 18, 2020⁴⁷ and requested consent to communicate with CHCH for information regarding Student’s school-based performance and progress in areas outlined within his IEP. (S-2; S-5⁴⁸; Bucyk)
133. Ms. Bucyk testified that she was not aware that Student had transitioned from CHCH to Austin Prep. (Bucyk) She did not contact CHCH to attend the meeting because Parents had not provided consent for her to do so. (Bucyk; Mother; S-2; S-3)
134. Ms. Bucyk testified that updated assessment results and input from both CHCH and Austin Prep would have been useful at the November 18, 2020 Team meeting, but none of this information was presented to the Team before, during or after the meeting. (Bucyk)
135. Parents again declined to participate in the Team meeting, refused the three-year re-evaluation, did not grant consent for release of information from CHCH, and did not provide any information with regard to Student’s current status or his progress while at CHCH. (S-1; S-5; P-4; P-6; Mother; Bucyk)
136. According to Mother, she did not attend the meeting because Hamilton-Wenham had refused to mediate the matter and would not support Student.⁴⁹ (P-2; P-3; P-6; P-35; Mother; Bucyk)
137. A Team consisting of Hamilton-Wenham staff convened on November 18, 2020 to develop an IEP for Student. (S-1; S-5; Bucyk)
138. Based only on available information from Pathways, Hamilton-Wenham proposed an IEP for the period beginning 11/18/2020 to 11/17/21 (Tenth Grade IEP).⁵⁰ Without new data or information, the Tenth Grade IEP was substantially similar to the IEP previously proposed in August 2019. (Bucyk) The Tenth Grade IEP proposed goals in the following areas: Class Participation, Executive Functioning, Expressive Language Skills, and Mathematics. The service delivery grid included C Grid services as follows: Mathematics, 4x45min/week/5 days, Academic Skills, 22x45 min/week/5 days, Sensory Regulation, 28x15 min/week/5 days, Speech Language Therapy, 2x45min/week/5 days. The Team continued to propose ESY and placement at Pathways Academy⁵¹ or at an equivalent therapeutic program. (S-1; S-5)
139. Mother testified that the Tenth Grade IEP was “repetitive” and “lack[ed] updating.” She disputed Communication as Student’s primary disability category as well as the goal areas and current performance levels. For instance, she indicated that the Classroom Participation Goal was “speculative, lack[ed] data, and was not an appropriate goal.” Similarly, she found the Expressive Language Goal speculative and reflecting inaccurate information about Student, since, according to Mother, Student does not have

⁴⁷ The meeting invitation was sent to Parents via regular mail on October 20, 2020 and also via email. (Bucyk) At that time, Hamilton-Wenham again proposed a re-evaluation in the areas of academic achievement speech/language, educational assessment, observation of the student, and psychological assessment. (S-2)

⁴⁸ CHCH was included on the Attendance Sheet which accompanied the meeting invitation. (S-5)

⁴⁹ No Hearing Request was pending before the BSEA at the time of this Team meeting.

⁵⁰ At the time of the IEP’s issuance, the IEP was overdue for renewal due to the delay in reconvening the Team that occurred as a result of Parents’ spring 2020 request to postpone the Team meeting due, in part, to the COVID-19 pandemic. (S-1; Bucyk)

⁵¹ Ms. Bucyk confirmed with Ms. Meade that Pathways continued to have a spot for Student. (Bucyk)

difficulties with peers and, in fact, has many friendships. She objected to the Expressive Language objectives as “written by someone who does not know [Student].” Mother opined that Student’s primary goal should be in the area of executive functioning. Speech and language services were unnecessary as Student had met his speech and language goal at Pathways. (Mother; P-54) Moreover, Student is well spoken and articulate. He also has no behavioral issues. (Mother)

140. Mother indicated that references to a Social Pragmatics Disorder in the IEP made it inappropriate. She found the services “demeaning and shaming.” Student did not require therapeutic supports or social pragmatic coaching because he “knows what is appropriate.” She testified that he should be in a regular high school setting and “be respected.” (Mother)
141. According to Parents, Student neither requires nor belongs in a therapeutic placement. (P-6; P-69; Mother; Chubinsky) Dr. Chubinsky agreed with Parents and testified that in contrast to Student, students at therapeutic schools have autism and more severe learning and social/emotional problems. (P-69; Chubinsky)
142. In addition, according to Dr. Chubinsky, therapeutic placements dilute the curriculum, but Student is on grade level, except for some “gaps.” (Chubinsky; P-12)
143. Dr. Chubinsky opined that Student requires a school like CHCH or Austin Prep, where he feels safe; there is no bullying⁵²; there is no “high tension” between students as there would be in a public high school; teachers are supportive and “tuned into his anxiety”; there is no “embarrassing” discipline; there are small classes for learning; and there are services to help students with academic difficulties related to ADHD, executive functioning and language-based disabilities. (Chubinsky)
144. With respect to IEP goals, Dr. Chubinsky recommended that Student work on identifying when he is being triggered, avoiding and mastering such triggers, and handling his performance anxiety. (Chubinsky)
145. As for IEP services, Dr. Chubinsky suggested that Student have someone to talk to at school but only if he chose to do so. Student should have opportunities to join clubs where the risk of bullying is low. He should also receive test taking interventions for ADHD, such as extra time. As Dr. Chubinsky believed speech and language services might make Student feel stigmatized, such services must be built into the program, as they are at Landmark. He stressed that Student should determine which services to access and should not be forced to participate. (Chubinsky; P-12)
146. Dr. Chubinsky also recommended Landmark School for Student because Student has “some higher-level language issues” that may possibly impact his learning and “some higher-level aspects of relationships.” (Chubinsky)
147. Dr. Chubinsky has never observed Student in any of his school settings. He had minimal contact with Pathways, Hillside and CHCH. (Chubinsky)
148. Mother testified that a bullying-free school with small classrooms and a focus on executive functioning would be appropriate for Student. She opined that Landmark would be appropriate.⁵³ (Mother)
149. Mother testified that she only received a copy of the Tenth Grade IEP when Hamilton-Wenham filed for hearing on December 4, 2020. (Mother)

⁵² Dr. Chubinsky did not explain the inconsistency in his testimony about this recommendation and the evidence that Student was in fact bullied while at CHCH.

⁵³ Parents did not request prospective placement at Landmark School as part of their Request for Hearing.

150. Ms. Bucyk testified that she signed the IEP on December 2, 2020 and sent Parents two copies of the N1 and Tenth Grade IEP. (S-1; Bucyk) Subsequently, she received an email from Mother requesting that documents also be forwarded to Student’s Father at a different address.⁵⁴ (Bucyk)

Unilateral Placement for Tenth Grade: Austin Prep:

151. Student attended Austin Prep for the 2020-2021 school year. (Mother) Austin Prep is not approved by the Department of Elementary and Secondary Education as a special education school.
152. Austin Prep is a parochial school. While attending Austin Prep, Student was “not shy” about expressing his views about Christianity. (Mother)
153. Dr. Chubinsky believed that Student could “reach his potential, academically and socially” at Austin Prep since it “substantially meets his needs” although “complications imposed by COVID-19, like a hybrid program, complicate[d] matters.”⁵⁵ (P-1)
154. Mother testified that Austin Prep was appropriate for Student because it has a learning center, a special education teacher, a psychologist and small class sizes. It is also close to Student’s home. Student did not have an IEP at Austin Prep but had “services” and a “learning plan.” (Mother)
155. Mother testified that, academically, tenth grade was more difficult for Student because of his organization and executive function deficits, and Student required more didactic teaching. Austin Prep also closed frequently during the 2020-2021 school year due to COVID outbreaks, and the inconsistency in instruction was difficult for Student. (Mother)
156. Austin Prep has recommended that Student not return to Austin Prep for eleventh grade. Parents are exploring educational options for next year for Student. (Mother)
157. Student has applied for the Landmark School summer program for summer 2021. (P-57; Mother)
158. No staff from Austin Prep testified at Hearing.
159. On June 22, 2021, a decision in the matter of BSEA #2104095 was issued, granting substitute consent to Hamilton-Wenham to conduct a three-year re-evaluation to include a psychological assessment, a speech and language assessment, academic achievement testing and an educational assessment.

DISCUSSION:

A. Legal Standards

1. Free Appropriate Public Education in the Least Restrictive Environment

⁵⁴ Ms. Bucyk testified that Hamilton-Wenham’s records at that time did not include a separate address for Father. (Bucyk)

⁵⁵ On December 20, 2020, Parents submitted a letter to the BSEA in which Dr. Chubinsky observed that Student was making progress at Austin Prep. (P-1)

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).⁵⁶ To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum."⁵⁷ Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the "least restrictive environment."⁵⁸ This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that "removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily."⁵⁹ "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs."⁶⁰

The IEP must be individually tailored for the student for whom it is created.⁶¹ When developing the IEP, the Team must consider parental concerns; the student's strengths, disabilities, recent evaluations and present level of achievement; the academic, developmental and functional needs of the child; and the child's potential for growth.⁶² Evaluating an IEP requires viewing it as a "a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was . . . objectively reasonable . . . at the time the IEP was promulgated."⁶³

At the same time, FAPE does not require a school district to provide special education and related services that will maximize a student's educational potential.⁶⁴ The educational services need not be, "the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."⁶⁵ Although parental participation in the planning, developing, delivery, and monitoring of special education services is central in IDEA, MGL c.

⁵⁶ Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 (d)(1)(A).

⁵⁷ See 20 USC §1401 (9), (26), (29); 603 CMR 28.05(4)(b); *C.D. v. Natick Pub. Sch. Dist., et al.*, No. 18-1794, at 4 (1st Cir. 2019) (quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017)); *Sebastian M. v. King Philip Reg'l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012); *Lessard v. Wilton Lyndeborough Cooperative Sch. Dist.*, 518 F. 3d 18 (1st Cir. 2008); *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F. 3d 279 (1st Cir. 2008); *In Re: Chicopee Public Schools*, BSEA # 1307346, 19 MSER 224 (Byrne, 2013).

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

⁵⁹ 20 U.S.C. 1412(a)(5)(A); *C.D. v. Natick Pub. Sch. Dist.*, 924 F. 3d at 631 (internal citations omitted).

⁶⁰ *C.G. ex rel. A.S.*, 513 F.3d at 285.

⁶¹ *Andrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

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

⁶³ *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990).

⁶⁴ *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n.21 (1982) ("Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.").

⁶⁵ *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942, 948-949 (1st Cir. 1991).

71B, and corresponding regulations,⁶⁶ school districts are obligated to propose what they believe to be FAPE in the LRE, “whether or not the parents are in agreement.”⁶⁷ In *Andrew F.*, the Supreme Court explained that appropriate progress will look different depending on the student.⁶⁸ An individual analysis of a student’s progress in his/her areas of need is key.⁶⁹

2. Reimbursement for Private Placement

When parents elect to place a student unilaterally in a private school notwithstanding the availability of a free appropriate public education (FAPE) through the school district, parents retain responsibility for the cost of that education.⁷⁰ However, parents who enroll a student in a private school without the consent of or referral by the school district may obtain reimbursement if a hearing officer finds both that the school district “had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate” for the student.⁷¹ Parents will be entitled to reimbursement for a private placement if (1) the school district's proposed placement violated the IDEA, (2) the parent's alternative private placement was appropriate, and (3) equitable considerations favor reimbursement.⁷² In other words, parents may be entitled to reimbursement for their unilateral placement if, after demonstrating that the district's proposed IEP and placement were not appropriate, they demonstrate that their chosen placement was appropriately responsive to the student's needs. To be reimbursed, parents' chosen placement need not meet state standards for special education schools, provided that the school chosen by the parents is “otherwise proper” under the IDEA or “appropriately responsive to [the child's] special needs.”⁷³

3. Burden of Persuasion

In a due process proceeding, the burden of proof is on the moving party.⁷⁴ If the evidence is closely balanced, the moving party will not prevail.⁷⁵

⁶⁶ *Rowley*, 458 U.S. at 208 (“Congress sought to protect individual children by providing for parental involvement ... in the formulation of the child's individual educational program”).

⁶⁷ *In Re: Natick Public Schools*, BSEA #11-3131, 17 MSER 55 (Crane, 2011).

⁶⁸ *Andrew F.*, 137 S. Ct. at 992; see also 603 CMR 28.02(17).

⁶⁹ *Andrew F.*, 137 S. Ct. at 1001 (“The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue”); see *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 809 (8th Cir. 2011) (explaining that the court would not compare the student to her nondisabled peers since the key question was whether the student made gains in her areas of need).

⁷⁰ See 34 CFR §300.148.

⁷¹ 34 CFR §300.148(c). See 20 USC §1412(a)(10)(C)(ii); see also *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 (2009) (explaining that §1415(i)(2)(C)(iii) authorizes “reimbursement when a school district fails to provide a FAPE and a child's private school placement is appropriate”).

⁷² See *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) (parents are entitled to reimbursement only if federal court concludes public placement violated IDEA and private placement was proper, and the court is to consider all factors in fashioning equitable relief); *Sch. Comm. of Town of Burlington v. Dep't of Educ.*, 471 U.S. 349 (1985) (parents may be reimbursed for private special education if court ultimately determines private placement was proper).

⁷³ *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 14; *Matthew J. v. Mass. Dep't. of Educ., et al.*, 988 F. Supp. 380, 391 (1998).

⁷⁴ *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).

⁷⁵ *Id.* (places the burden of proof in an administrative hearing on the party seeking relief).

B. Application of Legal Standard:

It is not disputed that Student is a student with a disability who is entitled to special education services under state and federal law. The fundamental issues in dispute are listed under **ISSUES IN DISPUTE**,⁷⁶ above.

In a due process proceeding to determine whether a school district has offered or provided a FAPE to an eligible child, the burden of proof is on the party seeking to change the *status quo*.⁷⁷ In the instant case, as the moving party challenging the IEPs that Hamilton-Wenham has proposed for ninth and tenth grades, and seeking public funding for the unilateral placements at CHCH and Austin Prep, respectively, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that for the period for which they seek reimbursement, Hamilton-Wenham's IEPs were and are not reasonably calculated to provide Student with a FAPE.⁷⁸ If Parents meet this burden, they must then prove that CHCH and Austin Prep were appropriate for Student for ninth and tenth grades, respectively. Parents are not held to the same appropriateness standard as Hamilton-Wenham, however, and need only demonstrate that CHCH and Austin Prep, respectively, were responsive to Student's special needs, so that he could benefit educationally.⁷⁹

Based upon four days of oral testimony, the extensive exhibits introduced into evidence, thoughtful arguments of counsel, and a review of the applicable law, I conclude that the IEPs for the relevant time periods were and are reasonably calculated to provide Student with a FAPE in the LRE. Parents did not meet their burden to prove otherwise. My reasoning follows.

⁷⁶ The only issues before me are those delineated in the **Issues** section herein. At Hearing, Parents raised the issue that no Team meeting was held at the conclusion of Student's extended evaluation period at Dearborn and immediately prior to Student's placement at Pathways. (Mother) As I indicated at Hearing, there are no allegations of procedural violations or remedies relative thereto identified in Parents' Request for Hearing, and as such this specific issue is not before me. See 20 U.S.C.A. § 1415(f)(3)(B) ("The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise"); see also *BSEA Hearing Rules*, Rule IB. Nevertheless, I note that although Hamilton-Wenham did not meet to develop an IEP prior to Student's enrollment at Pathways, Parents, who were represented by counsel at that time, did not object to the absence of an IEP document nor did they request a change in the services offered to Student at his start time or during the duration of his attendance at Pathways. There is also no evidence that there were any services later recommended by the Team that were not provided to Student between March 1, 2019, and June 11, 2019, when the Ninth Grade IEP was developed and proposed. See *In Re: East Longmeadow Public Schools*, BSEA # 01-3582, 8 MSER 218 (Byrne, 2002).

Similarly, at Hearing, the parties disputed whether the 10/2017-10/2018 IEP was Student's stay-put IEP. Ms. Bucyk testified that it was her understanding that Pathways was Student's stay-put placement. (Bucyk) I do not address the issue in this Decision, as it was not raised by Parents in their Request for Hearing and, as such, is not before me to decide.

⁷⁷ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008)

⁷⁸ *Id.*

⁷⁹ *Florence Cnty. Sch. Dist. Four*, 510 U.S. at 13 (1993); *Doe v. West Boylston Sch. Comm.*, 28 IDELR 1182 (D. Mass., 1998); *In Re Gill-Montague RSD*, BSEA #01-1222 (Crane, 2001).

Parents' objections to the appropriateness of the Ninth Grade IEP and the Tenth Grade IEP (together, the "IEPs"⁸⁰) center on issues relative to Student's primary disability and his need for social pragmatics instruction, related goals, and a therapeutic placement. Parents further assert that Student regressed during his time at Pathways and challenge the appropriateness of the peer grouping and the rigor of Pathways's academic curriculum.⁸¹ Parents also argue that the Tenth Grade IEP does not reflect current information regarding Student. To ascertain the appropriateness of the IEPs, the information available to the Teams at the times of the IEPs respective development must first be considered.⁸²

I find that throughout the relevant time period, when developing the IEPs, the Teams were handicapped by limited information regarding Student. Since 2015, despite considerable attempts to place Student in an educational setting, Hamilton-Wenham has had limited opportunity to educate him. (Bucyk) In fact, Student has not been consistently educated in any school setting. He spent the great majority of his school-age years being homeschooled or transitioning amongst more than a handful of unilateral school placements, many of which lasted less than a full school year, some under two weeks. , (P-1; P-7A; P-7B; P-7C; P-7D; P-15; P-15A p.1-3; P-23; P-33; P-37; P-43; P-44; P-48; P-49; P-69; Mother; Chubinsky; Bucyk; Meade) Hamilton-Wenham was further handicapped by Parents' refusal to share with the District any relevant educational records from any of Student's unilateral school placements both during his attendance at CHCH and Austin Prep and before. (Bucyk) In addition, evaluative data available to the IEP Teams was mostly outdated, including psychoeducational testing from 2013, psychoeducational assessments from 2009, 2010, 2015 and 2016, and two independent speech and language assessments from 2017.⁸³ As a result, it was difficult for the Teams to measure progress over time, to identify Student's needs, and to determine what constitutes a FAPE. (P-9; P-10; S-8; S-9; S-10; S-11; S-13; S-14; Bucyk; Meade; Rice; Paulson)

⁸⁰ For much of the **Discussion**, I refer to the IEPs together because they are substantially similar in terms of the areas of skill deficit, supports, services, and placement proposed. I refer to them separately where there are distinct issues relating to each.

⁸¹ Parents also took issue with Hamilton-Wenham's use of Action Ambulance to provide transportation for Student to and from Pathways.. (P-60; Mother) A publicly placed private school student has all the IDEA rights of a child with a disability who is served by a public agency, including the related service of transportation in conformance with an IEP, at no cost to the parents. See 34 CFR 300.146(c). A school district has the discretion to select the method for the student's transportation, provided it is appropriate; in other words, school buses, vans, cars, and even taxis are all acceptable forms of transportation, as long as they provide the student FAPE. Here, I do not find that Parents have met their burden to demonstrate that Hamilton-Wenham's use of the Action Ambulance van denied Student with a FAPE. See *North Reading Pub. Schs.*, BSEA # 98-0944 (MacAvoy, 1998) (where the district contracted with a transportation company and arranged for the student to receive taxi service to and from school, parent's assertion that the student was harmed emotionally by the transportation arrangement was rejected by the hearing officer as unsupported by the evidence).

⁸² *In Re: Southwick-Tolland Regional School District*, BSEA # 06-6583, 12 MSER 279, 289 (Crane, 2006) (citing *Roland M. and Concord Sch. Comm.*, 910 F. 2d. at 992 (1st Cir. 1990)).

⁸³ Both independent evaluations were conducted when Student was neither attending a school program nor receiving special education services. In addition, no input from prior school placements was solicited by either independent evaluator. (S-8; S-9; P-20)

In fact, the only updated information available to the IEP Teams in 2019 and 2020 were the findings of the Dearborn extended evaluation report and staff input from Pathways.⁸⁴ (Bucyk) Recommendations from Dearborn and Pathways similarly endorsed a therapeutic school setting with a high staff-to-student ratio and social pragmatic and executive function supports to address Student's academic, social, and emotional needs. (P-19; Rice; Meade) Although Parents correctly assert that the 2018 BSEA Decision did not support a therapeutic placement, each IEP is a snapshot and must be evaluated against the information available to the Team at that time.⁸⁵ Hearing Officer Figueroa suggested as much in her 2018 Decision; acknowledging that Student had been out of school for a significant period of time, she ordered that his needs be reassessed and his IEP amended after an extended tenure at a special education program.⁸⁶

Parents are unpersuasive that Student does not require therapeutic services, social pragmatic instruction and/or a therapeutic placement. (P-19; Meade; Rice) To the contrary, the record demonstrates abundantly that Student's needs in the social and emotional domain must be addressed in order for him to benefit from any educational program. (Rice; Meade; P-14; P-19; S-19). The most glaring evidence to support such need is Student's repeated school failures. Similar struggles with behavior regulation and social interaction resulting in allegations of mistreatment by staff and/or bullying are evident throughout Student's tenure at every school placement, including those selected by Parents and endorsed by their experts. (P-7A; P-7C; P-7D; P-12; P-14; P-15A p.3; P-16; P-16A; P-16E; P-17A; P-19; S-19; P-23; P-33; P-43; P-44; P-48; Mother; Rice; Meade; Chubinsky) For instance, within a twelve-month period following the issuance of the 2018 Decision and before Student's extended evaluation at Dearborn, Student attempted two unsuccessful school placements (MASCO and Hillside) and each lasted less than two weeks.⁸⁷ (P-7C; P-7D; Bucyk; Mother; Chubinsky) His subsequent tenures at Dearborn and Pathways, respectively, were similarly challenging. While at Dearborn, Student struggled significantly with academics, peer and staff interactions, work completion, self-reflection, and problem-solving. He was unpredictable, inconsistent, and demonstrated social and emotional challenges when relating to others. (P-19; Rice) Similarly, at Pathways, Student refused to engage, would not produce written output, left class, struggled to take feedback, misperceived

⁸⁴ Beginning in the fall of 2019, Hamilton-Wenham sought to re-evaluate Student but failed to obtain Parents' consent for a three-year re-evaluation. On June 22, 2021, I granted Hamilton-Wenham substitute consent to conduct said re-evaluation. See *In Re: Student and Hamilton-Wenham Regional School District*, BSEA #2104095 (Kantor Nir, 2021). No information was provided during the hearing as to the parties' actions with respect to complying with this Decision since its issuance, although Mother testified of her intent to so comply.

⁸⁵ See *In Re: Chicopee Public Schools*, BSEA # 05-2920, 11 MSER 87 (Crane, 2005) ("Each IEP is unique, reflecting the services and placement that the school district believes to be appropriate for Student for the particular period of time covered by the IEP. The IEP that was the subject of the previous Hearing is not before me. Each BSEA decision is decided only on the basis of the evidentiary record and argument for that particular dispute").

⁸⁶ Similarly, I find Parents' argument that the 2018 Decision limited the content of any subsequent referral packets to be irrelevant in the present matter. Hearing Officer Figueroa had ordered the Team to reconvene within eight weeks following Student's placement to reassess Student's transition, performance and, if needed, to modify the IEP. This suggests that she fully anticipated that once in a school placement, Student's strengths and weaknesses would be revealed and his program altered or changed, accordingly, which information was important to include in future placement referrals for Student.

⁸⁷ Student attended MASCO pursuant to the 10/2017-10/2018 IEP. (Bucyk; Mother) His behaviors resulted in two suspensions in close succession. (P-7C; P-7D; Mother; Bucyk) Student also attended Hillside, a general education private school. It is unclear what support Student received at Hillside, but Dr. Chubinsky testified that Hillside was not responsive to Student's needs, and Student was asked to leave because staff could not support him. (Chubinsky; Mother)

social situations, was misperceived by his peers, and struggled to express himself in ways that did not render him vulnerable to “backlash.” (S-19; Meade) And the unilateral placements at CHCH and Austin Prep, which are the subject of the present dispute, have also failed to support and maintain Student; at CHCH, Student again reported improper management and ongoing bullying, and Austin Prep has suggested that Student look for a different placement next school year. As such, Student is yet again, at present, without a school program.⁸⁸ (P-15A p.2; Chubinsky; Mother)

Albeit more limited than would be the case had Parents consented to the District’s requests to evaluate and for release of information, the available data in the record supports the District’s contention that Student requires behavioral, social and emotional support. In fact, the very social-emotional skill deficits that Student displayed at Dearborn and Pathways were identified in past evaluations. Whether related to mild ADHD, an Expressive Communication Disorder, a Social Pragmatics Communication Disorder, or PTSD secondary to bullying, Student’s social pragmatic skills have consistently been found to be impacted, particularly as the demands of language and environmental stressors increase. Even Parents’ independent evaluators found that Student demonstrated difficulty processing complex language, engaging appropriately in social situations, and regulating his behavior, especially when stressed, which, in turn, made him socially vulnerable. (S-8; P-9; S-10; P-10; P-20; P-53) Dr. Chubinsky too noted social anxiety, “some higher-level language issues,” and the “occasional misunderstanding or odd remarks in his social interactions” that might possibly impact his learning and “some higher-level aspects of relationships.” (Chubinsky; P-12; P-16) He noted that Student can present as a little “younger”, though he attributed this to Student’s lack of practice with same age peers in a school setting. (Chubinsky) Dr. Chubinsky’s testimony that Student’s presentation at Dearborn and Pathways reflected manifestations of his PTSD, and that Student behaved in immature and unpredictable ways at said placements because he had been retriggered or re-traumatized, negates neither Student’s concerning presentation nor his need for the supports and services recommended by Dearborn.⁸⁹ (Chubinsky; Mother) To the contrary, the IDEA obligates Hamilton-Wenham to address behavioral manifestations that impact access to instruction.⁹⁰ Hence, regardless of the etiology, Student’s continued struggles suggest a definite need for increased intervention and support. (Bucyk)

In fact, several of Dearborn’s recommendations, including those related to social skill development and instruction, echo those made by prior evaluators who called for a small, nurturing setting with limited tolerance for bullying and supports for attention, language, social pragmatics and executive function.⁹¹ (P-7F; P-9; P-10; P-15D; P-16; P-19; S-8; S-9; S-10; S-14; Rice; Meade) Speech and language services and social skills groups were recommended, even by

⁸⁸ Parents offered no documentary or testimonial evidence from any of Student’s unilateral placements regarding the reasons for his departures or terminations.

⁸⁹ I also note that Dr. Chubinsky’s observations of Student were limited to the context of psychotherapy sessions. He acknowledged that he had never observed Student in any social setting. (Chubinsky)

⁹⁰ The IDEA requires that IEP teams address behavior that interferes with the student’s ability to benefit from his educational programming. See 34 CFR 300.324(a)(2)(i).

⁹¹ There is no dispute between the parties relative to Student’s need for executive function support or accommodations for ADHD, and I find that in accordance with Dearborn’s recommendations, the IEPs include substantial supports for Student’s documented deficits with executive function and attention. (P-19; Chubinsky; Mother)

Parents' own evaluators. (P-7F; S-8; S-9; S-10; S-14; P-15D; P-19; Rice; Meade; Paulson; Chubinsky⁹²) In addition to Dr. Roosa's endorsement of the development of Student's expressive language skills through structured peer interactions and focused instruction in verbal pragmatics, Meghann Ridley, Parents' own independent evaluator, while not endorsing a Social Pragmatics Communication Disorder, observed that Student's social pragmatic skills were "vulnerable" and that he required direct instruction and reinforcement of language skills. (S-9; S-10). Similarly, Beverly Montgomery, another of Parents' independent evaluators found that Student required structured social opportunities. (S-8) Dr. Chubinsky too noted that Student struggled with social anxiety, and suggested that Student's IEP goals target identifying triggers and managing stress. (P-12; Chubinsky) Ms. Rice testified that relational work is important for Student, who struggles not only to form but also to maintain relationships. (Rice) Likewise, Ms. Meade opined that social pragmatics instruction and support was "salient" for Student, as he has experienced an extensive history of bullying in multiple settings.⁹³ (Meade)

Although Dr. Chubinsky disputed Student's need for life skills instruction, social pragmatic coaching, or a therapeutic placement, he offered no evaluative basis for determining that Student does not in fact require such supports and services or that he requires different supports. (Chubinsky; P-16) Dr. Chubinsky argued that a therapeutic program and social pragmatic coaching is only appropriate for students who have been diagnosed with autism and stressed that Student does not have an autism diagnosis. (Chubinsky; P-12). However, not only is Dr. Chubinsky inaccurate in his assessment that social coaching is only appropriate for students who have been diagnosed with autism, but in addition, this emphasis on the lack of an autism diagnosis is an oversimplification of Student's needs, which clearly include social skill deficits. (Meade; Bucyk) Moreover, Dr. Chubinsky is not an educator, has never worked with or consulted meaningfully with any school staff member, has not administered any formal testing instruments to Student, has not observed Student in any school setting, and, as a result, has never observed the behaviors reported by Dearborn and Pathways. Nor has he observed what the implementation of said supports and services looks like at Pathways.⁹⁴ (P-16; Chubinsky) Since his first contact with Student in January 2017, Dr. Chubinsky has relied solely on Parents'

⁹² Dr. Chubinsky opined, in his earlier recommendations, that Student required speech and language services and even cited the absence thereof as one of the reasons that New England Academy was inappropriate for Student. (P-7F) At Hearing, he testified that these should be embedded in the program and not provided as a pull-out service. (Chubinsky)

⁹³ Ms. Meade testified to weekly meetings with Pathways educators. At Hearing, she based her opinion on reported staff observations of Student as well as her own daily observations which evidenced social skill deficits. (Meade) Her extensive familiarity with Student in the school setting made her a persuasive and credible witness.

⁹⁴ Dr. Chubinsky's opinion that "programs like Pathways, Hillside, and Dearborn" failed to "see" Student's "problem and help[] him with his anxiety instead of criticizing him when it emerges" is equally baseless as it relies on neither professional discussions with the programs nor direct observations. (P-12) I furthermore note that, in this Decision, I place little weight on the testimony of Ms. Paulson. Although Ms. Paulson taught language arts at Landmark School for two years in the mid-1980s, she is not a special education teacher, has never worked with or observed Student in a school setting, has never assessed Student, and has not communicated with any school setting which Student had attended. Although she endorsed a dyslexia diagnosis for Student, later testing did not confirm same. (P-19; Paulson) Moreover, by November 2020, when the Tenth Grade IEP was developed, Ms. Paulson had not worked with Student for over a year. (Paulson) I also place little weight on the educational recommendations of Catherine Mosca, Pip Nielsen, Lucie Langa, and Noah Erikson. (P-15; P-57; P-58) Because they were not present at Hearing and not subject to direct and cross examination, their opinions cannot be given significant weight independently. In addition, Noah Erikson's strong endorsement of CHCH proved to be misguided.

reports; he has neither sought nor considered input from any school setting.⁹⁵ (Chubinsky) For the purpose of educational programming, this renders his findings and recommendations unpersuasive. As such, I place limited weight on his educational recommendations.⁹⁶

In contrast, I find the recommendations for therapeutic supports and services made by professionals who evaluated Student and/or observed Student's interfering behaviors in a school environment to be highly persuasive.⁹⁷ Based both on their direct observations of Student and their supervisory work with his educators, Ms. Rice and Ms. Meade concluded that Student's needs would be met by every recommendation included in the Dearborn Report. (Meade; Rice) Both witnesses were significantly involved in Student's educational programming while he was attending their respective programs. (Rice; Meade) Ms. Meade and Ms. Rice testified to a similar presentation of Student: Student felt that he neither belonged in a therapeutic setting nor that he required social pragmatic supports but nevertheless was unable to manage his emotions and was, at times, dysregulated; he tended to misperceive social interactions and to be misperceived by others; Student was susceptible to bullying because of his social skill deficits. They were both of the opinion that Student required direct and explicit social skill instruction as well as in-the-moment coaching in order to navigate increasingly complex social situations. For Student, a therapeutic placement with properly trained staff and a setting that offered consistent, gentle, trauma-informed interventions is essential in order to help Student learn to "manage difficult feelings" and to access instruction. (P-14; S-19; P-19; Rice; Meade; Bucyk)

Dr. Chubinsky and Parents primarily disagree with the IEPs because the IEPs do not identify PTSD secondary to bullying as Student's primary diagnosis.⁹⁸ (Chubinsky; Mother; P-12; P-13) Parents argue that Student's educational placement and services should be designed with the recognition that his behaviors arise from his PTSD and not from any other disability. (Mother; Chubinsky)

In general, when faced with competing disability categories, the primary disability classification is that which primarily impedes a student's ability to access his or her education.⁹⁹ In the present matter, even though Parents insisted that PTSD was the Student's primary disability, they also asserted that his executive function skill deficits were the primary obstacle to his education.

⁹⁵ Dr. Chubinsky's contact with school staff involved in Student's education is limited to a 30-minute conversation with the consulting psychiatrist at Dearborn. He also testified to speaking with the Hillside School briefly, and the record shows that he wrote a letter to CHCH in the fall of 2020. It is unclear what feedback or input he received from same. (Chubinsky)

⁹⁸ Parents did not argue that Communication and Health were inappropriate categories but only that PTSD should have been the primary diagnosis. In fact, Dr. Chubinsky agreed that Student has a communication disorder and mild ADHD but noted that the "problem that has made difficulties at school is Post-Traumatic Stress Disorder." (P-12) Therefore, I do not address whether the disability classifications are in fact appropriate and, instead, address Parents' concern that a different primary disability (PTSD) was in order.

⁹⁹ See *Joanna S. v. South Kingstown Public School District*, 15-267S, 69 IDELR 179 (R.I. 2017); see also *District of Columbia Public School*, 111 LRP 24667 (SEA DC 2011) (although Student has academic skill deficits in all areas as evidenced by IEP goals in reading, mathematics and written language, his main obstacle to learning was his behavior and needed an intensive behavior management and behavior modification program such as the one integrated into the therapeutic school's curriculum).

Although arguing that any IEP that fails to revolve around Student's PTSD diagnosis is a "sham," both Mother and Dr. Chubinsky testified that Student's goals, accommodations and services should focus chiefly on his executive function. (Mother; Chubinsky) Parents' argument is, therefore, inconsistent.

It is furthermore well established that the IDEA makes no specific provision for a student to be classified under a particular disability, but rather requires that the student's educational program be designed to suit the student's demonstrated needs.¹⁰⁰ Although a student's medical diagnosis must be considered to ensure that all disability-related needs are addressed, medical diagnoses are not the same as eligibility categories.¹⁰¹ The fact that Parents believe that Student was mislabeled does not *per se* mean that he was denied a FAPE. Even if Parents could prove that Student's classification in the IEPs is improper, they still would need to establish that the proposed IEPs denied Student a FAPE on the basis of his unique needs, regardless of the disability label given to those needs.¹⁰²

Although the First Circuit has not addressed this issue explicitly, the Seventh Circuit, in *Heather S. v. State of Wisconsin*, found that, in general, "[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."¹⁰³ In that case, Heather argued that the school district identified her as cognitively disabled which she equated with being labeled "mentally retarded." Heather's parents were apparently concerned enough about such an identification so as to refuse explicitly to permit the district (and, apparently, others) to test Heather for cognitive disabilities. The hearing officer in the matter had ruled that the District misidentified Heather's disability when the District identified her primary handicapping condition as cognitively disabled instead of other health impaired. The reviewing officer had disagreed¹⁰⁴, but the Seventh Circuit found the matter irrelevant, stating:

In any event, whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point. The IDEA concerns itself

¹⁰⁰ See 20 U.S.C. § 1412(a)(3)(B) ("Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter"); *Fort Osage R-I Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1004 (8th Cir. 2011) ("Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, ... the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. ... [T]he party challenging the IEP must show that the failure to include a proper disability diagnosis 'compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits."); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 814 (8th Cir. 2011) ("A school district is not required to identify a student's issues by name or official diagnosis so long as the IEP properly identifies and addresses the student's disability").

¹⁰¹ See *In Re: Student with a Disability*, 2012-06, 113 LRP 8924 (SEA MT, 2013) (despite the dispute over student's medical diagnosis of autism, the fact that the district considered the diagnosis and addressed all of his disability-related needs showed that the student was offered FAPE); *Victoria Independent School District*, 146-SE0211, 112 LRP 16077 (SEA TX, 2012) (a medical diagnosis of autism based on the DSM-IV criteria as opposed to IDEA eligibility criteria was irrelevant because the therapy needs of the student as identified by the doctor were already identified by the school district and the student was already receiving ongoing services in those areas).

¹⁰² See *Joanna S.*, 69 IDELR 179; and see *Fort Osage*, 641 F.3d 996; *K.E. ex rel. K.E.*, 647 F.3d 795.

¹⁰³ *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997); *Williamson County Schools*, 07.03-144120J, 119 LRP 39647 (SEA TN, 2019) (criteria for a medical diagnosis is different from that for eligibility under IDEA because when making a clinical diagnosis symptoms are not necessarily required in the school setting).

¹⁰⁴ Wisconsin has a two-tiered review process for special education appeals.

not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child. In Heather's case, the school is dealing with a child with several disabilities, the combination of which in Heather make her condition unique from that of other disabled students. The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities.¹⁰⁵

Although there are distinct instances when a specific diagnosis on an IEP is crucial, such is not the case here. For instance, in *Weissburg v. Lancaster School District*, the Ninth Circuit held that “although the IDEA does not confer a legal right to proper disability classification, legal ramifications do arise from a student's disability classification.”¹⁰⁶ In that case, Student’s identification was crucial because, in California, special education teachers must possess credentials specific to a child's primary disability.¹⁰⁷ Hence, in *Weissburg*, the service to which the student was entitled was directly related to and impacted by his disability classification. Similarly, in *Bell v. Board of Education of the Albuquerque Public Schools*, the district court found that incorrect identification led to a denial of FAPE for a student with a learning disability who, for two years, was mislabeled as cognitively delayed. “[U]nconvinc[ed]” that a school district “would design the same IEP for a learning disabled student as it would for a [cognitively challenged] student,”¹⁰⁸ the court further noted, however:

This general finding, however, does not mean that Bell was necessarily denied a FAPE...[Rather,] Bell has specifically demonstrated that his IEP changed when his eligibility was changed. Labels are not determinative. They are, however, often important. [The District’s] actions in changing Bell’s IEP indicate that Bell’s situation was one in which the incorrect label turned out to be important.¹⁰⁹

¹⁰⁵ *Heather S.*, 125 F.3d at 1055 (internal citations omitted); see also, *D.B. v. Houston Indep. Sch. Dist.*, No. Civ. A. H-06-354, 2007 WL 2947443, at *10 (S.D.Tex. Sept. 29, 2007) (“IDEA does not require that children be classified by their disability so long as each eligible child is regarded as a child with a disability under the Act”); *Pohorecki v. Anthony Wayne Local School District*, 637 F.Supp.2d 547, 557 (N.D. OH 2009) (classification of disability is not critical to determining the provision of a free appropriate public education; rather, the determination rests on whether the goals and objectives are appropriate for the student because the “very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself”).

¹⁰⁶ *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1259–60 (Ninth Cir. 2010); see *S. P. by & through Palacios v. E. Whittier City Sch. Dist.*, 735 F. App’x 320, 322 (9th Cir. 2018) (failure to classify the student under the hearing impairment category in addition to a speech impairment was not harmless error because the district failed to consider, as required by statute, the student’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s communication mode); compare *Hailey M. ex rel. Melinda B. v. Matayoshi*, No. CIV. 10-00733 LEK, 2011 WL 3957206, at *20 (D. Haw. Sept. 7, 2011) (where state law did not guarantee certain services to students with specific disabilities, the student’s classification was immaterial to the special education services in her IEP because the IEPs addressed student’s unique educational needs and were “needs driven”).

¹⁰⁷ See *Weissburg*, 591 F.3d 1260 (“We hold that a change in eligibility category materially alters the legal relationship between the parties because it *entitles* Edward to placement in a classroom with a teacher qualified to teach students with the primary disabilities of mental retardation and autism”).

¹⁰⁸ *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, No. CIV.06-1137 JB/ACT, 2008 WL 5991062, at *27 (D.N.M. Nov. 28, 2008)

¹⁰⁹ *Id.*

In *Bell*, the change in classification resulted in a drastically different IEP with a “significant number of objectives and modifications.”¹¹⁰

In contrast, here, no changes to strategies, interventions, goals or objectives are necessary due to Student’s PTSD label.¹¹¹ Student’s IEPs, incorporating the recommendations from Dearborn, address the documented behaviors and skill deficits that interfere with Student’s ability to learn, rendering his disability categories irrelevant. As recently stated by Hearing Officer Sara Berman, “The [disability] categories do not purport to be diagnoses and do not state the cause or etiology of the listed disabilities; rather they are descriptions of functional limitations that may affect a child’s educational performance.”¹¹² The type of disability does not define the needs of the student and in no way limits the services, programs, or opportunities provided to him.¹¹³ Instead, services “to an eligible child must be based not on the category used to establish eligibility, but on ‘*evaluative data*’ that informs the individual educational needs of the child.”¹¹⁴

In the present matter, even if Student’s IEPs were to have centered on his PTSD secondary to bullying diagnosis, there is no persuasive evidence in the record to suggest that such an IEP should not, in fact, include all the supports and services offered in the IEPs proposed by Hamilton-Wenham.¹¹⁵ The IEPs even include the recommendations made by Parents’ own expert. Student’s diagnosis of PTSD and Dr. Chubinsky’s recommendation for “small classes” with “special education that his communication disorder requires” and a “strong anti-bullying environment” were incorporated into the body of the IEPs, which included therapeutic supports to address the “emotional regression” and “anxiety” referenced by Parents and Dr. Chubinsky. (P-16; S-4; S-6; P-51; Bucyk; Chubinsky; Mother) Dr. Chubinsky’s recommendations for executive functioning support and accommodations are also included in the IEPs. For example, Student’s accommodations include, in part, minimizing distractions, cueing and redirection when

¹¹⁰ *Id.* at *28.

¹¹¹ See *Torda ex rel. Torda v. Fairfax Cty. Sch. Bd.*, 517 F. App’x 162, 163 (4th Cir. 2013) (agreeing with lower court that by addressing all of the student’s difficulties in processing information, the school district essentially nullified any IEP challenges relating to his classification); *District of Columbia Public Schools*, 113 LRP 19132 (SEA DC 2012) (the IEP Team’s determination that School A is inappropriate for the student, based solely on a change in disability category, was in error); *North Shore Central School District*, 121 LRP 11749 (SEA NY, 2021) (finding that there was nothing to suggest that the IEP would have been materially different even if the district had selected the parent’s preferred disability category as a descriptor).

¹¹² *In Re: Whitman-Hanson Regional School District*, BSEA # 2007520, 26 MSER 310 (Berman, 2020).

¹¹³ 603 CMR 28.05(2)(b).

¹¹⁴ *Id.* (referring to 603 CMR 28.05(3))(emphasis added).

¹¹⁵ See *Torda ex rel. Torda v. Fairfax Cty. Sch. Bd.*, No. 1:11CV193 GBL/TRJ, 2012 WL 2370631, at *17 (E.D. Va. June 21, 2012), aff’d, 517 F. App’x 162 (4th Cir. 2013) (ruling that a district’s failure to list a second disability in the student’s IEP did not amount to an IDEA violation because the IEP addressed all of the student’s needs, regardless of his classification); *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1055 (7th Cir.1997) (“[t]he IDEA charges the school with developing an appropriate education, not with coming up with a proper label”); *D.B. v. Houston Indep. Sch. Dist.*, No. Civ. A. H-06-354, 2007 WL 2947443, at *10 (S.D.Tex. Sept. 29, 2007) (“IDEA does not require that children be classified by their disability so long as each eligible child is regarded as a child with a disability under the Act.”); *In Re: Scott M.*, 95-59, 24 IDELR 1229 (N.H. 1996) (“the more important question remains whether the District has developed an appropriate IEP which addressed the manifestations of his conditions ... be they caused by autism alone ... or due to the multiplicity of his impairment”). But see *In the Matter of Minneto v. M.L.K., by & through his Parents S.K.*, No. CV 20-1036 (DWF/KMM), 2021 WL 780723, at *9 (D. Minn. Mar. 1, 2021) (where “accurate disability diagnoses would alert a district to the need of additional services, they are too important to leave out if known”).

distracted, study guides, extra time for assignments, and access to a laptop. Goal objectives include, in part, attending to academic instruction, producing formal output, generating semantically and syntactically correct sentences, retelling or summarizing curriculum related material, and showing his process for problems solving mathematical problems. (S-5; S-6; Chubinsky).

Moreover, although Dr. Chubinsky disagreed with Student's need for a therapeutic program, his recommendations, in fact, suggest a program that is not dissimilar to Pathways.¹¹⁶ For example, Dr. Chubinsky testified that Student requires a bullying-free, nurturing environment where staff understand Student's anxiety and do not discipline as a result thereof. (P-16; Chubinsky) He also opined that Student requires a placement with "communication supports." (P-16; P-7F) Pathways offers a "gentle" trauma-informed approach, a high staff-to-student ratio (2:1), in-the-moment coaching, and direct social pragmatics instruction to facilitate peer interactions and prevent and address bullying concerns. (Meade) Dr. Chubinsky stressed that Student should be given great control over which supports he accesses and when. He also opined that Student required time to adjust to his new environment and needed a placement where his "anxiety symptoms are treated as only that." (P-1; P-12; Chubinsky) Ms. Meade testified that Pathways does not force students to engage in services but rather works around their interests, allows students time to buy into the program, offers students control over access to supports, and encourages building rapport and collaborative problem-solving. (Meade)

Parents furthermore are unpersuasive that Pathways offered Student an inappropriate peer grouping or an insufficiently challenging curriculum.¹¹⁷ (Mother; Chubinsky) Although most students at Pathways carry a diagnosis on the autism spectrum, the record offers no evidence regarding the cognitive or academic profiles of Student's peers at Pathway, and Parents did not meet their burden of showing that Student would not derive educational benefit from the peer grouping as a result of the other students' profiles or needs. (Meade) Peer disability categories do not per se render peers inappropriate, because a student's diagnosis is not determinative of the appropriateness of his placement.¹¹⁸ Rather, the analysis is an individualized assessment and

¹¹⁶ Dr. Chubinsky testified that a therapeutic placement is appropriate for students with autism or students with more "pervasive difficulties" and more severe special needs. (P-12; Chubinsky) Although the IDEA does not define "therapeutic placement," therapeutic placements typically consist of small classes with embedded emotional and/or behavioral supports. See, e.g., *Bedford Pub. Schs.*, BSEA #2006076 (Figuroa, 2020) (describing the appropriate placement for a teen with PTSD as a "substantially separate, small, placement with embedded therapeutic supports due to his increasing behavioral needs"); *Somerset Pub. Schs.*, BSEA #1902332 (Byrne, 2018) (describing a separate therapeutic classroom as providing a highly structured learning environment with small-class sizes, a challenging academic curriculum, specific attention to the written language process, and full-time therapeutic intervention and supervision with the ability for scheduled and as-needed access to counseling).

¹¹⁷ Parents also argue that Pathways staff found the placement too restrictive for Student and recommended Student that he attend CHCH. (Mother) However, while Ms. Meade testified that Student could function in a larger classroom with less support when he was interested in the topic at hand. I find her testimony persuasive that Ms. Ryan's letter of recommendation was intended to support Student's wishes to attend CHCH rather than to serve as a testament to Pathways' inappropriateness for Student. (P-14B)

¹¹⁸ See *In Re: Pentucket Regional School District*, BSEA #10-6783 (Berman, 2010) ("while FAPE may necessitate a certain type of peer grouping, neither the right to an appropriate peer group nor LRE principles entitle an eligible child to a ... classroom devoid of ... students with particular types of disability").

centers on similarity in students' educational needs and necessary services.¹¹⁹ Dr. Chubinsky testified that Student requires "normal" peers so that he can develop "normal" friendships. (P-1; P-12; Chubinsky) I am not persuaded by Mother's or Dr. Chubinsky's conclusions, grounded solely in their preconceived notions of the peers based on diagnosis and Student's reports that the Pathways peer group is inappropriate or that Student could not develop relationships with them. Prior to offering these opinions, neither Mother nor Dr. Chubinsky personally observed the students in question, Student's peer interactions within the program, or even spoke with a single educational professional who worked with either Student or any other student in his class on a daily basis. (Mother; Chubinsky) Although Dr. Chubinsky indicated that the students at Pathways frightened Student and retriggered his PTSD, Dr. Chubinsky has not reviewed their psychoeducational profiles. Instead, he relied solely on students' disability categories and Student's and Parents' perceptions in rendering his opinion as to the peer grouping's inappropriateness. In contrast, Ms. Meade, who supervised Student's educators and observed Student regularly in the educational setting, has concluded that the peer group was a "great" fit, and Student "fit" in at Pathways and with his peers, who had similar backgrounds and comparable skill deficits. (Meade) Like Student, Pathways students have average to above average cognitive abilities. In addition, most students at Pathways have a history of trauma, have experienced multiple school failures due to inappropriate supports, and are working on developing social-emotional and executive function skills. (Meade) Many, like Student, are aware of social rules but are unable to put them into practice consistently. (Meade) In addition, Student's peers were similarly aged (although Pathways classrooms may include instructional groups with students whose birthdays are within 48 months of one another).¹²⁰ (Meade)

Similarly, Parents offered no evidence to support their assertion that the Pathways curriculum was not sufficiently challenging for Student.¹²¹ Dr. Chubinsky opined that the IEPs ignored Student's academic capabilities and that students at therapeutic placements were lower functioning than Student. (P-1; P-12; Chubinsky) However, even Dr. Chubinsky acknowledged that Student has some academic weaknesses. (Chubinsky) In addition, Student produced little written output during his time at Pathways, making it difficult to judge the need for more rigorous instruction. (P-19; Meade) If after a longer tenure at Pathways Student had

¹¹⁹ See for example *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 133–34 (2d Cir. 1998) (finding student's peer group appropriate where regardless of the fact that B.W. was the only child in the proposed group diagnosed with pervasive disability disorder, the peer group was operating at an intellectual level sufficiently comparable to B.W.'s, and the students in the proposed grouping were all slow learners who needed a similar program); *Letter to Fascell*, 18 IDELR 218 (OSERS 1991) (children with disabilities under different eligibility categories may be placed in the same class and educated in similar programs if the placements are based on the children's individual educational needs and all of the Part B requirements, including the FAPE and LRE provisions, are satisfied); *Moon Area School District*, 102 LRP 5452 (SEA PA, 1998) (determination to combine students with different disabilities must be made on a case by case basis).

¹²⁰ In their closing argument, Parents erroneously noted that Pathways allows an eight-year span amongst students within a particular classroom. However, the age span is 48 months as allowed by state regulations. See 603 CMR 28.06(6)(g) ("Instructional group sizes in all programs approved under 603 CMR 28.09 shall be limited to those outlined in 603 CMR 28.06(6)(d), and no such instructional groups shall have an age range greater than 48 months").

¹²¹ See *In Re: Tewksbury Public Schools*, BSEA #01-1100, 6 MSER 311 (Sherwood, 2000) ("it may be that Student is cognitively at the top of his group, but this does not render the grouping inappropriate"); see also *Dallas Independent School District*, 420-SE-797, 27 IDELR 968 (TX 1997) (although parents believed that student would have made more progress in school if he had received a more challenging curriculum, parents failed to demonstrate that student's learning difficulties were caused by an inappropriate educational program).

demonstrated the need for a more rigorous curriculum, Pathways would have been obligated to tailor instruction to Student's changing educational needs.

Parents further argue that Pathways is inappropriate because Student regressed while there. (Mother) Yet the evidence offered to support this is inconclusive, and the reasons for any regression are confounding. Student's engagement at Pathways was minimal; as such, so was his progress. (P-14; S-19; Meade) Nevertheless, Ms. Meade testified that, for many students, it takes time to buy into the program. (Meade) Based on her extensive experience with students of a profile similar to Student's, I credit Ms. Meade's testimony that most students, like Student, struggle with the idea that they require help with social skills, and many resist such services at first. (Meade) Ms. Meade's extensive experience with students with similar trauma backgrounds and histories of repeated school failures made her a credible and persuasive witness, and she convincingly testified that Student's prognosis for success at Pathways was "excellent," but for the fact that he did not "want to be there." (Meade) Parents argued that Student found placement at Pathways to be embarrassing and stigmatizing. (Mother; Chubinsky) However, the fact that Student did not want to attend a therapeutic placement has little relevance to my assessment of whether the District's IEP offered Student a FAPE.¹²² Even Dr. Chubinsky testified that Student made some academic progress at Pathways. Student also demonstrated overall progress towards the end of his tenure at Pathways. (S-19; Chubinsky; Meade) Dr. Chubinsky attributed this progress to Student's glee at being able to leave Pathways and attend CHCH, but Ms. Meade testified that by June 2019 Student began to settle into the Pathways routine and accept that "everyone was working on something." (S-19; Meade) I also find Ms. Meade's testimony that Parents' lack of support for the program "trickled down" to Student and impeded his participation and progress to be highly persuasive.¹²³ (Meade; P-14A; S-18) I find it unlikely that Parents successfully shielded Student from their own distrust and disenchantment with the Pathways program. Although Mother indicated that in Student's presence Parents were supportive of the placement, this is not supported by the evidence. Mother testified that she and Student counted down the days until his time at Pathways was completed. (Mother) Furthermore, Student only began attending Pathways on or about March 1, 2019, but as of June 11, 2019 he was already accepted at and planning to attend CHCH, which suggests that Parents had not considered his tenure at Pathways to be anything other than short-term. (S-4) Another factor which cannot be discounted is that, during Student's three months at Pathways he was under significant additional stressors; both Mother and Dr. Chubinsky testified as to the significant, overwhelming strain suffered by Student because of the C&P proceedings. (Mother; Chubinsky) Hence, Parents did not meet their burden to show that Student's regression, if any, during this time period was due to his placement at Pathways.

¹²² See, for example, *In Re: Marshfield Public Schools and Beth*, BESA #07-1052, 13 MSER 238 (Oliver, 2007) ("The fact that [a student] did not like [a] placement in the past and does not want to go there now is most unfortunate. Certainly [a] student's wishes are a factor that must be considered, along with all of the other evidence. However, such wishes cannot dictate a BSEA decision"); *D.E.B. v. Hawaii, Dep't of Educ.*, No. CIV. 13-00059 DKW, 2013 WL 6210633, at *7 (D. Haw. Nov. 27, 2013) (where a student who had difficulties with processing, focus, and attention did not want to attend special education classes, the court nevertheless found that his past performance showed he was unable to benefit from a general education placement despite receiving extensive supports).

¹²³ Ms. Crowley similarly observed that Parents' poor perception of Pathways had essentially poisoned the possibility that Student would buy into the program. (P-14A; S-18) Ms. Crowley did not testify at Hearing, and, as such, I give her conclusion, standing alone, limited weight. However, her reflection clearly buttresses Ms. Meade's highly persuasive testimony.

Parents also object to the Tenth Grade IEP's failure to reflect current information regarding Student. (Mother). I note that Parents and their expert were invited to be part of the development of both the Ninth Grade and Tenth Grade IEPs. (S-2; S-3; S-4; S-5; P-51; Bucyk; Meade) Parents did, in fact, participate in the development of the Ninth Grade IEP, along with their attorneys and Dr. Chubinsky and had an opportunity to share their concerns with the Team and to participate meaningfully in the Team process.¹²⁴ The Team reconvened in August 2019 to make changes to the IEP in response to Parents' concerns. (S-4; P-13; P-51; P-52; P-68; Mother; Chubinsky) The Team engaged in a cooperative process, making changes to the proposed IEP and even offering to send additional referral packets to DESE-approved programs. (S-4; P-2) The Team may not have given parental input regarding Student's current status the weight that Parents would have liked, but there is no evidence that Parents did not have the opportunity to present such information or participate in the decision-making process at the meeting.¹²⁵

Subsequently, Parents declined to participate in the development of the Tenth Grade IEP. (S-1; S-5; P-6; Mother; Bucyk) Mother testified that she refused to participate because Hamilton-Wenham had declined to mediate with the family and had refused to fund Austin Prep when she sought said support in March 2020. (P-2; P-3; P-6; P-35; Mother; Bucyk) Nevertheless, Hamilton-Wenham was willing to engage in placement discussions with Parents but requested that Student first be reassessed. (P-5; Mother; Bucyk) When Parents made it clear that they would not consent to the reassessment and would not participate, Hamilton-Wenham was obligated to convene said meeting and to develop the IEP.¹²⁶ It was therefore reasonable of the Team to hold an annual meeting without Parents and to develop the Tenth Grade IEP.¹²⁷ (S-5; Bucyk)

By refusing to participate in the development of the Tenth Grade IEP or allowing the District to secure updated Student information through a reassessment, Parents are precluded from then asserting that the final product does not reflect current information about Student or their input and is therefore inappropriate.' (Mother) Mother testified that the IEP was "repetitive," "speculative," and lacking updated information. (Mother) Ms. Bucyk too testified that current

¹²⁴ See 20 U.S.C. §1414 (e); see also *W.G., et al. v. Board of Trustees of Target Range School District, etc.* 960 F.2d 1479, 1485 (9th Cir. 1992) (a parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP); *N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003); *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993).

¹²⁵ Mother testified that the Team agreed that CHCH was appropriate for Student but that Hamilton-Wenham refused to support CHCH because it was not approved by DESE as a special education school. (Mother) Even had the Team agreed that CHCH could meet Student's needs, it was reasonable for Hamilton-Wenham to continue to propose Pathways since Massachusetts law clearly shows a preference for state-approved programs. See 603 CMR 28.06(3)(d); see also *Manchester-Essex Reg'l Sch. Dist. Sch. Comm. v. Bureau of Special Educ. Appeals of The Massachusetts Dep't of Educ.*, 490 F. Supp. 2d 49, 54 (D. Mass. 2007).

¹²⁶ See 34 CFR §300.322(d) ("A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend"). See also *Rockwall Indep. Sch. Dist. v. M.C.*, 816 F.3d 329, 340 (5th Cir. 2016) (Parents limited their own participation in the IEP-development process by adopting an all-or-nothing position); *In Re: Norton Public Schools*, BSEA No. 1609348, 23 MSER 40 (2017) ("when it was clear that Parents would not attend an annual review meeting, Norton acted properly and in accordance with its obligations in convening the meeting in Parents' absence").

¹²⁷ Parents' decision not to participate unless Hamilton-Wenham agreed to fund their preferred placement was unreasonable and lacked collaborative intent. See *Rockwall Indep. Sch. Dist.*, 816 F.3d at 340.

information from CHCH would have been useful in the development of the Tenth Grade IEP. (Bucyk). However, save for a first term report card from CHCH provided to the Superintendent of Schools in December 2019, Parents provided no other information from CHCH to Hamilton-Wenham despite repeated attempts by Ms. Bucyk to obtain a consent to release information. (Bucyk) Parents further refused to provide consent for the re-evaluation which had become due in the fall of 2019.¹²⁸ (P-4; P-6; Mother)

Parents cannot, on the one hand, assert that Hamilton-Wenham has an inaccurate view of their child's needs and at the same time refuse to allow the District to evaluate Student. In other words, Parents may decline a school proposed re-evaluation, but, in turn, Hamilton-Wenham cannot be found responsible for any educational injury that results from Parents' refusal to consent to the re-evaluation.¹²⁹

As a result, I must rely principally and substantially on Dearborn's evaluative data and the testimony of staff who have had the opportunity to work with Student and/or to observe him in an educational setting. In doing so, I find that both the Ninth and Tenth Grade IEPs incorporated the recommendations thereof, all of which were appropriate to meet Student's unique special education needs as they presented at that time. I therefore find that Hamilton-Wenham's IEPs were and are reasonably calculated to offer Student a FAPE in the LRE and to enable Student to receive educational benefits and to make progress in light of his circumstances.¹³⁰

Because I found that the IEPs were and are reasonable calculated to offer Student a FAPE, I need not address the questions of: whether CHCH and Austin Prep, respectively, were appropriate placements for Student, thus entitling Parents to reimbursement for the 2019-2020 and 2020-2021 school years; whether compensatory services in the form of reimbursement for medical and/or educational services privately provided by Parents to Student are warranted; and/or

¹²⁸ See *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 468-9 (7th Cir. 2000) ("parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement"); *Fairfield Board of Education*, 16-0165, 69 IDELR 21 (CT 2016) ("reimbursement for the 2015-2016 school year is not appropriate due to the refusal to consent to the evaluation for ESS and the unreasonableness of Parents' action in choosing not to cooperate with the District..."); see also *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir.2003).

¹²⁹ See 20 U.S.C. §1414 (a)(III)(aa); *Roland M.*, 910 F.2d at 995 ("the LEA, by virtue of appellants' actions, was in a perilously poor position"); see also *In Re: Ipswich Public Schools and Soleil*, BSEA #1906526, 25 MSER 220 (2019) (Byrne, 2019) ("By declining [to provide consent], however, the Parents lose the capacity to challenge a potential denial of FAPE linked to information an evaluation could have uncovered and thereby waive any future claim for compensatory services on that basis"); *In Re: Lexington Public Schools*, BSEA # 09-0139, 16 MSER 161 (Figueroa, 2010) ("Lexington cannot be held responsible for Parent's lack of cooperation in providing it with valuable information to assist with the development of the IEP"); *In Re: Brea Olinda Unified School District*, 2009020124, 2009050815, 53 IDELR 273 (CA 2009) ("Student's needs must be determined by assessment, and Parents refused District's offer to perform a complete assessment of Student ...").

¹³⁰ *Andrew F.*, 137 S.Ct. at 999. I note that here, the only potential obstacle to Hamilton-Wenham's proposal is that the Pathways placement has already been "poisoned" in Student's mind. (S-18; Mother; Chubinsky; Meade) The First Circuit has not opined directly on the appropriateness that becomes unviable due to parental hostility. Further, Parents have demonstrated through their actions that no placement proposed by Hamilton-Wenham would satisfy them. As such, I decline to find that Pathways is inappropriate by virtue of Parent's hostility to the placement.

whether a different remedy is appropriate.¹³¹ However, I note that even had I found the IEPs not to be reasonably calculated to offer Student a FAPE, I would be unable to find that CHCH and Austin Prep were responsive to Student's special education needs. While the IDEA does not mandate that a private placement furnish every special service needed by their child, it does require a showing that there was some design in place for meeting the unique needs of the child.¹³² The record here is devoid of such evidence. I note that no staff from CHCH and Austin Prep testified at Hearing, and Parents failed to present detailed evidence regarding the supports and services available to Student at each program and how said supports were responsive to Student's educational needs. Rather, the very limited evidence which was offered by Parents suggests that neither program could meet Student's needs; Student's inability to remain at either placement for longer than one school year highlights a fundamental deficiency in programming and an unresponsiveness to Student's unique special education needs.

All other relief sought is also denied.

ORDER:

The Individualized Education Programs developed by Hamilton-Wenham for Student during the relevant time periods were and are reasonably calculated to provide a free, appropriate public education to Student in the least restrictive setting. Parents are not entitled to reimbursement for expenses incurred for Student's placements at CHCH and Austin Prep, nor for any other expenses incurred during said time.

/s/ Alina Kantor Nir

Alina Kantor Nir, Hearing Officer

August 16, 2021

¹³¹ See *In Re: Arlington Public Schools and Xaylen*, BSEA# 2008870, 27 MSER 178 (Byrne, 2021) ("Having determined that the Parents have not demonstrated, by a preponderance of the evidence, that either IEP at issue was/is inappropriate, I do not reach the question of whether the Carroll School was an appropriate placement").

¹³² See *Florence County Sch. Dist. Four*, 510 U.S. at 13-14 (1993); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 25 (1st Cir. 2007) (private school was not appropriate since this school, "where [student] has remained for more than two full academic years, simply does not provide the special education services that [student's] mental health professionals have prescribed").

COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program." Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2). An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.