

**January 2, 2015**

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

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**BOSTON PUBLIC SCHOOLS**

**BSEA # 1401653 &  
BSEA # 1503083**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**PARENT, PRO-SE  
ANDREA ALVES THOMAS, ESQ., ATTORNEY FOR  
BOSTON PUBLIC SCHOOLS**

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

**In Re:** Boston Public Schools v.  
Student

**BSEA # 1503083  
& BSEA # 1401653**

**DECISION**

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

On October 10, 2013, Parent requested a hearing in the above-referenced matter (BSEA #1401653). The matter was continued at the request of the parties on several occasions. At the parties' request, pre-hearing conferences were held on November 26, 2013 and on October 2, 2014<sup>1</sup>. Boston Public Schools (Boston) then filed an Expedited Hearing Request (BSEA #1503083) on October 22, 2014.

On October 24, 2014 Parent amended her Hearing Request to add issues including a compensatory claim. Parent later attempted to withdraw this claim, stating her preference to proceed directly to Massachusetts District Court. Boston objected to Parent's withdrawal of the compensatory claim on October 30, 2014. A ruling was issued on the first day of hearing as discussed below.

The two cases, BSEA #1503083 and BSEA # 1401653, were consolidated by an order issued on October 31, 2014. This order also addressed Boston's withdrawal of its request for expedited status and scheduled the hearing on the consolidated matter for mid-November 2014. This Hearing was held on November 17, 18 and 19, 2014, at the Offices of DALA/BSEA, One Congress St., Boston, Massachusetts before Hearing Officer Rosa I. Figueroa.

Boston's motion regarding compensatory claims was heard at the beginning of the first day of hearing. At the time, the Hearing Officer explained to Parent that the BSEA has jurisdiction over claims for compensatory services. The Hearing Officer further explained that since Parent's claim for monetary damages was based on the same set of alleged facts giving rise to the claim for compensatory services, Parent would have to exhaust administrative remedies at the BSEA before proceeding to state or federal court with her

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<sup>1</sup> This would have been the first day of hearing but believing that they could reach full settlement of all of Parent's claims, the parties requested to use that day as a pre-hearing conference. The reader is referred to a *Ruling on Parent's Motion for Stay Put Order, Parent's Request to Amend the Hearing Request, Parent's Objection to Proceeding to Hearing on an Expedited Basis and Parent's Motion for Recusal of the Hearing Officer*, issued on October 29, 2014, addressing in detail much of the historical and procedural background in this matter.

additional monetary damages claims. On this basis, the Hearing Officer allowed Boston's *Objection to Withdrawal of the Compensatory Issue*.

Those present for all or part of the proceedings were:

Student's Parent	
Andrea Alves-Thomas, Esq.	Senior Attorney for Boston
Colleen Deasy, Esq.	Attorney for Boston
Cindie Neilson	Assistant Director Special Education, Boston
Joan Curran	COSESS- Coordinator, Boston
Jeremiah Faro	Headmaster/Principal Horace Mann School, Boston
Lynne Graham O'Brien	Audiologist Horace Mann School for the Deaf and Hard of Hearing, Boston
Marci Goldowski	Speech and Language Pathologist, Boston
Amanda Esar	Itinerant Teacher of the Deaf, Horace Mann School, Boston
Lita O'Malley	Teacher of the Deaf, Horace Mann School for the Deaf, Boston
Rebecca Hart	Teacher of the Deaf, Horace Mann School for the Deaf, Boston
Elizabeth Drake	School Psychologist, Horace Mann School for the Deaf, Boston
Ann Marie Accomando	Teacher of the Deaf, Horace Mann School for the Deaf, Boston
Jennifer Harris	Audiologist, Children's Hospital
Carol Shapiro	Speech and Language Pathologist, Clarke School, Canton, Massachusetts
Barbara Hecht	Director, Clarke School, Canton, Massachusetts
Evelyn Rankin	Director, READS Collaborative
Lauren Seafort	Pediatric Audiologist, Tufts Medical Center

The official record of the hearing consists of documents submitted by Parent marked as exhibits PE-1 through PE-15<sup>2</sup>, and documents submitted by Boston marked as exhibits SE-1 through SE-37; recorded oral testimony, and oral closing arguments. The parties requested and were granted a continuance until December 8, 2014 for submission of written closing arguments and the record closed on that day upon receipt of those closing arguments.

### **ISSUES FOR HEARING:**

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<sup>2</sup> Parent's exhibits had not been numbered when submitted. During numbering at Hearing, Parent's witness list was accidentally numbered as PE-2. I further note that Parent relied on Boston's exhibits for much of the Hearing as they were easier to follow than Parent's especially for those exhibits appearing in both of their books.

1. Whether the IEP proposed by Boston for the 2013-2014 school year was reasonably calculated to offer Student a free, appropriate public education (FAPE) in the least restrictive setting (LRE)?
2. Whether Parent is entitled to compensatory services for the period from February 2014 to September 2014 during which Student was out of school.
3. Whether the IEP proposed by Boston for the 2014-2015 school year calling for Student's placement at the Horace Mann School was reasonably calculated to offer Student a free, appropriate public education (FAPE) in the least restrictive setting (LRE)? If not;
4. Whether Boston is responsible to fund Student's placement at the READS Collaborative for the 2014-2015 IEP period?

## **POSITIONS OF THE PARTIES:**

### **Parent's Position:**

Parent states that Boston failed to offer Student an appropriate program during the 2013-2014 school year. According to Parent, Boston has relied on a program, services, and methodology that have not helped Student progress effectively and achieve the maximum degree of development of which Parent believes him to be capable. She states that Boston has not offered Student an appropriate peer group and asserts that Student should not be exposed to other students with varying disabilities. She prefers that he be educated solely with children whose only disability is deafness. Parent also wishes for Student to be instructed only orally, and not to be instructed in American Sign Language (ASL).

Parent asserts that Student is owed compensatory services for the period from February 2014 to June 2014 as well as for the month of September 2014. During those periods, Parent kept Student out of school, alleging safety concerns for herself and for Student. Parent distrusts Boston and argues that Student can only make effective progress in a private placement. She does not believe in the public school system and with the exception of one child, has educated all her children in private schools. She seeks the same for Student. According to her, the educational rigor of private schools, not found in public schools, is designed to maximize a student's potential. While she initially requested placement of Student at the Clarke School (until Clarke School found him ineligible for its program), she later pursued placement at the READS Collaborative. She now seeks public funding for Student's placement at READS Collaborative. Parent asserts that Student has made significant improvement since starting at READS Collaborative in October 2014.

Parent also seeks monetary compensation and compensatory services for the periods in 2014 during which Student did not attend school.

### **Boston's Position:**

Boston asserts that Student has been and can continue to be appropriately educated at the Horace Mann School's program offered to Student.

Boston denies that it owes Student compensatory education services in excess of 1.5 hours of speech and language services. Boston argues that Student has had available to him an appropriate program at all times, and that after Parent withdrew Student in March 2014, Boston funded a program for Student at the Clarke School during the summer of 2014. Moreover, it asserts that, Student had received a Free and Appropriate Public Education (FAPE) while in the Boston program consistent with the IDEA. Boston had also continued to offer Student placement at Horace Mann in September 2014 and it was Parent who refused to let Student attend.

Lastly, Boston argues that it offered Student placement at READS Collaborative as part of a settlement agreement that also included resolution of the compensatory claims. However, when Parent rejected settlement of the compensatory claims, Boston withdrew its offer, including funding for placement at READS Collaborative.

At all times, Boston has maintained that its proposed placement for Student at the Horace Mann School offers Student a FAPE and argued that its offer of placement at READS was only an attempt to reach full resolution of the case.

#### **FINDINGS OF FACT:**

1. Student is a six-year-old resident of Boston, MA who developed profound deafness as an infant, possibly as a result of medications administered when he was two months old (PE-1; SE-23; Mother). In December 2010, at age two and a half years, Student underwent surgery for a cochlear implant on his right ear (Mother). Student's implant was activated in January of 2011. After the surgery, Student was seen periodically for MAPping (reprogramming of the cochlear implant processors) (Gray O'Brien, Hart, Seafort). Following the implant, Student's diagnosis was bilateral auditory neuropathy (auditory dys-synchrony) (SE-1; SE-2; SE-8). According to Parent, Student's hearing issues are rare and differ from most other children with hearing impairments. Parent believes that because Student was not born with any hearing issues, his situation and needs are not similar to those of other children with hearing impairments (PE-9; Mother). Parent also believes that Student has hearing on his left ear but does not know how much. Other than the hearing impairment Parent does not believe that Student has any other issues including fine motor deficits (*Id.*).
2. Student has been described as friendly, curious, lovable, engaging, energetic and eager to please (SE-2). He is one of multiple children in his household and the only one eligible to receive special education services. Parent favors a private school education for all of her children, especially after a negative experience with her eldest child's public school education (PE-9; Mother). At present, Student receives educational services at READS Collaborative pursuant to a *Ruling on Clarification of Stay-Put (Id.)*.

3. Student received early intervention services from Bay Cove Human Services until he turned three years old at which time he transitioned into a pre-school program at the Horace Mann School in Boston (PE-15).
4. A Boston Metro evaluation performed in March 2011 showed that according to the Michigan Early Intervention Developmental Profile, Student's gross motor, social-emotional, and self-care skills were all within normal limits and age appropriate but that Student's language skills were significantly delayed (SE-2).
5. At the age of three Student was seen by Denise Eng, speech and language pathologist, and pediatric psychologist Dr. Terrell Clark at the Children's Hospital Deaf and Hard of Hearing Program in Waltham, MA. (SE-1). During the interview with Parent, Parent reported having completed the Family Sign Language Program (FSLP) herself and further noted that Student used a few signs and vocalizations to communicate at home. During this visit Student wore the speech processor, an integral component of the cochlear implant device necessary for the individual to access sound (SE-1).
6. The Children's Hospital assessment, which occurred on August 23, 2011, showed that Student communicated through vocalizations to convey his desires and frustration. He did not produce any words or word approximations during the assessment and did not attempt to engage in eye contact with the communicative partner when he was frustrated or needed help. He required a tap on the shoulder or a shifting of body position along with gestures/signs to attend to the directions or comments by the clinicians. He did not appear to understand any spoken language and did not respond to verbal requests. When the clinicians pointed to objects, Student shook his head yes or no indicating his interest. He was not responsive to sign language and the quality of his symbolic play suggested to the clinicians that Student's language was at around the 20 to 21 month level (SE-1).
7. The Children's Hospital report notes an inconsistent record in keeping appointments for MAPpings and "follow along" and Parent reported that getting Student to wear the device was a struggle, a discouraging finding also mentioned by the clinicians who concluded that Student did not appear to use the device consistently. The clinicians noted that Student was not accessing language and information through auditory modalities and he did not appear to expect people to communicate with him through visual modality (e.g., signing). Student appeared to be significantly delayed in language acquisition which was of great concern given that he was then three years old. The clinicians found it essential that Student build his base of language and the world through Sign Language (SE-1). The report states that

It was again emphasized with his mother that [Student] cannot be expected to comprehend spoken language (words, phrases, sentences, stories, conversation) rapidly enough to satisfy his language acquisition and development needs. Even with of the most optimal of auditory development post-Cochlear implantation, he could have benefited from access to signing as a supplement for spoken communication. He has not made the optimal

progress and definitely needs the support of visual access to language and information (SE-1).

The Children's Hospital clinicians recommended that family members learn and use sign language to communicate with Student and noted the need for Student to receive speech and language therapy from a "therapist who incorporates signing and visibly conveying information" (SE-1). They further recommended that Student participate in a pre-school program that used both visual and auditory modalities, as well as American Sign Language (ASL) and English to support concept development and comprehension of communication (SE-1). The report stressed the importance of all family members learning to sign and to consistently sign with Student to support his access to and acquisition of language, especially since Student showed no evidence of understanding spoken language at the time of the evaluation. Signing would not prevent Student from learning to speak (*Id.*).

8. Elizabeth Drake, Boston school psychologist at the Horace Mann School for the Deaf (HM), evaluated Student on October 3, 2011 (SE-2). Ms. Drake's evaluation notes that Student appeared more interested in toys than in communicating and when provided with spoken and signed language, he attended briefly to one-two signs, but appeared to understand neither the spoken message nor the sign requests (*i.e.*, come here, look, throw the ball). He also did not respond to tapping or physical redirection for attention. Ms. Drake noted that Student did not use language during the session. Student's expressive language skills fell in the 8 month old range while his cognitive abilities were in the 21 months range. Ms. Drake stated that Student had demonstrated some strengths and pre-academic skills and at least once, demonstrated satisfaction with his independent completion of a task by smiling and giving the evaluator a "high five" (SE-2). Ms. Drake opined that Student had not yet learned that language was a means to social interaction and a way to meet ones needs. She noted that language should be the primary focus of his education, and communication at home (especially to replace maladaptive communication behavior), and encouraged the family to learn ASL and to use it to allow for carryover of language into the home. She also recommended an instructional approach that encouraged visual and auditory modalities and recommended frequent communication between school and home. Ms. Drake also stressed the need for Student to wear his processor for longer periods of time throughout the day (SE-2; Drake).
9. Student's Team convened for the first time on October 14, 2011, at which time he was found eligible to receive special education services. Boston issued an IEP containing goals for pre-reading/ writing, math, socialization as well as transitional skills, within a three hundred minutes, five days per week program in Boston (SE-2). The IEP notes that he is a quick learner and that Parent wishes for Student to build the skills that will enable him to be mainstreamed preferably into a parochial school (SE-3).
10. The IEP covering the period from October 2011 to 2012 calls for Student's participation in a substantially separate classroom taught by a teacher of the deaf and provides the following accommodations:

Small group, FM system, teacher of the deaf, American Sign Language and Spoken English, positive reinforcement, demonstration, practice and repetition, modeling, manipulatives, visual cues, acoustically appropriate classroom, pre and post teaching, home/school notebook (SE-3).

11. During the 2011-2012 school year, Student participated in Boston's proposed pre-school program at the HM school (Parent).
12. Student's Team reconvened on November 2012 (SE-4). The Team noted that Student had made academic and receptive and expressive language gains during the previous year, but his language skills remained significantly delayed for his age. The Team recommended that Student continue to receive his instruction in Sign-Supported spoken English with ASL as needed for comprehension. The IEP notes, however, that as of April 8, 2013, Parent had communicated her desire that Student not be educated in ASL (SE-4).
13. In school, Student made his needs known through pointing and gesturing and with the use of some signs. He could
  - ...identify a few alphabet letters, and the numbers 1 and 2 in written form. He identif[ied] and name[d] the colors red and yellow. He engage[d] in pre-writing activities such as coloring and drawing... he [followed] along during a read aloud and attempt[ed] to copy signs and imitate sounds... [he] earned an age equivalent of 2.9 years on the Expressive Vocabulary Test... [and] required significant amount of guidance when sorting objects according to specific attributes (color, shapes, size)... has been able to understand and follow simple, one-step directions when given in sign and speech within a contextual situation...[was] beginning to understand statements and questions when they [were] paired with a picture or object. In the area of auditory training he [was] able to consistently detect the Ling sounds, his name, and environmental sounds 90% or the time within a structured setting (SE-4).
14. The November 2012 IEP further notes that Student was receiving speech and language therapy during which he was learning that he was expected to both sign and speak new English words. The IEP emphasized the need to provide auditory training throughout the day so as to help the auditory development of the brain (SE-4). When a child receives a cochlear implant, s/he can hear sound but cannot make sense of it until the brain is trained to understand sound. This is achieved through auditory training and lengthy periods of exposure to sound by having the child use his or her processor during all waking hours (O'Brien). Student had also undergone an occupational therapy (OT) evaluation which showed below average to low average visual motor and fine motor skills and recommended that Student receive OT to improve his pencil grasp thereby improving his ability to write and draw (SE-4).
15. The accommodations in this IEP included:

FM system, acoustically appropriate classroom, directions in small steps, preferential sitting, examples, extra time to process information, verbal prompts, use of manipulatives, practice/repetition, visual cues, monitoring, word banks, check-ins, extra time to complete work, behavior management, predictable schedule, cueing back to task (SE-4).

16. The Team recommended that Student continue to participate in the Early Childhood Program with door to door transportation (SE-26; SE-27). The IEP offered Student participation in a substantially separate Kindergarten 1 program at HM to address his communication and readiness needs and added OT to address his motor skill deficits (SE-4; SE-26; SE-27).
17. On December 19, 2012, Annie Accomando (Student's classroom teacher), Marci Goldowski (speech and language pathologist) and Charlotte Lunde (speech and language pathologist), discussed Student's progress including his ability to spontaneously sign several words (i.e, want, water, coat, nap, cracker, goldfish, who), to name several of his classmates and teacher in sign language, and to label and ask questions using simple words or non-verbally. He also imitated single words in sign and attempted to approximate speech in an effort to communicate. In auditory training, Student was able to detect gross sounds and could discriminate and imitate "oo, ah, and m" sounds. He inconsistently discriminated suprasegmental sounds. He could attend to an activity for up to 15 minutes, understood routines and rules, understood timeout and cause and effect situations, was independent in toilet training and in self-help routines, and could count to two. Student however, still lagged behind academically. He craved attention and had a melt-down when he did not receive enough. The report also states that at the beginning of the school year Student had great difficulty accepting limits but had improved in this regard (SE-5).
18. Susan Mumby Gibbons, Au.D., CCC-A/SLP, Student's outside therapist at Children's Hospital, wrote to Ms. Goldowski on December 19, 2011, informing her that she would no longer see Student for outside therapy.<sup>3</sup> She explained that Student had only attended three (3) of 13 hour-long appointments scheduled. In a previous email she noted that of the three appointments Student did attend, he was thirty to forty minutes late for the first two appointments, and had only received the full hour-long session on the third appointment. She informed Ms. Goldowski that she had left a telephone message for Parent because she was difficult to reach and rarely returned telephone calls (SE-30). Parent had consented to communication between Ms. Gibbons and Ms. Goldowski (*Id.*).
19. Terrell Clark of Children's Hospital conducted a "Follow-Along' Re-Assessment" on January 15, 2013 when Student was four and one-half years old. (SE-8). At the time of this evaluation he used his voice intentionally, but he was not yet speaking using clearly articulated speech. He was observed to use gestures and signing in his expressive communication, producing seven (7) spontaneous/ independent signs. Dr. Clark noted that Student's most clear form of communication was through signing. On request, Student was able to name several objects and demonstrated comprehension of single words/ signs and

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<sup>3</sup> According to Parent, Student's initial session with Ms. Gibbons occurred around October 2011 (SE-30).

could identify objects by function. He also demonstrated emerging abilities to respond to questions targeting action and in following simple directions. The evaluator placed Student's receptive language skills at the two year, two month (2.2) age level according to the Reynell Developmental Language Scales. The evaluator attempted to administer the Peabody Picture Vocabulary Test 4B in spoken English but was unable to establish a basal (starting point) preventing her from computing standardized scores. Student's adaptive skills (per parental report) and non-verbal cognitive skills (as per the Wechsler Nonverbal Scale of Ability) were solidly in the average range of functioning. The report notes that even at this time, Student did not wear his processor full-time, daily. The evaluator recommended OT and physical therapy (PT). Dr. Clark explained that Student needed to value interactions with others, and become more "hooked in" with peers and adults to further his language skills. She recommended that Student engage in turn-taking activities at home and in school to prepare for the type of turn taking involved in conversation (SE-8). Parent requested that Student's speech and language/ aural rehabilitation therapy services (which focused on building attention to and comprehension of spoken and signed language) be transferred to a location closer to the home as traveling to Waltham was not convenient for her (SE-8; Mother). Lastly, in addition to recommending that Student wear his processor during all waking hours, Dr. Clark noted that Student

...needs quiet listening environments. Too many sounds presented all at once (multiple voices, papers rustling, traffic, toy sounds, etc.) may be not only unpleasant but also not meaningful. To build his language, [Student] needs structured listening and language opportunities within a quiet setting with hands on activities, pictures, and sign-support.

Continued use of signing is essential for [Student's] development of linguistic competence. He does not show sufficient comprehension of spoken language to communicate with him for instruction through oral/aural modalities alone. The first needs to build his comprehension of concepts, labels, communication routines, etc. And can best be expected to do so using a combination of spoken and signed language when interacting with [Student]. Signs will provide him with basic concepts and serve as a bridge to comprehension of sounds and spoken language (SE-8).

20. E-mail communication between Jennifer Harris, (audiologist at Children's Hospital) and Lynn Graham O'Brien and M. Goldowski of Boston for the period between December 21, 2011 and January 23, 2012, sought and provided information regarding Student's attendance to school, problems with his processor, whether he was signing in school and how he was progressing. In these e-mails Ms. Harris conveys her frustration with the family's lack of follow up. Parent testified that getting to Waltham from Boston for a 3:00 p.m. appointment was difficult. Parent would later request that the appointments be changed to a location closer to home (Mother).

21. On or about April 8, 2013, Student's Team reconvened at Parent's request to discuss Student's language of instruction. Parent did not wish for Student to be instructed in

American Sign Language. Instead, she wished for him to be instructed in Sign Supported Spoken English only (SE-6). According to Parent, nobody in her house communicated using sign language and since she had decided to proceed with the cochlear implant, she wanted Student to speak English and not to sign (Mother). The Team discussed their concerns regarding Parent's preference and noted that some of Student's peers were receiving ASL as needed for comprehension. Ultimately, the Team acquiesced to Parent's request and reflected her preference in Student's IEP (SE-6).

22. On May 8, 2013, Mother consented to Student's placement at the HM public day program for Student as proposed in the November 2012 to November 2013 IEP (SE-7).
23. Ms. Harris and Ms. Goldowski e-mailed again in mid June 2013. Ms. Harris stated that Student had arrived an hour and fifteen minutes late to the appointment. She performed a quick assessment of Student's language skills (with Parent present) using a NU-CHIPS word identification task finding that Student's comprehension with signing had improved (10/10 correct answers), auditory plus speech reading with reminders to look at her face yielded 4/10 correct answers and with auditory presentation alone 2/10 correct answers one of which was a "lucky guess". Ms. Harris concluded and informed Parent that Student would not be able to learn academics through listening alone (even with speech reading). Parent asserted that Student was wearing the processor during all waking hours which puzzled Ms. Harris as to why he was not doing better with audition (SE-30).
24. On or about June 21, 2013, Student lost his speech processor (Parent).
25. Student's progress reports for the period ending in June 2013 note that Student was making slow progress in his communication and readiness skills but had not yet mastered them. Similarly, while he had made some progress regarding fine motor skills, he continued to require OT (SE-25). The Team recommended that Student repeat his kindergarten experience, but Parent decided against it and requested that he be promoted (PE-9; SE-30). Parent did not want Student in class with peers who used ASL or who had other disabilities. Her request was of concern to Ms. Goldowski who noted that HM did not have a class that met Parent's demands (SE-19; SE-30; Parent).
26. E-mail communication during the period from June 6, 2013 to December 3, 2013, among Parent, Ms. Goldowski, Ms. Harris, Charlotte Lunde (speech and language pathologist at HM) Ms. Graham-O'Brien (audiologist at HM), Sue Mumby Gibbons (Children's Hospital audiologist) Mark Campbell-Foster (Clinical Applications Specialist, Cochlear Americas) and Ms. O'Malley, note the difficulties associated with Student's inconsistent use of the processor, loss of the processor, efforts to obtain a replacement, lack of follow-up and/ or missing appointments for Student, and communication with the family (SE-31).
27. Specifically, Ms. Graham-O'Brien notes that at one point Parent had reported one of Student's two processors missing. Parent then found the processor after it had been replaced, but never returned the replacement to Cochlear America. Meanwhile, the replacement processor was not "hooked-up" because Parent did not have all of the pieces. A later e-mail

from Ms. Harris dated October 24, 2013 notes that because Ms. Harris could not guarantee that Student would know to push a button to modulate the device while he was at home, she had not activated the t-coil to prevent it from buzzing all day. Ms. Harris explained that the T-coil activation was essential to Student's ability to access the FM system (SE-31; Harris). In mid-November, 2013, Ms. Harris forwarded batteries, ear-hooks and microphone protectors to HM so that they could assist Parent in putting the pieces together as Parent had refused to see Ms. Harris for this. Also, a cable and coil scheduled to arrive at Student's house on or about November 13, 2013 had not been deliverable on three separate occasions, and as of December 3, 2013, had not yet been received by Student. On or about November 15, 2013, Student came to school with a broken processor.

28. An e-mail from Ms. O'Brien to Student's teacher and other service providers notes Parent's misunderstanding regarding the correct use of the FM system as well as Parent's emphatic request that HM personnel refrain from signing with Student and instead use more speech, as well as Parent's statement that at home, Parent and her friends simply talked to Student because he could hear (SE-31).
29. A letter dated September 16, 2013 by Ms. Graham O'Brien explains that although Student can hear sounds when he using his cochlear implant and processor, his ability to use sound to understand the words that are said, that is, speech, was weak. Again she notes Student's infrequent use of the processor and Student's issues with visual attention for speech-reading (SE-31).
30. As a result of a mediation meeting held on September 16, 2013, it was agreed that Student would participate in an unscheduled evaluation to assess his progress (SE-10). On October 1, 2013, Parent consented to a speech and language evaluation, an educational assessment, a classroom observation, and a psychological assessment. She specifically rejected the home assessment, health assessment and the OT evaluation (SE-11).
31. On or about September 23, 2013, there was an incident during which it took the staff approximately twenty minutes to produce Student when Parent showed up unannounced to pick him up. On that occasion, after a staff member initially called the wrong child over the speaker phone, Parent and another staff went looking for Student at gym. They could not find him at the location where gym was supposed to be held. Principal Ford was alerted and he found Student, the gym teacher, two other students and two paraprofessionals at the track field. The gym teacher was reprimanded for failing to follow the protocol before removing the children from the designated area and for not carrying his radio (Ford). Parent was alarmed by the amount of time it took to find Student and she later became concerned that Student may have been molested during the time she waited for him. Parent later filed a report under M.G.L. c. 119, § 51A. This report was screened out by DCF which determined that although not at the location where he was supposed to be, Student and the other children had not been in danger (Ford).
32. In mid-September and again in early October 2013, Parent requested that the audiology report be removed from Student's file because she believed that the audiologist did not write

her own report. She also requested that the OT evaluation report be removed because it was irrelevant to Student's hearing deficits. By then, Parent was dissatisfied with Boston's program because Student had not yet developed Spoken English despite having received services in Boston since October 2011 (SE-28).

33. Lita O'Malley, teacher of the Deaf at HM, was Student's K.2 classroom teacher. She explained that Student's group consisted of three other children, paraprofessionals and herself (SE-13; O'Malley).
34. Beginning on September 16, 2013, Amanda Esar, M. Ed., Teacher of the Deaf, offered Student auditory training three times per week at HM (SE-12). In her Auditory Rehabilitation Summary she explained that the purpose of this methodology was to guide Student to listen and expand his language through audition only. No sign language was used by the therapist and anything signed was clarified orally through Spoken English. During the sessions she monitored Student and kept data on Student's ability to hear and respond with Spoken English without visual cues. This report notes that Student had been attending the sessions without assistive devices such as the use of his cochlear implant and that his spoken language remained unchanged. Ms. Esar noted that when he could see the therapist's mouth, he could make good approximations or sounds, though not all of his attempts were accurate. He did not comprehend directions given from across the room even when at times he heard her voice. She noted that Student had increased his signing during the sessions to discuss the toys and games that were being used and consistently used the signs for: "mama, baby, bear, all done, no, your turn, help me, stuck, bye" which were in turn mouthed for him by the therapist and clarified in Spoken English with the expectation that Student also states them. Since Spoken English was the ultimate goal for Student's means of communication, Ms. Esar recommended that he use his cochlear implant during all waking hours daily so as to better "retrain his brain to understand the sounds and connect them to language." According to her, it would take months for the effects of the use of the device to begin to demonstrate results (SE-12; Esar).
35. Jennifer Harris, AuD, CCC-A saw Student during a visit at the Children's Hospital on September 23, 2013. The report from this visit notes that Children's had been able to get Student the parts he needed to have one complete working processor. At that time, Ms. Harris enabled Student's telecoil for FM use only. The report stresses the need for Student to use his processor during all waking hours in school and at home, attend all MAPping sessions so that he could begin to understand spoken language and make progress (SE-9).
36. Marci Goldowski, Speech and Language Pathologist at the HM, performed Student's speech and language evaluation on October 7, 9 and 11, 2013 (SE-16). She noted Student's excellent attendance to school. She also noted his inconsistent use or access to his cochlear implant (CI) processor which at times had lost or malfunctioning parts so that Student lacked consistent access to sound during those periods (PE-6; SE-16). To assess Student's comprehension through residual hearing part of the testing was performed in Spoken English without the benefit of amplification (SE-16).

37. Student's receptive language skills were assessed by Ms. Goldowski by using the Receptive One-Word Picture Vocabulary Test (ROWPVT) which was administered in Spoken English without the CI processor. He was able to identify 7 out of 25 items (28%, similar to what he would have obtained by chance) and did not establish a basal, but correctly identified the words "chair, car, lion, carrot, rabbit, flower and bear through Spoken English. When provided with sign supported Spoken English, Student responded to many more items correctly (e.g., jungle, pear, diamond, open, mailing and snake through sign), 46 of 56 items. Ms. Goldowski concluded that when given single word signs, Student was able to understand vocabulary words as well as his similarly aged hearing peers. His ability to understand Spoken English vocabulary without his processor was however, minimal (SE-16).
38. Parent reported to Ms. Goldowski that at home, Student was able to hear and communicate in spoken English without wearing the CI processor (SE-16).
39. To assess his receptive language skills, Ms. Goldowski administered parts of the Preschool Language Scale-5 (PLS-5) a test standardized on normally hearing individuals. Student was given the test first using only Spoken English and then again using Sign Supported Spoken English, without the CI processor (SE-16). When using only Spoken English with gestural cues, Student followed familiar directions and identified four out of six pictures of familiar objects (cookie, bird, apple, balloon), and no other item correctly in Spoken English, therefore no basal was established. When the test was administered in Sign Supported Spoken English, he demonstrated ability to understand negatives in sentences, make inferences, understand the use of objects, and follow commands without the use of gestural cues. He also demonstrated ability to understand some higher level academic skills such as identifying colors and letters and understanding number concepts, but was unable to identify shapes within a sentence, understand quantitative concepts, and spatial concepts. Given in this modality, Student scored two standard deviations below the mean demonstrating that his ability to understand connected language was emerging (SE-16).
40. Student's expressive language abilities were measured using the Expressive One-Word Picture Vocabulary Test (EOWPVT) (SE-16). Student did not use his processor for this test. He provided all of his answers by using vocalizations accompanied by a sign. He was able to provide "an identifiable spoken approximation of five words" (apple, cat, book, boat, and cloud), demonstrated a strength in labeling objects through signs (drink, straw, painting, corn, penguin), gave semantically related incorrect answers for certain items (cow for goat, bed for pillow and car for bus), had difficulty naming groups of items. Ms. Goldowski noted that had the test been scored, Student would have scored one standard deviation below the mean which is considered to be mildly impaired when compared to same age hearing peers (SE-16). On the Preschool Language Scale-5, Student gave most responses by providing mostly unintelligible vocalizations accompanied by signs (cookie, fish, scissors, banana, and elephant). He demonstrated turn taking ability, joint attention and used nouns, verbs and adjectives, but could not answer "what, when and where" questions, could not use three to four word utterances in spontaneous communication, name a described object or use grammatical markers. Had he received a score in this test he would have fallen three standard deviations below the mean showing severe impairment in his ability to express

himself in sign or Spoken English. Examples of his expressive language while describing *Carl's Afternoon in the Park* were: boy, baby, cute, flower, leaf, balloon, sheep, pig, deer, together, look, finished. He gestured a hose spraying water, climbing and swinging (SE-16). Student's oral mechanism was found to be within normal limits, but standardized articulation tests were not administered. Student was willing to imitate spoken words when he was given lip-reading cues. His pragmatic skills were age appropriate (SE-16).

41. Ms. Goldowski found Student to have made progress toward his communication goals during speech-language therapy sessions, noting that he used a combination of signs, intelligible words and some approximations of words independently to communicate his needs and thoughts. He labeled familiar things in his environment, and understood simple phrases through Spoken English alone. He was able to detect the 6 Ling sounds with 90% accuracy and discriminated them with 70% accuracy, and his ability to hear and repeat sounds when given lip-reading increased to 95%. Without the processor, however, Student's ability decreased drastically, demonstrating that without amplification and relying only on his residual hearing, Student's performance was inconsistent and sporadic. Overall, Ms. Goldowski found Student's language skills to be significantly delayed and had they been scored, would have ranged from the severely impaired to the average range. She recommended continuation of the same type of programming with instruction delivered in Spoken English and Sign Supported Spoken English, and further stressed the importance of having Student use his processor during all waking hours. Provision of individual speech and language therapy continued to be necessary (SE-16).
42. On October 16 and 17, 2013, Lis Drake, M.A. Psy.S., Boston, conducted Student's psychological evaluation consisting of a classroom observation and assessments. She noted that Student was an active and engaging student whose sign, spoken language and academic abilities were well below the Kindergarten level. Student communicated through signing, vocal approximations, gesturing and behaviors. Ms. Drake presented instructions and engaged in conversation using Sign Supported Spoken English as he was unable to understand most Spoken English without sign language (SE-17). During the classroom observation Student demonstrated symbolic play skills and frequently engaged in independent play. He required significant amount of support to maintain attention and eye contact and spontaneously used Spoken English and sign minimally. The assessments showed that Student's expressive and receptive abilities were stronger in sign language but these were still quite delayed. He was unable to respond to higher-level questions although he had improved in his ability to read lips and in his attention to spoken and signed language. Cognitive testing placed him in the borderline range of intelligence and he performed well below grade expectation in the Bracken School Readiness assessment. From a social emotional standpoint, Student had improved his social interactions with peers but continued to have a low frustration tolerance level. He responded well to very structured clear expectations, however, and would benefit from developing vocabulary to express his emotions. Ms. Drake found it essential that Student be exposed to sign language in addition to Spoken English. She strongly encouraged the family to use sign in addition to Spoken English to strengthen Student's communication skills, and help him decrease frustration; carryover to the home was important to his language development. Student responded well

to positive reinforcement and a token economy system. Language skills should be used to replace maladaptive behaviors (refusing, avoidance and tantrums) observed in school (SE-17).

43. Melissa Brown administered subtests of the Woodcock Johnson (WJ III) Test of Achievement on October 17, 2013 (SE-14). She noted that Student had not had his processor since June 2013 and was struggling to access Spoken English. She noted that when compared to same grade level peers Student's standard score was low average in brief reading and low in brief writing placing him at the pre-kindergarten level. He demonstrated letter confusion when signing "O" and "G", and showed pre-literacy skills when matching objects to pictures and identified the word "cat" correctly. While he showed some proficiency tracing letters and drawing straight lines, struggled to write letters on his own even with a model. Ms. Brown noted that he required direct teaching of English vocabulary using both sign and speech as he did not produce many spoken words spontaneously. She noted however, that he was beginning to express himself using lengthier utterances in sign and was beginning to connect words. Ms. Brown noted that Student

would benefit from American Sign Language (ASL) as that is a language that he can fully access. Once he has gained language, he would be better able to develop spoken language as he would have the concepts to attach to the spoken words (SE-14).

44. Lisa Nierenberg conducted Student's math testing at HM on October 17, 2013 (SE-13). Student was five years two months old at the time of this assessment and because of his limited access to language and limited success accessing math, formal instruments were not used. She tested Student in an empty classroom void of anything to play with, and also observed him during morning meeting, a time when he engaged in routine everyday math concepts. During the activities Student was observed counting to two and intermittently to three. His attention to task was much better when in the one-to-one testing situation during which he was also able to identify a square and identify the smallest, but not the largest star. She concluded that Student was accessing curriculum at a preschool level and was limited in both math skills as well as the language involved in academic math. As per the WJ III, Student placed between the 2.9 and 2.11 age range. Ms. Nierenberg noted that she would use the results from her testing as a measure for Student's progress throughout the year (SE-13).

45. Pamela Vaughn, MS, OTR/L, assessed Student on October 21, 2014. Ms. Vaughn met with Student individually once per week for 30 minutes to address fine motor and visual motor skills deficits. She noted that Student had partially met two of his objectives, had not met one and had fully met one (crossing midline 75% of the time in classroom activities). Student's visual motor and fine motor skill issues made it difficult for him to access the classroom curriculum. Ms. Vaughn stated that with minimal to moderate adult support, Student could complete a multi-step project three out of five times if provided a visual model. His pencil grip had improved but he required notable assistance when cutting with scissors. According to Ms. Vaughn's Student's participation and progress was impacted by

his difficulty with attention and lack of cooperation when engaging in non-preferred activities for which he required moderate to maximal encouragement. She recommended continued OT (SE-15).

46. Lita O'Malley, Student's special education teacher of the deaf conducted the educational assessment in mid-October 2013. Her report, dated October 21, 2013, notes that Student was able to "follow classroom routines, was eager to communicate, helpful, inquisitive and was able to incorporate new vocabulary." He was interested in gross motor activities, dramatic play, socializing with peers, building structures with blocks and *Legos*, looking at books and listening to stories (SE-18). In the Expressive Vocabulary Teas (EVT-2), Student scored at the 3.5 age equivalent (standard score of 76) placing his expressive vocabulary abilities in the moderately low range. In reading he was working at the readiness level (having identified twelve of 26 upper case letters and 7 of 28 lower case letters), and could recognize his name and that of his classmates in print, as well as visually discriminate similar letters across a row. He also showed progress in counting (up to four objects with 1:1 correspondence, and up to ten with support) and number recognition. Ms. O'Malley opined that Student was making slow, steady progress and noted that he benefitted from one-to-one instruction which makes it easier for him to focus his attention (SE-18). Ms. O'Malley recommended that Student continued placed in a small, self-contained, acoustically sound, classroom taught by a teacher of the Deaf, and use an FM system when he received his processor (SE-18).
47. Student's Team convened again on October 23, 2013 to discuss the result of his unscheduled evaluation and develop the plan for the period covering October 2013 to October 2014, Student's Kindergarten 2 (SE-10). By this time, Student could: recognize his name and that of classmates and teachers; identify 12 of 26 upper case and 7 of 28 lower case letters; matched similar letters and was able to discriminate similar letters across a row; and, although letter formation was challenging he engaged in writing. Student obtained an age equivalent of 3.5 in the EVT. With signing, his single word vocabulary score fell within the low average range, and he expressed himself with one to two word utterances. He could count to four objects with one-to-one correspondence, counted up to ten with support and was learning to use a calendar. The IEP notes that he responded well to redirection and praise and states that Student used sign more readily than speaking (*Id.*). Although he did not undergo an OT evaluation at Parent's request, it was noted that he had improved with visual motor/fine motor skills though they were still below age expectation and his cutting ability was an area of weakness (SE-10; SE-11). Subtests of the WPPSI-IV/ Informal assessments were used to perform the psychological evaluation which results fell in the borderline range of abilities though this was considered only a snap-shot of Student's abilities. The portions of the WJ-III Test administered placed him at the pre-kindergarten level for reading and writing, but no full scale score was obtained (SE-10).
48. The October 2013 IEP offered Student continued participation in his HM substantially separate public day school with direct services (as per the Service Delivery Grid) as follows: thirty minutes per day four times per week of communication skills with the speech and language therapist; communication skills 90 minutes daily; reading and writing skills 90

minutes daily; 80 minutes daily math skills (these last three areas taught by a teacher of the deaf); and twice per week, half hour long, OT services. The IEP also offered numerous accommodations including use of an FM system to be used with cochlear implant processor (SE-10).

49. Parent rejected the proposed program and placement on October 25, 2013, stating her dissatisfaction with Student's lack of speech and basic learning progress (PE-10; SE-19). She further wished for Student to be in a class with peers without other disabilities as she found it unfair that he would be exposed to them given that Student only had a hearing impairment. Parent sought an out of district placement for Student that solely focused on Spoken English whereas HM was focusing more on sign language. According to Parent,

[Student] learning sign is not realistic to his lifestyle. When [Student] leaves school he is not around anyone to sign. I had a great deal of difficulty finding a summer program for [Student] because he signs (PE-10; SE-19).

Parent also blamed Boston for the loss of Student's processor and noted her belief that Boston had done it on purpose as retaliation for her not agreeing to keep Student back one year. She further noted that Student had not been connected to the FM system in class during several unscheduled visits by her. Parent was also upset that during one weekend the previous year, the teacher had neglected to send the processor home with Student. Parent was again adamant that she did not want Student to be instructed in ASL and opined that Boston had done little to help Student get caught up. She opined that Student was being subject to racial discrimination since counterparts of different racial backgrounds than Student who had also been implanted were getting services to learn how to speak (SE-19; Parent).

50. On or about December 2013, Student's grandfather became ill. Upon leaving the hospital he required a great deal of assistance and therefore, moved in with Parent. The additional responsibility of caring for the grandfather caused Parent to delay Student's independent evaluations (Parent).
51. Student's Progress reports of December 2013, note improvement in all targeted areas, especially once Student regained access to his processor. Ms. Goldowski's report notes that with the use of the processor, Student was better able to comprehend auditory information and his speech production was clearer. He also had been able to regain many of the skills he had demonstrated prior to not having access to the processor. With the use of Sign Supported Spoken English, he had been able to form Spoken English sentences within structured activities when provided a model, and had combined nouns and verbs independently 80% of the time (SE-21). Ms. O'Malley also opined that Student had made progress. He could identify 20 upper case letters and 16 lower case alphabet letters, began reading simple sentences, was able to write with one-to-one structured support, could count objects to five and was learning to count objects to 10, with a prompt of "I want" could express his wants and needs, and had been very responsive to auditory stimuli around him when using his processor. He demonstrated the ability to respond in Spoken English to

simple questions and was better able to repeat words provided in this format (SE-22). Per Parental request (received on November 15, 2013), Student had stopped receiving OT services although Ms. Vaughn opined that he still needed OT services (SE-20).

52. A December 11, 2013, Children's Hospital Report by Denise Eng again notes that Student remains extremely limited in receptive and expressive communication skills and his family is hearing and does not sign. The family had been provided information about speech language/ aural rehabilitation therapy and services had been offered through Northeastern University but the family had been unable to access the services due to logistics (PE-4). During the assessment, Student was able to imitate 7 of 24 items, which improved somewhat with lip-reading visual cues. When imitating speech, Student demonstrated ability to use one-to-three syllable approximations. He was administered the Comprehensive Assessment of Spoken Language (CASL) Basic Concepts test in sign supported Spoken English but was unable to establish a basal level. Ms. Eng noted that he would likely demonstrate greater comprehension of discrete one-word tasks in contrast to connected language tasks. Overall, Student's comprehension of basic concepts presented below age level expectations (PE-4).
53. Ms. Eng recommended consistent use of the processor throughout all waking hours, access to a quiet listening environment as multiple sounds presented together may not be meaningful to him. She also recommended the use of sign language for comprehension and to help support development of linguistic competence, continued direct speech and language and aural rehabilitation therapy. Student required a full year school program inclusive of speech and language/ aural habilitation services in school and out of school, along with language stimulation activities after school and at home. Parent requested information regarding places that would provide additional speech therapy and information regarding services provided at Northeastern University and Emerson College was provided to Parent along with the contact information (PE-4). Lastly, Ms. Eng noted that acquisition of social pragmatic language was more difficult for hearing impaired children than their hearing peers, and recommended activities to develop skills in this area to help him understand the use of language to promote successful social interactions (PE-4)
54. Parent changed audiologists in December 2013. Starting on December 13, 2013, Student began to see Susan Mumby Gibbons, Au.D., at Children's Hospital for MAPpings (PE-1; SE-23; SE-31).
55. On January 14, 2014, Parent wrote to Lita O'Malley (Student's teacher) apologizing for Student's homework and explaining that they visited her father in the hospital daily and that they returned home late and too tired to do anything else. She related her appreciation of Ms. O'Malley's good teaching, noting the improvements observed while Student was doing his homework and remarking that he had learned a great deal since being in her class (although Parent was still looking for Student to produce more speech). Specifically, Student had been observed to write his name, sign and verbalize the letters, and show improved counting skills. (SE-36).

56. Between September 2013 and February 2014, Parent showed up in school unannounced on several occasions. Principal Jeremiah Ford testified that the Horace Mann staff was concerned that Parent distrusted the staff and her numerous visits were designed to monitor whether the staff was using the methodology of instruction she desired. During some of the visits the conversations with the school's staff escalated resulting in both sides reporting feeling threatened or abused. Parent's distrust had increased after the September 2013 incident. Parent was also upset with Horace Mann staff because on one occasion, she had seen a volunteer signing with Student during lunch time, despite Parent's request that all communication with Student be in Spoken English, not sign (Parent). Parent testified that she was human and that there had been times when she was upset and had lost her patience with some individuals (Parent). According to Principal Ford, Parent's unannounced visits felt intrusive to some of the staff. In February 2014, Parent had an argument with the school's vice principal and a secretary all of which resulted in a breakdown of communication between Parent and staff which Principal Ford was unable to resolve (Parent; Ford).
57. Parent stopped sending Student to school after the February incident with the vice principal. She later withdrew Student from school, and on advice from Boston, in March 2014, sought an itinerant student number for Student so that he could receive the speech and language services consistent with his IEP (Parent). At the time Student was five years old and as such not yet the mandatory school age.
58. In March 2014, Student underwent a comprehensive independent evaluation at the Clarke School (Clarke) (PE-1; SE-23). The evaluation notes that Spoken English is the language used in the home and states that Student does not wear his processor while being transported home by bus for fear that he would lose it, and also due to parental concerns that sounds could be too loud. As with previous evaluation reports, Clarke notes the importance of Student's full time use of the speech processor to provide the auditory centers of the brain with "consistent, reliable information". The report also emphasizes the importance of reducing background noise to address Student's asymmetrical hearing loss between his left and right ears. Clarke also recommends that Student be required to use spoken language or vocalizations anytime he wants something to emphasize the value of spoken language (PE-1; SE-23).
59. Clarke's speech and language assessment, performed by Diane Forman Judd, M.A., CCC-SLP, notes Student's strong visual and visual perceptual skills, and he used visual and auditory skills to access information. He used only three signs during the evaluation at which Parent was present: "more, thank you, and all done" and he used natural hand gestures. His speech intelligibility was found to be reliant of context and familiarity with his communication style and vowel/ consonant repertoire. The evaluator noted that Student had a wonderful relationship with Parent on whom he relied for accessing and understanding what was happening around him. The evaluation noted that Student was

...at a critical age to learn how to hear and to develop his speech and language skills. His performance today suggests that he requires intensive work to

establish and strengthen his auditory skills, articulation and phonology, vocabulary and receptive and expressive language skills... It will be important that he is provided with individual, daily speech and language instruction which targets his listening needs, speech and needs, the preview and review all academic vocabulary, concepts, and information, while addressing [Student's] vocabulary and language comprehension and usage. His Team should work to extinguish his maladaptive behaviors and substitute new habits for alerting others in his environment that he is tired, done or disinterested; strengthen his fine motor skills and evaluate if sensory issues are present (PE-1; SE-23)

Clarke's speech and language evaluation recommended that Student be immersed in an as small as possible, language-based classroom where he was provided vocabulary development, auditory habilitation and improve his receptive and expressive language skills; five days per week individual speech and language therapy; auditory habilitation services; and that all efforts be coordinated between teachers, service providers and the home. Student should also be provided with visual supports for spoken language such as pictures, gestures, and speech reading. Accommodations should be provided through his IEP and he should receive ongoing evaluations to ensure that he was responding to the techniques used (PE-1; SE-23).

60. Marian Hartblay, M.A.T., M.E.D., LSLS Cert. AVEd, Director of Early Childhood Services at Clarke, conducted an academic assessment. She noted that student demonstrated relative strengths in rudimentary early preschool skills. He presented as in the early stages of auditory development in that while awareness of sound was established, comprehension discrimination and processing of speech were in the beginning stages. Attention, disinterest in a task, and fatigue impacted his performance. He also presented with fine motor skills deficits which could also impact his educational advancement. Ms. Hartblay also recommended that Student interact with peers who have had hearing loss and wear sensory devices and like him, are learning to use spoken language for communication. Student should work on developing self-advocacy skills, and be provided with didactic instruction in social routines. Clarke also recommended that Parent pursue a neuropsychological evaluation for Student at Children's Hospital (PE-1; SE-23).

61. Overall, Student testing performance was akin to a child who had just received a cochlear implant. His difficulty listening prevented him from using the information reliably to solve problems. The Clarke evaluation summary prepared by Linda Findlay, M.E.D., Teacher of the Deaf, noted that

[Student] exhibits significant delays in his speech, language, and listening skills which are judged by this team to be a result of a combination of factors: his inconsistent use of his cochlear implant and therefore access to spoken language, inconsistent expectations regarding mode of communication, maladaptive behaviors and limited spoken or sign language skills. [Student's] major areas of need at this time, if communication using spoken language is

the goal, are his development of audition, speech and language skills and the emotional and behavioral supports necessary to address his frustration (PE-1; SE-23).

62. Following a reconvening of the Team on May 7, 2014, during which the results of the Clarke evaluation were discussed, Boston amended Student's IEP to reflect changes in the service delivery. Student's speech and language therapy service was increased to thirty minutes, five days per week; and auditory training /rehabilitation to be provided by a Teacher of the Deaf and Hard of Hearing trained in this area would be offered three times per week for forty minutes. At Parent's request, Student would be placed in a class using spoken English as the primary language of instruction. The IEP Amendment was forwarded to Parent on May 23, 2014 (SE-24).
63. Boston funded 24.5 hours (nine sessions) of individual audition and speech and language services (language-focused learning activities) provided by Clarke to Student between June 14 and July 14, 2014<sup>4</sup> as compensation for the speech and language services Student missed after he became an "itinerant student" in Boston on or about March 26, 2014 (PE-3; ; PE-13; SE-34; SE-36). Parent accompanied Student to all sessions and observed from an adjacent room. Student attended the first three sessions without his processor as he had lost it. Student's processor was later replaced with a new N6 processor which he wore for the remaining sessions (PE-3; SE-34).
64. The Clarke therapy report describes Student as a non-verbal communicator who relies on sign and gestures, at times accompanied by vocalizations for communicating. At times, during the individual audition sessions, Student attempted spontaneous verbal communications using utterances such as: "Ma, mo/ for more, go, buh/ for bye, ya, yeh/ for yes". Student was inconsistently successful imitating a variety of vowels modeled and showed a limited repertoire of consonant sounds. The practitioners used an "experience book" to assist Student in transitioning from one activity to the next, but in the instances in which the book was not used, Student displayed behaviors such as: "slamming fists on table, shouting, sitting down heavily in the chair with shoulders slumping laying on the floor with face covered, exiting the room, banging on the observation window" which behaviors were best curtailed by ignoring his frustration and instead engaging in the activity without him until he came around. (PE-3; SE-32).
65. Clarke noted Student's improvement during the four week period noting that by the end of the program Student was responding and producing all 6 Ling sounds though audition alone and with visual cues and visual access he produced the remaining high frequency sounds (h, t and f). It was noted that Student would benefit from continued auditory practice "with all supra-segmental aspects of speech (pitch, duration and volume)". The report states that as Student's stamina and attention to task improved, the accuracy of his approximations increased from 40 to 68% accuracy. Student also improved in his ability to detect, localize

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<sup>4</sup>Student was scheduled for eleven sessions but he missed three. Of the eight sessions attended he was between ten and fifty minutes late for seven appointments (PE-3; SE-32).

and identify everyday environmental sounds such as knocking on a door and detect a cooking timer. Play based activities were used to carry over the goals from the individual audition therapy to the speech and language therapy. Student's language sessions focused on social communication, expanding communicative functions, and introducing new vocabulary. Lastly, the report noted that

Since he does not yet have the language ability to understand verbal explanations or to verbally express so many of his needs and thoughts, [Student] benefits from structured, predictable routines as well as visual schedules, photos, experienced books and other visual cues to aid in his understanding and production of language and to prepare him for activities, transitions and upcoming events. [Student] adapted well to his short period of intensive audition speech and language therapy. In order [Student] to continue to make progress in his auditory, speech and language development, he will need continued intensive therapy by professionals with the expertise in the development of listening and spoken language in children with cochlear implants and delayed access to audition. He will also need consistent follow up audiological management. On-going parent education to support his auditory, language and communication development throughout his waking hours would also be of benefit to [Student] (PE-3; SE-32).

66. E-mails between Parent and Boston's attorney for the period from June 3 and August 28, 2014 discuss the Parties attempts to resolve their differences addressing compensatory services for Student and placement issues (PE-13). In an e-mail exchange on August 28, 2014, Parent notified Boston that she consented to a referral packet being sent to Clarke although Parent continued to explore other options for Student, and Parent stated her request for home tutoring for Student. Boston replied explaining that home tutoring could only occur if a physician completed the pertinent state form explaining the reasons why the student required home tutoring; otherwise if a parent simply wanted to keep the student at home and teach him or her, that was home schooling as had been previously discussed (PE-13).
67. On September 8, 2014, Colleen Kochman, a pediatric nurse practitioner (PNP), signed a Physician's Statement for Temporary Home or Hospital Education noting that Student would require home services for more than fourteen days citing the medical condition for said services to be "Hearing Loss" (SE-35).
68. Boston e-mailed Parent on September 8, 2014, informing her about the READS Collaborative Programs and encouraging Parent to look into it. Parent however, made her request clear that she wanted Student to attend Clarke (PE-13).
69. Barbara Hecht, Ph.D., Director of the Clarke School in Boston wrote to Parent on September 9, 2014 informing her that Clarke could not accept Student into their programs because of his

age and significant language and academic delays, and the fact that Clarke did not have a classroom with an appropriate peer group for Student (PE-5; PE-13).

70. On September 18, 2014, Boston e-mailed Parent informing her that Rebecca Hart, a teacher certified in elementary and hearing education would provide Student with 10 hours per week of home tutoring. Additionally, Boston continued working on locating another teacher that could provide the remaining hours (PE-13).
71. On October 10, 2014, Parent accepted placement of Student at the READS Collaborative for the IEP period of October 2013 to October 2014 (PE-11). In mid-October 2014, Student began attending the READS Collaborative. After a brief interruption, he resumed his education at READS pursuant to a Ruling on Clarification of Stay-put issued on October 29, 2014 (Parent; Administrative Record).
72. On October 16, 2014, the Parties participated in a pre-hearing conference at the BSEA in an attempt to resolve the sole remaining issue between them, compensatory services to Student. Several times during the pre-hearing conference (as had been previously stated by Boston's attorney in previous telephone conference calls), Boston explained that settlement of the case (placement and compensatory issues) was contingent on all issues being resolved. Boston would not agree to resolution of placement only if they later had to defend regarding the compensatory issues. The Parties discussed several options regarding the approximately 26 hours of speech and language services allegedly owed by Boston and finally appeared to reach an agreement. Boston's attorney also suggested to Parent that she consult and discuss the final draft with an attorney prior to signing the document. A draft of the agreement was forwarded to Parent for her review on October 16, 2014 (PE-13; PE-14; Administrative Notice of the *Ruling on Parent's Motion for Clarification of Stay-put* and other Motions issued on October 29, 2014). The agreement sought to resolve all issues then pending before the BSEA through the end of the 2014-2015 school year (PE-14).
73. On October 17, 2014 Parent e-mailed Boston stating that she agreed to resolution of the placement issue but not the compensatory issues because she opined that Student should be entitled to monetary compensation and punitive damages, and she also wanted to be reimbursed for her financial loss to herself, and opined that she had sufficient information to move forward with her claims (PE-13).
74. On October 25, 2014, Parent forwarded a letter to Boston noting her dissatisfaction with Student's HM's program and staff and citing an "irretrievable breakdown" between her and Boston and withdrawing Student from Boston (SE-36). The same date she requested that Boston issue an itinerant student number for Student. Parent maintains that she is not welcomed in Boston and does not trust Boston's staff, therefore, her son cannot attend this or any other placement where she is not welcomed (PE-13).
75. Student's Team convened on November 6, 2014, for the annual review (SE-37). Throughout this entire process Boston has continued to offer Student a program and placement at HM for his K/1<sup>st</sup> grade consistent with the proposed IEPs (PE-13). The IEP resulting from this

meeting offered Student placement at the HM (a separate day public school) for the period from November 6, 2014 to November 5, 2015. Consistent with the services delineated in the C section of the Service Delivery Grid, this IEP offered Student: communication skills for thirty minutes, four days per week with the speech and language pathologist (to address expressive, receptive and auditory skills); ninety minutes daily of communication skills with a teacher of the deaf; reading and writing skills, ninety minutes daily with a teacher of the deaf; Mathematics skills, eighty minutes daily with a teacher of the deaf; and, half-an-hour, twice per week, occupational therapy with the occupational therapist (SE-37). The IEP also offered extended school year services and door to door transportation. Parent requested that Student receive thirty minutes daily of speech and language services but the Team disagreed emphasizing Student's need to be in the classroom setting as much as possible. The parties agreed that the language of instruction should be Spoken English and ASL, a deviation from Parents previous position that little to no ASL be used to instruct Student (SE-31; SE-37; Parent).

## **CONCLUSIONS OF LAW:**

Parent and Boston agree that, due to a hearing impairment, Student is an individual with a disability falling within the purview of the Individuals with Disabilities Education Act<sup>5</sup> (IDEA) and the state special education statute<sup>6</sup>. While Parent denies that Student may present with any other issues and will not entertain the possibility of other deficits, Boston notes concerns regarding fine motor deficits. Parent further disputes that Student has made effective progress during the two and a half years that he received services from Boston and seeks public funding for an out-of-district placement for Student as well as compensation for Boston's alleged failure to offer Student a free, appropriate public education and for interruptions in services.

Boston denies Parent's allegations and states that it has and can continue to offer Student a free, appropriate public education (FAPE)<sup>7</sup> at HM. Boston does not dispute that Student has received appropriate services at READS but finds this placement unnecessary due to its similarity to the Horace Mann program. Boston denies procedural transgressions, asserting that at all times it has attempted to work with Parent and has respected her choices regarding methodology and provision of services, even when Parent's choices differed from the recommendations of Boston's and private experts. Boston disputes that it owes any compensatory education to Student in excess of 1.5 hours of speech and language services.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student's individualized education program (IEP) be tailored to

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<sup>5</sup> 20 USC 1400 *et seq.*

<sup>6</sup> MGL c. 71B.

<sup>7</sup> MGL c. 71B, §§1 (definition of FAPE), 2, 3.

address the student's unique needs<sup>8</sup> in a way "reasonably calculated to confer a meaningful educational benefit"<sup>9</sup> to the student.<sup>10</sup> Additionally, said program and services must be delivered in the least restrictive environment appropriate to meet the student's needs.<sup>11</sup> Under these standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.<sup>12</sup> Educational progress is then measured in relation to the potential of the particular student.<sup>13</sup> At the same time, the IDEA does not require the school district to provide what is best for the student.<sup>14</sup>

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<sup>8</sup> e.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that "emphasizes special education and related services designed to meet their unique needs . . ."); 20 USC 1401(29) ("special education" defined to mean "specially designed instruction . . . to meet the unique needs of a child with a disability . . ."); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs").

<sup>9</sup> See *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

<sup>10</sup> *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1<sup>st</sup> Cir. 2012) ("the IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1<sup>st</sup> Cir. 2007) (stating that FAPE must include "specially designed instruction . . . [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990) ("Congress undoubtedly desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the general education program* shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.").

<sup>11</sup> 20 USC 1412 (a)(5)(A).

<sup>12</sup> MGL c. 69, s. 1 ("paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential. . ."); MGL c. 71B, s. 1 ("special education" defined to mean "...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . ."); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential. . ."). See also Mass. Department of Elementary and Secondary Education's (then, Department of Education) Administrative Advisory SPED 2002-1: Guidance on the change in special education standard of service from "maximum possible development" to "free appropriate public education" ("FAPE"), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at [www.doe.mass.edu/sped](http://www.doe.mass.edu/sped)) (Massachusetts Education Reform Act "underscores the Commonwealth's commitment to assist all students to reach their full educational potential").

<sup>13</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 ("In most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP.").

<sup>14</sup> E.g. *Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1<sup>st</sup> Cir. 2004) ("IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.")

In the case at bar Parent, the individual challenging the appropriateness of the proposed IEPs and asserting compensatory claims, must prove her case by a preponderance of the evidence, consistent with *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Boston seeks determination that its proposed IEPs for the 2013-2014 and 2014-2015 school years are appropriate consistent with its Hearing Request and as such must present sufficient or substantial<sup>15</sup> evidence to support said finding. Therefore, Boston must also show that its program can offer Student a FAPE.<sup>16</sup>

In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary.

The evidence supports a finding that Boston's proposed 2013-2014 and 2014-2015 IEPs offered Student a FAPE, and that Student's progress during the two and a half years in Boston was effective given: the interruptions in services caused by Parent; problems with Student's devices which caused him to spend lengthy periods without access to sound; methodological limitations which impacted Student's ability to acquire language; and the lack of effective access to language/communication in the home due to Parent's belief that hearing sound without the ability to understand language was sufficient for Student to acquire language and learn to speak. Placement at READS, although appropriate, was unnecessary and largely duplicative of the program and services offered Student at the Horace Mann School. In this regard Boston, not Parent, has met the burden of persuasion pursuant to *Shaffer*. The evidence is also persuasive that Student is not entitled to compensation in excess of 1.5 hours of speech and language services. My reasoning follows:

#### I. **The 2013-2014 and 2014-2015 IEPs:**

Consistent with the standards stated *supra*, a student's access to FAPE is measured by his ability to make meaningful effective progress which yields effective results with demonstrable improvement when evaluated in the context of that student's educational potential. See *In Re: Arlington Public Schools*, BSEA # 02-1327 (Crane). In performing this analysis it is important to ascertain what Student's educational abilities were when he entered Boston in August 2011 at the age of three, and where he was at the time Parent discontinued his placement in February 2014, mindful of Parent's desire for Student to communicate with Spoken English as his primary form of communication given that he has a cochlear implant in his right ear.

The evidence shows that in 2011, Student presented with significant language delays even after receiving a cochlear implant. According to Ms. Eng, prior to implant, Student "presented as functioning as though profoundly deaf", not appearing to access language or

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<sup>15</sup> "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466, 420 N.E. 2d 298 (1981), quoting from G.L. c. 30A §1. *G.R. ex rel. Staples v. Dep't of Developmental Servs.*, 84 Mass. App. Ct. 791, 794 (2014).

<sup>16</sup> *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

information through the auditory modality, even when using his processor (SE-1). In October 2011, Ms. Drake's evaluation demonstrated that Student's receptive language skills fell in the ten month level and his expressive language skills at the eight month level (SE-2). According to Ms. Drake, attempts to communicate with Student through Spoken English or sign language proved equally unsuccessful (SE-2).

Ms. Goldowski testified that when she began working with Student in Boston, he did not know his name, was unable to discriminate when relying only on his listening skills and was not initiating communication independently. Also, while Parent had reported that he was able to use five signs and could speak five words, he did not use any signs or words during Ms. Goldowski's October 2011 speech and language evaluation (Goldowski). During this same period, his teacher noted that Student responded best to one-to-one instruction and stated that his progress was very slow (Accomando).

Slow progress continued during his second year in Boston during which he began signing single words spontaneously and was able to count to two (SE-5; Accomando, Goldowski). This progress was further noted by Dr. Clark whose January 2013 evaluation notes Student's ability to demonstrate comprehension of single words/signs and to identify objects by their function. Student then demonstrated emerging abilities in following simple directions as well as in responding to questions which targeted action (SE-8). Dr. Clark further noted that Student's most clear mode of communication was through sign. With a score of 63, she found Student's receptive language skills to fall within the two year, two month level pursuant to the Reynell Developmental Language Scales, placing him below the first percentile when compared to similarly aged peers. Dr. Clark noted that Student was not wearing his processor daily, all through the day (SE-8).

Dr. Clark raised concern over Student's lack of "hunger for language" or desire to seek interactive communication as if Student did not expect to access or comprehend either what was signed or said. She recommended the use of sign language as essential for development of Student's linguistic competence because of Student's lack of comprehension of spoken language and found that attempting to communicate through oral/aural modalities alone would be inefficient until Student first built his comprehension of labels, concepts or communication routines. In her opinion a combination of spoken and sign language would be most effective for Student in acting as a bridge for comprehension of spoken language (SE-8). Parent however, did not support that Student be instructed in ASL and in April 2013 requested that the methodology of instruction be Sign Supported Spoken English (SE-6). Boston acquiesced to Parent's request and amended Student's IEP to reflect her wishes. Parent accepted this IEP (SE-7).

Because of Student's slow but steady progress, Ms. Goldowski recommended that Student be retained another year in K-1 (pre-Kindergarten) to allow him to solidify skills before encountering the more rigorous demands of Kindergarten (K-2) (Accomando, Goldowski). Parent disagreed with the recommendation and Student was promoted to Kindergarten for the 2013-2014 school year.

At the end of June 2013 Student's processor was lost and was not replaced until November 2013 (through no fault of Parent). This, however, meant that Student had no access to sound during those five months. Ms. Goldowski, Dr. Clark, and Student's audiologists have noted that Student's ability to use his residual hearing without the use of amplification is sporadic and inconsistent due to his bi-lateral hearing impairment.

At the beginning of the 2013-2014 school year the Parties engaged in a mediation through the BSEA which resulted in an unscheduled evaluation of Student. Although recommended by Boston, Parent refused the OT evaluation and later rejected the OT services proposed by Boston. Student underwent this evaluation without his processor (Curran, Parent).

The evaluation results were consistent with Student's performance at the end of June 2013, that is, Student could identify 12 of 26 upper case and 7 of 28 lower case letters and he earned an age equivalent score of 3.5 on the Expressive Vocabulary Test. With signing, Student's vocabulary scores fell in the low average range when compared to his hearing peers. Also, Student was able to count to ten. The Woodcock Johnson III showed Student's abilities to fall within Kindergarten levels for reading, writing and math. The results of the Wechsler Preschool and Primary Scale of Intelligence (4<sup>th</sup> edition), which placed Student in the borderline range, was found to offer only a snapshot of Student's intellectual capabilities as no full scale IQ score could be determined (SE-16; Goldowski).

Student's gains increased after receiving his processor in November 2013. By January 2014, he could identify 20 upper case letters, 16 lower case letters, could read and spell his name from a model, began matching sight words, identified basic colors, showed number correspondence and could follow simple oral directions and responded to questions (SE-22; O'Malley).

The evidence is persuasive that, at the present time, Student requires a combination of Sign Supported Spoken English and Spoken English to help him acquire language. All of Student's teachers, evaluators, audiologists and service providers agreed that Student was and continues to be significantly less able to communicate using Spoken English alone, than he is when signing is used in conjunction with Spoken English. The record shows that by October 2013, when sign language was used, Student's ability to comprehend single word vocabulary had improved, falling within the low average range when compared to same age, hearing peers. Also as of October 2013, Student was using sign more readily than speech to express himself in school. According to Parent, at home, he was not signing and could not use speech effectively to communicate. Ms. Drake testified that it is not unusual that children use one form of communication with certain individuals and a different one with others when they realize that using a certain modality with certain individuals will yield no results (Drake).

As demonstrated by the Clarke School evaluation, when sign support was not offered, Student presented as a child who had "just been implanted" (SE-23). I note that this evaluation however, showed that Student had acquired basic pragmatic skills such as verbal turn-taking, greetings and responding to questions appropriately with head nods, clear

improvements when compared to Dr. Eng's (2011) and Dr. Clark's (2013) findings. Also, Clarke evaluators and service providers determined that Student's language delays were too significant for him to then be admitted to an all Spoken English program.

When a child is implanted s/he can hear sound but cannot make sense of it until the brain is trained to understand sound. This is achieved through auditory training and lengthy periods of exposure to sound and teaching language. All of the audiologists agreed that it was essential for Student to use his processor during all waking hours to train the brain for sound and support language development (O'Brien, Seafort, Harris). Student's language progress cannot be divorced from the impact that not having his processor had on him and the fact that he was receiving minimal to no language communication reinforcement at home. The evidence shows that while in Boston, Student spent five months without his processor, something that seriously impacted his ability to access spoken language. Also, Parent testified that she did not sign to him at home and that none of his siblings or other individuals to whom he was exposed knew how to sign and did not sign to him even during the periods when he did not have his processor.

But for his ingenuity with vocalizations, gesturing, pointing and behavior it is difficult to understand how he was able to communicate effectively in the home given his lack of language skills (spoken or sign), especially during the times when Student did not have access to a working processor. In school, Student had learned that he could communicate his needs and thoughts effectively through sign, and in this environment he signed more readily. Ms. Drake's testimony is persuasive that since Student did not get the same result at home, he did not attempt to sign in the home environment.

In her eagerness to have her child speak so that he could better communicate with the world around him, Parent did not seem to understand the importance that signing and visual cues had in Student's ability to understand and develop language in the short term so as to speed the development of Spoken English. In this light, practically, all of Student's progress can be attributed to the education he received through Boston and private providers such as Clarke.

Given that Student started in Boston with almost no language, and in light of the lack of carry-over into the home setting and the extended periods without his processor, the progress he did achieve between October 2011 and February 2014 can certainly be characterized as effective, albeit with on-going, significant delays. In viewing the totality of the record, the evidence is convincing that contrary to Parent's assertions, Student made effective progress while in Boston even if he was unable to fully close the gap between his skills and those of hearing peers, a clearly unrealistic expectation in such a short period of time given his significant language delays.

Boston is further correct that under federal and Massachusetts law it was and continues to be responsible to offer Student a FAPE tailored to meet his unique needs so as to enable him to make educational progress (which it did), not maximize Student's educational potential as Parent requests. Furthermore, the law is clear that Boston has discretion over choice of methodology to be utilized, as long as it constitutes FAPE. Here, Boston acceded to Parent's chosen methodology even though it was not obligated to do so. The credible evidence

supports a finding that Boston's proposed programs were, and continue to be, designed to offer Student a FAPE.

At all times Boston has maintained that placement at READS was not intended as an admission that Boston's programming was deficient. Rather, Boston offered the READS placement in an attempt to repair the fragile relationship between the parties for the benefit of Student. Boston's offer to fund Student's services at Clarke, the program preferred by Parent, was also intended to mend the relationship between the parties and compensate Student for the services owed after he became an itinerant student in Boston. When the parties entered into settlement negotiations in late summer 2014, Boston initiated placement to re-engage Student in an educational program as soon as possible, believing that the entire case would soon be settled. Boston issued an IEP placement page designating READS as Student's placement, Parent accepted, and placement was implemented.<sup>17</sup>

Since Student's Boston program and placement have been found to be appropriate, I need not reach a determination regarding the appropriateness of READS for Student, a program substantially similar to Student's program in Boston, the appropriateness of which Boston did not challenge. At READS, ASL is taught (voice-off) during part of the day and Spoken English is used during other parts of the day. Ms. Accomando's classroom in Boston can support this model and has a similar student to teacher ratio to Student's current program at READS. The proposed 2014-2015 program in Boston has two teachers, two paraprofessionals, and twelve students with a similar mixture of students whose primary disability is hearing impairment and who speak and sign with varying degrees of fluency<sup>18</sup>.

Until Student started attending READS Parent was vehemently opposed to the use of ASL in teaching Student language. Parent changed her position in this regard following Student's attendance at READS, now embracing ASL and noting her excitement regarding her ability to communicate with Student more effectively using sign, some of which she had learned from Student (Parent). Parent testified as to the noticeable changes she has observed in Student with increased opportunities for communication not just in school but at home (Parent). This is consistent with Ms. Drake's testimony that equally important to the school environment and exposure to peers was the access Student had to language and communication in the home in order to train the brain to make sense of sound (Drake).

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<sup>17</sup> Shortly after Student began attending READS, the anticipated settlement of the case fell apart over the issue of compensatory claims. Instead of settling these claims, Parent stated her intention to seek monetary damages from Boston (SE-36; Parent). When Boston attempted to discontinue the READS placement, which it viewed as contingent on settlement of the entire case, including compensatory claims, Parent filed a *Motion for Clarification of Stay-put Placement*. The *Ruling* maintained Student's placement at READS during the pendency of the proceedings. See *Ruling on Motion for Clarification of Stay-put Placement*.

<sup>18</sup>As in Boston, some of Student's peers at READS present with physical disabilities. Boston is correct that this evidence contradicts Parent's previous position that Student should not be exposed to children with disabilities other than hearing loss. Moreover, as long as Student's peer group is appropriate and consistent with the FAPE mandate, there is no "right" to be insulated from children with "unacceptable" disabilities any more than there would be a "right" to be educated only with children of a particular race, ethnicity, or gender.

Parent raised two additional claims: that she and Student had been discriminated against based on race and that Boston's staff may have molested Student. However, the credible evidence is convincing that while the one racial comment made by one of Horace Mann's staff was insensitive and inappropriate, there is no evidence that Student's education, substantive rights, or Parent's procedural rights under the IDEA were violated by Boston based on race. Similarly, with respect to Parent's allegation that Student had been molested while at gym, Parent produced no medical or other evidence of molestation, and in fact, DCF did not substantiate Parent's report. The evidence is also persuasive that Boston did not violate Student's procedural or substantive rights during the pertinent IEP periods as Parent submitted.

Lastly, I note that Parent's credibility was seriously compromised by her lack of memory and insistence that Boston had not explained multiple times that its offer for a READS placement was contingent on her acceptance of a settlement that fully disposed of all claims against Boston, including compensatory services (SE-36). Also, Parent's admitted bias against public schools and insistence that all her children be educated in private schools further compromises the reliability of her testimony.

Parent's shift regarding the use of ASL and sign supported Spoken English is also noteworthy. While she was adamant that there be no signing to communicate with Student in Boston, now that ASL is used at READS, she has embraced this methodology and praised Student's progress since he started at READS. READS uses the same methodology that Boston had been recommending for years. Parent has made it clear that nobody at home signs and therefore, the expectation was that Student should rely only on gestures and Spoken English. The record shows that Student lacks functional hearing without his processor, that he is significantly language delayed, and that at present his Spoken English abilities are insufficient to help him communicate effectively using only Spoken English. Therefore, it is not surprising that by using sign to communicate at home Parent would notice progress and improvement in the quality of his communication.

I found the testimony offered by all other witnesses to be credible, reliable and consistent with the documentary evidence.

Boston's proposed IEPs for the 2013-2014 and the 2014-2015 IEP periods at Horace Mann are appropriate to meet Student's needs and constitute the least restrictive placement for Student. Parent has therefore, not met her burden of persuasion pursuant to *Shaffer* in this regard.

## **II. Compensatory Services:**

Parent seeks compensation for herself and Student for the interruptions in services between February and October 2014.

Compensatory relief is an equitable, discretionary remedy available to eligible students when the public school has failed to meet its obligations under the IDEA either because there was

an interruption in services or because the IEP was so inappropriate that the student would have been denied a FAPE. If the school district's misfeasance or nonfeasance impacts a student's substantive rights, then that student is entitled to compensatory services. See *Phil v. Mass. Dept of Educ.*, 9 F. 3d 184, 188 (1<sup>st</sup> Cir. 1993); *G. v. Ft. Bragg Dependent Schs.*, 343 F. 3d 295, 309 (4<sup>th</sup> Cir, 2003); *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1<sup>st</sup> Cir. 2008). Moreover, a procedural violations under the IDEA is actionable if said violation results in a "loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefit" to the student. *D.S. v Bayonne Bd. of Educ.*, 602 F.3d. 553, 565 (3d Cir. 2010). However, if the loss of services or educational opportunities is due to parental conduct, no compensation is warranted. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1<sup>st</sup> Cir. 2008).

In the instant case Parent argued that both she and Student are entitled to compensation for Boston's alleged failure to offer Student services after Parent removed Student from school on February 14, 2014. Parent's allegations however, present several problems. First, Student was never terminated from his Horace Mann program, rather, Parent removed and later withdrew Student from Boston as a result of her dissatisfaction with the methodology, peer group, distrust of staff and her perception of the progress Student should have achieved (SE-36; Parent, Ford). Student's Horace Mann program, which has been found to be appropriate, was available to him when Parent chose to remove Student from school from February through June 2014 (Ford).

Second, Student, who was five years old in February 2014, had not yet reached the compulsory school attendance age and therefore, Parent could remove him from school and request only the services in his IEP without Boston being responsible for anything else. Boston offered the only service requested by Parent, speech and language, which service was provided through Clarke during the summer of 2014.

Regarding speech and language, Boston agrees that it was responsible to offer Student 26 hours of services for the period from March 26, 2014 when Boston received Parent's request for Itinerant Services, to June 26, 2014, the last day of school (SE-36; Nielsen). To compensate Student, Boston funded 24.5 hours of speech and language services at Clarke during the summer of 2014. The record shows that Student attended 9 of 11 sessions and he arrived late for seven of those (SE-32). In light of these circumstances, the record does not support a finding that Boston failed to fulfill its obligations to Student.

Moreover, I note that the September 8, 2014, Physician's Statement for Temporary Home or Hospital Education prepared by Colleen Kochman, a pediatric nurse practitioner (PNP), noted "Hearing Loss" as the condition requiring the home services. While the condition cited is inconsistent with 603 CMR 28.03 (3) addressing Temporary Home or Hospital Education, Boston offered home speech and language services in September 2014 with Ms. Hart (SE-13).

Again, during all relevant times, Student's services and placement at Horace Mann remained available. Student's failure to access said program was entirely the result of parental choice (SE-35), and compensatory services are not required when the loss of services is attributable to actions by a parent. Furthermore, through providing Student participation in the program at Clarke, Boston has in fact actually already compensated Student (except for the additional 1.5 hour it admits it still owes) for the missed speech and language services. Parent's compensatory claim therefore must be denied. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 290 (1<sup>st</sup> Cir. 2008). Student is not entitled to compensatory education for any interruption in services between September and October 2014 at which time he began attending READS.<sup>19</sup>

The evidence is persuasive that Boston has offered appropriate programs to Student and while Student's program at READS is also appropriate it is substantially similar to Boston's program and therefore not warranted. There is no dispute that Student is making increased progress with an approach that combines ASL, signed spoken English and Spoken English, the same approach recommended by Boston, thus further demonstrating appropriateness of Horace Mann. Lastly, increased access to communication using sign as well as Spoken English in the home has also clearly benefitted Student.

Parent has not met her burden of persuasion pursuant to *Shaffer* that Student has been denied a FAPE as a result of any substantive or procedural misconduct on Boston's part. Student, therefore, is not entitled to compensatory services in excess of 1.5 hours of speech and language services, to which Boston has already agreed.

**ORDER:**

1. Boston shall place Student at the HM's separate day program for the remainder of the 2014-2015 IEP period as this program offers Student a FAPE in the LRE.
2. Boston shall offer Student 1.5 hours of speech and language services reflective of the remaining compensation owed Student for the period from March to June 2014 after Parent withdrew Student from Boston.

By the Hearing Officer,

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Rosa I. Figueroa

Dated: January 2, 2015

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<sup>19</sup> The parties do not dispute that the services offered at READS are appropriate and therefore, Parent has no claim for the period of time since Student began in attendance at said program.

# **COMMONWEALTH OF MASSACHUSETTS**

## **DIVISION OF ADMINISTRATIVE LAW APPEALS**

### **Bureau of Special Education Appeals**

#### **EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL**

##### **Effect of the Decision**

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

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

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

##### **Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may

fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

### **Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

### **Confidentiality**

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

### **Record of the Hearing**

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