

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

**In Re: Boston Public Schools**

**BSEA #1308779**

**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 May 31, 2013, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Boston Public Schools (Boston, BPS or School) had failed to provide the Student, who has autism, with a free, appropriate public education (FAPE) since approximately 2011. Specifically, Parents alleged longstanding failures by Boston to fully implement Student’s IEPs while he attended an inclusion program operated by the Boston Public Schools. Instead, Parents allege, Student spent much time outside of the classroom with a paraprofessional, isolated from other students and not engaging in academic or other activities. They allege that School was failing to provide Student with the supplemental aids and services that would enable his successful inclusion in school.

In the spring of 2011, after one or more incidents made Parents concerned for Student’s safety, Parents removed him from the school and asked Boston to provide home-based instruction until another placement had been located or developed. In their original hearing request (subsequently amended as discussed *infra*), Parents asked for a home/hospital placement for Student, together with supplemental inclusionary services at a local high school and in the community.

Between the time Parents removed Student from school and the hearing, Boston has provided periods of home-based services, an extended evaluation in an out-of-district placement (which placement terminated Student unilaterally after about one week), and several Team meetings. Boston also has proposed several new or amended IEPs and several different BPS placements for Student. Parents have alleged gaps in the home-based services and also that the programs proposed for the Student are inappropriate.

The parties requested and were granted several postponements of the hearing because they were attempting to resolve their dispute. On July 31, 2013, the School filed a status update reporting on the parties’ steps towards resolution, and requesting to file a further status update on August 28, 2013. The BSEA duly ordered the parties to file a status report by that date. On October 13, 2013, having received no status report on

August 28 and no other communication from either party since July 31, 2013, the BSEA issued a “Thirty (30) Day Order to Show Cause” why the matter should not be dismissed. On November 1, 2013, shortly before the expiration of the 30-day period, the Parents filed a request to hold the case open for an additional 60 days. On November 19, 2013, after a conference call with the parties and Hearing Officer, the BSEA scheduled a hearing for February 4 and 5, 2014, to be preceded by a conference call in January 2014 to clarify the issues for hearing. On January 7, 2014 the parties jointly requested postponement of the hearing until March 2014 in light of an impending Team meeting regarding the Student. The BSEA granted the postponement request, and rescheduled the hearing to March 11 and 12, 2014.

Meanwhile, on March 6, 2014, pursuant to an order by the Hearing Officer, Parents filed a Statement of Clarification of Relief Sought from this Hearing in which they effectively amended their hearing request. In their amended request, Parents sought an order directing Boston to return Student to his last accepted placement (at the school he had left in 2011) in a full inclusion program. Parents’ amended request also included a detailed list of related services, modifications and accommodations for supporting Student in the inclusion setting, transition assessments to be conducted by Easter Seals, and travel training, as well as compensatory services for IEP services that had been accepted but allegedly not delivered by Boston. Parents also requested consideration of whether Student was entitled to monetary compensation as a result of incidents that led Parents to withdraw him from school during the 2010-2011 school year.

On March 26, 2014, the School filed a response to the amended hearing request, asserting, in sum, that the most recently proposed IEP (covering February 2014 – February 2015), which called for a substantially separate public school program at the Boston Community Leadership Academy, was and is calculated to provide the Student with FAPE, and denying that it owed Student compensatory services, or that the BSEA should consider any claims arising outside of the statute of limitations.

A hearing took place on April 4, 8, and 9, 2014 at the office of the BSEA in Boston, MA. The Parents appeared *pro se*. The School was 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 A through A-5-A<sup>1</sup> School’s exhibits S-1 through S-22, and approximately six hours of tape-recorded testimony. At the parties’ request, the conclusion of the hearing was postponed for submission of written closing arguments. The Parents’ closing argument was received on May 2, 2014. The School’s argument was received on May 5, 2014 and the record closed on that day.

Those present for all or part of the proceeding were:

Student’s Mother  
Student’s Father

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<sup>1</sup> Parents submitted three volumes of exhibits labeled A—Z, AA—ZZ and A2A—A5A. Most labeled exhibits comprised several documents.

Jennifer Sweeney	Asst. Dir. Special Ed. & Student Services, BPS
Joseph Bartholomew	Supervisor of Autism Programs, BPS
Stuart Jacoby, Ed.D.	Psychologist, BPS
Nilsa Reis	Asst. Program Director, High School Level, BPS
Kevin DeForge	Director, Home & Hospital Instruction, BPS
Harold Gregory	Student's former tutor, BPS (testified by telephone)
Marcie Handler	Director, Home-School Consultation, May Institute
Regina Hall	BCBA, May Institute
Andrea Alves Thomas, Esq.	Counsel for BPS
Jeffrey Becker, Esq.	Counsel for BPS
Colleen Deasy, Esq.	Counsel for BPS
Sara Berman	BSEA Hearing Officer

### **ISSUES PRESENTED**

The issues to be determined at hearing are the following:

1. Whether the IEP and placement proposed for the period February 2014 – February 2015, which called for placing Student in a substantially separate classroom at the Boston Community Leadership Academy (BCLA) was and is reasonably calculated to provide the Student with a FAPE in the least restrictive environment (LRE).
2. If not, whether the proposed IEP can be modified to make it appropriate for the Student.
3. If the IEP and placement proposed by BPS is not appropriate, whether the full inclusion placement at the Harbor Middle School, which will become Henderson-Harbor Innovation School at the start of the 2014-2015 school year, is appropriate.
4. Whether the BPS is required to provide the Student with the services listed in the Parents' amended hearing request.
5. Whether BPS owes Student compensatory services for alleged deprivations of FAPE occurring after May 2011.

### **POSITION OF PARENTS**

Historically, Student, who has autism, has done well and made progress in inclusion settings until approximately spring 2011. At that time, while Student was placed at the Harbor Pilot Middle School, BPS failed to fully implement Student's accepted IEP or behavior plan. Additionally, during that time, BPS failed to provide him with educational services or activities during substantial portions of the school day. Instead, Student spent many or most school afternoons isolated with his aide in *ad hoc*

locations around the school building. Student became anxious and emotionally and behaviorally unstable as a result, and Parents had to remove him from school in the spring of 2011. Since that time, Student has not had a school-based educational program. Boston has provided some home-based instruction. Student is now stable enough to return to school, and should return to the full inclusion setting at the Harbor School (to be the Henderson-Harbor Innovation School as of fall 2014), where he did well until the incidents of 2011. This placement should include increased ABA services with BCBA oversight, transition assessment by Easter Seals, and travel training as stated in the Amended Hearing Request.

Boston's proposed substantially separate placement is inappropriate. On one hand, the program is overly restrictive. On the other hand, the placement is not designed for students with autism and would not provide the ABA instruction that Boston asserts that the Student needs.

Finally, Student is entitled to compensatory services based on Boston's failure to deliver agreed-upon occupational therapy (OT), speech therapy, and adaptive physical education (APE) services since at least fall 2011. Additionally, Boston must compensate Student for lost ABA services that resulted from imposing unacceptable conditions (*i.e.*, having Parents authorize use of restraint on Student) on delivery of such services.

## **POSITION OF SCHOOL**

Boston's most recently proposed IEP and placement for Student (covering February 2014 – February 2015) would provide Student with FAPE in the LRE. The proposed program, located at the BCLA, would provide the Student with a small class (nine or fewer students) led by a special education teacher and two paraprofessionals, a dedicated 1:1 paraprofessional trained in ABA and overseen by a BCBA, as well as related services such as occupational and speech therapy, home-based ABA services, home and school consultation by a BCBA, extended school year (ESY) services and transportation. The travel training, and transitional assessments sought by Parents would be provided as part of Student's educational program. This placement and array of services is directly aligned with a 2011 private neuropsychological assessment performed by Parents' chosen evaluator, as well as with a 2014 evaluation report produced by a BPS psychologist. Both reports also indicate that Student's need for highly individualized and specialized ABA instruction to address significant skill deficits support his placement in a smaller and more specialized setting than a full inclusion classroom.

Parents are not entitled to compensatory services. Since Parents unilaterally removed Student from the Harbor School in April 2011, BPS has offered several appropriate successor placements that were immediately available, but which Parents rejected. Additionally, BPS has provided Student with home based instruction during this period even though Student does not qualify for such instruction.

## SUMMARY OF THE EVIDENCE

1. Student is a seventeen year old young man who lives with his Parents and one sibling in Boston. Student has attended various BPS special education programs since he was three years old. Student's eligibility for special education and related services from the BPS is not in dispute. Student's most recent school placement was in an inclusion program at the Harbor Pilot Middle School. Under circumstances to be discussed more fully below, since approximately April 2011 Student has received home-based instruction provided by the BPS. Additionally, since approximately October 2013, Student has been participating in Adaptive Physical Education (APE) and speech/language therapy at Dorchester Heights Academy.
2. Student is described as a likeable teenager who enjoys many interests, including riding his bicycle and scooter, building with Legos, reading history books, and using a computer or hand-held device for many activities including games, e-books, educational programs, Internet research, and social media. (S-15)
3. Student was diagnosed with autism when he was approximately three years old. (S-11) Student's autism has a global impact on his functioning. Although Student has a good vocabulary, much background knowledge on various subjects (e.g., history), and the ability to converse in full sentences, he has difficulty using his language skills to express wants, needs, interests, or emotions. His social skills are impaired and he has few or no friends. He often has difficulty with impulsivity, with adjusting to changes in routines, or with being directed to do something that he does not want to do. He can become overwhelmed or distracted by sensory stimuli and have trouble calming himself. (S-15) Student has intact basic self-care and household skills at home, can navigate his neighborhood on foot, and use public transportation for short, familiar trips, but he needs to further develop travel and safety skills in the community. (Mother, S-15)
4. Cognitive testing over the years has indicated that Student's visual-spatial abilities are stronger than his verbal functioning, with the former generally in the low average to average range and the latter in the "borderline" range. Academically, as of approximately winter-spring 2014, Student could read and comprehend at the fifth grade level. In math, at that time Student was able to count, write, order and compare whole numbers. (S-15)
5. Student has attended several BPS schools during his educational career. The record indicates that he was placed in an "integrated" classroom for first grade (S-1), and continued in inclusion classrooms (at least sometimes with a 1:1 aide) through seventh grade. Student attended grades 4 through 6 at the Jackson-Mann Community School. He was assigned to an inclusion classroom with a 1:1 aide. The record indicates that at least for sixth grade, Student spent most of his day outside of the classroom with his aide and ABA therapist. (Parents' Exhibit F)
6. Student entered the Harbor Pilot Middle School for the 2010 – 2011 school year pursuant to and IEP calling for an inclusion setting. Student was accompanied at all

times by the same 1:1 aide who had worked with him for several years in prior settings. (Ex. H) In November 2011, Student's IEP was amended to add 15 hours of individual ABA services per week by an ABA technician, ABA training for Student's 1:1 aide, additional consultation time for all staff, and a statement that the BPS Code of Conduct would not be applied to Student in standard form. (Ex. H)

7. In March 2011, each Parent (on different days) observed Student in class at the Harbor School for the purpose of assessing Student's adjustment and participation as well as to gather information for a future IEP review and transition planning. The Parents observed a total of approximately two school days between them, including 3 sessions of English Language Arts (ELA) and two sessions each of math, science and social studies. Parents also observed sessions with the speech therapist and school psychologist, computer class, lunch, extended time in the gym, and some non-academic activities. (Mother, Father, Ex. J)
8. Parents wrote a summary of their observation which stated that Student seemed consistently engaged and focused on instructional tasks involving reading, writing, listening, and answering questions during academic periods that took place in the mornings, before lunch. He seemed to mostly interact with his 1:1 aide and at times the classroom teacher. Student seemed not to be affected when the noise and activity level of the classroom increased, remaining focused on his work with his aide. (Ex. J)
9. On the other hand, Parents reported concern that after lunch, from approximately 12:00 PM until dismissal, Student was not consistently involved in planned classes or activities. He attended computer class on only one of the two observation days, did not attend either the AVID class (a college preparation class) or any alternative programming, and did not attend a scheduled Life Skills class. Instead, Student walked around outside the school with his aide for 20 minutes on the first observation day and spent 40 minutes on each day walking around in circles in the gym by himself with either his aide or ABA technician in the room. On the second day, Student was released from school 35 minutes early. Parents were told that on other days, Student would be taken to various administrative offices. (Father, Mother, Ex. J – 0)
10. Staff informed Parents that Student had not participated in Life Skills for two months because of "behavior problems." Parents were concerned because Student's IEP provided for a 1:1 ABA technician whose job it was to make adjustments to Student's programming and assist his aide to enable Student to participate. (Id.)<sup>2</sup>
11. On March 21, 2011 Parents communicated their concerns to staff overseeing Student's programming at the Harbor School. In an email of that date, Parents

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<sup>2</sup> Between September and December 2010, Student reportedly had had multiple incidents of "aggression to staff," several incidents of "aggression to student" and a few incidents of bolting. The Parents and Harbor School staff adjusted Student's behavior plan in December to address these issues. The school's rationale for Student's non-participation in afternoon activities beginning in January 2011 was to enable him to "rest" and to reward him with trips to the store earned by the absence of aggression. The record does not indicate as to when and whether the Parents were involved in this decision. (Ex. P)

communicated their “expectation” that Student would begin participating in computers or other electives, in an appropriate instructional alternative to the AVID program, and would be included in Life Skills class. Parents also requested that Harbor School staff communicate with Parents in writing on occasions when Student was excluded from participation, documenting the reasons for the exclusion.<sup>3</sup> Finally, Parents requested a meeting with Harbor staff to “address the losses to [Student] as a result of this exclusion and to discuss the best strategy for compensating him for the loss.” (Ex. J).

12. On March 22, 2011, Parents and Harbor School staff met and developed a protocol to enable Student’s participation in afternoon classes or alternative structured activities and also developed a structured procedure to enable Student to take breaks during the early part of the day. (Ex. J)
13. On or about March 31, 2011, Student’s aide briefly restrained him in a “basket hold” after Student had been hitting his own head. Subsequently, Student reportedly bit the aide and threw a trash barrel. (Ex. O) Parents were very concerned because they believed that the Student had been traumatized by the restraint and also because they believed that school administrators had failed to completely document and inform the Parents of the incident. (Ex. O)
14. During April 2011, Student was involved in one incident of aggression towards another student in Life Skills class. Parents assert that this occurred because Student and the other child were left unsupervised. (Ex. P) He was involved in a second incident a few days later (punching a staff member in the stomach) which led to a suspension hearing and a three-day suspension of Student. In June 2011, Parents successfully appealed the suspension, which was overturned because Student’s IEP did not require standard application of the Code of Conduct. (Father, Ex. S)
15. Meanwhile, in late April 2011, Parents decided to keep Student home from school because of behavioral and emotional concerns, feeling that Student needed an alternative placement on a temporary basis. Parents and BPS were in regular contact regarding investigation of the behavioral and restraint incidents. In May 2011 Parents requested home-based tutoring until a new placement could be located, and BPS agreed to provide this service.<sup>4</sup> (DeForge, Ex. P)
16. In May 2011, pursuant to a Team meeting, BPS offered, and Parents accepted, a summer placement at the TEC Collaborative located in Westwood, MA. The purpose of this placement would be to assess Student’s needs and assist him in stabilizing emotionally so that he could return to a school setting in the fall of 2011. The N-1

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<sup>3</sup> Parents created and provided forms for the staff to use for communicating with Parents.

<sup>4</sup> The events described in paragraphs 6 through 15 all took place outside of the applicable statute of limitations and are provided for purposes of historical background and to illustrate Student’s profile and needs. In a pre-hearing motion filed in March 2014, Parents sought compensatory relief for alleged events occurring outside of the statute of limitations. They were granted leave to amend their hearing request to allege facts warranting waiver of the statute of limitations. Parents’ amended hearing request contained no such allegations.

generated from that meeting provided for the summer placement at TEC and a full three-year re-evaluation for September 2011. (Ex. T, U, V, W)

17. Student began attending the TEC Collaborative in mid-June 2011. He left the program after approximately one week because TEC was not able to handle his behavior. (Ex. P)
18. By agreement, BPS began providing Student with home instruction during the summer of 2011, after he left the TEC placement. (Parents, DeForge, Gregory) Student's initial tutor was Harold Gregory, who worked with Student from the summer of 2011 through the 2011 – 2012 academic year. Mr. Gregory testified that in his first encounters with Student, Student appeared anxious and agitated, averse to instruction, and unwilling to come to the work table or remain there.
19. Based on Student's initial presentation, Mr. Gregory was surprised that he had spent several years participating in inclusion classrooms. Eventually, the tutor and Student developed a rapport. Mr. Gregory found that a computer learning program called "Achieve 3000" worked well for Student. Student was willing to "buy into" the program, and Mr. Gregory could modify it to meet Student's needs. (Gregory)
20. In October 2011, BPS began providing Student with 15 hours per week of in-home ABA therapy from RCS, which is one of several private ABA providers that contract with Boston for this purpose. (Mother) Mr. Gregory worked very closely with Student's ABA therapist and closely followed Student's behavior plan. He testified that as a result, Student did not have major behavioral problems during the time that Mr. Gregory worked with him. (Gregory)
21. Student's re-evaluation took place in September and October 2011 and comprised assessments by both BPS providers and a private neuropsychologist chosen by the Parents, Dr. Joann Frankhouser. (S-1 – S-6)
22. Dr. Frankhouser's evaluation of Student, conducted in September 2011, consisted of standardized testing and behavioral observations. She reported that behaviorally, Student had made progress since her prior evaluation of him six years earlier. Student showed somewhat better self-control over impulsivity and somewhat better frustration tolerance than he had previously, although his frustration tolerance continued to be low. He was not more explicit in communicating frustration than he had been previously but he was able to do so before melting down so that he could take a break from the task that he found difficult. He needed fewer breaks than in previous testing. Student comprehended test instructions, gave brief and sometimes indirect verbal responses to questions. He was very persistent in solving construction tasks. (S-6)
23. Student's scores on the WISC-IV-Integrated showed that Student had below average verbal reasoning skills. He also had below average skills in auditory/verbal working memory tasks and in his ability to independently sustain goal directed behavior and quickly complete clerical tasks. On the other hand, Student had generally average visual-spatial and visual construction skills. (S-6)



24. Parents and Mr. Gregory completed the BASC and BRIEF rating scales. The scores indicated that Student had difficulty with attention, excessive activity level, and atypical responses to situations. Parents also completed the Adaptive Behavioral Assessment System, 2d Edition (ABAS-II) which showed weak adaptive skills across all domains. Compared to ABAS-II scores from the prior year, Student's "growth was very modest and not seen in all areas." Student had improved in the area of leisure skills from the 1<sup>st</sup> to 16<sup>th</sup> percentiles. Functional academics had improved from the 1<sup>st</sup> to the 9<sup>th</sup> percentiles. On the other hand, skills in the domains of communication, community use, and health/safety, skills remained in the 1<sup>st</sup> and 2<sup>nd</sup> percentiles. (S-6)
25. In summary, Dr. Frankhouser stated that Student continued to have difficulties with inhibition, mental flexibility, and attention which impeded his ability to display his skills. Additionally, Student's verbal weaknesses resulted in his having difficulty with excessive language demands. He would continue to learn best with material presented in a meaningful visual format. (S-6)
26. Dr. Frankhouser recommended a comprehensive educational program addressing language, cognitive, sensory/motor, and social/behavioral needs, together with a home component and close communication between home and school. Specific recommendations included placement in a program offering "a high degree of structure and predictability; communication support (e.g., visual/gestural supports for oral directions/instruction use of technology to support output), regular sensory diet activities, social skills instruction and practice woven throughout his day...teachers/staff who are well trained and experienced in working with students with autism, and goals that comprehensively address his language, learning, adaptive and social/emotional needs." (S-6)
27. Dr. Frankhouser noted that while Student had been included in the past with the support of a 1:1 aide, "this model has drawbacks due to his significant deficits in skill development and socio-communicative functioning along with his need for very specialized instruction utilizing a behavior analysis approach to instruction and behavior management (which also includes evaluating and modifying environmental stimuli...) and sufficient processing time. Because he also has been reported by parents to derive benefit by ...modeling...by more typical...peers, it would be useful to look at programs with an eye towards providing him both with the specialized and individualized instruction he requires in a one-to-one or very small group setting...as well as time...in a larger group with appropriate peers...Thus, while [Student] should be placed in a specialized program (either in or out of district...) designed for Students with Autism and which incorporates principles of ABA throughout all activities, opportunities to attend [general education or language-based] class in some subjects should be incorporated...(S-6)
28. Additional recommendations by Dr. Frankhouser included OT, speech/language therapy, a behavioral therapist, oversight by an autism specialist, a 1:1 aide, case management by a single individual (teacher or BCBA), and social milieu experience

either in a social skills group or extended school day with typical peers, a highly structured classroom with reduced distractions, movement breaks, breaking down input, relevant topics of instruction, vocational and prevocational exploration, and numerous other accommodations and services designed to address Student's social, communication, daily living, community, safety, pre-employment and independence skills. (S-6)

29. An ABA Skills Assessment was conducted by Tiffany Szymanski, BCBA from RCS. The evaluation consisted of observations of home based ABA and tutoring sessions as well as administration of the Vineland Adaptive Behavior Scales-II (VABS-II). Student's age-equivalent scores (at age 14) in the domains and subdomains assessed were as follows:

- Receptive language 2 yrs. 5 mos. (2:5)
- Expressive language 3:2
- Written language 7:6
- Personal living skills 4:10
- Domestic skills 7:6
- Community skills 8:0
- Interpersonal skills 1:9
- Play skills 2:11
- Coping skills 2:10
- Internalizing behavior Clinically significant
- Externalizing behavior Elevated
- Composite Low, 0.2 percentile

30. The evaluator observed that during the ABA and tutoring sessions, Student frequently got up and left the work area. (S-1)

31. The RCS evaluator concluded that Student's "current instructional setting is not appropriate for him." (It was unclear whether the report referred to the home instruction setting or Student's prior placement.) The evaluator stated that Student was making minimal progress with any current IEP objectives, and recommended placement in a substantially-separate ABA-based classroom with no more than 6 students as well as at least one teacher and two paraprofessionals; instruction in readiness skills (e.g., remaining seated); 1:1 aide for safety and increasing time on task; 5 hours/week of BCBA oversight, a new FBA and behavior plan designed to increase Student's on-task time; at least 2 hours per day of 1:1 pullout, ABA-based instruction in academic, communication, social, and attending skills; weekly home-school communication; BCBA oversight of systems for ensuring generalization of skills from pullout sessions to classroom; and 8 hours per week of home-based ABA services focusing on adaptive skills provided by a therapist with at least a bachelor's degree and overseen by a BCBA. (S-1)

32. BPS conducted educational, speech/language and OT evaluations. The speech/language assessment indicated that Student was able to use oral language to communicate, but had significantly reduced skills in all areas except expressive

vocabulary, which was average. The evaluators recommended speech/language therapy along with various accommodations to reduce and simplify language demands and complexity. (S-2) The OT evaluation noted Student's strengths in visual-spatial skills and computer use as well as weaknesses in social skills and planning skills, and some sensory issues. The evaluator recommended a behavior plan, multisensory learning opportunities, and similar accommodations. (S-2)

33. The Team convened on December 8, 2011 to consider the foregoing evaluation and issued an IEP covering the period from December 2011 to December 2012. This IEP contained goals in the areas of communication, reading/writing, math, self-regulation and motor skills, ESY services, and door-to-door transportation. The service delivery grid provided for 5 X 60 minutes/day of ABA specialist consultation in Grid A, (in addition to consultation by the speech and occupational therapists). There were no Grid B services listed. All other services (academics, speech/language and adaptive physical education) were listed in Grid C. The "nonparticipation justification" section of the IEP stated that Student required a "higher level of structure and supervision than is available in a general education setting. The IEP placement page called for placement in the Community Academy of Science and Health (CASH) operated by the BPS within the same building complex as the Harbor School. The record does not contain further information about this placement. (S-4)
34. Parents partially rejected this proposed IEP on or about March 28, 2012. In a letter attached to the signature page, Parents rejected the omissions and/or reductions in various services and accommodations, including an explicit goal in travel training, hours of ABA services, and the like. (Mother, Ex. AA, S-4)
35. Meanwhile, in December 2011 and January 2012, Boston investigated and later proposed the autism program at West Roxbury Academy. Parents viewed the program and initially indicated that they would accept the placement, provided they could retain Student's then-current ABA therapist and have Student visit the program. BPS responded that Student could not visit unless Parents had accepted the placement. Parents found this condition unacceptable and ultimately did not accept this placement. (Mother, Sweeney, S-16)
36. Student continued to receive home tutoring and ABA services during the remainder of the 2011 – 2012 school year. Parents had planned to use the summer of 2012 for travel training with RCS; this did not occur, however, because the Parents declined to sign a general liability waiver with RCS as a condition of receiving the travel training. Parents also declined the alternative offered by BPS and RCS, *i.e.*, that a Parent would accompany Student and the RCS worker into the community. (Ex. JJ, Mother, Bartholomew)
37. In the fall of 2012, the parties still had not reached agreement on an IEP and placement, and Student continued with home tutoring and ABA services. In approximately November 2012, Student's long-term tutor, Mr. Gregory, went on a leave of absence. BPS provided approximately 4 or 5 subsequent tutors, who did

provide tutoring services, but Parents felt that each of them had problems, primarily with consistency of attendance. (Mother, DeForge)

38. In November 2012, the parties participated in a facilitated Team meeting to discuss the rejected IEP and various services. BPS proposed placement at the Community Academy of Science and Health (CASH) program. Parents rejected this program as overly restrictive after Father visited with the Student. No accepted IEP or placement resulted from the facilitated meeting. (S-5)
39. For the remainder of the 2012 – 2013 school year, Parents and BPS were engaged in continued discussions and negotiations regarding Student's next placement and services, with no resolution. Parents requested the instant hearing in May 2013. As stated above, resolution attempts continued, unsuccessfully, until the hearing ultimately took place in April 2014. Student continued with home tutoring during that period. In approximately October 2013, Student began attending Dorchester Heights Academy for APE, OT and speech/language therapy. The OT services were discontinued at Parents' request. (S-16, Sweeney)
40. As detailed above, Parents filed the initial hearing request in this matter in May 2013, seeking home-based instruction with ancillary services. The parties' attempts at resolution continued, without success.
41. During the summer of 2013, owing to conflict between Parents and RCS, Boston substituted the May Institute as the vendor designated to deliver Student's ABA services. (Bartholomew) Those services did not start, however, because Parents declined to sign the May Institutes standard authorization allowing certain physical interventions in the event of an emergency. (Sall, Handler) On or about January 31, 2014, BPS and the May Institute offered to waive the emergency protocol requirement and develop an updated behavior plan. Parents refused another plan since there had been so many such plans in the past, and did not respond to further BPS inquiries. (S-16)
42. In January 2013, Boston conducted a psychological evaluation of Student as well as an assistive technology assessment. (S-10, 11) The psychological assessment was conducted by Dr. Stuart Jacoby and comprised a battery of standardized cognitive and achievement tests as well as standardized rating scales. Dr. Jacoby also observed Student in his APE class. The results of cognitive testing with the WAIS-IV were basically consistent with the results of prior testing, showing that Student performed in the "low average" range of perceptual reasoning and the "borderline" range for verbal comprehension, working memory and processing speed. (S-11, Jacoby)
43. Achievement testing with the WIAT indicated that Student was able to read and comprehend basic material, but struggled with understanding more complex material calling for making inferences. In math, Student could perform the four basic operations at a "low" level. In tests of writing, Student could produce only three sentences. Parent and teacher responses to the BASC and BRIEF scales indicated that Student continued to struggle with inhibiting impulsive responses, adjust to

changes in routines or tasks, regulate his emotional reactions, and plan and organize. Student also had not generalized daily living skills to outside of the home. (S-11. Jacoby)

44. Dr. Jacoby concluded that Student would need a period of adjustment from home-based services to an educational setting. He also was of the opinion that in light of the extensive accommodations and modifications that Student would require in both his curriculum and educational methodologies, he would require a small, substantially-separate educational setting. (S-11, Jacoby)
45. The assistive technology evaluation report stated that Student already had computer skills and enjoyed using technology for games, internet research in areas of interest, transcribing videos and learning foreign language. He was able to use word-processing to copy a printed page and could read and understand materials from an e-book. Student was able to follow instructions on trying new applications, including speech to print. The report contained general recommendations on continuing to use computer applications, modified as necessary, as educational tools for Student. (S-10)
46. Student's tutor, Socorro Holland, who had been working with Student for 8 hours per week since approximately October 2013, reported that Student did "very well academically and behaviorally." The tutor reported that Student was able to read and comprehend material at a fifth and sixth grade level, has been working on basic operations in math, and were covering a variety of topics in science, social studies and penmanship. The tutor had been able to address potential behavioral issues by minimizing down time between tasks, presenting materials in a way that ensured Student's success, and establishing a trusting relationship with Student. (S-9)
47. On January 31 and February 27, 2014, the Team convened to consider the most recent evaluations. BPS indicated that it would be proposing a substantially separate program. Parents stated that they were seeking a full inclusion placement.
48. On March 13, 2014, the Team issued a proposed IEP covering the period from February 2014 to February 2015. This IEP called for multiple accommodations, including movement and sensory breaks, visual schedules and checklists, planned transitions, preparation for changes in routine, use of technology, and opportunities for inclusion. Content was to be modified, but developmentally appropriate and accounting for Student's interests. Methodology included a highly structured approach, use of social stories, use of ABA for instruction and behavioral support, and gradually increasing difficulty of tasks. (S-15)
49. The IEP contained goals in Independent Functioning Skills (i.e., travel training); Math Skills (word problems, money and measurement skills); Reading/Writing; Motor Skills (APE); Communication Skills (using words to indicate need for a break); Motor Skills (sensory integration, reducing self-stimulatory behavior); Self-Regulation Skills (self-calming without aggression or self-injury.) (S-15)

50. The IEP service grid contained no Grid B services. Grid A provided for 30 minutes/month of consultation services from the occupational therapist, 4 hours per month of consultation services from a BCBA, and a total of 2 hours per day, 4 days per week of consultation services from an ABA specialist. Grid C provided for daily instruction in all academics and in self-regulation skills, as well as weekly OT and speech therapy. The assigned school placement is Boston Community Leadership Academy (BCLA). (S-15)

### **Program Proposed by the School**

51. The most recent placement proposed by Boston is located at the Boston Community Leadership Academy (BCLA). (Reis)
52. Information about the BCLA program was presented by Nilsa Reis, who is the BPS Assistant Program Director for special education for the high school level. Ms. Reis is familiar with BCLA. She was on Student's Team when he was in elementary school at the Jackson Mann, and expressed concern at that time about the amount of time he spent being pulled out of the classroom for 1:1 instruction; however, she had no contact with him until the fall of 2013, when she facilitated his involvement at Dorchester Heights Academy. Ms. Reis has not evaluated Student. (Reis)
53. According to Ms. Reis, the proposed program consists of three classrooms serving up to seven students each, and staffed by a special education teacher and two paraprofessionals. The program is designed to serve two groups of high school aged students. One group consists of students who may have cognitive or learning delays, but who are working on passing MCAS. The other grouping, described as "multidisciplinary," contains students who are working on a more functional curriculum and includes post-graduate students.
54. In addition to functional academics, the second grouping also works on "embedded" community and life skills and generalization of skills. Transition services are mostly "embedded." The STRIVE program comes into the BCLA program to conduct transition assessments, make referrals, and oversee job placements. All students are included in general education music and drama and additional inclusion opportunities are available. (Reis)
55. Ms. Reis did not know into which of the two groupings Student would be assigned. (Reis)
56. The BCLA program is not a specifically designated autism program, although the teachers are trained and/or experienced in working with students with autism. There is no BCBA specifically assigned to the program; students have access to "autism strand" support. (Reis)

### **Program Proposed by the Parents**

57. Parents seek placement in a full inclusion setting, as stated in their Amended Hearing Request, summarized below.
- Placement of Student in his last accepted educational placement, full inclusion class at the Harbor School (to become the Henderson School as described below);
  - Provision by Boston of 40 minutes/week each of occupational therapy, speech/language therapy, and adaptive physical education (APE); 10 hours/week of home ABA therapy, 2 hours/week of ABA program supervision by a BCBA;
  - Assignment of an appropriately certified curriculum specialist to differentiate lesson plans and materials and modify/differentiate assessments;
  - Comprehensive vocational assessment and updated transition plan;
  - Amendment of IEP to include travel training on service grid with specified frequency/schedule/duration and identified staff or provider;
  - Compensatory services for services denied within statute of limitations
  - Consideration of request for monetary damages.
58. Parents have characterized much of their request for relief in terms of assertion of their right to Student's "stay put" placement at the Harbor School with various services that have been outlined in past accepted IEPs.
59. BPS plans to convert the Harbor Pilot School to a school serving grades K – 12 and renamed the "Dr. William W. Henderson K-12 Inclusion School" (Hereafter "Henderson School"). According to a program description contained in an "Innovation School Plan" published by BPS in November 2013, BPS' goal in developing the Henderson School is to provide BPS students with "the first-ever fully-inclusive, single school pathway from pre-K to Grade 12."
60. One motivation for development of the Henderson School was to provide students who had been participating in various BPS inclusion programs in elementary and middle school with a seamless transition into a high school program modeled on the same principles of inclusion, as opposed to moving to traditional high schools or more restrictive settings when they reached high school age. (Ex. TT) Parents' want Student to enter the Henderson program with the services listed above.
61. BPS plans to have an "autism strand" within the new Henderson program. (Reis) The record does not indicate how the "autism strand" would function with respect to Student. A space would be available for Student at Henderson for the 2014-2015 school year if Parents chose to enroll him there. (Reis)
62. The "Innovation School Plan" referred to above contains general descriptions of program philosophy, design, administrative and staffing structure, and development goals. (TT) Neither the "Plan" nor any other information on the record describes how the Student would be served on an individual basis.

## **FINDINGS AND CONCLUSIONS**

The Student here 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 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 (1<sup>st</sup> Cir. 1993).

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 (1<sup>st</sup> Cir. 1984); *D.B., et al v. Esposito, et al.*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012)

Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. *Rowley, supra*, at 202, *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008); *D.B. v. Esposito, supra*. In cases where a student’s potential to learn is difficult to determine because, for example, the student’s disability is complex and not fully understood, or, the student has communication deficits or behaviors 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*.

A key component of FAPE is the concept of “least restrictive environment, or LRE. That is, to meet the FAPE standard, education must be provided in the least restrictive environment consistent with an appropriate program. A student may be placed in more restrictive environments, such as separate classrooms, or public or 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).

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 relief. In the instant case, as the moving party challenging the School’s proposed IEP, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that the IEP and placement at BCLA proposed by Boston 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).



The parties substantially agree on Student's profile. Student is an engaging young man with many skills, strengths and interests. In addition to basic reading and math skills, Student has learned how to use computers and hand-held devices to read books, research areas of interest, play games, transcribe videos, and interact socially using Facebook. He can perform many or most self-care tasks independently and is beginning to navigate his community. Student is universally described as likeable, and has maintained relationships not only with his family members but also with his former 1:1 aide, his initial tutor from BPS and others.

There is no dispute, however, that Student's autism significantly interferes with his ability to communicate, focus, complete tasks, interact socially, and manage his frustrations, and that he will need intensive educational and transitional services to help him move towards increased independence. There also is no real dispute—and overwhelming evidence in the record—that the method of instruction for Student must be highly individualized and based on ABA principles in order to enable him to access both the curriculum (whether academic or social) and his own abilities. The critical importance of ABA-based instruction was emphasized by evaluators chosen by both Parents (Dr. Frankhouser) and the School (Tiffany Szymanski, Dr. Jacoby).

Student's longstanding 1:1 paraprofessional at the Harbor School had received ABA training and the support/collaboration of an ABA technician, which assisted him in working successfully with Student. Student's former tutor, Harold Gregory, testified impressively and credibly that his ability to teach Student effectively was contingent on his collaboration with Student's ABA provider as well as his ability to highly individualize Student's academic program. Student has many interests, skills, and talents, the expression of which continue to be impeded by his difficulties with attention, task completion, flexibility and self-regulation. The record shows that these issues have been responsive to proper application of ABA methodology and highly individualized instruction. (*e.g.*, testimony of Gregory)

The School's proposed IEP for February 2014 – February 2015 encompasses goals, objectives and services that address most or all of Student's needs and provide for the approaches, accommodations and methodologies recommended by all evaluators and on the whole, endorsed by the Parents. Thus, the Parents have not met their burden of showing that the goals and objectives of this IEP are inappropriate, and indeed, while Parents may not fully agree with all of the details of the IEP, they do not appear to have major objections to the goals, benchmarks and services.

The only real dispute here is the setting in which the Student can receive FAPE. Boston takes the position that Student currently needs to be educated in a substantially separate program for students with autism and/or related disabilities based on the severity and nature of Student's disabilities and his demonstrated need for highly individualized, specialized instruction. Boston has proposed several substantially separate programs to the Parents in the three (3) years since Student left the Harbor Pilot Middle School, including but not necessarily limited to programs located at West Roxbury Academy, CASH, and the most recent proposal at the BCLA.

Parents, on the other hand, seek placement in a full inclusion setting, with modifications, accommodations, and services, asserting that Student did well and made progress in an inclusion setting at the Harbor School until they had to remove him in 2011 because, as they assert, the Harbor's mismanagement of a behavioral incident disrupted Student's emotional and behavioral stability. Now that Student has regained his emotional equilibrium, they state, he is ready to return to a full inclusion placement.

Parents have rejected all of the School's proposed placements for a variety of reasons, but primarily because they believe that they are overly restrictive. With respect to the most recent proposed placement, Parents argue that it is both too restrictive and would not be capable of delivering Student's ABA services.

Resolving this dispute requires an examination of the facts in light of LRE mandate of federal and state special education law. As stated above, the IDEA requires disabled students to be educated with students without disabilities to the "maximum extent appropriate." 20 USC Sec. 1412(a)(5)(A), 34 CFR 300.114(a)(2)(i). Massachusetts law contains the same mandate. G.L. c. 71B, Sec. 1; 603 CMR 28.06(2)(c). School districts, therefore, are required to place students in the least restrictive environment that can meet a child's needs. See, e.g., *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1<sup>st</sup> Cir. 2008), *Roland M. v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990).

Additionally, however, the IDEA and Massachusetts law require schools to provide services that are individually tailored to meet all of a disabled child's unique needs. 20 USC Sec. 1400(d)(1)(A)-(B); 20 USC Sec. 1414(b)(3)(B); 34 CFR 300.304(c)(4); 603 CMR 28.04(2)(a). It is well-settled that those needs may be "academic, physical, emotional or social." *Lenn v. Portland School Committee*, 998 F.2d 1083, 1089 (1<sup>st</sup> Cir. 1993), cited in *Mr. and Mrs. I. v. Maine School Administrative District No. 55*, 47 IDELR 121 (1<sup>st</sup> Cir. 2007.) The preference for mainstreaming cannot be used to "cure" a program that is otherwise inadequate in this regard. *Burlington, supra*.

A review of the voluminous record indicates that notwithstanding Parents' assertions that Student was successful in his Harbor School inclusion placement (and, previously, at the Jackson-Mann Community School), and despite the undisputed fact that Student did make academic and behavioral progress in that setting, it is very clear that at the age of 17, Student's functional communication, self-regulation, community, and vocational skills are in need of much development if Student is to make meaningful progress towards self-determination and independence. Of particular concern is Student's longstanding isolation from peers. Student's proposed IEP indicates that he is "sad" about his lack of friends, but there is little or no evidence in the record about group instruction (other than his current APE class) or facilitated peer contacts, either before or after Student left the Harbor School.

Ironically, in this regard, much of Student's nominally "inclusive" placement at the Harbor School, academically successful as it may have been, entailed 1:1 instruction by Student's aide or by various therapists even when Student was seated in the general

education classroom. Put another way, despite being seated with a group of other children, the record reflects Student was primarily educated by himself. This isolation was exacerbated during the 2010 – 2011 school year when Student spent many afternoons not only isolated, but idle until the situation was rectified. The record reveals little or no group instruction on a day-to-day basis while Student was at Harbor. Moreover, when Student was at Jackson-Mann, BPS witness Nilsa Reis testified as to her concern about the amount of time Student was removed from the inclusion classroom for 1:1 instruction. (Reis)

Finally, as stated previously, the record also indicates that the virtually unanimous view of all who have evaluated Student is that he requires a highly structured and specialized, individualized ABA-based program to make effective progress, as well as structured and facilitated small group instruction in addition to inclusion opportunities. Parents' chosen evaluator, Dr. Frankhouser, stated in 2011 that the model of 1:1 instruction by an aide within an inclusion classroom had "drawbacks," in light of Student's difficulties with social skills and communication.

The totality of the evidence, then points to the inevitable conclusion that Student's unique needs would be very difficult to meet in a full inclusion setting at the high school level, even with supports and services. The Parents have not met their burden of showing that the School's proposal to educate Student in a small, specialized setting with inclusion opportunities is inappropriate. As for the planned new Henderson-Harbor School put forward by the Parents as appropriate for the Student, the record contains only a proposal, with no information about how, in reality, this program could or would meet Student's highly complex needs or could be modified to do so in a reasonable time.

On the other hand, while Boston has demonstrated that the Student requires a specialized program involving small group instruction, it has not demonstrated that the BCLA program as presented at hearing would be appropriate for the Student or could implement Boston's proposed IEP. The BCLA program is not designed specifically for students with autism, despite its access to autism specialists within the BPS. The program is not modeled on ABA principles. Other than the assertion by a BPS witness that the teachers are experienced and knowledgeable about autism, the record provides no detail on the program's experience or practice in serving youngsters with profiles similar to Student's, no information on how ABA services and principles would be integrated into Student's educational program, no detailed information about the proposed peer groupings, and no information on how Student would be truly integrated/included with his classmates. There is no information on the record about whether and how home programming is incorporated for students who require such programming.

However, were Boston able to modify the BCLA program to skillfully and meaningfully incorporate ABA principles, provide adequate BCBA oversight and ABA training to all pertinent staff, as well as explicit home-based and community based instruction as addressed in the proposed IEP, then this program might become appropriate to meet this Student's needs. The BCLA already has numerous features which Student needs and from which he could derive meaningful benefit, including

embedded community and life skills programming, the ability to conduct transitional assessments and make referrals and oversee job placements through STRIVE, all of which would contribute to FAPE for Student. Moreover, the placement would provide the Student with group of peers, affording him opportunities for group instruction and socialization as recommended by all evaluators and which constitutes an element of FAPE for Student. Additionally, the BCLA program builds in opportunities for inclusion in the larger school community, a feature sought by Parents and recommended by evaluators.

Time is of the essence, however. Student is now 17 years old, and has not attended a school program for three years. He has few or no friends his own age. He urgently needs to acquire not only additional academic skills, but the social, vocational, and community skills he will need to have some degree of independence after his special education eligibility ends as well as a pool of peers for potential friendships. If Boston is unable to modify the BCLA program as described above in a timely manner, then it must locate or create a public or private program that is capable of implementing the most recent IEP as well as the recommendations of Dr. Frankhouser in her 2011 report.

With respect to compensatory services, the record shows that any gaps in services were not the result of Boston's disregard of its responsibilities towards Student. On the contrary, Boston was highly responsive to Parental concerns such as RCS's general liability waiver or the May Institute's emergency protocols, neither one of which the Parents agreed to sign, resulting in delays to the provision of services to Student.

### **ORDER**

Within ten calendar days from the date of this Order, Boston shall reconvene the Team to determine whether it can modify the BCLA program consistent with this Decision for the summer of 2014 and no later than the beginning of the 2014 – 2015 school year. If not, then Boston shall locate or create a public or private program that will meet the criteria set forth in this Decision and be available for Student by no later than September 2014.

By the Hearing Officer:

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Sara Berman

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Date: June 13, 2014

