

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

**In Re: Boston Public Schools**

**BSEA # 1407862**

**DECISION**

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

A hearing was held on May 5, 2014 at the Bureau of Special Education Appeals (BSEA) offices in Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Timothy Bossert	Paraprofessional, Boston Public Schools
Ann Kinnie	Speech-Language Pathologist, Boston Public Schools
Courtney Brackenbury	Inclusion Teacher, Boston Public Schools
Nadia Cyprien	Principal, Harbor Middle School, Boston Public Schools
Leslie Borr	Special Education Coordinator, Boston Public Schools
Cindie Neilson	Special Education Assistant Director, Boston Public Schools
Erik Grau	Realizing Children's Strengths ABA Supervisor
Tiffany Szymanski	Realizing Children's Strengths ABA Supervisor
Andrea Alves-Thomas	Attorney for Boston Public Schools
Jeffrey Becker	Attorney for Boston Public Schools

The official record of the hearing consists of documents submitted by the Boston Public Schools (Boston) and marked as exhibits S-1 through S-11F; and five hours of recorded oral testimony and argument. Parent did not submit any exhibits. As agreed by the parties, oral closing arguments occurred at the end of the hearing on May 5, 2014, and the record closed on that date.

**INTRODUCTION**

On April 18, 2014, Boston filed a request for expedited hearing with the BSEA. The BSEA granted expedited status and scheduled the hearing to occur on May 5, 2014. During a conference call with the parties on April 28, 2014, the parties agreed that the hearing would take place on that date.

Through its hearing request, Boston seeks to obtain a BSEA decision that its most recently proposed IEP is appropriate. This IEP continues Student's placement at Boston's Harbor

Middle School (the Harbor). Parent has partially accepted Boston's proposed IEP and placement but has expressed a number of concerns, including that the educational services are not cohesive, that a number of Boston staff cannot be trusted to provide appropriate services, and that the Boston program is little more than a "day care" service for Student.

For the reasons explained in the instant Decision, I have found that with several modest amendments, Boston's most-recently proposed IEP is appropriate. I have further found that because of Student's absences from school, he has not had the opportunity to make meaningful or effective progress commensurate with his educational potential.

## **ISSUES**

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Boston reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment? If not, what changes should be made to the IEP to meet this standard?
2. Are Student's absences from school resulting in his being denied the opportunity to receive a free appropriate public education in the least restrictive environment?

## **PREVIOUS BSEA DECISION**

On October 21, 2008, I issued a decision in BSEA # 09-2167 and 09-2209 resolving a roughly similar dispute between the same parties. See *In Re: Boston Public Schools*, BSEA # 09-2167 and 09-2209, 14 MSER 342 (October 21, 2008). That decision found that within the context of his particular capacity to learn, Student had made meaningful and effective educational progress during the previous (2007-2008) school year at Boston's O'Hearn Elementary School (the O'Hearn). The decision found that Boston's then most-recently proposed IEP would provide substantially the same special education and related services at Boston's Mason Elementary School for the 2008-2009 school year as had been provided at the O'Hearn. The decision then concluded that the proposed IEP would likely result in giving Student a similar opportunity to make meaningful and effective progress during the 2008-2009 school year.

The decision acknowledged Parent's concerns with the proposed IEP and agreed that Boston may have made mistakes, but ultimately concluded that the IEP was appropriate, with one wording change.<sup>1</sup> More specifically, the decision explained as follows:

In summary, Parent has testified as to the many concerns and frustrations that she has with Boston. I do not doubt the sincerity and strength of Parent's convictions. I also

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<sup>1</sup> The decision required Boston to amend the IEP to include within the service delivery grid the services of a 1:1 dedicated aide. In other places in the IEP, it called for a 1:1 dedicated aide, and Boston did not oppose its inclusion in the service delivery grid. See *In Re: Boston Public Schools*, BSEA # 09-2167 and 09-2209, 14 MSER 342 (October 21, 2008).

agree with Parent that Boston may have made some mistakes in the past and may not have done what she believes they agreed to do. Yet, taken together, these incidents do not persuade me that Boston cannot be trusted to implement appropriately its most recently-proposed IEP. In the final analysis, Parent has provided no evidentiary basis for a finding that her concerns render Boston's proposed IEP inappropriate or the placement unsafe.

In contrast, Boston has provided credible and persuasive testimony, supported by documentation, that it has proposed an IEP and placement that are well-suited to address Student's unique educational needs in the least restrictive environment and that are likely to result in meaningful and effective educational progress if he were to attend school. In addition, I note that to its credit, Boston has sought to go beyond what is minimally required under the law, all for the apparent purpose of trying to accommodate Parent's desires so that she would allow her son to attend school.

Boston's IEP therefore must be found to be appropriate.

It is most unfortunate that a severely disabled young boy, who loves to go to school and who made demonstrable progress during the last school year and who would likely continue to do so in Boston's proposed educational program, has been kept home from school since the beginning of the current school year. My decision will serve no useful purpose unless it facilitates Student's return to school as quickly as possible.<sup>2</sup>

## FACTS

Student Profile. Student is a twelve-year-old boy who lives with his mother (Parent) in Dorchester, MA. He is in the 6<sup>th</sup> grade at Boston's Harbor Middle School where he is in a full inclusion program. Student is curious and engaging, he enjoys music and bouncing balls, he is handsome and animated, and he loves being with his peers. He demonstrates particular strengths with performing physical tasks and comprehension of categories. Testimony of Parent, Bossert, Brackenbury; exhibits S-3, S-6A, S-6D.

Student has multiple, significant disabilities. He has a well-documented history of global delay (including intellectual and communication deficits), cortical vision impairment, and autism. He also has a history of infantile spasms and a mixed seizure disorder; the seizures have generally been well-controlled through medication. Student is non-verbal and communicates using a combination of gestures, expressions, American Sign Language (he uses eight to ten signs and understands many more) and assistive technology (the Dynavox Maestro). Student is able to follow daily routines, works well with an adult on a one-to-one basis, makes choices from a field of two, has comprehension of many linguistic concepts and can follow predictable multiple-step directions. He continues to have challenges answering yes or no questions, understanding spatial concepts (for example, in, on, in front, top) and

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<sup>2</sup> As of the date of the hearing in the previous dispute (October 15, 2008), Parent had yet to allow her son to attend school during the 2008-2009 school year. During this time period, Student had remained home with Parent, receiving no educational services from Boston. *Id.*

communicating more than his basic wants and needs. Testimony of Parent, Bossert, Brackenbury, Kinnie; exhibits S-3, S-6A, S-6D, S-6E.

Student's Individualized Education Program. Boston's currently-proposed IEP for Student calls for him to continue to be placed in a 6<sup>th</sup> grade inclusion classroom with a dedicated 1:1 aide who is with him throughout the school day. The IEP calls for special education and related services as described below.

Consultation services to school personnel:

- Communication skills from a speech therapist for 20 minutes, twice per month.
- Perceptual skills from an itinerant vision teacher for one hour, once per month.
- Motor skills from a physical therapist for 15 minutes, once per month.
- Communication skills from a music therapist for 20 minutes, twice per month.
- Perceptual skills from an occupational therapist for 15 minutes, once per month.
- Self-regulations skills from a BCBA for an hour per month.
- Assistive technology for a half hour quarterly.

Special education and related services delivered within the classroom:

- Reading/writing services from a special education teacher for one hour per day, five days per week.
- Math services from a special education teacher for one hour per day, five days per week.
- Applied Behavior Analysis (ABA) services from an ABA specialist for one hour per week.

Special education and related services delivered in other settings:

- Motor skills from a physical therapist for 40 minutes, two days per week.
- Motor skills from an assistant physical therapist for 30 minutes, once per week.
- Math instruction from a special education teacher for 20 minutes, three times per week.
- Communication services from a speech therapist for 45 minutes, three days per week.
- Communication services from a music therapist for a half hour, once per week.
- Perceptual skills from an occupational therapist for 40 minutes, twice per week.
- Perceptual skills from an itinerant vision teacher for a half hour, twice per week.
- Self-regulations skills from an ABA specialist for nine hours per week.

The currently-proposed IEP also calls for extended year services. Exhibit S-3.

Educational History. Student has been receiving special education and related services from Boston since he was three years old. During 1<sup>st</sup> grade, Student attended the O'Hearn as a result of a mediation agreement between Parent and Boson. The classroom included two teachers (both dually certified in special education and regular education) and 24 children,

seven of whom had IEPs. Testimony of Parent; *In Re: Boston Public Schools*, BSEA # 09-2167 and 09-2209, 14 MSER 342 (October 21, 2008).

At the end of the school year, Parent requested that her son not return to the O'Hearn. After Parent visited Boston's Mason Elementary School (the Mason), Parent and Boston agreed that Student would attend the Mason for the 2008-2009 school year. It was also agreed that Student would repeat 1<sup>st</sup> grade. Testimony of Parent; *In Re: Boston Public Schools*, BSEA # 09-2167 and 09-2209, 14 MSER 342 (October 21, 2008).

The classroom proposed for the 2008-2009 school year at the Mason was similar to, although smaller than, the previous year's classroom. It included two teachers (one of whom was dually certified in regular and special education, and the other was certified in regular education) and 13 children, two of whom had IEPs. Mason was an "inclusion" school in that it had been specifically structured and designed for the integration of special education children into a regular education environment. Testimony of Parent; *In Re: Boston Public Schools*, BSEA # 09-2167 and 09-2209, 14 MSER 342 (October 21, 2008).

Parent disputed the appropriateness of Boston's IEP for the 2008-2009 school year and filed a hearing request with the BSEA. As discussed above (see "Previous BSEA Proceeding"), in a previous decision I determined that Boston's proposed IEP for this school year was appropriate. Testimony of Parent.

Notwithstanding the appropriateness of Boston's educational program at the Mason for the 2008-2009 school year, Parent sought (and Boston agreed) to place Student at the Perkins School for the Blind for the next (2009-2010) school year. At the end of that school year, Parent requested (and Boston again agreed) to discontinue this placement and to place Student at the Kids Are People School for the 2010-2011 school year. The Kids Are People School is a private inclusion school. At Parent's request, Boston continued to place Student at this school for the 2011-2012 and 2012-2013 school years. Testimony of Parent.

However, by the spring of 2013, Parent had stopped sending Student to school because of her concern that the long commute to school was exacerbating Student's seizures. During Student's absence from Kids Are People at this time, Parent and Boston arranged for Student to receive his related services at the Harbor. In July 2013, Parent resumed sending Student to the Kids Are People School. Student continued to attend this school through November 2013 when Parent again rejected the placement and requested Student attend the Harbor which is a full inclusion school. Parent chose the Harbor, in part, because it was closer to home, as she remained concerned that the longer commute to the Kids Are People School was increasing Student's seizure activity. Boston agreed to Parent's request but also proposed that because Student had not attended a Boston Public School for several years, he be re-evaluated to determine his need for special education services and how those needs should be met at the Harbor. Testimony of Parent, Cyprien; exhibits S-1, S-5.

On December 4, 2013, Parent consented to Boston's proposed nine evaluations. On December 10, 2013, Parent requested that Boston also conduct an orientation and mobility assessment, and a sensory integration assessment. Boston proposed to do these latter two evaluations as part of an extended evaluation at the Harbor. However, Student's lack of

consistent attendance at the Harbor has precluded these two evaluations from being completed. Testimony of Borr; exhibits S-1, S-2.

On or about December 10, 2013, Student began attending the Harbor, with a dedicated 1:1 aide. An IEP Team meeting was convened on February 24, 2014 to review Boston's nine evaluations and develop an IEP for Student at Harbor. The IEP was developed and proposed to Parent. Testimony of Cyprien, Borr; exhibits S-3, S-6A through 6K.

On March 21, 2014, Parent rejected, in part, Boston's proposed IEP. Parent checked the box on the IEP indicating that the portions of the IEP not rejected would be considered accepted and implemented. Parent added the following comments to explain her partial rejection:

Please add ABA 60 minutes to Grid B [special education and related services in the general education classroom] and change ABA to 9 hours in Grid C [special education and related services in other settings]. Also add Assist. Tech to Grid A [consultation services]. Lastly there are several other things that needed to be added + corrected – will email.

Parent's partial rejection of the IEP prompted Boston to make several changes to try to satisfy her concerns, including adding assistive technology consultation services and making the requested change to the ABA services. However, Parent did not further respond to this most-recently proposed IEP. The IEP with these changes (as requested by Parent) is Boston's most recently proposed IEP, which it is defending in the instant dispute (see description of the IEP, above). Testimony of Cyprien, Borr; exhibits S-3.

From December 10, 2013 (when Student first began attending the Harbor) to April 30, 2014, there have been a total of 78 school days. During this time, Student has been absent without an excuse for 31 days and tardy without an excuse on 36 days. Two additional absences were excused—both for medical reasons. Importantly, the absences have increased, with Student having come to school on only four days between March 24, 2014 and April 30, 2014. When Student is tardy, he sometimes misses homeroom and most or all of the first period. Testimony of Cyprien, Brackenbury; exhibit S-4.

## DISCUSSION

It is not disputed that Student is an individual with a disability, falling within the purview of the federal Individuals with Disabilities Education Act (IDEA)<sup>3</sup> and the Massachusetts special education statute.<sup>4</sup>

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”<sup>5</sup> “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”<sup>6</sup> An IEP must be “tailored” to address the

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<sup>3</sup> 20 USC 1400 *et seq.*

<sup>4</sup> MGL c. 71B.

<sup>5</sup> 20 U.S.C. § 1400 (d)(1)(A).

<sup>6</sup> *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) (internal quotations omitted).

student's "unique" needs that result from his or her disability.<sup>7</sup> A student is not entitled to the maximum educational benefit possible or "even the best choice".<sup>8</sup> Rather, the IEP must be "reasonably calculated to confer a meaningful educational benefit."<sup>9</sup>

In the application of the meaningful benefit standard, "levels of progress must be judged with respect to the potential of the particular child"<sup>10</sup> unless the potential is "unknowable"<sup>11</sup> because "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between".<sup>12</sup>

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations<sup>13</sup> and which may exceed the federal floor<sup>14</sup>) seek "to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment."<sup>15</sup>

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<sup>7</sup> See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)"); *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1<sup>st</sup> Cir. 2012) ("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) (FAPE includes "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)).

<sup>8</sup> See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n. 21 (1982) ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education."); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993) ("Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential."); *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1<sup>st</sup> Cir. 1991) ("FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice").

<sup>9</sup> *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012); *Andover School Committee v. Bureau of Special Educ. Appeals of Div. of Administrative Law Appeals*, WL 6147139, \*1 (D.Mass. 2013); *I.M. ex rel. C.C. v. Northampton Public Schools*, 869 F.Supp.2d 174, 177 (D.Mass. 2012). See also *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984) "Congress sought primarily to make public education available to handicapped children and to make such access meaningful" (internal quotations omitted), quoting *Rowley*, 458 U.S. at 192.

<sup>10</sup> *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008). See *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."); *Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) ("The IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential.")

<sup>11</sup> See *D.B. v. Esposito*, 675 F.3d at 36.

<sup>12</sup> *Rowley*, 458 U.S. at 202.

<sup>13</sup> See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the "education standards established by statute or established by regulation promulgated by the board of education").

<sup>14</sup> See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) ("education must ... meet the standards of the State educational agency"); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1<sup>st</sup> Cir. 2007) (state may "calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]").

<sup>15</sup> 603 CMR 28.01(3) ("purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws"). See also 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 (term "special education" defined to mean "educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities").

Thus, the IEP must be tailored to the student's unique special education needs so as to confer a meaningful educational benefit (gauged in relation to the potential of the student at issue) within the least restrictive educational environment and must be designed to develop a student's educational potential.

The IDEA<sup>16</sup> and Massachusetts law<sup>17</sup> reflect a preference for mainstreaming disabled students. This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children.<sup>18</sup> "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs."<sup>19</sup>

Parent has the burden of persuading me that Boston's most recently proposed IEP (including its placement of Student at the Harbor) does not meet the above-described standards, and is therefore not appropriate.<sup>20</sup> I now turn to a consideration of the factual evidence in this dispute.

Beginning with Student's placement at Perkins for the 2009-2010 school year until he enrolled at the Harbor School in December 2013, Student has been attending private schools. Because of the dissimilarities between these private schools and Harbor (as well as the lack of evidence regarding Student's progress in these private schools), it is not possible to look to Student's progress in the private schools as a means of determining whether Student would likely make progress in his current educational program at the Harbor. Thus, it is not possible to determine the appropriateness of Boston's proposed IEP on the basis of Student's educational history prior to his current placement at the Harbor.

In addition, Student has been attending the Harbor School for a short period of time (only since December 10, 2013), and during this time period, Student has been absent or tardy on many days (he has been absent or tardy without an excuse on 67 of the 78 school days). As a result, Student's progress at Harbor provides only a glimpse of what would likely occur if he were to actually receive all of the IEP services by attending school consistently over the course of a school year.

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<sup>16</sup> 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

<sup>17</sup> MGL c. 71B, s.1.

<sup>18</sup> 20 U.S.C. § 1412(a)(5)(A); MGL c. 71B, s. 1. See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

<sup>19</sup> *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1<sup>st</sup> Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1<sup>st</sup> Cir. 2002) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria."), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990).

<sup>20</sup> The burden of persuasion in an administrative hearing challenging an IEP is normally placed upon the party seeking relief, which in the instant dispute is Boston. See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). However, the First Circuit Court of Appeals has concluded that this general rule does not result in a school district having the burden of persuasion when it files a hearing request for the purpose of seeking an order that its IEP is appropriate. The First Circuit explained: "understand[s] [the general rule regarding burden of proof in IDEA disputes] to mean that a school system does not incur the burden of proof merely by preemptively seeking an administrative determination that a proposed IEP would comply with the IDEA, as in this case. In that instance, the school system is defending the adequacy of the IEP, not challenging it." *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35 -36 (1<sup>st</sup> Cir. 2012).

Consequently, in determining the appropriateness of Boston's proposed IEP, I rely on the recommendations contained in Boston's recent evaluations of Student as well as the testimony of those who are Student's teachers and service providers at the Harbor. It is noteworthy that Parent did not provide any credible evidence in support of an educational program or educational services that would be substantively different than what has been proposed in Boston's most recent IEP. As a result, I find that the testimony of Boston's witnesses and the recommendations in Boston's evaluations are unrebutted regarding the appropriateness of Boston's proposed IEP.<sup>21</sup>

Boston's witnesses and documents provided credible and persuasive support for the appropriateness of Boston's most recently proposed IEP, including Student's placement at the Harbor, with several relatively minor exceptions that will be discussed below.

Harbor uses a co-teaching model of a special education teacher and a content teacher within each of the following classes: English language arts, science, math, and history. This is a full-inclusion model. The maximum class size is 20 students. At the Harbor, Student is responsive to his peers (often appearing excited to see his friends), enjoys being in the classroom, and seems generally to be happy at school. Testimony of Cyprien, Brackenbury.

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<sup>21</sup> Parent submitted no documents. She called no witness other than herself. Her own testimony focused on broad criticisms (for example, that the educational program is little more than "day care" for her son) as well as specific, alleged missteps by Boston staff which include the following. Parent was critical of Student's 1:1 paraprofessional because when Student came home with a flushed face one day and Parent asked the paraprofessional for an explanation, the paraprofessional responded that he did not know why Student's face was flushed and explained that possibly it occurred from his being in a warm room. Parent was dissatisfied with this answer and believes that the 1:1 paraprofessional was at fault but apparently has no basis for concluding that Student's face was flushed for any particular reason. (The Harbor principal looked into this complaint and could find no reason for Student's face appearing to be flushed, other than the possible explanation provided by the 1:1 paraprofessional. Testimony of Cyprien.) Parent complained that when Student arrived in the morning, sometimes the 1:1 paraprofessional took a minute or two to complete what he was doing before he was ready to accompany Student. Parent took the position that even though Student does not arrive at school in the morning at a predictable time, the 1:1 paraprofessional should always be ready to begin working with Student immediately upon his arrival, and that a delay of even a few minutes is not acceptable. (The 1:1 paraprofessional testified that at times, he is doing paperwork while waiting for Student to arrive, and it may take a minute or two to complete and put away the paperwork before he is ready to accompany Student. Testimony of Bossert.) Parent made clear her desire to have a different paraprofessional as well as a different occupational therapist working with her son (her concerns regarding the occupational therapist were not specified). Parent's concerns regarding these staff provide no basis for a finding that they are unable to implement the portions of the IEP for which they have responsibility, and I therefore have no basis for requiring that Boston substitute staff. Parent also criticized what she believes are incomplete communications (through the home-school communication system) to her from Boston service providers as to what is happening in school. Parent correctly emphasized that because Student is non-verbal, she is forced to rely almost entirely on these communications from school in determining what is occurring at school. Parent also expressed concern that Student's schedule was not finalized quickly enough; that it took too long to develop a picture exchange (PECS) book to assist with Student's communication; and that behavioral consultation was not provided during the early months of Student's time at the Harbor School. Some of these criticisms may have merit. However, even fully crediting Parent's concerns, none of them actually rebuts Boston's evidence in support of the appropriateness of its proposed IEP, nor are her concerns persuasive that the IEP, as modified through the instant Decision, will not prospectively be implemented appropriately. Rather Parent's testimony, at best, might arguably support a compensatory claim if she could demonstrate educational harm. However, there is no factual basis for a finding that educational harm has occurred as a result of Boston's actions or inactions. And, in any event, Parent has raised no compensatory claim as part of the instant dispute. For these reasons, I find that the testimony and documents provided by Boston regarding the appropriateness of the IEP are unrebutted.

Student is engaged and able to communicate with his teachers and paraprofessional at the Harbor. Student uses American Sign Language, the Dyanvox and PECS systems, and other communication pictures. Student is able to communicate basic wants/needs and frustrations (for example, help, all done, more, eat, drink). Staff use these same communication systems plus language to communicate with Student. His receptive language skills are somewhat higher than his expressive language skills. Testimony of Parent, Kinnie, Bossert, Brackenbury; exhibits S-6A.

In English language arts, the special education teacher is able to work with Student to identify the details of a story, Student is able to identify appropriate answers to “WH” questions, he is learning simple vocabulary words, and he is learning the alphabet and numbers. The ELA teacher testified that Student’s progress in ELA and his other academic classes (by report from other teachers) has been substantially slower than it should be because of Student’s excessive absences and tardies (discussed above at the end of the “Educational History” section), with the result that Student has been making only limited progress in the classroom. Testimony of Brackenbury; exhibits 6A, 6C.

Student’s speech-language therapist wrote in her report of February 6, 2014, “[Student] learns best through practice and repetition” reflecting the importance of Student’s attending school consistently. The speech-language pathologist testified that Student is able to further develop his communication skills through her services, noting for example that his understanding of categories and opposites has improved, as has his ability to understand stories. She consults with Student’s teachers and his 1:1 paraprofessional. Parent agreed that Student’s speech-language services are appropriate. Testimony of Parent, Kinnie, Bossert, Brackenbury; exhibits S-6A, 6-D.

The occupational therapy evaluation of February 7, 2014 reported that in occupational therapy, Student had been working on visual perception skills such as matching and sorting as well as functional fine motor skills such as writing, stamping, painting and gluing. The report indicated that as of February 7, 2014, Student’s accuracy in these areas had been increasing steadily with increased time working on these skill areas. Exhibit S-6F.

Student’s behavior therapist supervisors from Realizing Children’s Strengths (RCS) testified that they (and their RCS colleague who provides direct behavioral services) have been able to develop draft guidelines and a draft behavior support plan to work on addressing Student’s motor stereotypy (hand flapping, object tapping) and other maladaptive behavior, and to increase his socially appropriate and on-task behaviors. They explained that skill development is being tracked and that some progress has been observed (for example, significant progress was noted in matching). However, they testified that meaningful progress has only occurred when Student has been attending school on a relatively consistent basis. Student’s lack of attendance has also precluded completion of Student’s behavior support plan. As a result, Student’s behavioral progress has been limited while attending the Harbor. Testimony of Grau, Syzmanski.

In addition to Student’s progress being limited by his inconsistent attendance, Boston witnesses explained that the location of his related services also is negatively impacting his learning.

The English language arts teacher testified that too many of Student's related services are being provided outside of the classroom. She explained that typically, the delivery of related services (other than physical therapy) would be provided within the classroom, thereby allowing Student's teachers to have more opportunity to be involved in his education. She noted that per Parent's request, the IEP had been written for virtually all of Student's related services to be provided outside of the classroom. Testimony of Brackenbury.

The RCS behavior therapist supervisor addressed this issue specifically with respect to Student's behavior therapy. He explained that Boston's proposed IEP currently calls for one hour of behavior therapy in the classroom and the remaining nine hours outside of the classroom. Student's two RCS behavior therapist supervisors testified persuasively that instead of providing behavior services in this manner, there should be an equal split of time between in class and outside of class therapies, with a gradual transition for changing this over time. The therapists and teachers can gauge how Student is doing as the in-class therapy is increased and out-of-class therapy is decreased, and adjustments can be made as to how quickly this change should be made. Parent did not object to such a gradual transition of the location of behavioral services. Testimony of Grau, Syzmanski, Parent.

Currently, Student's proposed IEP calls for all speech-language services to be provided outside of the classroom. During the hearing, the parties agreed that one speech-language session should occur within the classroom, and the other two sessions should occur outside the classroom.

There was not sufficient evidence for me to determine whether any other related services should be re-located into the classroom. However, on the basis of the testimony of the English language arts teacher, it is evident that this issue needs further consideration by Student's IEP Team. Therefore, the IEP Team should review the other related services to determine whether the IEP should be further amended regarding the location of these related services.

The IEP needs adjustment in one additional way. Boston has proposed and provided a dedicated 1:1 paraprofessional for Student and this service is described within the proposed IEP, but not within the service delivery grid of the IEP. Boston did not object to the suggestion that this service be included within the service delivery grid.

For these reasons, I find that Boston's proposed IEP is appropriate with the several minor modifications outlined above.

I now turn to the question, raised by Boston in its Hearing Request, whether consistent attendance in the educational program described within this modified IEP is necessary for Student to have an opportunity to receive an appropriate education.

Parent has demonstrated that she is a highly-motivated and persistent advocate for her son. She has devoted herself to finding educational programs that she believes to be appropriate for Student. No one doubts her admirable loyalty to her son. At the same time, however, Parent has not allowed her son to attend school on a consistent basis, apparently because of her dissatisfaction with Boston's educational program at the Harbor, even though Parent has

not proposed any modifications in the services described within the IEP (other than a change of personnel, discussed in footnote 21), nor has she asked for a change of placement.<sup>22</sup>

Based on the undisputed testimony and documents discussed above, I find that Student's many absences and tardies since he began at the Harbor on December 10, 2013, have precluded him from having the opportunity to make meaningful progress commensurate with his learning potential.

### **ORDER**

Boston's most recently-proposed IEP is appropriate in that it is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment, provided that Boston amends the IEP as follows:

- The service delivery grid of the IEP shall include the services of a 1:1 dedicated aide.
- The service delivery grid of the IEP shall provide for the ten hours of ABA services to be provided as follows: five hours of ABA services to be provided within the classroom and five hours of ABA services to be provided outside of the classroom. The transition to this mix of ABA services shall occur gradually, as determined by the RCS behavioral supervisors after consultation with Parent and Student's teachers.
- The service delivery grid of the IEP shall provide for the three sessions of speech services to be provided as follows: one session of speech services within the classroom and two sessions of speech services outside of the classroom.

The IEP Team shall meet to consider whether any other adjustment is appropriate regarding the location of related services.

By the Hearing Officer,

William Crane

Dated: May 14, 2014

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<sup>22</sup> Boston has recognized the importance of Parent's support of Student's educational program so that Parent would send her son to school consistently. Boston has been willing to provide or fund a number of different programs that Parent would support. But, historically, after Parent has requested a program (such as Kids Are People and then the Harbor School), and after Boston has provided or funded the program, Parent has become dissatisfied with the program and either removed her son from school or simply not given her son the opportunity to attend school consistently. Similarly, when Parent rejected parts of the currently-proposed IEP, Boston made changes designed to satisfy Parent's concerns, but Parent did not further respond by accepting or rejecting the modified IEP, and Parent has continued to not allow Student to attend school consistently. See discussion in "Educational History" above. In the instant dispute, Parent testified that she has lost confidence in the Harbor and is not likely to send her son there, even if all of her specific concerns were met. Testimony of Parent.

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

**THE BUREAU'S DECISION, INCLUDING 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 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 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.