

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

In Re: Malden Public Schools

BSEA #1409290, 1500006

DECISION

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

In April 2014 the Malden Public Schools (Malden or School) issued an IEP covering the period April 2014 to April 2015 which proposed changing the placement of Student from a co-taught general education second grade classroom in a public elementary school to a substantially-separate classroom designed for children with autism spectrum disorder (ASD), located in a different Malden elementary school. Parent rejected the proposed placement.

On June 6, 2014, Malden filed a request for a hearing with the Bureau of Special Education Appeals (BSEA) (BSEA No. 1409290).¹ In its request, the School sought a finding that the rejected IEP referred to above was appropriate, and that the School’s proposed substantially-separate placement was necessary to provide the Student with a free, appropriate public education (FAPE) in the least restrictive environment. Malden alleged that this change in placement was necessary because Student’s disabilities, which significantly impact his attention, his understanding and use of language and his ability to interact with adults and peers, have prevented Student from making effective progress in his co-taught general education program, despite extensive modifications, accommodations and supports in that setting.²

Parent filed her response to the hearing request on June 20, 2014. Parent disputed Malden’s characterization of Student’s performance during 2013-2014, as well as its claim that Student did not and/or could not make effective progress in an inclusive setting with adequate support. Parent attributed any claimed deficiencies in Student’s progress to provision of inadequate related services and/or failure to fully implement Student’s accepted IEP. Parent further asserted that the School’s proposed placement would be overly restrictive for Student, and that Student could succeed in an inclusion setting.

¹ This case was originally assigned to Hearing Officer Ann Scannell. The BSEA administratively transferred the case to the current Hearing Officer on November 3, 2014.

² The School’s hearing request also sought substitute consent for Student’s 3-year re-evaluation. The parties resolved this issue prior to the hearing.

Additionally, on June 30, 2014, the Parent filed her own hearing request which was assigned BSEA No. 1500006. Parent alleged that Malden had committed procedural violations during the 2013-2014 school year related to delays in issuing an IEP, failure to issue certain progress reports or to implement new goals, and failure to fully implement the 1:1 paraprofessional services required by Student's IEP. Additionally, Parent claimed that by committing some of these procedural violations, Malden had retaliated against her for contesting its proposed placement, in violation of Section 504 of the Rehabilitation Act. In addition to findings of fact and conclusions of law with respect to her allegations, Parent sought full implementation of Student's "stay put" IEP pending resolution of this matter as well as compensatory services in the form of tutoring. The School disputed Parent's claims in a response dated July 7, 2014. The BSEA consolidated the parties' hearing requests by order dated July 9, 2014.³

On October 16, 2014, after reviewing Malden's responses to Parent's discovery requests, Parent filed an amendment to her initial hearing request. In her amendment Parent alleged that Malden had failed to ensure that an appropriately-certified substitute teacher was in place in Student's co-taught classroom during the special education teacher's approximately seven-week maternity leave in 2014. Parent contended that this alleged failure constituted a denial of FAPE as well as deliberate indifference to Student's rights under applicable federal and state law.

On or about November 3, 2014, both parties amended their respective hearing requests to reflect Malden's most recently issued IEP covering October 3, 2014 to October 2, 2015. Since the parties have essentially the same disagreements regarding this IEP as they did with respect to its predecessor, the parties and Hearing Officer agreed that the appropriateness of the October 2014 IEP would be subject of the instant hearing.

The parties requested and were granted several postponements of the original hearing dates for purposes of discovery, other procedural matters, and to attempt resolution. The BSEA conducted a pre-hearing conference on August 18, 2014 and an evidentiary hearing on November 10, 12 and 13, 2014, at which both parties were represented by counsel and had an opportunity to examine and cross-examine witnesses as well as submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until December 3, 2014 for submission of written closing arguments and the record closed on that day.

The record in this case consists of the School's exhibits S-1 through S-83; Parent's exhibits P-1 through P-83, and the transcript created by the certified court reporter.

Those present for all or part of the proceeding were:

³ On August 12, 2014 the School filed an additional hearing request, No. 1501215, contesting Parent's request for an independent evaluation (IEE). The Hearing Officer denied the Parent's request for an IEE by order dated September 10, 2014.

Parent	
Faith Morgan	Advocate for Parent
Gretchen Timmell	Educational Psychologist, Mass. General Hospital (MGH)
Ellen O'Donnell, Ph.D.	Psychologist, MGH
Christine Blake	Teacher, Intensive Learning Program (ILP), Malden Public Schools
Joanna Cutting	School Psychologist, Malden Public Schools
Denise Doucet	Substitute Teacher, Malden Public Schools
Katelyn Endicott	Occupational Therapist, Malden Public Schools
Michelle Farrell	Education Team Leader, Malden Public Schools
Elizabeth Greenhagen	Board Certified Behavior Analyst (BCBA), Malden Public Schools
Betsey Hanifan	Elementary Program Manager, Malden Public Schools
Karen Hill	BCBA, Malden Public Schools
Maura S. Johnson	Asst. Supt., Student Services, Malden Public Schools
Carol Keenan	Principal, Salemwood School, Malden Public Schools
Susan Nellhaus	Speech/Language Therapist, Malden Public Schools
Susan Nestor	Teacher, Malden Public Schools
Alyssa Perrault	Special Education Teacher, Malden Public Schools
Kathleen Quill, Ph.D.	BCBA, Consultant, Malden Public Schools
Adriana Rojas ⁴	Paraprofessional, Malden Public Schools
James Russo, Jr.	Team Chairperson, Malden Public Schools
Scott Nicholas, Esq.	Attorney for Parent
Alisia St. Florian, Esq.	Attorney for School
Felicia Vasuvedan, Esq.	Observer, Murphy, Hesse, Toomey & Lehane
Sara Berman	Hearing Officer
Jane M. Williamson	Court Reporter
Anne H. Bohan	Court Reporter
Carol H. Kusnitz	Court Reporter

ISSUES PRESENTED

The issues for hearing are the following:

- A. Whether Student requires a change in placement from his current co-taught inclusion classroom to a primarily self-contained, specialized classroom designed for children with autism spectrum disorder (ASD) and related disabilities in order to receive a FAPE in the least restrictive environment;
- B. Whether the following acts or omissions of the Malden Public Schools occurred, and if so whether such acts or omissions constituted a failure to comply with procedural requirements during the 2014-2015 school year:

⁴Ms. Rojas testified by speaker phone.

1. Failure to deliver a progress report for Student's Occupational Therapy (OT) visual motor goal in the 2013-2014 first quarter (Q1) progress report;
 2. Failure to deliver a written IEP to Parent within two calendar weeks of the Team meeting held in December 2013 and issuance of N-1 form erroneously substituting a notice date for the meeting date;
 3. Failure to report on all goals in Q2 progress reports for 2013-2014;
- C. Whether Malden unlawfully retaliated against Parent for objecting to the IEP issued in December 2013 by withholding progress reports and by sending Parent emails indicating that it would not work on new IEP goals until Parent had responded to the IEP of December 2013.
- D. Whether Malden failed to fully implement Student's IEP during 2013-2014 by (a) during the approximately 7-week leave of Student's special education teacher, employing a substitute who was not a certified general or special education teacher; (b) failing to provide Student with the full complement of 1:1 paraprofessional assistance required by his IEP.

POSITION OF MALDEN PUBLIC SCHOOLS

Student has not made and cannot make effective progress in his co-taught classroom at the Salemwood school. While Student has made some gains in a few discrete areas, his general academic and social progress has not been commensurate with his abilities, and he has been showing signs of frustration with his difficulty in comprehending and meeting classroom expectations. Student's current placement is deficient for reasons inherent in the nature of the co-taught model, including large class size, quickly paced and linguistically complex instruction, and the absence of embedded social pragmatics instruction and facilitated interactions throughout the school day. Multiple attempts to modify the current placement to fit Student's needs have been unsuccessful, and no additional accommodations would cure the fundamental deficiencies of the placement model.

On the other hand, the ILP program at the Forestdale School is well-suited to meet Student's needs. The ILP program would provide Student with a small class size and high staff-to-student ratio. He would receive the intensive language-based instruction and direct teaching of social thinking, language and skills throughout the school day, as recommended by witnesses for both the Parent and the School. Further, the ILP would provide Student with appropriate peers as well as opportunities for meaningful inclusion as appropriate.

Finally, at all relevant times Malden has fully implemented the Student's IEP, has complied with all relevant procedural requirements, and has not retaliated against Parent or Student.

POSITION OF PARENT

The proposed IEP and placement within the ILP program would not provide Student with FAPE in the least restrictive environment. On one hand, the proposed IEP and placement would be inadequate because they fail to offer Student a language –based program recommended by Parent's evaluators, and fail to adequately accommodate Student's visual impairment. On the other hand, the proposed IEP and placement would be overly restrictive for Student because they would not provide sufficient exposure in an academic setting to typically-developing peers and would not provide Student with an appropriate peer group.

Student historically has benefitted from the day-in, day-out social and language modeling of typically-developing peers. With support, he manages the daily routine of the general education setting. He does not have major behavior problems. Student could continue to progress in an inclusion setting with appropriate supports and accommodations. While Parent agrees that the current-co-taught setting might be overly distracting as constituted, Student has made some meaningful progress in that setting. Any problems with the co-taught classroom model could be overcome with additional OT and speech/language services, assistive technology and ABA services. Malden has not implemented sufficient additional interventions in an inclusionary setting prior to seeking placement in the ILP.

FINDINGS OF FACT

1. Student is a nine-year-old child who is a resident of Malden. Student currently is repeating second grade in a co-taught general education classroom at the Salemwood School in Malden. Parent, teachers and evaluators describe Student as a friendly, caring, polite, enthusiastic child who is curious and interested in learning.
2. Outside of school, Student enjoys many activities including swimming, roller skating, gymnastics, bike-riding, soccer, and reading. In school, Student has many strengths including decoding, sight-word recognition, reading fluency, copying text, memorizing math facts and doing math calculations. Both in school and at home, Student loves using the computer and is very adept at educational computer applications. Student is well-mannered and well-behaved in all settings. (Testimony of Parent, Timmell, Perrault, Cutting, O'Donnell, Rojas, S-2)
3. Student has a complicated medical and developmental history stemming from his extremely premature birth. (S-2, O'Donnell, Parent) Student's medical problems have improved as he has gotten older, and he now is relatively healthy; however, Student's prematurity and ensuing medical interventions resulted in a constellation of impairments that have been diagnosed as Autism Spectrum Disorder (ASD) and

ADHD. (O'Donnell, Cutting, S-2) Additionally, Student has impaired vision in his left eye and relies primarily on his right eye to see. Student wears glasses but they do not fully correct his vision. Student often must tilt his head to look at a person or object with his functional right eye. (Parent, Timmell, S-2)

4. One major manifestation of Student's disabilities is his difficulty with communication. Student can and does speak to communicate and has a good vocabulary, but has significant delays in his receptive and expressive oral language, particularly with comprehension and use of language for abstract concepts. Although he is a fluent reader, Student struggles to understand what he reads and to answer questions, particularly "wh" questions or those which require him to make inferences. He also has great difficulty with initiating and maintaining reciprocal conversations with peers, using words to name his emotions, and generalizing language skills outside of a lesson. (Nelhaus, S-2) Student has difficulty with "relevance." (Timmell) For example, Student might understand the literal meaning of a story he has just read, but be unable to recognize and/or verbalize particular elements of the story to respond to a question. He appropriately raises his hand when the teacher asks the class a question, but when called on, he might provide a one-word answer that is unrelated to the question. (Timmell, Perrault)
5. The combination of Student's ADHD and ASD with associated language deficits cause him to be very distractible and to require much 1:1 prompting to focus on and complete academic tasks. (S-2, Nelhaus, O'Donnell, Timmell, Endicott, Cutting, Perrault, Hill, Rojas)
6. The Parent and School witnesses disagreed about the level of Student's social skills with peers. According to the Parent, Student is outgoing and has friendships with several children in his neighborhood. Parent testified that recently, on a couple of occasions, Student has approached a child that he did not know and asked the child to play, once on a playground and once on a play structure in a fast-food restaurant. (Parent) Student's 1:1 aide, Ms. Rojas, disagreed, and testified that on two recent occasions, Student told classmates who had approached him to go away, and that Ms. Rojas never observed Student to invite another child to play. Rather, she stated, he played alone on the playground or parallel played on the monkey bars. I have no reason to doubt the veracity of either witness, and conclude that it is plausible that Student is more or less likely to initiate interaction with other children depending on the circumstances. There is no dispute, however, that Student is interested in social interaction and does interact with both peers and adults but that his disabilities reduce his social language and ability to take the perspective of others. (O'Donnell, Cutting, Perrault, Quill, Nelhaus)
7. Student received early intervention services as an infant and toddler. He began receiving special education services from Malden in approximately June 2008, shortly after his third birthday, and has attended the Malden Public Schools continuously from that time to the present. Between the time Student enrolled through the 2010-2011 school year Student attended a partially integrated preschool, and then pre-kindergarten/kindergarten program designed for children on the autism spectrum

in Malden's Early Learning Center (ELC). (Parent, Hill, Quill, S-17, S-18) Student's placements entailed small classrooms with ABA-trained staff, overseen by a BCBA. Student's instruction included discrete trial training on individual objectives, data collection, and a data-based behavioral support plan. Typically-developing students were present for part of the school day. (S-18)

8. Malden conducted a three-year re-evaluation during the spring of 2011 consisting of psychological, educational and functional behavioral assessments. In sum, the evaluators determined that Student had made significant progress since starting the ELC in 2008 but would continue to benefit from specialized programming based on ABA principles coupled with inclusion opportunities. Evaluators found that Student was socially interested and had some strong early academic skills, but struggled with significantly weak language comprehension and communication skills. (S-17, 18, 19, 20).
9. Student attended an integrated kindergarten program at the Forestdale School during 2011 – 2012.⁵ In June 2012, the Team proposed an IEP for the 2012-2013 school year (first grade) with goals in social pragmatics, social behavior, receptive/expressive language, English Language Arts (ELA) and math and placement in the specialized ASD program (now the Intensive Learning Program or ILP) at the Forestdale School. (S-5) Parent rejected this placement because she felt that Student would benefit from an inclusion setting. After discussions, Parent and Malden agreed on a placement in a general education first grade classroom at the Salemwood School with a 1:1 aide and pullouts for ELA support, math, and social skills support as well as OT and speech/language therapy. Student also had a Positive Behavior Support Plan (PBSP) developed by a BCBA to target increased class participation and appropriate communication to protest and to request desired items or activities. (Parent, Hill, S-4)
10. Parent and Malden felt that Student functioned quite well in first grade. (Parent, Rojas, Nelhaus, Hill) Student's language skills and social language abilities were below those of his typical peers so that he struggled with reading and language comprehension and had difficulty with conducting more than rudimentary conversations. Nonetheless, the parties agree that he did well in reading fluency and math calculation, and made academic, social, and behavioral progress in the inclusionary setting in first grade. (Parent, Hill, Nelhaus)
11. For 2013-2014, Parent and Malden agreed to Student's placement in a co-taught second grade general education classroom at the Salemwood School with a 1:1 aide and pull-out OT, speech/language therapy, and counseling. (S-3, Parent, Perrault, Hanifan). This classroom contained approximately 25 students, approximately 10 of whom had IEPs and was staffed by a full-time general education teacher, Ms. Nestor,

⁵Malden witnesses have testified that Student repeated kindergarten, in 2009-2010 and 2010 – 2011. (Johnson, Keenan). Parent disputed Malden's claim that Student repeated kindergarten, and testified that the 2009-2010 placement, was, in fact, a pre-K program. This is a minor discrepancy that is not material to the resolution of this case.

as well as a special education teacher, Ms. Perrault. Although Ms. Nestor was usually designated as the general education teacher for the classroom, she is dually certified in elementary and special education. (Nestor, Perrault, Keenan, Hanifan)

12. On December 12, 2013 the School convened an annual review meeting. Several brief reports were submitted. The OT report indicated that Student had met his OT goals (in handwriting and drawing) and recommended terminating OT services. A counseling report from the school adjustment counselor stated that Student had made progress in turn-taking, sharing, and eye contact; however, his attentional problems impeded his ability to generalize the skills he had learned. (S-34) The speech therapy report also indicated progress in expressive and receptive language. (S-35)
13. During the course of the meeting, School-based Team members stated that they recommended a change in Student's placement to the ILP program at the Forestdale School because they felt that Student was not making effective progress in the co-taught classroom. (Hanifan, Parent) Parent was surprised to hear this recommendation at the meeting because she had no prior indication from the School that Student was struggling to the point of needing a change in placement. (Parent) Parent objected to the proposed change in placement at the Team meeting. (Parent)
14. On January 6, 2014, Parent received a proposed IEP covering December 10, 2013 to December 9, 2014. This IEP contained goals in social pragmatics, behavior (remaining in seat, work completion, not raising his voice or complaining), reading comprehension, and math. The IEP service grid provided for consultation in social skills, OT, behavior, communication, and academic support in Grid A, math in Grid B and all other subjects and activities (including speech/language therapy) in Grid C. The "Non-Participation Justification" section of the IEP stated that "[d]ue to Student's disability of autism, he requires small-group instruction and review of material in a distraction-free environment." (S-3)
15. On February 5, 2014 Parent rejected the proposed placement in the ILP class as well as the elimination of direct OT services, reduction in speech services, and omissions of various accommodations that had been in the previous IEP. (S-3).
16. Meanwhile, on January 27, 2014, Malden issued Student's quarterly progress report which stated only that progress had been discussed at the December Team meeting and that the Parent had not yet responded to the IEP proposed subsequent to that meeting. (P-62)
17. In an e-mail to Parent dated February 3, 2014, Ms. Perrault advised Parent that she should refer to annual review reports from the December 12 Team meeting. Ms. Perrault further stated that the School could "only work on and report progress on goals and objectives on a student's active IEP. [Student's] IEP dated 12/10/2013 – 12/9/2014 has not yet been returned; therefore, it is yet to be active." Ms. Perrault invited Parent to contact her or Mr. Russo (Evaluation Team Leader) with any questions or concerns. (P-32)

18. Since Parent partially rejected the proposed IEP and rejected the proposed placement, Student continued to attend the co-taught second grade at Salemwood for the remainder of the 2013-2014 school year. The School determined that Student had not completed the requirements for promotion to third grade, and decided to have Student repeat second grade in 2014-2015. (Keenan)
19. Between approximately May 5, 2014 and June 19, 2014, which was the last day of the 2013-2014 school year, Ms. Perrault was on maternity leave. Because this leave was considered “short-term” under pertinent Malden policies, and the short-term substitute list contained no certified special education teachers, the Salemwood principal, Carol Keenan, decided to fill the position with Ms. Denise Doucet, who had been serving as a substitute in the Salemwood building at all grade levels. According to Ms. Keenan, Ms. Doucet was well known to staff and students because she was present in the building nearly every day during the 2013-2014 school year. There is no dispute that Ms. Doucet is not a certified general or special education teacher. (Doucet) Malden administrators believed that she was appropriate for the substitute position for three reasons. First, they were familiar with Ms. Doucet and had found her work as a substitute teacher to be excellent. Second, because Ms. Nestor, the co-taught classroom general education teacher, is dually-certified, they determined that she could take on Ms. Perrault's special educator role and Ms. Doucet could perform classroom functions that did not require special education qualifications. Finally, Student was familiar and comfortable with Ms. Doucet. (Keenan, Doucet)
20. Ms. Nestor and Ms. Doucet testified that during Ms. Perrault's absence, Ms. Nestor took over direct instruction of the students in her class—including Student-- who were on IEPs. She made some adjustments in how she delivered instruction (e.g., in some cases, substituting small-group for whole group instruction) and assigned certain administrative tasks to Ms. Doucet to ensure that she (Ms. Nestor) was available to work directly with students with IEPs. Ms. Nestor and Ms. Doucet testified without contradiction that Student did not lose special education services during Ms. Perrault's leave. (Nestor, Doucet) Moreover, Ms. Nestor did not report to Ms. Keenan that she lacked classroom resources or was unable to meet Student's needs as a result of Ms. Perrault's absence. (Keenan)
21. Ms. Rojas, who had been Student's 1:1 aide since first grade, testified that she accompanied Student at all times except for speech therapy and lunch. Ms. Rojas' responsibilities included prompting Student to attend to school work, redirection, restating instruction if necessary, and gathering data on behaviors targeted for intervention (generally, attention to task, work completion, and similar behaviors).
22. Student attended a summer program during the summer of 2014 as he had during prior summers, in a small, substantially separate program consisting of approximately six children with autism diagnoses. Some or all of these students attend the ILP. (Greenhagen) In the fall of 2014, Student began attending his second year in Ms.

Perrault's and Ms. Nestor's co-taught second grade, with Ms. Rojas continuing as his aide.

23. Malden conducted Student's three-year re-evaluation in April 2014 (FBA only) and September and October 2014 for the remainder. The FBA was conducted by Beth Greenhagen, who has served as the BCBA consultant for Student since the 2013-2014 school year. (Greenhagen) Targeted behaviors were off-task behaviors, non-compliance and prompt dependency. Teachers were concerned generally with Student's overall low participation during the school day, which averaged around 25% of the school day despite facilitation from teachers and Student's 1:1 aide. (P-50) Based on the results of multiple assessment tools, Ms. Greenhagen concluded that the functions of Student's behaviors were to meet sensory needs and escape from work demands. (P-50) Ms. Greenhagen developed a Positive Behavior Support Plan (PBSP) and numerous recommendations including simplification of language, use of a sensory diet, frequent social attention, reinforcement for appropriate behavior, a token economy during academic instruction, use of verbal scripting and modeling, and data collection. (P-50) Malden proposed an IEP in April 2014 after a meeting to review the FBA. This IEP, like its predecessor issued in December 2013, called for placement in the ILP classroom at Forestdale. Parent rejected the placement and partially rejected the IEP, stating the same reasons as she had provided for her rejection of the previous IEP. (S-2)
24. Ms. Nestor conducted an educational assessment in September 2014. The assessment report indicated that Student's academic progress had been inconsistent and that Student was "struggling" in the co-taught classroom. Reading comprehension test scores ranged from 100% to 0. When asked to answer inferential questions from a story, Student frequently said "no thanks" and/or turned his head. Reading tests revealed "average" vocabulary and fluency skills and below average comprehension. In class discussions, Student often said "pass" when asked a question or repeated a question being asked. He could not participate in partner discussions with peers. In math, Student made progress with calculation, but had trouble applying skills to word problems. Student's attentional difficulties negatively affected his class participation. (S-10)
25. Ms. Perrault conducted additional educational assessments. On the DIBELS, Student met the second grade benchmark on all measures except story retell, on which he scored "0." Woodcock-Johnson III measures of oral language and listening comprehension skills were in the low to very low range, as were broad reading, math reasoning, and reading comprehension. On the other hand, math calculation skills were "average," and basic reading and writing skills were "low average." Ms. Perrault concluded that Student had made minimal progress (except in math calculation) since beginning second grade in fall of 2013. (S-15)
26. Ms. Karen Hill, BCBA, observed Student in his classroom. Ms. Hill concluded that although Student worked hard and was well-behaved, he had much difficulty participating in language-based tasks and was highly dependent on prompts from his

teacher and aide to perform tasks. Ms. Hill was particularly concerned that Student's difficulties with language and attention impeded his ability to participate effectively in most academic activities and access the curriculum. In her testimony, Ms. Hill indicated that at times, Student had such difficulty understanding the language of instruction and applying that language to the task he was being asked to do that he was completely dependent on the prompts of his aide, who sometimes ended up supplying answers to questions or telling Student what to write. (S-11, Hill)

27. The speech-language assessment, conducted by Susan Nelhaus, who had been Student's ongoing speech therapist, yielded results indicating generally below-average receptive and expressive language skills. Student demonstrated minimal progress in increasing his sentence length or in social language skills. However, he was focused and performed in the "average" range on the Expressive One Word Picture Vocabulary Test (EOWPVT). Ms. Nelhaus testified that she was surprised at how little Student was able to demonstrate upon assessment in light of his familiarity and comfort with her and the amount of speech/language intervention he had been receiving. (S-12, Nelhaus)
28. An OT evaluation conducted in October 2014 showed that Student had age appropriate skills in many school-related areas, including handwriting, fine motor skills, gross motor skills and self-care. He had difficulty with functional communication, memory and understanding, task completion, and attention, among other, similar areas. (S-8)
29. Psychological testing was conducted by Joanna Cutting, Ph.D. Student's performance on standardized tests, including the WISC-IV, was highly variable both across and within skill areas, ranging from "average" to "extremely low." Student's greatest weaknesses were in expressive and receptive language and in verbal knowledge and verbal reasoning skills, in which he performed below the first percentile. On the other hand, Student showed strengths in nonverbal sequential reasoning skills. Student had weak processing speed and working memory, visual learning and social perspective taking, but his ability to recognize facial expressions was in the average range. Student's attentional problems impacted his test performance. Student's adaptive functioning in the areas of conceptual, social and practical skills as measured by the ABAS-II was in the "extremely low" range; however, he did have areas of strength in basic self-care and basic social behavior. (S-7)
30. Dr. Cutting recommended placement in a classroom with "clear external structure, consistency, regular prompts and predictability" Additional recommendations included advance warnings of transitions and changes, accommodations for attentional weaknesses, multimodal and multi-sensory presentation of curriculum, and small-group social skills instruction. (S-6)
31. In her testimony, Dr. Cutting elaborated that Student's weaknesses in attention, language comprehension and use, social pragmatics, and "theory of mind" as well as his reported difficulty in progressing even with a tremendous amount of in-class

support and scaffolding, supported Malden's recommendations for a small, highly specialized language-based placement. Dr. Cutting was familiar with the proposed ILP program and believed that it would provide Student with appropriate instruction. Additionally, Dr. Cutting felt that at age 9.5, Student should be placed with peers closer to him in age (for example, third graders) than the second graders with whom he has been placed, at least in part because older students would be more appropriate as social role models. (Cutting)

32. On October 1, 2014 Parent had an independent neuropsychological evaluation performed by Ellen O'Donnell, Ph.D., from the LEAP program at Massachusetts General Hospital (MGH). Dr. O'Donnell reviewed prior records, interviewed Student and Parent, conducted a battery of cognitive and achievement tests, and had Parent and teachers complete various behavior rating scales. (P-8, O'Donnell)
33. Dr. O'Donnell observed that Student's ability to engage in conversation and formal testing was limited by short attention span, impulsivity, and low frustration tolerance, so that scores might underestimate his potential, although they give an accurate picture of current functioning. Student was able to work well for short periods with breaks for a preferred activity such as a computer game. He did better with auditory tasks if he was playing with a toy at the same time, or if he was highly engaged. His response to challenging tasks was to whine, check in with Parent, or say "I can't." Student did engage in some imaginary play, and had interest and some skills in simple social conversations, but his skills were limited by his verbal weaknesses. (P-8, O'Donnell)
34. Student's performance on cognitive testing was similar to his performance on prior school-based and private evaluations. His general intellectual functioning as measured by the Differential Ability Scales-II (DAS-II) was in the "low" range overall, at the first percentile, with particular weakness in verbal knowledge and reasoning, but relative strength in pattern recognition, sequential, and quantitative reasoning. (P-8) Student's performance on language testing was similar to his performance on school-based testing, with an "average" score on the EOWPVT and below average to well below average scores on tests of receptive language and comprehension. (P-8) Tests of visual motor and fine motor skills ranged from "average" or "borderline" to "extremely low." Student had overall "below average" working memory skills but "average" skills in rote mental processing. (P-8) On achievement testing as measured by the WIAT-III, Student's age-based percentile rankings for the Basic Reading Composite and Math composite were 18 and 10, respectively. Grade-based percentiles were 50 and 82. On the Gray's Oral Reading Test (GORT-5), Student's reading rate was "average" but accuracy was "below average," and he had limited ability to answer open-ended questions. (P-8) The result of Parent and teacher responses to adaptive functioning rating scales were similar to those seen with school-based testing. (P-8)
35. Dr. O'Donnell concluded that Student met criteria for diagnoses of Autism Spectrum Disorder, ADHD, and a specific learning disorder with impairment in reading.

Despite these diagnoses, Student has strengths in social interest and reciprocity (limited by his language weaknesses) and basic academic skills. (P-8)

36. Dr. O'Donnell recommended moving Student to a "partial inclusion model in which he was integrated into the general education classroom for some instruction (e.g., math and special subjects) with the support of a 1:1 aide and received pull-out instruction in his areas of weakness (e.g., reading comprehension, applied subjects). Dr. O'Donnell further recommended a multi-sensory language-based approach to instruction, behavioral supports, picture charts and cues, daily inclusion time with an aide, daily services in speech/language, and reading comprehension, an individualized academic program, 1 – 2 sessions per week of OT focusing on handwriting, keyboarding, and spatial perception and reasoning skills, and a social skills group. (P-8, O'Donnell)
37. Parents obtained an outside school observation of Student by Gretchen Timmell, who is a licensed psychologist and certified teacher who works as an educational specialist at the Lurie Center operated by MGH. On October 16, 2014, Ms. Timmell observed Student in his current program and also observed the ILP classroom that Malden has proposed for Student. On October 25, 2014, in the context of these observations, Ms. Timmell conducted some assessments of Student, including the Test for Auditory Comprehension of Language, Third Edition (TACL-3) and the Oral and Written Language Scales, Second Edition (OWLS-II) and a test of math calculation. (Timmell, P-7) Student's scores were consistent with prior scores on language testing that indicated relatively strong basic vocabulary, decoding, spelling and calculation skills and much weaker comprehension and critical thinking skills. (Timmell, P-7)
38. Ms. Timmell observed Student together with Karen Hill, BCBA from Malden. Ms. Timmell observed Student in gym class for approximately one hour. She found that Student participated in the class quite easily, with little prompting. He followed the routine of the class and had some interactions with classmates. Ms. Timmell attributed his relatively easy participation to the lack of language demands in gym class. (P-7, Timmell) Ms. Hill agreed with Ms. Timmell's opinion of Student's participation in gym class. (Hill)
39. Ms. Timmell also observed Student in his co-taught general education classroom during an ELA class. She observed him participate, with his aide, in two activities. She noted that he followed the class routine reasonably well, accepted an unexpected change in routine without problems, and was able to accept feedback from his aide to complete academic tasks. Ms. Timmell did not observe Student initiate interactions with peers. Ms. Timmell's impression was that Student is "accessible to learning," willing and able to accept information, and able to listen to group instruction. Ms. Timmell concluded that Student could be successfully educated in an inclusion setting with modifications, including implementation of a language-based, multisensory approach and an incentive system to reduce his prompt dependency. (Timmell, S-7) On the other hand, Ms. Hill, the co-observer, felt that Student was not really comprehending what was being taught, and that ultimately, his aide was simply

supplying him with answers because Student could not generate them on his own. (Hill)

40. The Team convened on October 3, 2014 after the School's re-evaluation and issued an IEP and placement proposal that is substantially similar to the IEP issued in April 2014 except for the addition of a proposal for a trial of assistive technology. (P-2) Parent continues to contest this IEP and placement proposal. The Team did not consider the reports of Dr. O'Donnell and Ms. Timmell at the Team meeting. School personnel indicated at hearing that in their view, these outside evaluations in fact supported the School's position. (Cutting, Nelhaus)

PROGRAM PROPOSED BY SCHOOL

41. The School has proposed placing Student in an ILP classroom at the Forestdale School. The ILP class is part of a district-wide program (formerly called the ASD program) that Malden established to serve students with autism spectrum disorders by providing individualized research-based interventions utilizing ABA principles in self-contained classrooms as well as flexible opportunities for inclusion, and oversight by BCBAs. Dr. Kathleen Quill, who has 40 years of experience as an autism researcher and consultant, assisted in developing the program and provides ongoing consultation services to the District as well as training and oversight to the BCBAs. (Quill, Cutting, Johnson, Blake)
42. The ILP classroom proposed for Student currently has five students ranging from second to fourth grade and is staffed by a special education teacher and 3 paraprofessionals. Beth Greenhagen is the BCBA assigned to the program. Of the 5 students, one student attends general education classes for most of the day, returning to the ILP only for social skills instruction. The remaining students have their academic instruction in the ILP room but are included at their respective grade levels for exploratories (specials), recess and lunch. The amount of inclusion for each student is dependent on his or her IEP.
43. All students have ASD diagnoses, and all are verbal but have significant communication deficits. Some have communication abilities that are more developed than Student's. None of the students demonstrates significant disruptive behavior. (Blake, Greenhagen)
44. All students receive individual and/or group pullout speech/language services. The program is characterized as language-based in that multi-modal presentation of material is used in all subjects. The program uses a social skills curriculum called Social Thinking which incorporates instruction in social interaction into all aspects of the school day. All of the students in the class struggle to some degree with language comprehension, and there is at least one student whose reading profile is similar to Student's. (Blake)
45. Instruction in the ILP includes independent reading, a 45-minute ELA block encompassing reading comprehension, vocabulary, phonics and building basic

English concepts, as well as writing and math. The teacher consults weekly with a school-wide literacy coach. (Blake)

46. The School proposes that Student would attend a general education classroom with an aide for math and all exploratories, as well as lunch and recess. Additional inclusion opportunities could be provided as appropriate. (Blake, Greenhagen)
47. Malden believes that the ILP program would provide Student with the slower pace, language-based instruction, and reduced distraction that he needs in order to progress academically and socially. Additionally, the small class size would allow for implementation of a token economy, more refined behavior support plan, and strategies to reduce prompt dependency as recommended by Student's BCBA's who have stated that it is not possible to implement many of the behavioral and sensory strategies Student needs in a class of 20-plus children. (Hill, Greenhagen)
48. Student attended a summer program during summer 2014 with three of the 5 current students in the ILP. Data demonstrated that Student's off-task behavior diminished during the summer program. (Hill, Greenhagen, Quill)
49. School witnesses have stated that Parent's experts' recommended programming describes the ILP, albeit with a different label. (Cutting, Nelhaus)

PROGRAM PROPOSED BY PARENT

50. Parent visited the ILP program and feels that it is inappropriate for Student because the peers seem less verbal and interactive than Student. Parent believes that Student benefits academically and socially from day-in, day-out immersion in the inclusion setting where he is constantly exposed to peers' conversation, interaction and activity. Parent experienced the ILP classroom as too quiet, with no evidence of liveliness or enthusiasm for learning. At hearing, Parent agreed that Student was too distracted in the co-taught setting, and suggested that he return to the classroom model where he was successful in first grade, namely, a general education classroom with pullouts for reading comprehension and other subjects as needed. (Parent)
51. Additionally, Ms. Timmell felt that the ILP program was inappropriate because it was not sufficiently language-based. She felt that one peer was possibly appropriate, but that this was the peer who was out of the ILP classroom for most of the day. Ms. Timmell stated that Student could receive a FAPE in his current placement or a similar setting with the addition of more visual supports and a consistent reinforcement plan to increase attention to work. Alternatively, Ms. Timmell suggested placement in a language-based classroom⁶ where Student could receive

⁶ Other than a brief suggestion in Ms. Timmell's report, neither party presented evidence on the existence in Malden or potential appropriateness for Student of a so-called "language-based" program geared to students with language disabilities that is not specifically designated for students with ASD. The absence of such evidence on the record in no way precludes the parties from exploring this option on their own.

small-group, focused multi-sensory instruction throughout the school day. (Timmell, P-7)

DISCUSSION

After reviewing the testimony and documents on the record, I conclude that the School has proved⁷ Student is not making effective progress commensurate with his educational potential in his current setting. Student is able to follow the routines of his general education classroom, and has made some academic and social progress. The evidence is overwhelming and largely uncontroverted, however, that Student's severe difficulties with understanding and using language, together with his distractibility, prevent him from making meaningful educational progress in light of his potential. Testimony of multiple witnesses made clear that a busy, fast-paced classroom of 20-plus young children is highly distracting to Student and does not allow for the in-depth reinforcement and repetition of comprehension and social strategies throughout the day that Student requires. To provide just one example, the structured reinforcement plan suggested both by Gretchen Timmell and Beth Greenhagen cannot be implemented effectively in the current placement because of its size, pacing and activity level.

Moreover, witness testimony made clear that although Student is physically present in his classroom and participates to the best of his ability under the circumstances, his participation is heavily mediated by his aide, and does not necessarily reflect true understanding of the subject matter. At least in some situations, Student himself has been withdrawing from participation, saying "pass," or "no thank you," or simply refusing to work. Student recently has showed signs of discouragement and frustration. (Perrault) Additionally, at least one witness commented that Student could not participate unless the aide essentially gave him an answer. (Hill)

Parent's experts have suggested that additional accommodations in an inclusion setting would enable Student to make effective progress; however, the record indicates that many such accommodations (e.g., visual cues, behavior support plan) already are being implemented. (Perrault) Student already receives extensive modifications, accommodations and supports, and there is no evidence that additional such supports would cure the fundamental weakness of the present placement for Student—class size, and rapid-paced, linguistically complex instruction—or would not further isolate Student within that classroom, e.g., by expanding the role of the aide or increasing the amount of pullout service.

As the parties well know, it is axiomatic that FAPE entails educating a child in the least restrictive environment (LRE). That is, to the maximum extent appropriate, a student must be educated with students who do not have disabilities, and "removal...from the regular educational environment [should] occur only when the

⁷As the party seeking a change in the status quo, the School has the burden of showing, by a preponderance of the evidence, that the current program is inappropriate and the proposed program is appropriate. Schaffer v. Weast, et al., 126 S.Ct. 528, 441 IDELR 150 (2005) On the other hand, Parent carries the burden on her claims of procedural violations and retaliation.

nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily.” See 20 USC Sec. 1412(a)(5)(A); G.L. c. 71B Sec. 3. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985). The LRE mandate must be balanced with Student’s entitlement to a program that will provide him with meaningful educational benefit by “measurably advancing the child toward the goal of increased learning and independence.” D.B., et al v. Esposito, et al., 675 F.3d 26, 34 (1st Cir. 2012)

Here, while Student has made gains in his inclusive setting, the record does not support the conclusion that remaining in this setting at this time will “measurably advance” him toward increased learning and independence. On the contrary, as stated above, the record indicates that Student is not now acquiring necessary skills that he appears capable of achieving under correct circumstances, and that the current setting might undermine independence.

On the other hand, the ILP proposed by the School is reasonably calculated to provide Student with FAPE in the LRE. The program offers all of the elements suggested by witnesses for both Parent and Malden: a small, non-distracting environment using multisensory language-based instruction and embedded social language teaching, coupled with flexible opportunities for inclusion. Student’s proposed IEP calls for initial inclusion in math and all specials, and such inclusion could be increased as appropriate. Moreover, by addressing Student’s core language-based needs and helping him with his distractibility, the proposed program has the potential to advance Student toward more meaningful and independent participation in his educational setting.

Next, I address the Parent’s claims of procedural violations and retaliation. First, with respect to the claims numbered B.1 through B.3, if any errors occurred in this regard, the Parent has failed to show any educational harm as a result and thus has no basis to seek compensatory relief. As for the retaliation claim, Parent has failed to make a threshold showing of an adverse action on the part of Malden. The email at issue (P-32) simply restates the law with respect to new IEP goals, namely, that a school district cannot implement new IEP goals without the parental consent. A school which implemented new IEP goals without such consent arguably would be violating the rights of the parent and student. Further, the Parent has proffered no evidence of harm to Student from the absence of a quarterly report in January 2014 in light of the annual review, with accompanying reports, that was held in mid-December 2013.

Finally, I address the Parent’s claim that Student was denied FAPE by Malden’s use of a non-certified substitute during Ms. Perrault’s absence or by allegedly denying Student the full complement of 1:1 paraprofessional services. The record simply does not support this claim. While Ms. Perrault was on leave, the record indicates that Ms. Nestor, who is herself a certified special education teacher, provided Student’s special education services. Parent has presented no evidence to the contrary or that Ms. Doucet had any responsibility for implementing Student’s IEP. Regarding paraprofessional

services, the uncontroverted evidence is that Ms. Rojas was and is exclusively occupied with assisting Student in accessing the curriculum. Parent presented no evidence to the contrary. That the paraprofessional may occasionally answer a brief question asked by another student does not undermine this conclusion.

CONCLUSION AND ORDER

Based on the foregoing, I find that the IEP and placement proposed by Malden in the IEP covering October 2014 – October 2015 are reasonably calculated to provide Student with FAPE in the least restrictive environment. In light of Student's long experience in inclusive settings, the parties are encouraged to assess Student's adjustment and progress in his new setting at the end of the current school year. I further find that Parent has not proved her claims of procedural violations, retaliation, or denial of FAPE by Malden.

By the Hearing Officer:

Sara Berman

Date

