

**COMMONWEALTH OF MASSACHUSETTS  
SPECIAL EDUCATION APPEALS**

**In Re: Boston Public Schools**

**BSEA #1300579**

**DECISION**

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

On August 10, 2012, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Boston Public Schools (Boston, BPS or School) was failing to provide the Student, who has autism, with a free, appropriate public education (FAPE). Specifically, Parents alleged that the substantially separate program for children on the autism spectrum, which Student had attended since January 2009, was not sufficiently intensive or ABA<sup>1</sup>-based to enable Student to make meaningful academic, social and behavioral progress. In their original hearing request, Parents sought an order from the BSEA directing Boston to fund Student’s placement at a private placement, the Nashoba Learning Group for the 2012 – 2013 school year. On August 15, 2013, the Parents amended their hearing request to request placement at Confidence Connection instead of Nashoba Learning Group. In the alternative Parents seek an order directing Boston to increase the number of Student’s ABA hours from 15 to 20 or 30 hours per week. The School responds that the Student is making effective progress within Boston’s program, that the outside placement sought by Parents is far too restrictive for Student, and that, further, the Student does not require additional hours of ABA instruction.

The parties requested and were granted several postponements of the hearing date for good cause, including completion of discovery and attempts at settlement. Parents requested and were granted leave to amend their hearing request a second time, in April 2013, to incorporate Boston’s most recently-proposed IEP, covering January 2013 to January 2014.

A hearing took place on April 11, 25, 26, May 7, and May 8, 2013 at the office of the BSEA in Boston, MA. Both parties were represented by counsel. Each party had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P-1 through P-55, School’s exhibits A through Q, tape-recorded testimony and argument, and the verbatim transcript created by the certified court reporters. At the parties’ request, the conclusion of the hearing was

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<sup>1</sup> Applied Behavioral Analysis

postponed to June 14, 2013 for submission of written closing arguments and the record closed on that day.

Those present for all or part of the proceeding were:

Parents

Sheila Deppner	Parents' Advocate
Joseph Bartholomew	BPS Office of Special Education & Student Services
Jennifer Linera	BPS Coordinator of Special Education & Student Services
Robert Putnam	May Institute, Consultant to BPS
Cindie Neilson	BPS Assistant Director of Special Education
Genteen Jean-Michel	BPS, Principal, Lee Academy
Isabel Cartagena	BPS, Paraprofessional
Jacqueline Durgin	BPS, Special Education Teacher
Erika Bowen	BPS
Janet Walden	BPS Occupational Therapist
Melissas Lopes-Yorio	BPS Occupational Therapist
Bryan Blair	BPS ABA Program Director
Lindsay Grogan	BPS School Psychologist
Melinda Kennedy	BPS Speech/Language Therapist
Leslie Deutchman	Executive Director, Apex Behavioral Consulting
Mary Kate DeFranca	ABA Therapist, Apex Behavioral Consulting
Ellen O'Donnell, Ph.D.	Neuropsychologist, LEAP Program, Mass. Gen. Hosp.
Rebecca Tubbs, Psy.D.	Integrated Center for Child Development (ICCD)
Eve Weber	Confidence Connection (testified by speaker phone)
Thomas Elkind, Esq.	Counsel for Parents
Michael Mozes, Esq.	Counsel for Parents
Andrea Brown, Esq.	Counsel for BPS
Andrea Alves Thomas, Esq.	Counsel for BPS
Jeff Becker	Counsel for BPS
Gabriella McDonald	Legal Intern, BPS
Sara Berman	BSEA Hearing Officer
Carol Kusnitz	Court Reporter
Jane Williamson	Court Reporter

**ISSUES PRESENTED**

1. Whether the IEP and services for January 2012 through January 2013 and January 2013 to January 2014 were and are reasonably calculated to provide the Student with FAPE.
2. If not, whether the Student requires a private day school placement at the Confidence Connection in order to receive FAPE.

3. Alternatively, if the IEP and services are not appropriate, whether they can be made appropriate by increasing the number of hours of ABA services and/or making other changes or adjustments.

### **POSITION OF PARENTS**

Student is a bright young child with autism who has not been making effective social, behavioral, or academic progress in his BPS program at the Joseph Lee Academy Pilot School during 2012 – 2013. Further, Student is not likely to make effective progress during the 2013-2104 school year under a substantially similar IEP. Despite recommendations from outside evaluators, BPS has not provided Student with a highly intensive, specialized program for children with on the autism spectrum. Student requires an educational placement that is infused with ABA in all settings, and should receive much or most of his instruction individually, in a discrete trial format, until the behaviors that interfere with his progress have been further reduced or eliminated. Student’s current program, which provides him with a total of 15 hours per week of individual ABA services divided between school and home, does not meet the standard of care for children on the autism spectrum, and is inadequate for Student. Moreover, the program does not provide the Student with an individualized behavioral plan or with adequate social skills instruction and does not adequately address his language-based difficulties. As a result, Student’s academic, social and behavioral progress is inadequate, especially in light of his potential. Student does not play with other children, and does not have friends, and continues to display behaviors that interfere with his learning.

The Confidence Connection program would provide the Student with the intensive, ABA-based behavioral and instructional intervention that he needs to reduce the autism-related behaviors that preclude academic and social growth commensurate with Student’s potential. Student has been receiving parentally-funded services from the Confidence Connection as a supplement to his school program, and has benefited from these services. Student would likely do well as a full-time student at Confidence Connection, and, hopefully, return to public school in one to three years.

Alternatively, even if Confidence Connection is not appropriate, Student needs to receive more ABA services than the 15 per week that he currently receives from BPS in order to make effective progress.

### **POSITION OF SCHOOL**

BPS has provided, and will continue to provide Student with ABA-based instruction, related services, home programming, consultation and oversight by Board Certified Behavior Analysts (BCBAs) and regular home-school communication, along with opportunities for inclusion with typical peers, within a school setting that is explicitly designed for children on the autism spectrum. Student has thrived in the programming provided by the BPS. Student has made effective progress in all domains: academics, social-emotional functioning, and daily living skills. These skills are not all at age or grade level, which is to be expected in light of his autism diagnosis; however,

even Parents concede that Student has demonstrated measurable growth in all areas of need. Student's growth will likely continue as he moves into the next phase of BPS' program at the Joseph Lee School.

The program requested by the Parents, Confidence Connection, is far too restrictive for the Student, who clearly benefits from inclusion opportunities. Moreover, if Student remains in the placement recommended by Boston, he does not require an increased amount of ABA service in order to receive FAPE.

### **FINDINGS OF FACT**

1. Student is a seven year old child who lives with his Parents and siblings in Boston. Since the age of three, Student has received special education services from the BPS, and has attended a program for children on the autism spectrum at the Joseph Lee Academy Pilot School (Lee Academy).<sup>2</sup> Student's eligibility for special education and related services is not in dispute. Student is described as a smart, playful, happy, friendly, very likeable child. Student is enthusiastic, eager to learn, and very responsive to his environment and to other people. (Parents, Durgin, O'Donnell, LaFranca,
2. According to testing conducted in December 2012, Student's cognitive performance is uneven, with average-range basic language, nonverbal, and spatial reasoning skills and much weaker higher-order language reasoning, social pragmatic, and executive functioning skills. (P-45, O'Donnell) Academically, as of December 2012, Student had generally average-range skills in basic reading, spelling, and math calculation, but his skills were weaker in reading comprehension and math problem solving.
3. Consistent with his diagnosis of autism, Student has difficulty with communication, attention, and social interaction. He has some stereotyped behaviors (e.g., talking to himself and "hand puppets"). He tends to be self-directed and is usually not able to engage in age-appropriate reciprocal play with other children. (Mother, P-45)
4. Student received a diagnosis of PDD-NOS when he was about 15 months old. Starting at age 18 months, he received Early Intervention (EI) services, consisting of speech/language therapy, ABA and Floortime therapies, visits from a developmental specialist, music therapy, and a toddler group. (P-3)
5. The BPS conducted its initial evaluation of Student in September and October 2008, shortly before Student's third birthday. The BPS evaluation consisted of psychological, speech/language, educational, occupational therapy, and ABA assessments. (P-1 – P-4)

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<sup>2</sup> The Lee Academy serves children in grades K-0 through 1 feeds into the Joseph Lee School for Grades 2 through 5. The Lee Academy and Lee School contain both general education classrooms and an "autism strand" comprising substantially separate classrooms for children with autism. (Lacet) At all relevant times, Student has attended the Lee Academy. BPS' plan is for Student to move on to the Lee School, remaining in the autism strand, for 2013-2014, when he will be in second grade.

6. The BPS evaluation revealed that Student had significantly reduced communication skills, clustering at the 15 month level (at Student's age of about 33 months). Student could follow some rote directions, and identify some familiar objects. He communicated primarily with gestures, a few signs, and a small amount of spoken language. (P-3) At home, Student reportedly was impulsive and sometimes tried to break away from his Parents and run to the street. He sometimes imitated other children but did not play with them. He had tantrums at home and in the community when he was frustrated. Overall, Student had strengths in his motor skills, imitation skills, and ability to play with toys appropriately, and weaknesses in his social interactions, ability to comply with teacher requests, and communication skills. (P-6)
7. In January 2009, BPS issued an initial IEP for Student covering the period January 2009 – November 2009, which contained goals in the following skill areas: social/emotional, language, self-help, academic readiness, and motor. The IEP provided for placement in a substantially separate early childhood classroom at Lee Academy, together with pullout services in speech/language and occupational therapy and 60 minutes/day, 4 days per week of individual ABA services. Parents fully accepted this IEP and placement. (P-9)
8. According to BPS, Student made progress during the term of the initial IEP, especially in the areas of language, self-help and academic readiness. In November 2009, Boston issued a successor IEP providing for continued placement in the autism program at Lee Academy with updated goals and objectives. In January 2010, Parents partially rejected this IEP because they felt it provided insufficient amounts of ABA, speech, and OT services. (P-16) Despite Student's progress in some areas, Parents felt that Student had not made sufficient progress in language, behavior, or social skills, and was not generalizing skills to the home or community. (Mother, P-16)
9. In March 2010, Student was evaluated by Leslie Deutchman, MS, BCBA. Ms. Deutchman is the Executive Director of Apex Behavioral Consultation, and is a BCBA with approximately 30 years of experience both in providing direct ABA services and in supervising ABA therapists. (Deutchman)
10. After observing Student at home and in his classroom, Ms. Deutchman concluded that

‘[i]ntensive ABA services are vital to allow [Student] to develop the critical skills to make academic gains and establish social competency. At 4.3 years old, he is almost past the usual age when such behaviors are addressed and nearly past the crucial developmental state when language and behavior competence are most readily mastered. His deficits are a profound obstacle to future independence and school and community success.’ (P-16)
11. Ms. Deutchman reported the following areas of concern, particularly in the home setting:

- Lack of language skills
- Lack of social skills
- Lack of grooming skills
- Lack of dressing skills
- Lack of appropriate eating skills
- Lack of interactive play skills
- Lack of age appropriate independence
- Lack of executive functioning skills
- Echoic language
- Scripted language
- Lack of pre-academic skills
- Lack of peer interaction
- Lack of age-appropriate attending skills
- Lack of age-appropriate toileting skills
- Lack of safety skills, safety awareness
- Food issues
- Bolting
- Lack of eye contact
- Maladaptive behavior, screaming, mouthing. (P-16)

12. Ms. Deutchman recommended a home-based ABA program consisting of at least 15 (fifteen) hours per week of both discrete trial training (DTT) and natural environment training to address language and social development as well as 1.5 hours per week of family consultation. She stated that the ABA home program should be highly-specialized, systematic, and comprehensive, with systematic instruction in all deficit and at-risk areas, using “scientifically validated behavior analytic procedures and programming based on the principles of [ABA]” Staff should be supervised by a highly-experienced BCBA. (P-16, Deutchman)

13. Ms. Deutchman concluded that Student had “much unmet potential,” evidenced by his being “very likeable and charismatic,” with “the social relatedness and interest in his environment that will allow him to maximize interventions.” She further concluded that Student would “learn critical skills and thrive when intensive, high-quality home services are provided.” On the other hand, Ms. Deutchman opined that “[p]rogramming that is inadequate both quantitatively and qualitatively will guarantee continued failure,” and put Student “at great risk for escalating behavior problems and dramatic limitations on his academic performance, social development, and ability to be independent as an adult.” (P-16)

14. The record does not indicate what BPS’ immediate response was to Ms. Deutchman’s report. In June 2010, the Parents rejected the November 2009 – November 2010 IEP in full. At some time during the 2010 – 2011 school year, Parents and Boston negotiated an agreement under which Student’s individual ABA services would be increased from 4 to 15 hours per week, divided between home (5 hours per week) and school (10 hours per week). (Mother, Deutchman, Durgin, Linera) Under the terms

of this agreement, the provider for Student's ABA services was the program operated by Ms. Deutchman, Apex Behavioral Consulting (Apex), which negotiated a contract with BPS for this purpose. (Deutchman, Linera) Apex is not the ABA provider associated with the Lee Academy autism program; rather, at all relevant times, such services were provided and/overseen through a BPS contract with the May Institute. (Louis-Michel, Putnam)

15. From the end of the 2010 – 2011 school year forward and throughout the period covered by the disputed IEPs up until the time of hearing, Student has been receiving the 15 hours of weekly ABA services referred to above. Student's school-based ABA provider was Mary Kay LaFranca, who was supervised by a BCBA, Andrea Barruch and by Ms. Deutchman. (LaFranca, Deutchman)
16. BPS conducted an annual review in approximately May 2011, when Student was approximately 5 ½ years old. At that time he was continuing in his placement in a substantially separate Early Childhood classroom for children with autism at the Lee Academy. His class consisted of seven children, aged 3 to 5 years old, and three adults. The classroom was structured, with a visual support system in place. (P-20) In addition to classroom instruction, Student was receiving small group speech/language therapy 3x30 minutes/week and occupational therapy 2x30 minutes per week. One of the weekly sessions was actually a combined speech/occupational therapy session called "SPOT." (P-18)
17. In an educational assessment dated May 5, 2011, Student's teacher, Ms. Melissa Angelucci, who had taught Student for the prior 2.5 years, stated that Student had made "some exceptional gains in all areas of learning." Specifically, Student had strong academic/readiness skills, as well as increasing language, social/emotional, and play skills. Student was participating in the general preschool curriculum with very few modifications, e.g., practicing simple addition, beginning to write his name and the letters of the alphabet, categorizing pictures by beginning letter sound, learning to recognize sight words, and similar tasks. Student's ability to pay attention during work centers (some of which took place in the regular preschool classroom) had "improved drastically over the past few months," and Student was able to sit independently through a 30 minute circle time activity and a 40 minute center time activity. Student's scores in the Phonological Awareness Literacy Screening, administered in May 2011, fell within or above the "normal" range for grade level K-1 in most subtests. (P-20)
18. Student's communication ability had increased. He had become able to ask for what he wanted during the school day, answer "wh" questions, become emotionally invested in his surroundings, and express likes and dislikes, where previously he had seemed to proceed indifferently through the day, screaming or having tantrums when he was upset. Student had "drastically" improved play skills to include pretend play, and would interact with peers with prompting, modeling, and structure.
19. Student's behavior had improved with a "newfound understanding of consequences" of a behavior program consisting of earning "happy faces" or "sad faces" for

compliance/non-compliance, earning choice time, and being timed-out for occasionally aggressive behavior, which the teacher seemed to view positively, as a sign of a new emotional investment in his day-to-day life. Student previously had not seemed motivated by consequences or rewards. (P-20)

20. Finally, Student had made progress in the area of self-help skills. He was completely toilet-trained, and independent with breakfast and lunch activities as well as morning and afternoon routines. (P-20)
21. Student continued to have weaknesses in behavior and social skills, engaged in “scripting” during the day (repeating phrases and comments he had heard), as well as echolalia, and engaged in parallel play with other children rather than interacting with them. (P-20)
22. The speech/language report written for the annual review in May 2011 stated that Student’s expressive language, particularly his vocabulary, had “blossomed.” The speech therapist was using a total –communication approach with Student. The therapist noted that Student’s progress was directly related to his focus and attention on the task being addressed. He progressed well when focused, but was easily distracted or self-directed. (P-18)
23. Meanwhile, Parents were concerned that Student’s behavior at home seemed worse since he had begun the Lee Academy program, with more screaming, yelling, and oppositional behavior. Parents attributed Student’s gains to the ABA services he was receiving rather than his school placement. (P-20) In May of 2011, BPS issued a proposed IEP for May 2011 to January 2012. This IEP provided for continued placement of Student at the Lee Academy, with Grid C services in academics, speech therapy (3x30 minutes/week), occupational therapy (2x30 minutes/week), and 5x2 hours/week of ABA services. Parents rejected this IEP. (P-16)
24. In June 2011, Parents obtained a neuropsychological evaluation from Ellen O’Donnell, Ph.D. at the LEAP program of Massachusetts General Hospital (MGH). Dr. O’Donnell’s evaluation consisted of standardized testing and behavioral observations as well as an interview with Parents. Student’s cognitive performance, as measured by the Differential Ability Scales (DAS) fell in the “average” range for nonverbal reasoning and the “low” range in his language skills. Achievement scores on the WIAT were “average” for early reading skills and “below average” for math problem solving. Student’s language skills ranged from “average” for an expressive vocabulary test to “borderline” or “low” for language measures requiring comprehension and attention to detail. Testing also indicated that Student struggled with memory, attention, and executive functioning. Parent and teacher surveys of Student’s adaptive functioning indicated that Student had much weaker skills in the communication, social, play, leisure, independence, health/safety, and self-care domains than he did in academics. (O’Donnell, P-20)
25. In general, Dr. O’Donnell concluded that Student met the criteria for autism based on qualitative impairments in social interaction and communication, a pervasive pattern

of restricted and stereotyped behaviors, and impaired self-care and social skills. (P-20)

26. Dr. O'Donnell concluded that Student had strengths suggesting a good prognosis, including average nonverbal reasoning ability, functional academics, some ability for shared interest, and gains from increased hours of ABA. However, Dr. O'Donnell felt that Student was not yet ready to function independently in an inclusion classroom (which was anticipated for the 2011 – 2012 school year). (P-20)
27. Dr. O'Donnell recommended placement in a substantially separate, 12-month ABA infused program for children on the autism spectrum. She further stated that Student needed intensive individualized ABA services at home and at school, with a minimum of 12 hours per week of home services; at least 3x45 minutes per week if individualized speech/language therapy focusing on articulation, pragmatic language and social skills; regular meetings of Parents and providers, daily home-school communication, close monitoring by a specialized autism treatment team, and followup testing in 1.5 to 2 years. (P-20)
28. BPS convened a Team meeting after receiving Dr. O'Donnell's report. Parents requested increased ABA services in light of Dr. O'Donnell's report, but the School did not grant this request. (Mother, Linera) In October 2011, the School issued a proposed IEP for January 2012 – January 2013 that continued Student's placement in the Lee Academy, with the same number of ABA hours as previously. Parents partially rejected this IEP in November 2011; specifically, they rejected the absence of the following: a year-round ABA program, an additional 7 hours per week of home-based ABA, additional OT and speech therapy, and a 1:1 aide for all inclusion activities. The Parents requested continued services pending resolution of the disputed IEP. (S-D)
29. Meanwhile, in October 2011, in response to Parents' request, BPS proposed an "unscheduled re-evaluation;" i.e., agreed to conduct Student's upcoming 3-year re-evaluation a few months earlier than originally planned. ( P-17) This evaluation comprised psychological, educational, occupational therapy, speech/language and ABA assessments.
30. The psychological assessment consisted of an observation of Student on three different days in December 2011 by Leslie Grogan, BPS school psychologist. Ms. Grogan observed Student in his classroom and during inclusion activities, and reported that Student appeared happy, managed transitions between activities appropriately, seemed to respond well to an individual behavior plan (earning stars for work completion) and although he became upset (crying, becoming angry, moving around) on one occasion when he had to go to gym class when he needed to earn one more star, he was able to follow his teacher's prompts to use strategies to calm down. Student seemed aware of peers, and would interact with them if prompted. (P-26) In inclusion technology class, Student worked appropriately with an I-Pad and headphones, and was easily redirected when he began flapping his hands. Student also was able to participate appropriately in an inclusion gym class

with 23 students and 5 adults, Student was able to participate appropriately in a team and individual activity, and responded to redirection when he occasionally got off task. Ms. Grogan concluded that Student was deriving benefit from his classroom setting and interventions, as well as from inclusion opportunities. (Grogan, P-26)

31. In January 2012, an ABA evaluation progress report was completed by BCBA Andrea Barruch, who supervised Student's ABA program, and Leslie Deutchman. Ms Barruch reported that Student had responded "extremely well" to discrete trial training. As of the date of the report, Student had developed his skills in "manding" (i.e., making his wants or needs known with words), "tacting," (labeling) objects, actions, community helpers, classes of objects; responding to one-step directions, playing independently with toys or craft materials, engaging in parallel play and interacting with peers when prompted, as well as spontaneously vocalizing with words and sentences. Student's academic skills as addressed in the ABA sessions were also progressing. (P-30)
32. Ms. Barruch's assessment of Student with the VB-MAPP Barrier Assessment revealed continued obstacles to Student's language acquisition, including mild to moderate levels of minor negative behaviors (screaming, crying, non-compliance), and stereotypy. The levels of negative behaviors were diminishing to very low levels in the context of school-based ABA. Ms. Barruch recommended continued intensive ABA services. (P-30). The educational assessment noted that Student had strengths in his reasoning and academic skills as well as his creativity and ability to respond to structure and positive reinforcement. Student had continued weaknesses in social interaction skills and distractibility. (P-32)
33. In March 2012, Parent obtained an observation of Student in his classroom by Rebecca Tubbs, Psy.D., from the Integrated Center for Child Development (ICCD). Dr. Tubbs is a pediatric neuropsychologist with experience observing children in classroom settings, including children on the autism spectrum. (Tubbs) Dr. Tubbs observed Student for a total of about three hours, on two different days. In sum, Dr. Tubbs concluded that Student's program was not intensive or focused enough to consistently address his high level of distractibility, off-task behavior, and language deficits. She felt that Student had a great deal of potential to make progress that was not being developed because so much time was being spent on redirecting and managing Student after he was off task. Much of the redirection was being done by the teacher at the same time that she was trying to do group instruction; the aides were relatively uninvolved, or became involved after the fact. (P-34, Tubbs).
34. Dr. Tubbs noted that Student's ABA services from the Apex provider took place outside of the classroom, the program books were kept outside of the classroom; Dr. Tubbs was told explicitly that there was no carryover of ABA goals or activities into the classroom. (P-34, Tubbs)
35. Dr. Tubbs recommended placement in a more specialized program that "can comprehensively address his language-based deficits across curriculum, while simultaneously managing his behavioral dysregulation and attention vulnerabilities."

She stated that the program should be guided by ABA principles throughout the day, and recommended at least 30 hours of individual ABA instruction per week (divided between home and school), most instruction delivered in individual, discrete trial format, and/or 1:1 support for all academics, a highly specific behavioral intervention plan to address dysregulation and atypical behavior, daily, ongoing data collection, and supervision of the entire program by a BCBA. (P-34, Tubbs)

36. The Team reconvened in approximately May 2012 to consider Dr. Tubbs' report, and on May 9, 2012 issued an IEP that essentially continued the configuration of services and placement as the prior IEPs, with adjusted goals and objectives. (P-27) Parents rejected the sufficiency of ABA services, the absence of 1:1 services, and the particular classroom placement, but requested that the services in the IEP be implemented pending resolution of the dispute. (P-27)
37. Dr. Tubbs reiterated the same programmatic recommendations she had made in her prior report, and commented that Student had been attending his BPS program for several years, but had made only modest progress in his areas of need. She felt that he had the potential to make more progress with a more intensive ABA-based program. (Tubbs, P-53)
38. Parents filed the hearing request in this matter in August 2012; meanwhile, Student continued at the Lee Academy program for the 2012 – 2013 school year.
39. Dr. O'Donnell evaluated Student a second time on November 7, 2012, after the Parents had requested the instant hearing, and issued a report on or about December 3, 2012. Based on standardized testing, Dr. O'Donnell concluded that Student's intellectual functioning was similar to that measured in prior testing. He had gained some ground in math, but scored relatively lower on early reading skills measures than he had in 2011. (P-45, O'Donnell)
40. Dr. O'Donnell recommended the following: a substantially separate, full-day, full year ABA-infused program, with intensive, individualized therapies provided by a trained ABA specialist at school and at home. She recommended that all academics be taught in an individualized special education setting, tutoring provided by an aide qualified in ABA, with most information presented using discrete trials in light of Student's learning and memory weaknesses. Student needed instruction focused on helping him apply his existing basic academic skills to reading comprehension and math problem solving. Dr. O'Donnell further recommended increased OT and speech therapy. Dr. O'Donnell further recommended a social skills curriculum used during all group time and a daily social skills group.
41. In April 2013, Dr. Tubbs again observed Student at the Lee Academy program. Dr. Tubbs reported that she observed some improvements to the program: the aides were more engaged with the children, there was a BCBA, Brian Blair, who had been serving as a classroom consultant since January 2013, the class-wide behavior plan was more visually accessible. Dr. Tubbs felt that the program was still inappropriate

for Student however, for the same reasons that she had cited the prior year: insufficient ABA instruction for Student, lack of pro-active intervention in Student's off-task behavior, lack of carryover between the ABA provider and the classroom, and an overly slow pace of instruction for Student (once engaged, Student would complete academic tasks quickly, then drift off task). (Tubbs, P-53)

42. Moreover, Dr. Tubbs was concerned by what she termed a change in Student's presentation; his activity level was lower, but he seemed more anxious, angrier, and was talking to himself and scripting in place of some of the physical activity he had exhibited when he was younger. (Tubbs, P-53)
43. At all relevant times in this matter, Parents have provided numerous supplementary services and activities for Student. Specifically, Student receives weekly private speech therapy and occupational therapy. He attends a weekly social pragmatics group at Confidence Connection during the school year, and, as described below, attends summer camp and private summertime ABA therapy at Confidence Connection as well. Additionally, Student attends swimming, dance, art and piano lessons, all of which he enjoys. (Mother, Father)

### **School's Program**

44. At all relevant times, Student has been enrolled in the autism strand at the Lee Academy Pilot School. As stated above, as of the hearing date, the Lee Academy served young children in grades K-0, K-1, K-2 and 1. The school serves a total of about 180 children and comprises both general education classrooms and five classrooms for young children with autism. One of these five classrooms is integrated; the others are substantially separate. Each specialized classroom is paired with a general education classroom to facilitate inclusion activities. Each of the specialized classrooms is staffed by one teacher and two "surround care" paraprofessionals. (Jean-Michel)
45. Surround care paraprofessionals were introduced at the Lee Academy during 2011-2012. In exchange for a somewhat higher salary than most BPS paraprofessionals, these aides participate in a little over 40 hours of professional development (as opposed to the 8 hours required of most paraprofessionals) and meet monthly with the professional teams at the school. Some of the training is in ABA. (Jean-Michel)
46. The Lee Academy has had a partnership with the May Institute, which provides staff consultation and training, including supervision of 4 full-time BCBA's and 20 ABA therapists. Additionally, the Lee Academy has an autism strand specialist, Erika Bowen, who is the building-based autism specialist. (Jean-Michel, Bartholomew)
47. The contract between BPS and the May Institute is scheduled to terminate during the 2013-2014 school year, and replaced, for the most part, with BCBA's and ABA therapists who have been trained and employed by BPS. (Putnam, Bartholomew)

48. Beginning in 2013 – 2014, the structure of the Lee School will change in that the Lee Academy Pilot School will administratively merge with the Joseph Lee School. Student is slated to move to the Lee School as a second grader, for 2012-2013, but will continue in the autism strand, in a classroom similar to his first grade classroom. (Jean-Michel)

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

49. The Parents seek placement for Student at the Confidence Connection in Needham, MA. Confidence Connection is a clinic and school for children with autism. The clinic provides various home and clinic based services for children with ASD, including individual ABA services, speech/language therapy, social groups, school consultation and the like. Confidence Connection also runs a summer program, Camp Confidence, an integrated social camp. (Weber)
50. Confidence Connection Day School opened in January 2013. As of the hearing date, the school was serving three students, and plans to serve a maximum of 10 students. The school has applied for DESE approval and as of the hearing date was awaiting review of its application from DESE. (Weber)
51. Each Confidence Connection student is taught by a master's level teacher, trained in ABA, and receives 1:1 teaching throughout the school day. Additionally, when the school has its full complement of 10 students, it will be staffed by 2 BCBA's. Students' programs are highly individualized, but also include group instruction in music, Spanish. The goal of Confidence Connection Day School is to serve students who could benefit from inclusion programming but for interfering behaviors; to serve those children with intensive programming to stabilize their behaviors, then to move them into public school settings. (Weber)
52. As stated above, Student has participated in Confidence Connection's summer camp as well as a weekly social skills group for the past couple of years. Additionally, Student received ABA instruction during the summer of 2012 as well as camp. Parents feel that Student has benefited tremendously from Confidence Connection, particularly the ABA services. Mother feels that his behaviors improved after he attended both ABA programming at Confidence Connection and camp during summer 2012, but then deteriorated once he had been back in school for a few weeks. (Mother)
53. Dr. Tubbs observed Confidence Connection in the spring of 2013 and felt that it would be an appropriate program for Student. (Tubbs)'

### **FINDINGS AND CONCLUSIONS**

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, et seq., and the Massachusetts special education statute, G.L. c. 71B ("Chapter

766”). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to his unique needs and potential, and is designed to provide ‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); North Reading School Committee v. BSEA, 480 F. Supp. 2d 489 (D. Mass. 2007); citing Lenn v. Portland School Committee, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993).

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

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

Education must be provided in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to change the status quo. In the instant case, as the moving party challenging the School’s proposed IEP and seeking to change Student’s placement, Parents bear this burden. That is, in order to prevail, Parents first must prove, by a preponderance of the evidence, that Boston’s IEP and services are not appropriate, i.e., are not reasonably calculated to provide Student with FAPE. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

The parties substantially agree on Student’s profile. Student has many strengths, including a friendly, charismatic, enthusiastic personality, creativity, eagerness to learn, relatively strong basic academic skills, and intact non-verbal reasoning ability. There also is no dispute that Student’s ability to learn is significantly impaired by autism-related distractibility, self-directedness, social skills deficits, and, sometimes, emotional dysregulation. Additionally, Student has significant difficulty with aspects of language

which interfere with his reading comprehension, understanding of directions, and other academic tasks.

Parents argue that Student has not made effective educational progress because Boston's educational program has failed to provide him with the specialized, intensive, individualized ABA programming he needs to address his social and behavioral deficits so that he can acquire more age-appropriate academic, social and self-care skills. Parents rely primarily on the testimony and report of Dr. O'Donnell and Dr. Tubbs, who believe that Student's current program lacks the intensity of ABA programming that the Student requires to make meaningful progress.

On the other hand, Boston argues that Student has made effective progress, and will continue to do so in Boston's program. Boston points to Student's acquisition of basic academic and self-help skills as well as his improved behavioral regulation during his tenure at the Lee Academy, arguing that Parents' expectations of how fast Student can learn might be unrealistic in light of his autism diagnosis. Boston further argues that the Parents' proposed program at Confidence Connection is far too restrictive for Student.

Based on the evidence, I find that the Parents have met their burden of demonstrating that Student's current IEP and placement do not provide Student with a sufficient amount or intensity of ABA services to effectively address the behavioral and attentional issues that interfere with Student's academic, social and self-care progress. Student clearly has made academic and behavioral progress at the Lee Academy. He now is able to speak in sentences, make his wants and needs known, and follow a school routine. He can interact with other children if prompted. He has acquired many basic literacy and math skills.

However, Student's autism-related behavioral and social skills deficits still significantly interfere with his learning. The testimony and reports of Dr. Tubbs and Dr. O'Donnell to this effect, as well as their detailed testimony and reports stating that the BPS program, as constituted when they observed it, was not addressing Student's behavioral needs with the consistency and intensity that he requires, are persuasive and credible, as are their strong opinions that Student needs many more hours of ABA service than he has been receiving. Additionally, the testimony and reports from Ms. Deutchman, Ms. DeFranca, and Parents regarding Student's favorable response to rigorous ABA-based instruction, both in terms of reducing negative behaviors and increasing skill acquisition, is persuasive and largely undisputed.

Ms. Deutchman, the representative of Apex Consulting, Student's ABA provider, was unwilling to give an opinion as to whether Student would benefit from more hours of ABA service, but neither she nor Ms. DeFranca stated that he would not benefit. Additionally, Ms. DeFranca testified that she did not really have enough time to optimally facilitate Student's interactions with peers.

Additionally, it is undisputed that for reasons that are unclear, there was little or no formal collaboration or sharing of data between the Apex providers and the classroom teachers, which had to have reduced the effectiveness of Student's program.

Finally, Student's Parents have provided him with supplemental speech/language, occupational therapy and social skills services, summer ABA services, and many enrichment lessons and activities. It is impossible to determine how much of Student's progress is attributable to the additional services his Parents have provided for him.

While the Parents have met their burden that Student requires additional ABA services, they have not demonstrated that Student needs to be placed in an as-yet unapproved, new, private day school that will serve a maximum of 10 students, all with autism, in order to receive FAPE. With additional hours of ABA services, at home and in school, closely linked with his classroom instruction, as well as additional, ABA-based facilitation of social interactions, the record supports the conclusion that Student can benefit from his less restrictive, public school placement.

The record supports a significant increase in the ABA services provided to Student. The only remaining issue is how many additional hours should be provided, and the only evidence on the record on this point is the recommendation of Dr. Tubbs and Dr. O'Donnell for a total of 30 hours per week of individual ABA services, divided between home and school in proportions decided by the Team.

### **ORDER**

Boston shall immediately amend the Student's IEP to increase the number of hours of individual ABA services to at least 30 (thirty) hours per five-day cycle, to be apportioned between home and school-based services as determined by the Team in light of Student's academic, social, behavioral, and self-help needs. Boston also shall adjust Student's program to ensure close coordination between the ABA providers and classroom teachers, facilitation of social interactions, appropriate data collection and analysis, and supervision by appropriately credentialed personnel.

By the Hearing Officer:

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Sara Berman

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Date: July 24, 2013