**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

# **In Re: Marblehead Public Schools BSEA #12-3975**

##

## **DECISION**

 This decision is issued pursuant to the Individuals with Disabilities Education Act (“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) and the Massachusetts Administrative Procedures Act (MGL c. 30A), as well as the regulations promulgated under these statutes.

On January 24, 2012, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Marblehead Public Schools (Marblehead, MPS or School) is incapable of providing the Student with the highly specialized, integrated services he needs to address his severe, complex, and global learning disabilities. In their hearing request, Parents asked the BSEA to order Marblehead to fund Student’s placement at the Learning Skills Academy in Rye, New Hampshire, which had indicated that it would accept Student. A few days before the hearing, which took place on June 6, 7, and 8, 2012,[[1]](#footnote-1) LSA revoked its acceptance of Student, so that Parents had no specific, named proposed placement for Student, but Parents continue to seek a highly specialized fully language-based placement for Student that is designed to meet the needs of children with severe communication disorders and related disabilities.

 The hearing took place at the offices of the Bureau of Special Education Appeals (BSEA) in Malden, Massachusetts. Both parties were represented by counsel. Each party had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P-1 through P-35, School’s exhibits S-1 through S- 34, tape recorded testimony and argument, and the written transcript created by the certified court reporters. At the parties’ request, the conclusion of the hearing was postponed to July 23, 2012 for submission of written closing arguments and the record closed on that day. On August 24, 2012, I issued a Conclusion and Order in this matter, which is incorporated by reference; additionally, the pertinent portion is reproduced on Pages 15 and 16, below. The full decision in this matter follows.

Those present for all or part of the proceeding were:

Parents

Elaine Lord Parent Advocate

Susan M. Brefach, Ed.D. Psychologist

Robert Bellucci Director of Student Services, Marblehead

Mary Sue Nienstedt-Santos Team Chairperson, Marblehead

Maureen Smith Team Chairperson, Marblehead

Meghan Doherty-Walsh Special Education Reading Consultant, Marblehead

Jocelyn Sullivan Academic Skills Teacher, Marblehead

Melanie Gambale Academic Skills Teacher, Marblehead

Lyn Snow BCBA, Marblehead

Nora McCarron, Psy. D. School Psychologist, Marblehead

Denise Moretto, Ed.D. School Psychologist, Marblehead

Sari Steinberg Speech-Language Pathologist, Marblehead

Lisa McManus Education Director, Learning Skills Academy

Sean Goguen, Esq. Counsel for Parents

Matthew MacAvoy Counsel for Marblehead Public Schools

Sara Berman BSEA Hearing Officer

Jessica DeSantis Court Reporter

Amie Rumbo Court Reporter

### ISSUES PRESENTED

 At issue is whether the IEP and proposed placement in Marblehead’s PACE program, for the period from February 10, 2012 to February 12, 2013, is reasonably calculated to provide the Student with a free, appropriate public education.

#### POSITION OF PARENTS

 Student has severe, complex learning disabilities affecting both language and communication and visual processing, which interfere with his academic and social progress. Marblehead has provided the Student with successively more restrictive and isolating placements that have not been sufficiently specialized or comprehensive to enable the Student to make effective progress. The PACE program, proposed for February 2012 to February 2013, is not appreciably different from the Student’s prior placement, in which he did not make effective progress. Student needs a highly specialized fully language-based program designed for students with average intelligence and severe communication disorders that can address both his severe language disorders and his visual processing deficits in order to receive FAPE.

POSITION OF SCHOOL

 Marblehead does not dispute that Student has complex deficits and needs, but asserts that it has addressed these needs appropriately and that the IEP and placement at issue would continue to do so. Since his enrollment in the MPS in the fall of 2007, Marblehead has provided Student with specialized, individualized educational programming which it has progressively adjusted as Student’s needs have evolved. In particular, during Student’s fourth grade year, Marblehead proposed an IEP amendment further individualizing Student’s programming, consistent with recommendations of Parent’s private evaluator. Despite Parent’s rejection of that amendment, the Student made academic and social progress in fourth grade (2011 – 2012). The School’s recommended program for February 2012 – February 2013, in the PACE program, would further increase the specialization and intensity of instruction, provide additional one-to-one instruction as recommended by evaluators, while continuing inclusion opportunities as appropriate. Parents have not met their burden of proving that the School’s proposed program would fail to provide the Student with FAPE. On the contrary, the School’s proposal is consistent with comprehensive evaluations conducted both by the School and Parent’s evaluators, and could be modified as necessary to meet the Student’s needs

**FINDINGS OF FACT**

1. Student is an eleven year old child who lives with his family within the Marblehead Public School District. As of the hearing date, he was completing fourth grade in a Marblehead elementary school. Student’s eligibility for special education and related services is not in dispute.
2. Student has a complex constellation of disabilities that have been given different labels over the years, and which do not fit neatly in any one diagnostic category. In a neuropsychological evaluation conducted in August 2011, Dr. Susan Brefach, Parent’s private evaluator, described Student as having a “complex profile characterized by neurologically-based learning disabilities” and as having a “global learning disability of significant proportions including a communication disorder and profound visual spatial learning disabilities. (P-1) On cognitive testing, Student’s scores vary from low average to borderline. (P-1, Brefach) In addition, for most of his early life, Student has had chronic, intermittent hearing loss which has interfered with his language and communication skills, complicated by a central auditory processing deficit. (S-1)
3. Student has delayed language skills, auditory processing weaknesses, pragmatic language deficits, and fine motor difficulties. He absorbs academic information in a fragmented manner, which makes it difficult for him to understand the main idea being taught. He has reduced processing speed and retrieval skills. While he is able to form strong relationships with others, his pragmatic language weaknesses and slow processing of information can make complex social interactions difficult for him because it is hard for him to keep up with the pace of conversations. He struggles with attention and with planning, organization, and execution of academic tasks. He has difficulty staying on task in school without 1:1 assistance and frequent prompting. All of Student’s academic skills are significantly below grade level.[[2]](#footnote-2) (Mother, S-1)
4. Student has been on IEPs since the age of 3. He entered the Marblehead Public Schools for his second year of kindergarten (2007-2008 school year), after having attended his first year of kindergarten in another district. For kindergarten and first grade, Student was in supported, co-taught classrooms. The School also provided speech-language and occupational therapy. For at least part of first grade, Student received pull-out small group and individual reading instruction. (S-19) Parents supplemented the School’s services with private occupational and speech therapy as well as a reading tutor for part of first grade. (Mother, S-18, S-33)
5. During first grade (2008-2009), Student had trouble keeping up with the pace of his classroom. The first grade teacher found, and informed Parents, that she was spending much of her day working with Student individually in all subject areas because he needed explicit instruction, reorganization, and slower pacing in order to learn. Additionally, although Student was social and friendly, his communication difficulties were making it difficult for him to sustain friendships. (Mother)
6. For second grade, Student was placed in the Academic Skills program, a substantially-separate language-based class for students with significant learning disabilities. This program is designed to provide highly individualized language-based instruction with reduced pacing and modified curriculum. Student received small-group instruction for reading, writing, and math, with supported inclusion for social studies, science, and specials. (Mother)
7. According to Mother, Student had a difficult time in second grade. He was having difficulty transitioning between different classrooms, was anxious, and unwilling to participate in class, and had periods where he was completely inattentive. Student was questioning why he had to change classrooms and do different work from students in the general classroom. By the end of the school year, Student was having headaches, frequently crying in the mornings when he had to go to school, and telling Parents that school was too hard, and no one would play with him. Teachers were informally reporting to Mother that they were concerned about Student’s scratching himself, hitting himself, and talking about how frustrated he was. (Mother)
8. In an effort to assist teachers in supporting Student in second grade, the School obtained consultation by a Lyn Snow, a Board Certified Behavior Analyst (BCBA). Ms. Snow provided consultation to teachers and also provided guidelines to the Parents to improve Student’s ability to do homework. Parents found these suggestions effective. In around May of 2010, Ms. Snow developed a formal behavior support plan for Student to increase his engagement and reduce off-task behaviors. (Snow)
9. Student’s year-end progress report for second grade, issued in June 2010, indicated that he had made small gains in reading and math, but that his performance was inconsistent because of attentional problems and the impact of his intermittent hearing loss. Regarding his goal in class participation, Student had also made small gains. He was able to engage in discussions about subjects of interest, but at other times did not participate. He was able to follow explicit one-step instructions, but struggled to follow the class routines, even with teacher support, and did not pick up cues from what his classmates were doing. The progress report indicated that it was unclear if he would meet his IEP goals at the end of the IEP period (February 2011)[[3]](#footnote-3) (S-14)
10. Student received two outside evaluations during second grade, a neurological evaluation from Frank Duffy, M.D, and a neuropsychological evaluation from Dr. Lisa Shaw. (Mother) Dr. Duffy conducted a BEAM study which reportedly ruled out a seizure disorder (which had been a concern of the School’s) but suggested a severe language-based learning disability and severe processing disorder. (Mother)
11. Dr. Shaw conducted her evaluation in April 2010. In sum, Dr. Shaw concluded that Student had significant problems “integrating visual-spatial information, difficulty appreciating larger patterns of organization and meaning, and marked disengagement from environmental stimulation, learning activities, and social interaction. While some of [Student’s] language skills are age appropriate, there is evidence of significant language impairment….” Dr. Shaw felt that Student had features of PDD. (P-8)
12. Dr. Shaw recommended a small, full-day, full year program for children with PDD[[4]](#footnote-4) and language dysfunction, with a focus on language development throughout the school day, as well as ABA and assistance with social skills. (P-8)
13. In September 2010, at the start of Student’s third grade year, Marblehead convened the Team to consider the results of Dr. Duffy’s consultation and Dr. Shaw’s report. The resulting IEP, which covered the period from September 2010 to February 2011 called for continued placement in the Academic Skills program for third grade. Pursuant to this IEP, Student would receive reading, language arts and math instruction in the separate Academic Skills classroom, along with pullout speech/language and occupational therapy. He was to be mainstreamed for morning meeting, science and social studies. As a result of the IEP amendment, Student would be accompanied by a tutor from the Academic Skills program for science and social studies and would be supported by a staff member for non-academic mainstream activities. Instead of music class, Student would receive three sessions per week of “academic support/explicit instruction” in order to reinforce lessons in a non-distracting environment. The amended IEP also provided for consultation by a behavioral specialist and development of a behavior plan. (S-20, Mother)
14. Parents accepted this amended IEP in November 2010, stating that they did not feel it fully captured Student’s profile or needs, and that they understood that the IEP would be further amended as more private testing was completed. (S-20)
15. In January 2011, the Team again amended the IEP to reflect a diagnostic reading assessment and an assistive technology evaluation. The reading assessment, conducted by Meghan Doherty-Walsh, revealed that Student had low to poor skills in phonological processing, decoding/encoding, comprehension and processing. The report also stated that the Student’s slow processing and retrieval speeds interfered with his reading. The report noted that improvement in Student’s phonological processing skills should be prioritized, as without improvement in this area, Student would not progress in a sequential, rules-based decoding program such as Orton-Gillingham or Wilson. The report recommended daily instruction with the Lindamood Phoneme Sequencing Program (LiPS), as well as explicit instruction in fluency, decoding/encoding, comprehension and fluency. (S-21)
16. The IEP amendment, which the Parents accepted after some adjustments were made, added 30 minutes x 4 days per week of LiPS instruction in the context plus an additional session for reinforcement. The LiPS instruction was a component of the 90 minutes per day of direct instruction in reading, which also encompassed explicit instruction in fluency, sight word development, decoding, and comprehension. (S-10, S-22, Doherty-Walsh)
17. Progress reports issued in June 2010 indicated that while Student had made “small gains” in all IEP goal areas, his performance was inconsistent and it was unclear whether he would achieve the goals at the end of the IEP period in February 2011. (S-14)
18. In general, Student did better in third grade (2010-2011) than he had in second grade. Parents felt that most of the improvement was social-emotional. The Parents observed that he was happier in school and tolerated it better than he had previously, and attributed this to his having a more consistent schedule, a more organized classroom, and a more focused teacher than he had had in second grade. Student seemed to enjoy being part of the group in the Academic Skills class. (Mother) On the other hand, Parents did not feel Student made much academic progress. (Mother)
19. Progress reports for June 2011 stated that Student had made progress in all IEP areas, including reading, phonology, writing (including beginning typing), math, class participation, social skills group, and content comprehension within the mainstream science and social studies classes. (S-13)
20. In August 2011, Parents obtained a private neuropsychological evaluation of Student from Dr. Susan Brefach, Ed.D. Dr. Brefach conducted a battery of standardized tests and interviewed Parents and Student. Based on her evaluation, Dr. Brefach concluded as follows: (P-1, Brefach)
* Student has a complex diagnostic profile; labeling is less important than intensive remedial services and a fully adapted academic placement.
* Student has a “global learning disability of significant proportions,” including a severe communication disorder and visual-spatial learning disability. This means he lacks a “clear channel of strength to use to compensate” for his weaknesses. He struggles with the entire cycle of taking in information, analyzing it, and producing a response. Student’s communication and perception disorder impacts both academics and social-emotional functioning.
* In Dr. Brefach’s view, Student’s longstanding hearing impairment has seriously interfered with his early acquisition of basic language and communication skills, and requires accommodations and an adapted teaching approach.
* Cognitive testing is highly uneven, with Student having some skills in the low-average to average range and others in the “mildly deficient” range. There are signs that Student has cognitive potential in the low-average to average range, but cannot fulfill this potential because of his learning disabilities.
* Student’s achievement scores are very low, well below grade level.

1. Dr. Brefach recommended placement in a “highly structured fully adapted psychosupportive setting [with] very small language-based classes across the curriculum.” She opined in her report that an instructional group of more than two other students would be “a waste of [Student’s] time in terms of linguistic analysis and learning.” Dr. Brefach further recommended an academic program focused on phonemic awareness, phonological processing and memory, developing a sight word vocabulary, improving fluency, and basics of written language and math. Other features of the program included daily speech therapy and pragmatics instruction, and occupational therapy. Dr. Brefach suggested some specific methodologies such as LiPS and Touch Math. (P-1)
2. Finally, Dr. Brefach recommended that Parents obtain further medical assistance for Student’s hearing issues, as she believed that his hearing loss had affected Student’s learning. The Parents followed through on this suggestion, and, during the summer of 2011, Student had surgery which seemed to successfully correct his hearing loss. (Parents had been actively obtaining treatment for Student since he was a toddler, but with limited success until this particular surgery). (Mother)
3. For fourth grade, (2011-2012) Student transferred to the Village School in Marblehead. (His original school only provided grades Kindergarten through third grade). His configuration of services was substantially similar to that provided in third grade. More specifically, Student was placed in the Academic Skills classroom with a total of approximately 7 students for core academic subjects. At least some of the time, the students worked individually, with tutors. Student received ELA, reading, and math services from an individual tutor, behind a partition in the Academic Skills classroom, or, in the case of math, in the guidance office, because he became distracted when taught in group sessions, or in the same space as other students. He attended mainstream science and social studies classes accompanied by his tutor. Student also received speech and occupational therapy, behavioral consultation, assistive technology consultation, and participated in a social skills group. (S-23)
4. In October of 2011, the Team convened to consider Dr. Brefach’s report. In November 2011, the Team issued a proposed IEP amendment which would provide for Student receiving his ELA and math instruction in the classroom in 1:1 format in the PACE program classroom as Student was having trouble keeping up with the pace of the Academic Skills program, and already was receiving ELA, reading and math services from a tutor, behind a partition in the Academic Skills classroom. The instruction in the PACE program, which is designed for students with significant cognitive impairments, was even slower than that of the Academic Skills program, and each student in PACE is taught individually, and there is some small group instruction and activity. The N-1 form indicated that many of Dr. Brefach’s recommendations were being implemented (such as LiPS and Touch Math). (S-49)
5. Parents accepted the goals and services of the revised IEP, but partially rejected the proposal as insufficient, stating that it did not meet his many needs and was “extremely restrictive and isolating.” Parents also objected to Student being removed to the PACE program for ELA and math. Mother had observed this classroom, and concluded that it was not quiet or distraction free. In particular, Parents had observed a child taking breaks to jump on a trampoline, and felt that this would be disruptive to Student. The School did not implement this portion of the revised IEP. (S-49, Mother)
6. In February and March 2012, the School conducted a three-year re-evaluation of Student consisting of educational testing, evaluation of progress in the reading tutorial, and occupational therapy, speech/language, psychological, and classroom assessments. (S-2 – S-8) Educational testing consisted of administering the Woodcock-Johnson III Tests of Achievment. (W-J III) In Broad Reading, Student scored overall in the “very low” range, in the first percentile. He scored in the 3d percentile in Letter-Word Identification, below the first percentile in Passage Comprehension, and the 20th percentile (“low average”) in Word Attack. In Oral Language, Student’s overall scores were “low average” (22nd percentile). His score in Story Recall was in the 53rd percentile (“average”) and his scores in Understanding Directions and Oral Comprehension were in the 15th and 18th percentiles, respectively (“low average). (S-2) Student’s scores in Broad Math and Written Language were all “very low,” mostly at or below the first percentile. (S-2)
7. For Student’s Reading Tutorial Progress Assessment, Student was given the Qualitative Reading Inventory (QRI) and the Lindamood Auditory Conceptualization Test (LAC-3). The scores were compared to scores on the same tests administered in October of 2010, about 17 months earlier. In the LAC-3, Student’s overall score had increased from the 4th to the 50th percentiles. On the QRI, Student’s scores increased slightly. In 2010, he could read isolated words at the pre-primer level on an instructional ability level and at the primer and first grade level on a frustration ability level. In 2012, Student was able to read isolated words with independence at the pre-primer to primer level, instructionally at the first grade level, and with frustration at the second grade level. In 2010, Student performed at a frustration level for decoding when attempting to read connected text. In 2012 he could read connected text independently at a pre-primer level and a frustration level for first grade text, with variable comprehension. (S-3)
8. The psychological assessment, conducted by Dr. Denise Moretto and entitled “Cognitive Social Emotional Evaluation” consisted of standardized testing and review of prior testing. Dr. Moretto also had observed Student at various times. Dr. Moretto found a profile fairly consistent with prior testing. (S-9, Moretto)
9. Pursuant to the re-evaluation, in March 2012, the Team recommended changing Student’s primary placement from the Academic Skills program to the PACE program where he would receive intensive, individualized instruction for language arts and math. Student would continue his reading tutorial, and would accompany Academic Skills and PACE students to the general education classrooms (with support) for specials, morning meeting, lunch, recess and “curriculum support.” (S-1)
10. The rationale for the change in placement as stated in the N-1 form accompanying the IEP was that Student required the intensive 1:1 instruction, slower pace of instruction and increased access to math manipulatives that were provided in the PACE program, but could continue to be grouped with Academic Skills students for other activities to provide more socialization opportunities. (S-1)
11. In mid-April, 2012, Parents accepted certain increases in services in the proposed IEP, as well as the various accommodations but rejected the placement in the PACE program, stating both that they did not want to risk having Student being “stuck” in the PACE classroom if it was not a good fit, and that generally, the IEP was not intensive or specialized enough to meet Student’s needs. Parents further stated that they felt that Marblehead had no in-district programs appropriate for Student. (S-1)
12. Student’s progress in fourth grade was uneven. Student transitioned smoothly into the Academic Skills program at the start of fourth grade and was excited about starting a new school (the Village School). (Mother, Snow) He had some friends at school and enjoyed aspects of school, including “Fun Fridays,” pizza day, the hands-on aspects of science class, and field trips. (Mother) He “adored” his homeroom teacher. (Mother)
13. As the fourth grade year progressed, Parents observed Student’s enthusiasm for school, morale, and motivation decline. Beginning in February or March 2012, his anxiety increased. Parents observed that he was disengaged from his school work, resisted doing homework, did not want to read, and told Parents the work was too hard for him. Parent observed that Student seemed to have no skills for attacking a math problem. (Mother)
14. In school, during the latter part of fourth grade, Student began stating that he did not want to do his work behind a partition, separately from his classmates. According to Lyn Snow, Marblehead’s BCBA, this was an age-appropriate development. (Snow) Additionally, Student became more interactive with other students, and made progress in his social skills group. (Snow, McCarron) Student also made progress in aspects of speech/language, as measured by increased scores on aspects of the CELF-4 test. (Doherty-Walsh)
15. Academically, Student made progress in the LiPS program, and increased his scores on the QRI (see Para 27, above). On the other hand, he was not keeping up with his Academic Skills classmates academically, especially in math, despite his receiving 1:1 instruction in reading, ELA and math. He continued to struggle with staying on task when working on academics. (Mother, Doherty-Walsh, Snow, Brefach)

**School’s Proposed Program**

1. The IEP at issue, covering the period from February 2012 to February 2013, calls for changing Student’s primary placement to the PACE program at his current elementary school, while preserving connections with the Academic Skills program and providing inclusion opportunities. The School designed this placement to enable Student to have intensive, 1:1 instruction at a pace he could manage—especially when introducing new concepts--while still preserving his social relationships with his classmates in the Academic Skills class and his ability to participate, with support, in inclusion science, which he enjoys. (S-1, Snow)
2. Specifically, Student would receive 1:1 instruction in language arts/literacy (5 x 70 minutes/cycle), and math (5 x55 minutes/cycle) in the PACE classroom. He would continue his individual phonemic awareness tutorial, (5x 45 minutes/cycle) using LiPS and successor programs when appropriate. Student would participate in inclusion science with the Academic Skills class, accompanied by his 1:1 tutor, (2x45 minutes/cycle) and would attend the Academic Skills class for social studies. Student also would be included, with tutor support, for specials, morning meeting, lunch, recess, and curriculum support. (S-1) In addition, Student would receive speech-language services (3 x 30 minutes/cycle), occupational therapy (2x30 minutes) and would continue in his social skills group (1x30 minutes/cycle). (S-1)
3. The PACE program consists of substantially-separate classrooms designed to serve students with “significant developmental, neurological, and cognitive disabilities.” (P-15) According to the program brochure, the program goals are to “teach strong communication skills, mastery of functional academics, social development, and independence…[via] individualized structured teaching as well as integration into smaller and larger groups…” (P-15)
4. In the PACE classroom to which Student was assigned, he would be one of approximately four students in the class. The class is led by a special education teacher. Additionally, each student has his or her own individual tutor. For the most part, students work with their tutors on individual goals, and there is some small group activity, as well as inclusion opportunities. New concepts in core academics would be introduced to Student on a 1:1 basis.
5. Two of the three potential peers in the PACE class have diagnoses of PDD or autism. All three are verbal; two are relatively talkative and one is less so. At least one peer has an intellectual disability. One or two peers have some mild behavioral issues that do not typically surface when they are engaged in schoolwork. (Snow)
6. Student potentially might have two peers with whom he could be grouped in the PACE class, one for ELA and one for math. (Snow, Brefach)
7. Dr. Brefach observed the PACE program in May 2012. In general, her view was that like the Academic Skills Program, which she felt was not intensive enough for Student, the 1:1 focus in PACE would not allow Student to have enough small group instruction and interaction throughout the day in order to generalize language and social skills. (Brefach)

**Program Proposed by the Parents**

1. At the time they made their hearing request, Parents sought funding for Student’s placement at the Learning Skills Academy (LSA). LSA is a small, private special education school that provides language-based programming for students in grades 4 through 8 with speech and language disorders and learning disabilities as their primary diagnoses. Students may carry additional, secondary diagnoses including anxiety or features of non-verbal learning disorders. (McManus, P-24)

1. Parents had referred Student to LSA at approximately the end of the 2009 – 2010 school year. During the spring of the 2010 – 2011 school year, Student attended a three-day trial at LSA and was accepted shortly thereafter. (Mother, McManus)
2. Shortly before the hearing in this matter, in May of 2012, Student returned to LSA for another day visit. After observing Student during the second visit, LSA administration withdrew their acceptance of Student. According to Lisa McManus, LSA’s Education Director, during the initial visit, Student was able to participate in classes, relate to peers, and respond to teacher direction, and appeared to be an appropriate candidate for the school. During the second visit, Student appeared disengaged with both the teacher and the subject matter during class, and did not respond to the teacher’s attempts to involve him. He also did not appear to relate to other students as he had in the previous visit. Ultimately, LSA determined that it could not serve Student, and revoked its acceptance. LSA concluded that it did not have available staff or an appropriate peer group to do the groundwork of helping Student engage with students and the curriculum. (McManus, Mother)
3. Notwithstanding LSA’s rejection of Student, the Parents continue to seek a language-based school program designed for students with complex communication disorders in the context of average or near-average intelligence. Parents’ private evaluator, Dr. Brefach, characterized such a program as consisting of “small group, highly-structured language-based classes in which the teaching style would be consistent across the classes, across the academic curriculum. There would be an emphasis on social communication and pragmatic language…..” (Brefach, P-1)
4. Dr. Brefach further defined a language-based program as one using simplified language, review of prior knowledge, spiraling to previously presented information, presentation of small chunks of materials, and multisensory presentation, with a consistent teaching approach across all settings. For Parents, an appropriate program would be acoustically adapted in consideration of Student’s hearing and processing difficulties, and would entail small group instruction so that Student could practice social communication and language skills throughout the day. (Brefach)
5. Dr. Brefach acknowledged that that math instruction she observed in the PACE program would not be inappropriate for Student. (Brefach)
6. In general, Parents view is that the PACE program is simply a reiteration of the Academic Skills program, only with students who are more severely disabled. They feel that the peer grouping is inappropriate, that the teaching approach is too isolating. (Mother)

**FINDINGS AND CONCLUSIONS**

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, et seq., and the Massachusetts special education statute, G.L. c. 71B (“Chapter 766”). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to his unique needs and potential, and is 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); North Reading School Committee v. BSEA, 480 F. Supp. 2d 489 (D. Mass. 2007); citing Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

Education must be provided 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 opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. See Bd.of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 201 (1982), Town of Burlington v. Dept. of Education, 736 F.2d 773, 789 (1st Cir. 1984); D.B., et al v. Esposito, et al., 675 F.3d 26, 34 (1st Cir. 2012)

Whether educational benefit is “meaningful” must be determined in the context of a child’s potential to learn. Rowley, supra, at 202, Lessard v. Wilton Lyndeborough Cooperative School District, 518 F3d 18, 29 (1st Cir. 2008); D.B. v. Esposito, supra. In cases such as this one, where a child’s potential to learn is difficult to determine because, for example, the child’s disability is complex and not fully understood, or the child has communication deficits that interfere with his or her ability to express thoughts, it is still possible to “assess the likelihood that the IEP will confer a meaningful educational benefit by measurably advancing the child toward the goal of increased learning and independence.” D.B. v. Esposito, supra.

 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 change the status quo. In the instant case, as the moving party challenging the School’s proposed IEP and seeking to change Student’s placement, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that Marblehead’s proposed IEP and services are not appropriate, i.e., are not reasonably calculated to provide Student with FAPE. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

 After carefully reviewing the testimonial and documentary record, I conclude that the Parents have not met their burden. Rather, I find that Marblehead’s proposed IEP and placement, modified as outlined below, is reasonably calculated to provide the Student with FAPE. My reasoning follows.

 It is undisputed, and clear from the record, that the Student’s disability profile is complex, global, and evolving. The consensus of the professionals who have worked with and evaluated Student is that labels are less important than his individual areas of need and requirements for remediation. Student has an uneven cognitive profile with average verbal abilities and less developed abilities in non-verbal reasoning, visual-spatial skills, and processing speed. To complicate matters, Student has a history of intermittent hearing loss that persisted despite treatment until surgery was performed in 2011. According to the uncontroverted testimony of Dr. Brefach, this hearing loss probably interfered with Student’s early language acquisition. Although Student’s hearing has improved, he still has auditory processing weaknesses.

Student has tremendous difficulty processing incoming information and is slow in formulating responses to it. As a result, he has difficulty keeping up with the give-and-take of conversations, or with verbally-presented classroom instruction. He is easily distracted and struggles to stay on task in school even though he is cooperative and interested in learning. His visual-spatial weaknesses impede his ability to make sense of visual information, such as facial expressions. Importantly, Student is aware of his difficulties, and becomes anxious when he knows he cannot keep up with the demands of school. Student’s academic skills hover at around the first-grade level. It is clear that he needs intensive remediation in all academic areas, either 1:1 or in a very small group, explicit instruction in, and opportunities to practice, social skills, and the ability to work in a quiet, distraction-free setting to accommodate his auditory processing needs and distractibility.

In response to Student’s evolving profile, Marblehead has increased the intensity of services provided during Student’s school career. By the beginning of third grade, Student was in a classroom for students with severe language-based learning disabilities (the Academic Skills classroom), where much or most of his instruction was provided in a tutorial format. Student also received related services in speech-language therapy, occupational therapy, assistive technology consultation, and social pragmatics.

 Student’s progress in that setting had been halting in many areas, including the core academic subjects of reading, language arts, writing and math. After reviewing both internal and outside evaluations, Marblehead made adjustments to Student’s IEP and service delivery, including the introduction of LiPS instruction to develop his phonological processing skills. There is no dispute that Student has responded well to LiPS, which is designed to provide him with missing foundational skills for reading, and that he has made some progress in other aspects of reading (e.g., is now able to read connected text). There also is no dispute that Student made social-emotional progress in the Academic Skills program, where he has developed friendships and has enjoyed being part of a group. On the other hand, during fourth grade, Student has not been able to keep up even with the reduced pace of the Academic Skills classroom, and this has made him anxious and upset.

The core dispute here is whether the proposed IEP running through February 2013 is likely to enable Student to increase his progress. The Parents’ position is that the new IEP, which preserves certain elements of the prior IEP while transferring Student to the even slower-paced PACE program for core academics, is simply a relocation of an ineffective program to a setting where Student will be isolated and mixed with inappropriate peers. Parents assert that Student needs an explicitly language-based program designed for students with communication disorders and average intelligence, rather than with children who may have been diagnosed with autism or intellectual disabilities as is the case in the PACE classroom. Parents further argue that a program for Student must provide more opportunities for small group instruction with like peers.

 Marblehead argues, on the other hand, that Student did make progress in the Academic Skills program, and that the Parents foreclosed opportunities to make more progress when Parents refused Marblehead’s fourth-grade proposal of part time instruction in the PACE classroom.

 The record indicates that in fact, Parents did not object to the School’s proposal to intensify Student’s instruction, working with him 1:1 to identify and remediate the gaps in his skills. Indeed, this proposal incorporated many or most of the recommendations of Parents’ expert, Dr. Brefach. What Parents contested—and continue to contest—is the peer grouping in the PACE classroom, as well as the alleged absence of “like” peers for small group instruction. Parents also contend that the program is not “language-based.” Parents concerns are not supported by the record, however.

 With respect to peers, two of the children in the PACE classroom carry an autism spectrum label, and one is diagnosed with an intellectual disability. However, all of these children are verbal, to varying degrees (including one child who is talkative), and none demonstrates disruptive behavior that would likely impact Student. (The trampoline in the classroom to which Mother objected has been removed). Parents’ expert noted that one of the peers might be appropriate for some of Student’s academic instruction.

Equally important, while Parents’ expert testified that, generally, Student should be grouped with peers with similar communication disorders rather than with children whose primary diagnoses are on the autism spectrum, she (the expert) did not testify that the potential peers whom she observed would be inappropriate for Student, for part of his day, regardless of his diagnostic label. Moreover, the proposed IEP is designed to continue Student’s contact with his friends in the Academic Skills class, so that he can practice his conversational skills, maintain relationships, and continue the social-emotional growth he has shown with these peers.

 Regarding the argument that the proposed program is not “language-based,” Parents’ expert recited elements of what she would deem a language-based program. There is no evidence on the record that these elements (including building on prior knowledge, scaffolding, simplified language, etc.) could not or would not be incorporated into the proposed program where appropriate. As for the issue of small-group instruction, the School’s proposal appears flexible enough to make this available where appropriate, either in the PACE classroom or in the Academic Skills classroom.

 Finally, the argument that the proposed program is no different from prior, allegedly ineffective programming, is not supported by the record. The undisputed evidence is that first, Student did make progress in several areas even though the School’s fourth-grade proposal to intensify services was not fully accepted. Additionally, the PACE program has more capacity than Academic Skills to provide intensive remediation at a pace that works for the Student.

 Developing appropriate programming for this Student has been complex. His needs have evolved and become better understood as he has progressed through school, and Marblehead has consistently responded with increases and changes to his services. Student’s progress has been slow, but measurable in some areas of need—phonology and social skills. The proposed IEP is designed to continue interventions that have been successful, and increase remediation in areas of lesser progress.

 Student’s profile and pattern of learning are unique and not yet fully understood. Parents’ concerns that Student not be “stuck” in a setting that is not appropriate for him is understandable. Therefore, it is reasonable to implement the School’s proposal on a trial basis, gather objective evidence of Student’s progress with the help of an expert in communication disorders, and conduct a Team review of such progress at the end of the trial period.

**ORDER[[5]](#footnote-5)**

 Based on the documents admitted into the record and the testimony of witnesses, I conclude that the IEP and services proposed by Marblehead appear reasonably calculated to provide the Student with a free, appropriate public education, modified as follows:

1. By the end of the second week of the 2012-2013 school year, the School shall identify a doctoral-level expert in complex communication disorders and in designing programs for children with such disorders, to assist the Team in monitoring and implementing Student’s IEP.
2. The IEP and, in particular, the placement in the PACE program shall be implemented on a trial basis for a period of eight (8) school weeks.
3. During that trial period, the Team, in consultation with the expert referred to above, shall gather objective data as to Student’s progress and rate of progress, as well as observe Student’s social-emotional functioning. This process shall include regular input from the Parents.
4. At the end of the trial period, the Team shall convene to consider the data collected, and if the Student has not made documented, verifiable progress in his areas of need, or if he shows signs of social or emotional distress, the Team, with the assistance of the expert, shall amend or modify the IEP for the Student in accordance with their findings.

By the Hearing Officer:

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Sara Berman Date: August 31, 2012

1. The parties requested and were granted several postponements of the original hearing date for good cause. [↑](#footnote-ref-1)
2. Evaluators have disagreed with each other on the appropriate “labels” for Student, which have included an early diagnosis of Pervasive Developmental Disorder (PDD), non-verbal learning disorder, and severe language and visual-spatial processing disorders. (P-8, P-14) [↑](#footnote-ref-2)
3. The IEP at issue covered March 2010 to February 2011 [↑](#footnote-ref-3)
4. Dr. Duffy disagreed with the PDD diagnosis. (Mother) [↑](#footnote-ref-4)
5. This Order copies, verbatim, the Conclusion and Order issued on August 24, 2012. [↑](#footnote-ref-5)