

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

BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Student v. Swansea Public Schools

BSEA No. 2202178

DECISION

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

The Student in the instant case is a fourteen year old eighth grader with disabilities who currently attends the Wolf School pursuant to successive IEPs issued by the Swansea Public Schools (Swansea, School or District) and accepted by Parent. The Wolf School, a DESE-approved private special education school in East Providence, RI, serves grades K through 8. Since Student will finish eighth grade at the end of the 2021-2022 school year, she will need a new placement for ninth grade. For the 2022-2023 school year, Swansea has proposed a program within its public high school.

On March 21, 2022, Parent filed a hearing request with the Bureau of Special Education Appeals (BSEA) in which she asserts Student’s “stay put” rights to a program comparable to the Wolf School and allege that Swansea’s proposed IEP and placement for the 2022-2023 school year is neither comparable to the Wolf School nor reasonably calculated to provide Student a free, appropriate public education (FAPE). Parent seeks an order from the BSEA directing Swansea to place Student residentially at the Landmark School in Pride’s Crossing, MA for the 2022-2023 school year.

Upon receipt of Parent’s hearing request, the BSEA scheduled an initial hearing date of April 25, 2022. At the request of the School, the hearing was postponed for good cause to April 26, 29, and May 9, 2022. With the consent of both parties, the hearing took place via Zoom videoconference. Both parties were represented by counsel and had an opportunity to examine and cross-examine witnesses, as well as to submit documentary evidence for consideration by the Hearing Officer. On May 9, 2022, the last day of hearing, the parties presented oral closing arguments in lieu of written closing briefs, and the record closed on that day.

The record in this case consists of Parents’ Exhibits P-1 through P-38, School’s Exhibits S-1 through S-12, as well as stenographically-recorded witness testimony and argument of counsel. Those present for all or part of the proceeding were the following:

Student’s Mother
Student’s Stepfather
Kirstin Birtwell, Ph.D.

Private Neuropsychologist

Nicole Coman	Private Educational Psychologist
Sarah Dulac	Eighth Grade Special Education Teacher, Wolf School
Courtney Lopes-Finnerty	Speech/Language Pathologist, Swansea Public Schools
Julie Garell	Director of Student Services, Swansea Public Schools
James Tucker Harrison	Public School Liaison, Landmark School
Amber Kaltenstein	School Psychologist, Swansea Public Schools
Lauren Karlsson	Special Education Director, Wolf School
Sandra Kozatek	Reading Specialist, Swansea Public Schools
Kathleen Fisher	Counsel for Parent
Melanie Falzone	Counsel for Parent
Kimberley Rozak	Counsel for Swansea Public Schools
Sean Clough	Counsel for Lauren Karlsson and Sarah Dulac
Sara Berman	BSEA Hearing Officer
Jane M. Werner	Court Reporter
Carol Kusinitz	Court Reporter

ISSUES PRESENTED

The issues to be decided are the following:

1. Whether the IEP and placement offered by Swansea for the 2022-2023 school year are comparable to Student’s current programming at the Wolf School;
2. If not, whether Swansea must place Student residentially at the Landmark School in order to provide a comparable placement;
3. Whether the IEP and placement proposed by Swansea for the 2022-2023 school year are reasonably calculated to provide Student with FAPE in the least restrictive environment;
4. If not, whether the IEPs and/or placement can be modified to provide FAPE;
5. If not, whether Swansea must place Student at Landmark School or another approved out-of-district placement in order to provide her with FAPE.

POSITION OF PARENT

Student is a 14-year-old eighth-grader who has solidly average cognitive ability and age-appropriate social skills. As a result of specific learning disabilities in reading, writing, and math, as well as significant executive functioning concerns and ADHD, Student’s academic skills fall well below her grade level and intellectual potential. At the end of the 2021-2022 school year, Student will age out of her current placement at the Wolf School, a private day school for students with language-based learning disabilities, which she has attended for the past three years pursuant to IEPs issued by Swansea Public Schools. Parent has rejected Swansea’s proposed IEP for ninth grade, which calls for placement in a substantially-separate setting within the public high school, and asserts that this placement is neither comparable to Student’s current program at the Wolf School

as required by “stay put” principles nor reasonably calculated to provide Student with a FAPE. Unlike the Wolf School, and contrary to the recommendations of evaluators and educators familiar with Student, the proposed program would provide Student neither with the language-based programming and executive functioning supports across the curriculum, nor with the cohort of peers with similar profiles that she needs to make effective progress.

The Landmark School, which has accepted Student for her ninth-grade year, is a DESE-approved private school exclusively serving students who, like Student have specific learning disabilities in reading and writing in the context of at least average cognitive abilities. Because there are no DESE-approved private day schools that are either comparable to the Wolf School, or appropriate for Student, within an hour’s commuting distance from Student’s home, Student requires placement at the Landmark School as a residential student in order to receive FAPE.

POSITION OF SCHOOL

Contrary to Parent’s claim, the substantially separate, language-based program offered by Swansea is both comparable to the Wolf School and able to provide Student with the language-based methodologies, specialized reading instruction, and executive functioning supports that she needs to make effective progress. Incoming ninth graders in the program have similar profiles to Student and will be appropriate peers for her. Additionally, Student will benefit from inclusion opportunities at the high school in elective courses and extracurricular activities and will be able to continue her current athletic and recreational activities within her community. A residential placement at Landmark is far too restrictive for Student and will not provide her with any educational benefit that is not available in Swansea’s proposed program.

SUMMARY OF THE EVIDENCE

Student Profile

1. Student is a 14-year-old child with disabilities who is a resident of Swansea. Student’s eligibility for special education and related services pursuant to the IDEA and MGL c. 71B is not in dispute. Student attended three different public elementary schools in Swansea from Kindergarten through fifth grade. Pursuant to IEPs issued by Swansea and accepted by Parent, Student has attended the Wolf School, a DESE-approved private day school in East Providence, RI, for grades six (2019-2020), seven (2020-2021), and eight (2021-2022).
2. Student presents as a typical teenaged girl who is fun, loving, “super-funny and very athletic.” (Mother). Her current teachers describe her as friendly, charismatic, always smiling, and always ready to help classmates. (Karlsson, Dulac) Student enjoys art and gymnastics and is very involved with cheerleading in her community. Cognitive testing shows that Student has at least solidly average intellectual abilities. She has no behavioral difficulties at home or at school. While Student has a history of experi-

encing anxiety, she currently has no significant emotional or mental health issues. In school, Student struggles with reading, writing, math and executive functioning, but demonstrates age-appropriate social and behavioral skills, as well as leadership ability. (Mother, Birtwell, Dulac, Karlsson, P-1)

3. The parties do not dispute Student's disability profile. Student has long-standing diagnoses of a language-based learning disability, including dyslexia, that affects her skills in reading, writing, and math. She also has been diagnosed with ADHD and executive functioning deficits and has a history of generalized anxiety disorder (GAD), although the GAD has not affected her functioning recently. In addition, Student has a rare, chronic autoimmune disorder, diagnosed when she was about a year old, for which she was medically hospitalized approximately four times as a young child. At present, Student's health is relatively stable, but because a trial of ADHD medication in approximately 2018 exacerbated her symptoms,¹ her medical providers have determined that her ADHD cannot be treated with medication. (Mother, Birtwell, P-1)
4. As a result of her language-based learning disabilities, executive functioning challenges, and ADHD, Student's academic performance is significantly below expectations for her age, grade placement, and intellectual abilities. (Birtwell, Garell)

Chronology through grade 5 (2018-2019)

5. Student became ill with her autoimmune disorder when she was about one year old. Parent enrolled her in Early Intervention (EI) to address developmental regressions caused by the illness. (Mother)
6. Student entered Kindergarten within the Swansea Public Schools without special education services. During Student's first grade year, Parent and teachers became concerned because she was "not wanting to go to school...hiding under the desk [at school], lots of visits to the nurse, crying for homework." (Mother, P-18). Parent hired a tutor for Student for the summer between first and second grade, and then pursued special education services during second grade. School-based evaluations conducted in November 2015 indicated possible dyslexia. (P-18) At some point during Student's second grade year, Swansea issued an IEP providing for a full-inclusion program with 30 minutes per week of reading instruction as well as push-in support in the general classroom. (Mother, P-18)

Mid-way through her fourth-grade year (2017-2018, Student's reading services were increased to 3x30 per week and that her academic performance improved somewhat, but Parent felt that Student's needs were still not being fully met. (Mother)

7. In November 2017, the School Team of the Developmental Medicine Center at Boston Children's Hospital (BCH) conducted a Parent-funded multi-disciplinary evalua-

¹ Student was hospitalized for several weeks with this flare-up of her condition.

tion of Student in response to Parent's concerns about Student's difficulties with reading, memory, anxiety, and recent diagnosis of ADHD. (P-18)

Testing revealed low-average to average overall cognitive abilities. Her scores were affected by frequent reversals of letters, numbers, symbols, and patterns. Academically, Student "performed at a level that was incongruent with her cognitive abilities." Her word reading and pseudoword decoding skills, as well as her math problem solving skills, as measured by the WIAT-III were in the "borderline" range. In fourth grade, Student's literacy skills ranged from the mid-first to mid-second grade level; her writing skills fell at the upper second-grade level; and math problem-solving skills were at the mid-second grade level. Only numerical operations were at the fourth-grade level.

Student also had weaknesses in various facets of executive functioning and had significant amounts of anxiety. The BCH team diagnosed Student with ADHD, Combined Type, Generalized Anxiety, and Specific Learning Disorders in Reading/Dyslexia, as well as in Writing/Dysgraphia.

BCH made multiple recommendations, including extended school year (ESY) services in reading, writing and math to prevent regression, provision of core academic instruction (reading, writing, and math) in a substantially separate classroom with reduced distractions, and inclusion in the general education classroom for science, social studies, and specials with the support of a shared aide.

BCH made additional, specific recommendations for reading, writing, and math. For reading, BCH recommended at least 5x60 minutes per week of specialized reading instruction with a reading specialist or special education teacher using an explicit, and multisensory, phonics-based methodology such as Wilson, Orton-Gillingham, Language! Live, Project Read, or SPIRE, as well as instruction in word retrieval and morphology. BCH further recommended daily, explicit instruction in writing and math. Lastly, BCH made multiple recommendations regarding the classroom setting and accommodations, and home-based activities. (P-18) The record is not clear as to whether or when the Swansea Team considered the BCH evaluation.

8. In November and December 2018, while Student was in fifth grade, Swansea conducted Student's three-year re-evaluation which entailed a psychoeducational evaluation comprising cognitive and academic testing as well as behavioral rating scales. On the WISC-V, Student's overall score was in the "low average" range; however, she achieved solidly average scores in the Verbal Comprehension and Visual Spatial reasoning components of the test.

On the WIAT-III, Student achieved "average" scores in oral language, but showed "below average" skills (6th percentile) in "Total Reading." While Student's score on the Oral Reading Fluency subtest was "average," scores in all other subtests were

“below average,” and the evaluator noted that Student struggled with decoding and reversed sounds within words, which interfered with her comprehension.

Student scored in the “average” range in the math portion of the WIAT-III (18th percentile), with an “average” score in Numerical Operations and “below average” in Math Problem Solving. While she had good foundational skills in basic math operations, she struggled with word problems.

Student achieved “average” scores in written expression. She had average skills in organization and theme development, but struggled with mechanics such as spelling, capitalization, and punctuation.

On the CTOPP-2 (Comprehensive Test of Phonological Processing, Second Edition), Student performed in the “Poor” range for phonological awareness (3rd percentile), “Average” in phonological memory, and “Average” in rapid naming. She achieved “Poor” scores in two supplemental subtests to the CTOPP-2 (blending and segmenting non-words). The examiner concluded that based on her poor phonological awareness, Student had tremendous difficulty decoding, but that if decoding were not a factor, Student would be able to read and comprehend at a level similar to her same aged peers.

According to Parent and teacher responses to the Conners Rating Scale, Student had “clinically significant” problems related to attention, hyperactivity, and learning problems across all settings, and, additionally, problems with peer relations, defiance and executive functioning at home.

The evaluator concluded that Student met the criteria for a specific learning disability, and made multiple recommendations, including for continued reading intervention targeting weak phonological awareness. (P-17)

9. The record does not contain a copy of the IEP issued as a result of the 2018 re-evaluation.

Grades Six (2019-2020), Seven (2020-2021), and Eight (2021-2022), Wolf School

10. At the beginning of the 2019-2020 school year, Student entered sixth grade at the Joseph Case Junior High School (“Case JHS”) which is Swansea’s public middle school. According to Parent, that placement “became very overwhelming really fast.” (Mother) Student often forgot needed homework materials in her locker, cried when she needed to do homework, and left class frequently to get water or visit the nurse. Student complained to Parent that she felt “weird,” and began napping every day after school. Medical testing indicated that that Student’s medical condition was not causing her fatigue. (Mother)

11. On or about January 6, 2020, Swansea convened a Team meeting for Student's three-year re-evaluation, during which the Team reviewed information suggesting that Student needed instruction from a reading specialist. The Case JHS did not have a reading specialist on staff. At the suggestion of Parent's advocate, Swansea agreed to change Student's placement to the Wolf School, and Student began attending the new placement mid-way through her sixth-grade year. (Garell, Mother)
12. Located in East Providence, RI, the Wolf School ("Wolf") is a private, DESE-approved special education day school serving approximately 60 students in grades K through 8. (P-29) Wolf serves children whom it describes as "complex learners" who typically are "struggling in one or more or three main areas: language processing/production, sensory regulation, and social communication." Many students have literacy needs and executive functioning challenges. (P-29, Karlsson)

Wolf uses an "Immersion model" for delivering instruction, that is, each classroom is staffed with a special education teacher, teaching assistant, speech/language therapist and occupational therapist² who collaborate to develop individualized programming for each student. At the middle school level, there are no more than eleven students per classroom, and the student/staff ratio is approximately 4:1. In the middle school, each class is broken up into smaller groups of two to four children with similar skill levels for core subjects (reading, writing and math). The full class usually comes together for science, social studies and electives and language and executive functioning supports are provided for this group instruction. There is one Orton-Gillingham (O-G) specialist employed at the Wolf School. (Karlsson, Dulac)

Wolf purports to provide a "language-based learning environment with sensory processing supports and social thinking skills immersed into the academic curriculum." (P-29) Student's eighth grade special education teacher, Sarah Dulac, testified that the language-based features of Wolf include use of many visual supports, teacher modeling, multisensory teaching, facilitating discussions, repetition, previewing of content and vocabulary, and presenting information multiple times and in several formats. Language-based methodologies are implemented throughout the school day, as are strategies for executive functioning, organization, and self-regulation. Assistive technologies such as spell-check and speech-to-text software are available and students may be instructed in their use. (Karlsson, Dulac)

13. Parent was in favor of the Wolf School placement for Student because it was a DESE-approved, language-based program located within commuting distance of the family's home. While Parent was concerned that Student would be the only girl in her class, and that the other students seemed cognitively and socially different from Student, she felt that at that time the availability of language-based instruction took

² The speech/language and occupational therapists are not all continuously present in the classroom at the same time but rotate among approximately three classrooms and provide consultation services to the teachers. (Dulac)

precedence over social and peer concerns. Parent testified that “I felt like educationally, this was a much better fit than Swansea Junior High. I was worried very much socially.” (Mother)

14. In January and February 2020, shortly after Student’s enrollment, Wolf School staff evaluated Student in the areas of reading, writing, math, speech/language, occupational therapy (OT), and social/emotional skills. In general, overall reading skills were at approximately a fourth-grade level. For writing, Student could produce a two-paragraph essay with four to five sentences per paragraph. She was provided with various supports for this assessment, including, *e.g.*, a graphic organizer, assistive technology, breaks, and the use of fidgets. She demonstrated a “proficient” skill level in a subtest measuring understanding of content and ideas, and “below basic” skills in capitalization, usage, punctuation, and spelling.

Student’s math skills were measured with the Group Mathematics Assessment and Diagnostic Evaluation (GMADE), on which she achieved an overall score of 95, in the 27th percentile, which placed her skills at a 4.8 grade level. As with the reading and writing assessments, Student was tested in a 1:1 setting with multiple accommodations such as movement breaks, fidgets, and positive reinforcement.

(P-5)

The speech/language screening revealed age-appropriate language skills in the areas of articulation, following directions, understanding linguistic concepts, syntax, grammar, higher-level language skills and social pragmatics. Student had relative weaknesses in phonological awareness and auditory memory, particularly in tests measuring sentence memory, phonological segmentation, and phonological blending, where her scores were “below average.” The latter two skills are “considered both foundational and predictive of reading and spelling development.” (P-5)

On the OT assessment, Student produced legible handwriting and benefitted from movement breaks and fidgets during instruction. According to a teacher questionnaire targeting social/emotional skills, Student’s strongest skills were in “empathy and caring,” “self-awareness,” and “communication,” and her weakest area was “executive functioning.” (P-5)

15. In May 2020, Swansea issued an IEP covering May 2020 to May 2021, corresponding to the last portion of sixth grade and most of seventh grade, and providing for continued placement at the Wolf School. Parent accepted the IEP and placement. (P-5, Mother).
16. The IEP goals and benchmarks were developed by staff at the Wolf School. The IEP noted in PLEP A that Student’s limitations in reading comprehension and decoding affected progress in all academic areas, as did challenges with executive functioning and sensory regulation. The IEP contained goals in Reading (with benchmarks in de-

coding and encoding), Reading Comprehension, Writing, Math, “ELA-Reading,” (emphasizing phonological blending and auditory direct and explicit instruction in all content areas, and processing skills), Occupational Therapy (focused on sensory regulation), and Social Skills (with benchmarks targeting organizational skills).

The IEP provided for numerous accommodations, including reduced workspace distractions, visual calendars and schedules, additional time for task completion, review and repetition of information, modeling of approaches to task, breaking down tasks into smaller increments, and visual supports.

Under “specially designed instruction,” the IEP provided for a multi-modal, multi-sensory approach to supplement verbal language, a systematic structured, multisensory reading program, guided reading strategies, writing workshop model, small group/individual work, whole group community-building curriculum instruction, direct and explicit instruction in all content areas, sequential and spiraling programs, and clear/consistent routines, transitions and expectations. (P-5)

The service delivery grid specified as follows: Grid A—60 minutes/week, each of consultation from the special education teacher, occupational therapist, and speech/language therapist, Grid B—5x420 minutes/5 days of “Academics” and 4x30 minutes/5 days of “English Language Arts-Reading, both from the special education teacher. Testimony at hearing established that while Student was to receive, and did receive, 4x30 minutes/5 days of specialized reading instruction from a reading specialist, this time was included in the 5x420 minutes/5 days of “Academics.” (Karls-son, Garrel) The IEP also provided for one month of Extended School Year (ESY) services during the summer of 2020. (P-5)

17. Student attended Wolf School for the second half of sixth grade and all of seventh grade (2020-2021) pursuant to the above-referenced IEP. Standardized assessments performed by Wolf staff in September and December 2020 and in May 2021 demonstrated that Student had made progress towards achieving many of her IEP benchmarks and goals. (P-4, P-26).
18. On May 26, 2021, Swansea issued an IEP covering May 2021-May 2022, corresponding to the last weeks of seventh grade as well as most of eighth grade. The IEP provided for continued placement at the Wolf School for eighth grade, as well as ESY services for the summer of 2021. Wolf developed the goals and benchmarks for this IEP as it had with its predecessor. Parent accepted the IEP and placement.

This IEP, in PLEP A and PLEP B, respectively, noted Student’s difficulties with auditory memory and regulating her arousal level, and provided for additional accommodations including access to assistive technology throughout the day to support

reading comprehension of grade level text, and explicit teaching of self-regulation strategies.³

This IEP contained goals in Reading, Writing, Reading Comprehension, Math, ELA Reading, Self-Regulation, and Executive Functioning. These goals and benchmarks were adjusted from those in the prior IEP to reflect Student's progress (in phonemic awareness, for example), and to further target areas of need (self-regulation, executive functioning, auditory memory). (P-4)

19. Student attended Wolf for eighth grade pursuant to the above-referenced IEP and was still in attendance as of the hearing in this matter. Presently, Student is in a class of eight, eighth-grade students. There are five staff assigned to the class: Ms. Dulac (the eighth-grade special education teacher), a teaching assistant, a speech/language therapist, an occupational therapist, and a learning specialist. At any one time, three of these staff members are present in the classroom. (Dulac)

Student's daily schedule consists of morning meeting, followed by math, literacy, snack/movement break, science, social studies, or a second literacy block, recess/lunch, All School Read, either electives or explicit teaching of social and/or executive functioning skills, and either "Spot On" (a collaborative activity with the speech and occupational therapists) or physical education. For literacy and math, the class is divided into smaller groups of two or three students who are matched by instructional levels. Student and one other child receive 4x60 minutes per week of instruction in reading with the learning specialist, who is a special education teacher with Orton-Gillingham training. (Dulac)

20. There is no dispute that Student made progress in her areas of need during her tenure at the Wolf School. Goals and benchmarks were made increasingly challenging as she moved through the grades. According to the most recent progress report in the record, issued in April 2022, Student had achieved annual IEP goals in Written Expression, Math, Auditory Comprehension, Self-Regulation, and Executive Functioning, had achieved benchmarks for April 2022 in Reading Comprehension, and was "progressing" towards meeting April 2022 benchmarks in Reading Fluency. (P-23) According to Student's eighth grade teacher, Ms. Dulac, as of the hearing date, Student was performing at approximately a sixth-grade level in reading fluency, reading comprehension and math, and at a fifth-grade level in written expression.

Parent observed that Student had become happier, less anxious, more independent, and more organized after enrollment at Wolf. She was able to manage homework independently. (Mother)

³ For Student, "self-regulation" refers to her ability to maintain an optimal level of attention and alertness to focus on schoolwork. (P-4, P-5)

21. Despite Student's academic progress, the parties agree that she will continue to need language-based instruction and related accommodations and supports when she transitions into high school. According to Ms. Dulac, Student still struggles with decoding, reading fluency, and comprehension, and benefits from explicit instruction in reading strategies from the learning specialist as well as multisensory presentation of materials. She still does not read at grade level. For writing, Student has challenges with organization and needs graphic organizers as well as assistive technology and teacher support to help with capitalization, spelling, grammar and punctuation. She needs similar supports in math, particularly with word problems. Student's memory and attentional weaknesses require accommodations and strategies, such as check-ins and prompts. Student is working on independently using strategies to monitor her arousal level. (Dulac)
22. The parties also agree that Student's social skills are an area of personal strength. At Wolf, Student is more advanced socially than most of her peers. She is a leader and role model for other students. She is kind, supportive, and helpful to other children and to staff, but has few or no peers who function at her level socially. She does not require explicit social skills instruction. Further, Student's general cognitive abilities—which are average—are more advanced than those of most of her peers. Parent has been and continues to be concerned about the lack of socially similar peers at Wolf, and both parties agree that Student's high school placement should provide her the opportunity for more age-typical peer interaction. (Karlsson, Dulac, Mother, Garell, Birtwell)
23. In September 2021, at the beginning of eighth grade, Student underwent a private neuropsychological evaluation conducted by Kristin B. Birtwell, Ph.D., which consisted of clinical interviews with Student and Parent, review of records including prior evaluations, and an extensive battery of standardized tests and rating scales.

On the WISC-V, Student performed in the "Average" range overall (58th percentile). Her Verbal Comprehension, Visual Spatial, Fluid Reasoning and Processing Speed index scores fell in the "Average" range, with some subtests (Vocabulary, Visual Puzzles and Symbol Search) in the High Average range, while Working Memory scores were "Low Average."

Additional testing of Student's language functioning using the NEPSY-II revealed a strong ability to generate words in a category but weaknesses ("Below Average" scores) in phonetic fluency generating words starting with a particular letter) and phonological retrieval skills. Regarding memory, Student's narrative verbal memory was "nicely intact," but rote learning was challenging for her. (P-7, Birtwell)

Student's scores in measures of academic skills were below what would be expected in light of her solid cognitive abilities. On the Kaufman Test of Educational Achievement, 3rd Edition (KTEA-3), Student achieved Reading and Math Composite score in

the 7th percentile (“Below Average”). Within the Reading Composite, Student’s phonological processing scores showed skills at the 21st percentile, corresponding to an age level of 8 years, 1 month. (Student was 13 years, 8 months at the time of testing). She could identify some sight words but had trouble decoding unfamiliar words. Reading comprehension measured at the 4th percentile (“Below Average,” 9-year one month level). Student’s scores in Writing were also “Below Average,” at the 2nd percentile (7-year 10-month level). Without support, she was unable to demonstrate understanding of capitalization, punctuation, or sentence structure.

In summary, Dr. Birtwell found that Student had many strengths, including “solidly intact” cognitive skills, as well as the ability to work for a long period of time during testing in a focused and attentive manner, despite her previous diagnosis of ADHD. She was not currently showing symptoms of anxiety.

Academically, however, Student’s reading, writing, and math skills were well below expectations given her strong cognitive ability and long history of educational supports and services, including over 2 years in a specialized school setting. In particular, the gap in her math achievement appeared to be widening over time. Dr. Birtwell opined that Student had a “continued pattern of learning difficulties characterized by underlying deficits in phonological encoding and processing, phonemic retrieval, and global executive functioning vulnerabilities related to working memory and planning/organization in daily life. Dr. Birtwell found that Student met criteria for ADHD (combined type) as well as specific learning disorder with impairments in reading, written language and math. (Birtwell, P-7)

Dr. Birtwell recommended that Student be placed in a highly specialized, language-based, self-contained educational program with a small group of similar peers. She provided a detailed list of the essential features of such a program, including, but not limited to, multi-sensory, multi-modal instruction techniques, individualized instruction, small classes with peers at the same cognitive and language levels and learning profiles, executive functioning supports and accommodations integrated throughout the entire day, including explicit coaching and instruction, daily 1:1 reading instruction from a certified reading tutor using a multisensory instructional program based on a phonetic, rule-based sequential approach (e.g., Wilson, Orton-Gillingham, or Lindamood-Bell), reading supports across the curriculum, instruction in reading comprehension and writing, daily, direct math instruction, and multiple accommodations including assistive technology. (Birtwell, P-7)

Dr. Birtwell testified that she could not recommend any reduction in the intensity of Student’s services in ninth grade. With respect to peers, Dr. Birtwell stated that they should have “intact or loosely intact cognitive abilities, loosely intact core language abilities, but really struggle with reading and writing, and need those supports... embedded and integrated throughout the curriculum.” (Birtwell)

24. During December 2021, Swansea conducted Student's three-year re-evaluation consisting of a classroom observation by the Director of Special Education as well as educational, speech/language, and occupational therapy (OT) assessments.

On December 16, 2021, Dr. Julie Garell, Swansea's Director of Student Services, (who also holds a certification as a special education teacher), observed Student's break time, literacy block, OT session, and science class. On the school observation checklist, Dr. Garell reported that Student's language, basic reading, written language, social-emotional skills, attention, and behavior were all "age appropriate." (Dr. Garell did not observe a math class). She noted that Student appeared to be a "star student" in her class. She was able to focus her attention, complete assignments, follow instructions, and work independently, unlike many of her peers, who needed much individual prompting and assistance. Dr. Garell testified that both socially and academically, Student appeared to be performing at a more advanced level than her classmates at Wolf. However, Dr. Garell did not observe Student reading aloud, and did not view her math class. (Garell, P-11) Student's teachers at Wolf also completed the observation checklists and gave similar answers. (S-4-8)

The Speech/Language evaluation, conducted by Courtney Lopes-Finnerty on December 2, 2021, consisted of several standardized tests of various aspects of Student's language functioning. On the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), Student achieved a Core Language Score in the 16th percentile, which is considered "low average." This score encompassed index scores for expressive and receptive language as well as language content, and language memory, all of which were "average." Student achieved "average" scores in vocabulary as measured by the Expressive Vocabulary Test-Third Edition (EVT-3), and the Peabody Picture Vocabulary Test-Fifth Edition (PPVT-5). On the Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2), Student achieved scores in the "average" range in tests of phonological awareness, phonological memory, and rapid symbolic naming.⁴

Based on testing and observation, Ms. Lopes-Finnerty concluded that Student did not present with a communication disorder and did not require either direct or consultative speech-language services. (P-14, Lopes-Finnerty)

Lastly, Student underwent an occupational therapy (OT) evaluation by Elizabeth Faulkner, who found that Student demonstrated functional writing skills. She continued to present with "sensory processing difficulties with features of sensory seeking." (P-15). Ms. Faulkner did not believe that Student needed direct OT services but recommended that she continue to have sensory strategies available in the classroom, as

⁴ The CTOPP-2 scores had improved since the prior three-year evaluation, when Student's score for Phonemic Awareness was "poor." Specifically, the percentile rank had increased from the 3rd to the 39th percentile.

well as access to assistive technology to help her with written output. (P-15, Faulkner)

25. On January 6, 2022, the Team convened to consider the school-based evaluations and Dr. Birtwell's report, and to develop an IEP for the remainder of eighth grade and for ninth grade. Discussion at the Team meeting focused on Student's need for continued supports of the type she had been receiving at Wolf coupled with her need and expressed desire for social opportunities with other girls and with typical peers. (Garrel)
26. On January 24, 2022, Swansea issued an IEP which designated Student's primary disability as "Learning Disability" and her secondary disabilities as "Health" (ADHD) and "Emotional" (Generalized Anxiety Disorder). The proposed IEP called for continuation of Student's placement at the Wolf School for the remainder of eighth grade. The proposed placement for ninth grade (August 2022-January 2023) was a substantially separate classroom at the Joseph Case High School. (P-1)

The Parent Concerns statement on the IEP indicated that Parent "would like to see [Student] in a more socially appropriate setting for her moving into high school." (P-1). The Team's vision for Student as set forth in the Vision Statement was for Student to continue to progress in all areas, for the Team to foster positive social connections in school and in the community through extracurricular activities, and for Student to continue increasing her independence as a learner.

Like the predecessor IEP, PLEP A and B of the IEP issued in January 2022 listed Student's challenges in reading comprehension, decoding, spelling, and written language, as well as attention, executive functioning, sensory regulation, and auditory memory, and proposed multiple accommodations with respect to the instructional setting (*e.g.*, a quiet workspace, preferential seating), "Timing/Schedule," (such as visual schedules and extra time), "Presentation," (such as modeling, review/repetition, pre-teaching vocabulary, breaking down tasks), and equipment (*e.g.*, noise-cancelling headphones, desk dividers, access to technology to support reading of grade level text). The section entitled "Methodology/Delivery of Instruction" was virtually identical to the corresponding section of the prior IEP.

The IEP contained goals and benchmarks in Reading, Reading Comprehension, ELA-Writing, Math, ELA-Reading, Self-Regulation and Executive Functioning. These goals had been developed by staff at Wolf and were largely unchanged from those in the prior IEP. (Garell, P-1). The service delivery grid provided for 1x60 minutes/week, each of consultation with the special education teacher and occupational therapist in Grid A,⁵ no services in Grid B, and all academic subjects (English, Reading, Math, Science, Social Studies, and Academic Support) in Grid C. Unlike prior IEPs, this IEP did not propose ESY services. (P-1) According to Dr. Garell, Wolf had not mentioned or recommended ESY services after eighth grade. (Garell)

⁵ Based on the most recent speech/language evaluation, the speech/language consultation was eliminated.

27. Parent partially rejected the proposed IEP,⁶ accepting the portion covering the remainder of the 2021-2022 school year and Wolf School placement and rejecting the services and placement at the Joseph Case High School for 2022-2023 as well as the elimination of ESY services. In her partial rejection letter, Parent stated that the services and placement for ninth grade were not comparable to the Wolf School and asserted “stay put” rights to a comparable placement, *i.e.*, a highly specialized language-based, self-contained educational program that provides multi-modal instruction with a similar peer group and small classes across the curriculum. Parent further stated that the proposed program at Joseph Case High School would not meet Student’s needs as outlined in Dr. Birtwell’s report. Lastly, Parent stated “upon information and belief, I do not believe that the program that has been proposed exists.” Parent requested Swansea to send referral packets to “comparable programs” such as Landmark and Middlebridge School and informed Swansea that Student had been accepted at Landmark and that her application at Middlebridge was pending. (P-2, Mother)

Program Proposed by Swansea Public Schools

28. Swansea has proposed placing Student in its ninth grade substantially separate classroom. According to the Joseph Case High School *Program of Studies* (course catalog) for 2022-2023,

Substantially separate programming services children in grades 9 through 12 who have significant specific learning disabilities and/or are cognitively challenged. Small classroom instructional groups offer support in each major subject area: English, math, science, and social studies. The students placed in substantially separate classrooms require a small classroom setting where a multi-sensory/differentiated approach is utilized to assist students in developing new skills. The goal of each classroom is to provide the student with a developmentally appropriate academic program supported by intensive academic instruction. A multi-modal approach is used to reinforce new concepts...and enhance skill development. Special education teachers utilize a diverse approach to instruction...including small group and individualized lessons, differentiation of presented materials according to ability level, authentic learning opportunities, and repetition and review to reinforce key concepts. Students may elect a course in the general education setting in one or more subject areas as deemed appropriate...Eligibility...requires that the student is in grades 9 through 12, has cognitive limitations or significant learning disabilities, and requires a small, intensive instructional group.

⁶ The record contains an unsigned, undated copy of Parent’s rejection letter, but there is no dispute that Parent wrote the letter and the District received it.

29. The *Program of Studies* lists courses in English, U.S. and world history, math, biology, physical science, and general science, all of which are designated as special education classes for students who have IEPs. (P-9) The classrooms for these courses are located within their respective departments within the high school; thus, students in the substantially-separate program travel through the school to change classes in the same manner as general education students. The teachers for the core classes hold dual certifications in their respective academic subjects and in special education. (Garell)

The course description for “English 9/10” states that this course is designed to prepare students for MCAS and also that students are expected to read grade-level texts with accommodations per their IEPs, and to “discuss a work of literature in a five-paragraph essay.” None of the descriptions for ninth-grade classes indicate the use of language-based instruction. (P-10)

Dr. Garell testified that she knew of nine or ten students who would constitute Student’s ninth grade peer group if she were to attend the substantially separate program at the high school. When asked if they had similar academic needs as Student, Dr. Garell answered in the affirmative.

30. According to Dr. Garell, under the proposed IEP for Case High School, Student would receive specialized, 1:1 reading instruction from a certified reading specialist, 3x30 minutes per 7 day cycle. This amount of time could be increased if needed. (Garell)

31. The reading specialist designated to provide this service is Ms. Sandra Kozatek, who is the special education reading specialist for the Swansea Public Schools. The 2021-2022 school year is Ms. Kozatek’s first year in this position; however, she has served as a permanent and long-term substitute special education teacher in Swansea since approximately 2016. Ms. Kozatek holds a master’s degree in special education as well as a master’s degree as a reading specialist. She has engaged in continuing education in areas such as reading comprehension, phonological awareness, executive functioning and writing. Ms. Kozatek holds Massachusetts certifications in special education and as a reading specialist. She has almost completed requirements for Orton-Gillingham certification. (Kozatek)

32. Ms. Kozatek is the only special education reading specialist for the District. (There are other reading specialists for general education). In that capacity, Ms. Kozatek works to develop literacy curricula for special education programs in Swansea’s elementary schools as well as in the middle and high school. She consults with teachers, and is responsible for acting as “the reading specialist district-wide for students that may be diagnosed with dyslexia or other reading disabilities...” (Kozatek)

In that addition, Ms. Kozatek conducts formal diagnostic reading evaluations to determine if a student requires her reading services or some other intervention. She currently carries a caseload of approximately five students with whom she works individually or in small groups. The students in her present caseload are in elementary or middle school. None is in high school. Ms. Kozatek uses different reading and writing programs for students depending on their grade level, proficiency, and areas of need. (Kozatek)

33. Ms. Kozatek provided reading services to Student when she was a third-grader but has not worked with her since that time. She has never evaluated Student and has not attended any recent Team meetings. She testified that if she were to work with Student in ninth grade, she would first conduct informal assessments to determine her current needs, and then develop appropriate interventions. She would monitor Student's progress weekly with instruments such as spelling tests and would make results available to Student and Parent. (Kozatek)
34. Dr. Amber Kaltenstein is a licensed school psychologist employed by the District. She has never met or evaluated Student, but attended the IEP meeting of January 6, 2022 for the purpose of reviewing Dr. Birtwell's report. Dr. Kaltenstein testified that she believes that the substantially separate program at the Joseph Case High School would be appropriate for Student because she has evaluated students in the past with similar profiles to Student who have been successful in that program. Dr. Kaltenstein's only role with those students has been as an evaluator, and her conclusion that they have been successful is based on reports from teachers in Team meetings and elsewhere. (Kaltenstein)
35. Dr. Kaltenstein has conducted psychological evaluations of eight current eighth graders who would be Student's peers in the substantially separate ninth grade program. Of those students, one meets the criteria for an intellectual disability. The remaining students have below average cognitive ability but do not have intellectual disabilities. These students also have specific learning disabilities in reading, writing, and/or math, and one or two also have diagnoses of ADHD. (Kaltenstein)
36. Parent observed the proposed program in March 2022, visiting English, Math, Science and Social Studies classes as well as meeting with Ms. Kozatek. (Mother) Her impression was that the students appeared to have a variety of disabilities, in that some could read very well, some seemed to have behavioral issues, and some could not use a calculator. She observed that some were wearing earbuds or were on their phones and not paying attention. Other students were leaving the room for bathroom breaks, taking their phones, and not returning for a long time. Parent did not observe repetition or scaffolding of information. (Mother)

37. Because of her concerns about what she had observed, Parent retained Nicole Coman, a licensed educational psychologist,⁷ to observe the substantially separate program at Case High School. Ms. Coman conducted her observation on March 16, 2022. Prior to the observation, she reviewed pertinent records, including IEPs and Dr. Birtwell’s report. She testified that from this review, she understood that Student needs “very specific, specialized, and subseparate language-based instruction across all academic areas...a similar peer group...executive functioning supports across her day...a small student-to-teacher ratio...and daily, 45-minute to 60-minute reading intervention time by a certified reading tutor...[with] one of those multisensory instruction programs like Orton-Gillingham or Wilson...[with] reading support embedded across her day.” (Coman)
38. Ms. Coman observed the substantially separate English, Science and Math classes at the high school and met with Ms. Kozatek. In the English class, the students were involved in an MCAS reading comprehension exercise. Ms. Coman noted that most of the students were fluent readers, and that those who struggled with decoding were not provided with the “language-based formal scaffolding or...instruction” that she would expect to see in a language-based class.

In the Science class, the students were reviewing the answers to a test they had previously taken. A student struggled to spell a word, and the teacher spelled it for the student rather than employing language-based strategies. Again, Ms. Coman stated that she saw no language-based strategies used in the classroom. The Math teacher was using some appropriate strategies to assist students.

Ms. Coman’s conversation with Ms. Kozatek led her to question whether Student would receive instruction from a teacher certified in evidence-based methodologies, that the services would be frequent enough (3x30 per seven days as opposed to 45 to 60 minutes/day), or that there was a clear method for documenting progress.

Based on her observation in light of her understanding of Student’s needs, Ms. Coman concluded that the program would not be appropriate for Student “due to the lack of specific language-based instruction, peer group,⁸ reading support, and overall⁹ reading interventions provided throughout her day.” (Coman)

Placement Sought by Parent

⁷ Ms. Coman holds an M.Ed. degree in school psychology, as well as qualifications as an educational specialist in school psychology. She has worked in Florida and Massachusetts in clinical and educational settings, providing or overseeing learning supports and interventions for students with disabilities. She currently has a private practice doing educational evaluations and program observations and has done between 40 and 50 such observations in Massachusetts. (Coman)

⁸ Note that the students whom Ms. Coman observed would not be Student’s peers, as they already are in high school. She did not observe the current eight graders who are potential peers.

⁹ The Landmark campus is located between 76.7 and 87.7 miles from Student’s home, depending on the route, and the commute time varies from 1 hour 40 minutes to 2 hours 50 minutes, in each direction.

39. Parent is seeking placement for Student at the Landmark School in Pride's Crossing, MA. Because of the distance and consequent commuting time between Student's home in Swansea and the Landmark campus, Parent is seeking residential placement at Landmark for Student.
40. The Landmark School is a coeducational DESE-approved private special education day and residential school. According to its website and the testimony of its public school liaison, James Tucker Harrison, Landmark serves students in grades 2 through 12 who have at least average cognitive ability and who are diagnosed with dyslexia or another language-based learning disability that impedes reading, writing, listening or speaking. Many Landmark students have executive functioning weaknesses and/or ADHD in addition to their language-based learning disabilities, but Landmark does not serve students carrying diagnoses of non-verbal learning disorders, autism spectrum disorders, or primary social-emotional disorders. (Harrison, P-33-34)

The central feature of Landmark's programming is a daily, one-to-one tutorial in reading/language arts. Each student's reading tutorial is customized to address the student's individual needs, and may focus on fluency, decoding, vocabulary, spelling, composition, comprehension, and/or study skills. The school uses multiple methodologies (including, *e.g.*, Orton-Gillingham, Wilson, LiPs and others), depending on the student's individual needs. (Harrison, P-33, 34)

Academic classes follow a college-preparatory curriculum. Language-based strategies are embedded in all content classes and across all school-based activities (such as athletics), and skills taught in the language tutorial are implemented and reinforced in the content classes and vice versa. Class routines are highly structured and predictable. Student groupings within academic classes are based on skill levels as well as grade levels, and there is a large enough student population to allow students in each class to be closely matched with respect to skills as well as to be in a single grade. Landmark seeks to provide high-school aged students with an experience that is close to that of a typical high school. As such, students change classrooms and teachers for each subject, and students are offered electives and extracurricular activities, including sports.

Landmark has accepted Student for the 2022-2023 school year. In or about January 2022, as part of the admissions process, Landmark conducted screening assessments consisting of a non-standard virtual administration of the Lindamood Auditory Conceptualization Test-3 (LAC-3) as well as portions of the KTEA-III, the Gray Oral Reading Test-5 (GORT-5), the Landmark Informal Writing Sample (LMK Wrtg), and the Berea Visual-Motor Gestalt (BEREA). Student scored below average for her age on the LAC-3 (where she had difficulty tracking phonemes and syllables) as well as on the letter-word recognition and nonsense word decoding subtests of the KTEA. On the GORT-5, Student earned below average scores in rate (5th percentile), fluency

(9th percentile), and comprehension (16th percentile). Writing showed spelling errors and weak syntax. Performance on the BERE A was age-appropriate. (P-16)

41. Parent testified that she would prefer Student to live at home, rather than be in a residential placement, but that she is unaware of any appropriate special education day school that can meet Student's needs within commuting distance from Swansea. In her hearing request, Parent indicated that she has applied to Middlebridge School in Narragansett, RI, and "remains open to the District placing her there should the District prefer this to a residential placement." Middlebridge is not DESE-approved for Massachusetts students. (Parent, Hearing Request at p. 9, FN. 5)

DISCUSSION

There is no dispute that Student is a school-aged child with a disability who at all relevant times was eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B ("Chapter 766"). Student was and is entitled, therefore, to a free appropriate public education (FAPE), which "comprises 'special education and related services'--both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).¹⁰ Student's IEP, which is "the primary vehicle for delivery of FAPE, *C.D. v. Natick*, 18-1794 at 4, quoting *D. B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012), must be "reasonably calculated to enable her to make progress appropriate in light of her circumstances." *C.D. v. Natick*, 18-1794 at 4, quoting *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

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

¹⁰ In *C.D.*, the First Circuit reiterated its conceptualization of FAPE set forth in earlier cases as educational programming that is tailored to a child's unique needs and potential, and designed to provide "'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." 34 C.F.R. 300.300(3)(ii); *Burlington II*, *supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012)

Finally, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child's disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, "the desirability of mainstreaming must be weighed in concert with the Act's mandate for educational improvement." *C.D. v. Natick, 18-1794* at 5-6, quoting *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990). Opportunities for mainstreaming will not cure an otherwise inappropriate program. *Id.*

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. In the instant case, as the moving party challenging the placement offered by Swansea, Parent bears this burden. *Schaffer v. Weast*, 546 US 49 (2005) As such, to prevail, Parent must demonstrate, by a preponderance of the evidence, that the program proposed by the School is not comparable to Student's last agreed upon placement that it is inappropriate and cannot be made appropriate, and, if the School's proposed program is not comparable and/or inappropriate, that the program proposed by the Parent is appropriate.

The parties substantially agree on Student's profile as a bright, friendly, socially-typical teenager with longstanding diagnoses of language-based learning disabilities, including dyslexia, together with pervasive executive functioning challenges, some difficulty with maintaining a proper arousal level for instruction, and ADHD. As a result of this constellation of disabilities, Student struggles to read, write, or solve math problems at a level commensurate with her age, grade placement, or cognitive level.

The parties further agree that to make effective progress, Student needs a highly specialized, substantially separate, language-based program that infuses language-based methodologies as well as executive functioning strategies throughout the curriculum. Student's program must include daily or near-daily individual or very small group (1:2) specialized literacy instruction with a reading specialist experienced in using structured, sequential, evidence-based methodologies. Student needs multiple accommodations for her executive functioning, attentional, and sensory challenges. Finally, Student needs to be grouped with similar peers, *i.e.*, with students who have similar struggles with reading, writing, and/or math, but who have intact cognitive and social abilities. The record amply supports the parties' position in this regard, and unequivocally demonstrates that while Student made progress during her tenure at the Wolf School, she continues to need the same amount and intensity of services as she moves into high school. Evidence supporting the parties' shared positions in this regard is contained in the IEPs and progress reports relative to the Wolf School, the report and testimony of Dr. Birtwell, and the testimony of Wolf School staff, Lauren Karlsson and Sarah Dulac. There is no evidence to the contrary.

The only real dispute between the parties is over whether Swansea’s proposed placement in the substantially separate program at Joseph Case High School can meet Student’s needs as described above, or, if not, can be modified to do so.

Based on my review of the record, I conclude that the School’s proposed program is not appropriate for Student at this time and cannot be changed or adjusted to make it appropriate. Because the program is not appropriate, the issue of “comparability” is moot. My reasoning follows.

Swansea’s Proposed Program is Inappropriate and Cannot be made Appropriate

The evidence is persuasive that the substantially separate program at Joseph Case High School is not a specialized language-based program. The Joseph Case High School *Program of Studies* does not state that the program is “language-based.” While some methodologies are mentioned (e.g., “multi-sensory” instruction) that may be used in language-based programs, there is nothing in the program description to suggest that it provides cohesive, specialized language-based programming. Further, while the descriptions of the individual content courses stipulate that accommodations and modifications will be provided per each student’s IEP, they make no specific mention of language-based strategies or methodologies. Other than Swansea witnesses’ generic assurances that the program could fully implement Student’s IEP, the District provided no detailed information about how Student would receive the coherent and intensive language-based instruction she requires. (For example, Swansea did not put forward testimony from any of the proposed teachers in the program).

The testimony of Nicole Coman, who observed parts of an English, math and science class on March 16, 2022, provided further evidence that the District’s proposed program is not language-based. Ms. Coman did not observe language-based strategies being employed in either the English or the science classes, although she did observe one or two language-based interventions in the math class. Further, she noted that at least some of the students were fluent readers, which Student is not. Based on her observation, Ms. Coman concluded that the program is not language-based and does not conform with the recommendations of Dr. Birtwell. I credit Ms. Coman’s testimony and note that other than the assurances referred to above, there is no credible evidence to counter her conclusion.¹¹

The School’s proposed placement would provide Student with individualized reading instruction approximately every other day, for 30 minutes. This is less than the 45 to 60 minutes per day that Dr. Birtwell recommended. Although the School’s reading specialist, Ms. Sandra Kozatek, testified that this amount could be increased if needed, this would require a change in Student’s daily schedule.

¹¹ During cross-examination of Ms. Coman, the District pointed out that two of the classes observed were not “typical” because the students were either reviewing a quiz or preparing for MCAS. Ms. Coman replied that in a language-based program, the language-based strategies would be used during all activities, including reviews of quizzes and test preparation. Again, I credit her testimony,

Additionally, it appears that the peer cohort would be inappropriate for Student. Witnesses for both parties testified to the importance of Student being placed with peers who have similar learning needs but intact cognitive and social functioning. While again, District witnesses made conclusory statements to the effect that the proposed peers have learning needs similar to Student's and would be appropriate peers, Swansea provided no corroborating information. Rather, the only specific information about Student's proposed peers came from Dr. Kaltenstein, who testified that of the eight such students whom she evaluated, all have below average cognitive abilities and one meets the criteria for a diagnosis of intellectual disability.

Having concluded that Swansea's proposed program is inappropriate for the reasons outlined above, I turn to the question of whether it can be made appropriate. I conclude that it cannot. Typically, the changes required to make a program appropriate consist of items such as adding a staff person or a discrete service or increasing the frequency of a particular service. See, for example, *In Re Whitman-Hanson Regional School District*, BSEA No. 2007520 (Berman, 2021) Here, however, making the program capable of providing the Student with FAPE would require a change in the fundamental nature of the program. An order directing Swansea to make such a change is neither an appropriate exercise of the BSEA's authority nor feasible to implement.

A Day Placement at Landmark is Appropriate but Inaccessible Without a Residential Component

Because I have found that Swansea's proposed program is not appropriate and cannot be made appropriate, I turn to whether the Parent's proposed placement at the Landmark School is appropriate. The evidence is persuasive that the day school programming at Landmark would be capable of providing Student with a FAPE.

Specifically, Landmark is a well-established, DESE approved private day and residential school that serves students with profiles and needs similar to those of Student. Landmark serves children who, like Student, have at least average cognitive ability and intact social/emotional skills, and whose academic performance is impaired by language-based learning disabilities affecting reading, writing, and math. Like Student, the typical Landmark student may also carry diagnoses of ADHD and/or executive functioning weaknesses. The testimony of Mr. Harrison, Landmark's public school liaison, established that Landmark would provide a coherent, intensive language-based program where Student could receive classroom instruction with closely matched peers and a customized tutorial for reading and writing remediation, as recommended by Dr. Birtwell. The District has provided no evidence to the contrary.

In reaching this conclusion, I seriously consider the LRE mandate of the IDEA. Student is entitled to be educated in the least restrictive environment capable of providing her with a FAPE and should be removed from a general education setting only when the "nature or severity" of her disability prevents her from progressing in such a setting. Student also is entitled, however, to a program that can implement goals and objectives that are "appropriately ambitious in light of [her] circumstances, *Andrew F. supra, C.D.*

v. Natick, supra. Improvement of Student’s literacy and academic skills so that they more closely align with her age and solidly average cognitive ability constitutes an “appropriately ambitious” goal for Student in light of her individual circumstances. Parent has demonstrated that the District’s proposed program is not likely to be capable of implementing such goals at this time, and as stated above, “the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement.” *C.D. v. Natick, supra.* (Internal citations omitted).

While the day program at Landmark is reasonably calculated to provide Student with FAPE, and therefore appropriate, it is located over 70 miles from Student’s home, and would require at least 1.5 hours of transportation in each direction, contrary to 603 CMR 28,08(6)(a). For this reason alone, and because Parent contends that there is no appropriate language-based program within a commuting distance of one hour or less, Parent seeks residential placement.

There is no allegation by either party and no evidence in the record that Student needs a residential component for educational reasons; However, the BSEA may order residential placement when necessary to make an appropriate educational program accessible to a student. *See In Re Jed and Westport Public Schools*, BSEA No. 1302922 (2013) and *In Re: Quincy Public Schools*, BSEA No. 1307468. (Crane, 2013) In the instant case, where there is no dispute that the travel distance between Student’s home and Landmark exceeds one hour in each direction, I find that residential placement is necessary to afford Student access to the program, and, therefore, would be appropriate.

In the instant case, however, the relief sought is essentially prospective in nature. Student had not completed her tenure at Wolf as of the hearing dates, and the placement in question is for the 2022-2023 school year. The relief the hearing officer can order, therefore, need not be limited to the restrictiveness of a residential program or even, for that matter, a private day program. Rather, Swansea will be directed to place Student residentially at Landmark unless, within 15 calendar days of this Decision, the District creates or locates a language-based program that can address Student’s documented needs and that is located within one hour’s commuting distance from Student’s home. Such program must be cohesive and language-based across content area curricula and serve students who have at least average cognitive ability, intact social/emotional skills, but whose academic performance is impaired by language-based learning disabilities affecting reading, writing, and math. The program also must offer daily or near-daily individual or very small group specialized literacy instruction with a reading specialist experienced in using structured, sequential, evidence-based methodologies.

Parent’s Claim that the School has failed to Offer a Program Comparable to the Wolf School is Dismissed as Moot

In her hearing request, Parent alleged that the School’s proposed placement is not comparable to Student’s program at the Wolf School and asserted her “stay put” rights to a comparable placement. Because I have determined that the District’s proposed program is inappropriate, the claim as to comparability is moot, and will be dismissed.

CONCLUSION AND ORDER

Based on the evidence in light of applicable law as discussed above, I conclude that Parent has met her burden to demonstrate that the IEP and placement proposed by Swansea for the first portion of the 2022-2023 school year (*i.e.*, until the IEP expires in January 2023) are not reasonably calculated to provide Student with FAPE in the least restrictive environment, and that this IEP and/or placement cannot be modified to provide FAPE. In light of the foregoing, I issue the following ORDER:

1. Swansea Public Schools shall place Student in an appropriate language-based program with similar peers, consistent with the terms of this Decision, *supra*, that that is within one hour's commuting distance from her home.
2. In the event that such program is not located or created within 15 calendar days of receipt of this Decision, Swansea shall place Student residentially at the Landmark School.
3. Parent's claims that Swansea's proposed IEP and/or placement were not comparable to the Wolf School and that Student is entitled to placement at Landmark as a comparable placement are DISMISSED as moot.

By the Hearing Officer,

/s/ *Sara Berman*

Sara Berman

Dated: June 14, 2022

