

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

In re: Jacqueline¹

BSEA #1408578

DECISION

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

A hearing was held on April 28, 29, 30 and May 15, 2015 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student's Mother	
Student's Father	
Mary Ann Biele	Occupational Therapist, Brookline Public Schools
Susan Bruce	Professor, Boston College (by telephone)
Leslie Deutchman	Executive Director, APEX Behavioral Consulting
Audra Francisco	Speech and Language Pathologist, Brookline Public Schools
Caryn Glazer	Adapted Physical Education Teacher, Brookline Public Schools
Katherine Hale	Adaptive Learning Center Teacher, Brookline Public Schools
Barbara Keenan	Physical Therapist, Brookline Public Schools
Lisa Nowinski	Psychologist, Lurie Center for Autism
Christina Pello	BCBA , Brookline Public Schools
Gretchen Timmel	Education Specialist, Lurie Center for Autism/MGH
Naami Turk	Psychologist, Consulting to Brookline Public Schools
Colleen Yorlets	BCBA, Realizing Children's Strengths Learning Center
Mary Kay Deiss	Educational Team Facilitator, Brookline Public Schools
Emily Frank	Special Education Administrator, Brookline Public Schools
Karen Schmukler	Assistant Superintendent, Brookline Public Schools
Andrea Wizer	Consultant, Advocate for Parents
Dan Heffernan, Esq.	Attorney for Parents
Janine Solomon, Esq.	Attorney for Parents
Colby Brunt, Esq.	Attorney for Brookline Public Schools
David Murphy, Esq.	Attorney for Brookline Public Schools, observing
Sean Feener	BSEA Intern
Ricki Meyer	Law Clerk for Parents' Attorney
Sarah Spofford	Legal Intern for Parents' Attorney
Alexander Loos	Court Reporter

¹ "Jacqueline" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

The official record of the hearing consists of documents submitted jointly by the parties and marked as exhibits J-1 through J-53; a document submitted by the Brookline Public Schools and marked as exhibit S-1; documents submitted by the Parents and marked as exhibits P-1 and P-2, and approximately four days of recorded oral testimony and argument. Several exhibits were marked for identification but not allowed in evidence. As agreed by the parties, written closing arguments were due and received on May 27, 2015, oral arguments were made on June 4, 2015, and the record closed on that date.

INTRODUCTION

At issue in this case is the continuing efficacy of the educational services provided for Jacqueline by the Brookline Public Schools. The individuals who work with Jacqueline on a daily basis care about her and believe they are serving her well. Jacqueline's parents respect those individuals and appreciate all they have done for Jacqueline. The case comes down to a question of methodology and ultimately placement: is Brookline's Individualized Education Program ("IEP") for Jacqueline reasonably calculated to allow Jacqueline to make meaningful educational progress, or does she require more specialized programming? For the reasons below, I find the latter: Jacqueline's parents have established that Brookline is not currently providing her with the services she needs in order to make meaningful educational progress. I find further that Realizing Children's Strengths Learning Center (RCS), the program selected by Jacqueline's Parents, is an appropriate placement for her.

ISSUES

1. Whether the IEP most recently proposed by Brookline Public Schools on January 13, 2015 (as amended March 13, 2015) is reasonably calculated to provide Jacqueline with a free appropriate public education in the least restrictive setting;²
2. If not, whether additions or other modifications may be made to the IEP in order to satisfy this standard;
3. If not, whether Jacqueline is entitled to public funding for placement at RCS.

FINDINGS OF FACT

1. Jacqueline is a nine and a half year old girl described by her parents and teachers as a happy, sweet, friendly, energetic, engaging, funny and loving child. (Mother, Hale, Francisco, Pello) She carries a long-standing diagnosis of Autism Spectrum Disorder

² Parents' Hearing Request, filed on May 27, 2014, sought a finding that the Individualized Education Program (IEP) proposed for the school year inclusive of that date (December 3, 2013 to December 2, 2014) was not calculated to provide Jacqueline with a free appropriate public education (FAPE). New IEPs have been proposed and amended since that time. As the Parents seek no compensatory or retroactive relief and little, if any, evidence was offered specific to previous IEPs, this decision is limited to the IEP proposed in January 2015, as amended in March 2015.

(ASD) and was diagnosed with an Intellectual Disability in March 2014, though those who lived and worked with her had noticed signs of the intellectual disability for some time. (J-31, Mother) Jacqueline's evaluations place her considerably below age level in all areas and she has a variety of sensory, cognitive, physical, and communicative needs. (J-35, J-31, J-23, J-27) Jacqueline is non-verbal and uses an augmentative communication device, referred to colloquially as her "talker," (AAC or "talker") to communicate.³ She tends to seek sensory input and enjoys big hugs and swimming. (J-35, Keenan, Hale).

2. Jacqueline was born at 39 weeks following a pregnancy significant for IVF, polyhydramnios, and a single artery umbilical cord. Her Apgar scores were five and eight at one and five minutes, respectively. Jacqueline was an easygoing baby, and was delayed in meeting all of her developmental milestones. She began receiving Early Intervention services around the age of 16 months, at which time she was identified as having a global developmental delay. Jacqueline did not walk until she was 18 months old, but her parents discovered later that frequent ear infections had impacted her gross motor skills, and she began walking one month after ear tubes were placed. Jacqueline began speaking single words when she was between 16 and 18 months old. Within a few months of starting to speak, however, she stopped using all words and has remained nonverbal since that time. (J-31, J-34, J-35, Mother).
3. Jacqueline transitioned from Early Intervention into the public school system at the age of three. Initially, she attended a substantially separate preschool program at the Lynch Center. In the fall of 2011, Jacqueline was transitioned into a kindergarten program at the Lincoln School Adaptive Learning Center (ALC), where she has remained. (J-34, J-35)
4. In January 2010, when she was four years old, Jacqueline was evaluated by Tina Lafiosca, who administered the Bayley Scales of Infant and Toddler Development – 3rd Edition; the Receptive-Expressive Emergent Language Test – 3rd Edition (REEL-3), the Autism Diagnostic Observation Schedule (ADOS), and the Vineland Adaptive Behavior Scales – 2nd edition (Vineland –II). At that time Jacqueline's cognitive skills were equivalent to those of a 20 month old; her receptive language measured 13 months, expressive language nine months, and her gross motor skills were placed at the 18 month level. On the REEL-3, Jacqueline's receptive language fell at the 12 month level and her expressive language skills at the seven month level. The Vineland-II confirmed first percentile scores in all areas of adaptive functioning, and ADOS results were consistent with an Autism diagnosis. (J-34, J-35)
5. In December 2011, when she was six years old, Jacqueline was evaluated by Rebecca Therriault with the Children's Hospital Augmentative Communication Program. By that time Jacqueline was using an augmentative communication device called the Vantage Lite, and the results of Ms. Therriault's evaluation included recommendations for applications and activities to enhance her use of the device. (J-35)

³ Jacqueline initially began using a device called the Vantage Lite. (J-35) She currently utilizes the Language Acquisition for Motor Planning (LAMP) for Life Program on her iPad. (Francisco)

6. Jacqueline has been attending the Adaptive Learning Center classroom at the Lincoln School in Brookline since kindergarten. (Mother, Hale, Turk) The ALC, a substantially separate program, serves a range of students with multiple moderate to severe special needs, including developmental delays, health impairments, co-existing disabilities such as ASD and an intellectual impairment, or intellectual impairment and a health impairment. (Turk) The ALC classroom is divided in two by a large partition, with Jacqueline, her teacher, a paraprofessional, and two (at times three) other students on one side, and another ALC teacher and her students on the other. (Hale)
7. Jacqueline receives much of her instruction from her teacher, Katherine Hale, in a one-on-one setting. (Bruce) Jacqueline also receives direct speech and language services three times a week for 30 minutes each time; occupational therapy two times a week for 30 minutes each time; physical therapy one time a week for 30 minutes; and adaptive physical education two times a week for 30 minutes each time. (J-2) She receives ten hours a week of home-based services and extended school year programming for approximately six weeks. She does not go longer than one week without services. (J-2) Jacqueline has strong bonds with many of the professionals with whom she works at the Lincoln School. (Hale, Francisco, Bruce, Turk)
8. Throughout her day, Jacqueline utilizes her AAC, which works by converting her input into a voice output. Adults and other students can communicate with her through their own unique methods of communication, whether non-verbal through a different kind of AAC or verbal. (Francisco).

Jacqueline has limited opportunities to interact with other students who also use high-tech voice output devices like hers. (Francisco) At this point, Jacqueline might be able to communicate with the four other students in the ALC who use AACs if each student were to be supported by his or her communication partner (Francisco), though no testimony was offered regarding Jacqueline having had this type of exchange other than with the student with whom she is paired at times.

9. Jacqueline's current IEP, which covers the period from January 13, 2015 to January 12, 2016 (as amended March 13, 2015), calls for continued placement of Jacqueline in the ALC. It includes the services enumerated in Finding 7, as well BCBA supervision of the special education teacher or aide once a week for 15 minutes; AAC programming delivered by the speech and language pathologist once a week for 8 minutes; speech and language consultation to the special education teacher or aide once a week for 15 minutes; and Inclusion Support five times a week for 30 minutes in the ALC classroom. (J-2) Previous IEPs included six hours a week of home-based ABA services; this has recently been increased to ten hours a week.⁴
10. Jacqueline's classroom teacher Ms. Hale has been teaching in the ALC for two years. She earned her Master's degree in Education in 2013 with a concentration in Severe Special

⁴ The IEPs (and amendments thereto) developed for Jacqueline since December 2, 2013 have included substantially similar services. (J-4, J-5, J-6, J-9, J-11, J-14, J-15) For the reasons explained in Note 2, above, they will not be discussed further.

Education and earned her Massachusetts Department of Elementary and Secondary Education (DESE) Initial Licensure in Severe Disabilities, all levels that same year. (J-39) Prior to being hired at the ALC, Ms. Hale worked with children with developmental disabilities as a paraprofessional at the Lynch Center, a preschool in Brookline. She also spent two years working as an Applied Behavior Analysis (ABA) therapist in a home setting. Ms. Hale worked primarily with children on the autism spectrum at the Lynch Center and has worked with Board Certified Behavior Analysts (BCBAs) both there and at the Lincoln School. She has training in ABA topics such as prompt hierarchies, data collection, task analysis, and the creation and modification of programming for a particular student. (Hale)

Ms. Hale has worked with Jacqueline at the ALC for two years, and prior to that for two years while she was in preschool at the Lynch Center. Jacqueline spends most of her day in the ALC classroom with Ms. Hale, a paraprofessional, and two other students on one side of the classroom; an additional student comes to Jacqueline's side of the ALC for some of the day but works in another area of the room. There is a large circular table that may be used for snack and some group activities and a bathroom within the classroom used for Activities of Daily Living (ADLs). Jacqueline has a specific partitioned area with visual blocks on three sides and a desk with a slant board for her communication device or an activity. (Hale)

Ms. Hale has four students on her caseload. One student is only in her classroom half of the time with a paraprofessional; the others are in her classroom for half to three-fifths of the day. These students, all males, are in the inclusion classroom for the remainder of the school day. (Hale) Neither of the two peers with whom Jacqueline is grouped for most of the day has an autism spectrum diagnosis or consultation services by a BCBA during the school year. (J-51, Hale) Jacqueline also works throughout her day with Melissa Castro, the dedicated one-to-one paraprofessional assigned to her. Ms. Castro is a certified special education teacher pursuing an advanced degree in behavioral intervention. (J-45, Hale)

After entering the classroom Jacqueline often needs guidance and assistance, as well as some prompting, to go to her cubby, take off her backpack, and unzip her jacket. She then takes her AAC to her desk and does approximately half an hour of academic work. Ms. Hale described Jacqueline's program as "very ABA based." She and Ms. Castro perform discrete trial programs and utilize a prompt hierarchy for their data collection. Jacqueline takes sensory breaks as recommended by the occupational therapist to assist her in maintaining her focus, often for twenty minutes to half an hour in the motor room between her one-on-one discrete trial work sessions. (Hale)

In addition to her work with Ms. Hale, Jacqueline has two or three therapy sessions each day, either pull-ins such as speech and language or pull-outs such as occupational therapy or adaptive physical education; works on ADLs such as hand washing, or tooth brushing with the board-certified behavior analyst; and participates in group activities such as music and listening to stories with the other two or three students with whom she is grouped. During her lunch time Jacqueline sits at a table in the cafeteria with about four

peers. (Hale) She greets them and experiences the sensory stimulation of the large environment, though she focuses with Ms. Hale on feeding, chewing, and requesting and does not appear to engage with the other students beyond greetings. (Hale, Nowinski, Bruce) Jacqueline also works on feeding and chewing during two snack periods per day. Two days a week, Jacqueline has reverse inclusion recess, during which two neuro-typical students from the general education classroom spend time with Jacqueline engaging in her preferred activities, such as playing a game or going to the motor room. On the other days she attends recess by herself on the playground where she works on physical, communication, and self-regulation skills. Two times a week Jacqueline has “game time” with a peer who uses a communication device in which she works on turn taking, waiting for preferred activities, and advocating for what she wants. She has recently begun going into a K-2 classroom once a week where four of the potential five students use communication devices in some form. (Hale)

Ms. Hale maintains regular communication with Jacqueline’s parents, both informally when they drop Jacqueline off at school and through a home school communication log and occasional emails. She speaks with the other service providers daily, either for a short conversation or for a more extensive discussion before or after school or during times specifically set aside for collaboration. (Hale) Jacqueline has a good connection with Ms. Hale and appears comfortable with her. Ms. Hale clearly cares about Jacqueline. (Mother, Nowinski, Turk, Bruce)

Ms. Hale evaluated Jacqueline in November and December 2014 utilizing the Assessment of Basic Language and Learning Skills – Revised (ABLLS-R). She noted that she had seen a fair amount of growth with Jacqueline in several areas since 2011, including cooperation, reinforcement effectiveness, and visual performance, and some progress in social interaction and classroom routines. Jacqueline had not shown much growth in other areas such as play and leisure, much of which involves interacting with other students, and generalized responding; minimal improvement in reading, math, and writing; and no growth at all in group interaction. Jacqueline made some improvements in eating. As to toileting, the only progress she made between November 2011 and December 2014 was in requesting to use the toilet;⁵ she made no progress in the other five of the ten categories she had not yet mastered in 2011. (J-22, Hale) Even so, Ms. Hale believes that Jacqueline has made progress in her program in her ability and desire to use her communication, in her motor skills, and in her ADLs. Ms. Hale acknowledged that Jacqueline may not be fully independent in classroom routines or other activities, but observed that although she is a prompt-dependent student Jacqueline presently requires less prompting than she used to. (Hale)

11. In her occupational therapy sessions, Jacqueline works with MaryAnn Biele. Ms. Biele earned her Master of Science degree in Occupational Therapy in 1997; her graduate thesis focused on students with autism spectrum disorders. She has been employed by the Brookline Public Schools since 1998 and in this time she has worked with approximately

⁵ Jacqueline has made some progress in this area, as reflected on the Assessment of Basic Language and Learning Skills – Revised (ABLLS-R), though witnesses testified that these spontaneous requests are more the exception than the rule and occur more often in school than at home. (Father, Hale)

fourteen students with ASD. She has also worked with students with intellectual disorders. Ms. Biele is licensed in Massachusetts as an occupational therapist. (J-42, Biele)

Ms. Biele has worked with Jacqueline at the Lincoln School for almost four years. She currently sees Jacqueline twice a week, once one-on-one and once with another student who uses an augmentative communication device. During these sessions, which are pull-outs, Ms. Biele works with Jacqueline on her IEP goals and on activities that will assist her in accomplishing those goals, including strength-building exercises, sensory discrimination, and skills such as zippering jackets, tearing toilet tissue and wiping. She is also working with Jacqueline to reduce hand-flapping. In addition to these direct services, Ms. Biele provides consultation to the special education teacher, paraprofessionals, and others who work directly with Jacqueline on sensory strategies, positioning, types of materials and visuals to use, etc. (J-2, Biele)

Ms. Biele evaluated Jacqueline most recently as part of her three-year re-evaluation in November and December 2014, at which time she administered the Sensory Profile II School Companion; the Sensory Profile II Caregiver Questionnaire; portions of the the ABLLS-R, and the School Function Assessment (SFA). Among other things, she found that Jacqueline has many areas of inefficient sensory processing; exhibits signs of decreased registration and patterns of increased sensitivity; and avoids eye contact and occasionally avoids groups. On the ABLLS-R, Ms. Biele noted that Jacqueline has made some fine motor progress but still needs verbal and gestural prompts in many areas. (J-24, Biele)

12. In her physical therapy sessions, Jacqueline works with Barbara Keenan, who is licensed by the Massachusetts DESE and has been a physical therapist with the Brookline Public Schools since 2000. Ms. Keenan has practiced physical therapy for thirty-five years and has worked with students in the school setting since 1982. She has worked with students on the autism spectrum and students with intellectual disabilities. She has been working with Jacqueline since she was in kindergarten. (J-43, Keenan) Ms. Keenan sees Jacqueline once a week for thirty minutes as a pull-out service. She works with Jacqueline to help her stretch and strengthen her muscles. Ms. Keenan also provides consultation to Jacqueline's teachers, paraprofessionals, and other staff who work with Jacqueline around monitoring her braces and finding ways to provide the sensory input Jacqueline seeks. (J-2, Keenan)

Ms. Keenan evaluated Jacqueline most recently as part of her three-year re-evaluation in December 2014 using the SFA, Clinical Observation, Peabody Developmental Motor Scales—2nd Edition Gross Motor section (as a guideline), and the ABLLS-R. Ms. Keenan found that Jacqueline has become more independent in moving around since her last evaluation. (J-25, Keenan) From a gross motor standpoint, she is now a safe and independent ambulator who demonstrates functional balance and postural reactions to be able to participate in gross motor activities that interest her and engage her. (J-22, J-25, Keenan)

13. Jacqueline sees Caryn Glazer for Adaptive Physical Education. Ms. Glazer has worked in various schools and summer settings with children with a range of disabilities, including children on the autism spectrum and children with intellectual disabilities. She has worked in Brookline for eleven years. (J-44, Glazer)

Ms. Glazer sees Jacqueline twice a week in a pull-out class for thirty minutes each time. Once a week Jacqueline has a “land class” with two other students and once a week she participates in a swimming class with her ten classmates from the ALC. According to Ms. Glazer, Jacqueline has progressed in Adaptive Physical Education, and she is now an active participant in both her land and swimming classes. (Glazer)

14. For speech and language, Jacqueline sees Audra Francisco. Ms. Francisco earned her Master’s degree in Speech-Language Pathology. She is a speech and language pathologist licensed through DESE and by the Commonwealth for speech language pathology. She is also certified by the American Speech, Language and Hearing Association. Ms. Francisco has been employed by the Brookline Public Schools since 2007. She works full-time at the Lincoln School, particularly within the Adaptive Learning Center; she also has a private practice and supervises students in Northeastern University’s on-campus clinic. Ms. Francisco’s experience includes work with students on the autism spectrum, students with intellectual impairments, and students with significant language disabilities. (J-40, Francisco)

Ms. Francisco sees Jacqueline individually three times a week for thirty minutes a session as a push-in to the ALC. Ms. Francisco is working with Jacqueline toward developing competence across linguistic competencies, social competencies, operational competencies, and strategic competencies, and focusing on receptive language, expressive language, social skills, and feeding. (Francisco)

Ms. Francisco also provides consultation to the special education teacher, service providers such as Ms. Biele, Ms. Keenan and Ms. Glazer, home service programmers, and the BCBA, with a focus on maximizing Jacqueline’s ability to communicate by embedding functional communication targets throughout her day at home and school; she also collaborates with the others on a feeding component. (Francisco)

15. Jacqueline’s BCBA at the Lincoln School is Christina Pello, who has a Master’s degree in Behavior Analysis and is certified by the Behavior Analyst Certification Board. Ms. Pello has worked primarily with children with ASD both in schools and through a company that provides home-based ABA services, though she has also worked with children with intellectual disabilities. She has been with the Brookline Public Schools since September 2014, when she started working with Jacqueline.

Ms. Pello provides consultation about Jacqueline’s programming to Ms. Hale primarily, as well as to the rest of the team, including the occupational therapist, the speech therapist, and the paraprofessional who work with Jacqueline at school. Jacqueline’s IEP refers to one fifteen minute consultation for each five-day cycle, though Ms. Pello testified that this consultation occurs nearly every day with Ms. Hale or the

paraprofessional, where Ms. Pello observes the programming and coordinates the discrete trial training. She provides a monthly consultation with APEX (the IEP provides for one 30-minute consultation per week) around progress at home and school and the coordination of goals on Jacqueline's IEP. (Pello) Ms. Pello has recently been working with Jacqueline's service providers on several goals on her IEP, such as self-regulation (trying to reduce motor and vocal stereotypy), social play, and functional academics. (J-2, Pello)

Ms. Pello also works daily with all of the children in the ALC on tooth brushing. She testified that Jacqueline still requires some physical prompting to brush her teeth but she is making progress. (J-41, Pello)

16. Jacqueline participates in an Extended School Year (ESY) program through Brookline Public Schools. This program does not take place at the Lincoln School, but at a different school within Brookline. For the summer of 2015, it will take place at the Runkle School; during the summer of 2014, it was housed at the Devotion School. With the exception of adaptive physical education, Jacqueline receives the same services during the ESY that she receives during the school year, with the same number of sessions of the same duration. (J-2, Hale)
17. As described above, Jacqueline spends part of her day grouped or paired with peers, most of whom are verbal and some of whom (as in reverse inclusion recess and in the cafeteria) are neuro-typical. (Hale, Nowinski, Turk)
18. Jacqueline was observed in her school setting by Gretchen Timmel, Dr. Lisa Nowinski, Dr. Naami Turk, and Dr. Susan Bruce. Ms. Timmel and Dr. Nowinski both found that Jacqueline's current program did not adhere strictly enough to ABA principles to meet her needs. (Nowinski, Timmel) On the other hand, Dr. Turk and Dr. Bruce concluded that although they might recommend slight modifications to some of Jacqueline's activities to make them more purposeful, Brookline's ALC classroom is sufficient to meet Jacqueline's needs. (Turk, Bruce)
19. Gretchen Timmel is a licensed educational psychologist, a certified teacher, and a school psychologist who has observed Jacqueline four times through the years. (J-36, J-50, Timmel) She regularly tutors children with a wide variety of disabilities, and spent some time working at the League School, a residential program for children with autism. She has worked on staff at the Lurie Center for four years, before which she consulted with the doctors there from other sites, including the Psychology Assessment Center and the Learning Disorders Unit at Massachusetts General Hospital, for over 25 years. At the Lurie Center, where Ms. Timmel is employed part-time, her role is to provide educational insight to a team of specialists who understand children from medical, psychological, and neuropsychological perspectives. She also observes children at their schools and makes recommendations regarding appropriate educational programs. Ms. Timmel estimated that 80 percent of the children she works with at the Lurie Center are autistic, half of those children have an intellectual impairment, and 20 percent of the children she works with have autism and an intellectual disability and are also nonverbal. Through the

Psychology Assessment Center, Ms. Timmel serves a broad population of students with medical and learning issues; this work includes performing independent evaluations for school districts and assisting them in curriculum design for language-based classrooms and programming for children with autism. (Timmel)

20. Ms. Timmel observed Jacqueline both at home and in school between January and March 2013 and again at school in November 2013. She also accompanied Dr. Nowinski on a school observation at the ALC in February 2015. Each time she observed, Ms. Timmel noted that Jacqueline needed full prompt in all areas and her performance on Discrete Trial Training (DTT) trials was variable. After observing Jacqueline in some limited inclusion with typically-developing peers, Ms. Timmel concluded that Jacqueline was unable to access the language that surrounded her and could not be meaningfully drawn into activities. She also expressed concern that Jacqueline's peers did not use communication devices, depriving her of the opportunity to learn from modeling. (J-36, J-32, Timmel)
21. Dr. Naami Turk observed Jacqueline at the ALC on October 7, 2014. She also evaluated Jacqueline in October 2014; her findings are discussed in detail below.⁶ Dr. Turk earned her B.A. from Brandeis University in 1982 and her Ph.D. in Clinical Psychology from the Massachusetts School of Professional Psychology in 1993. Between college and graduate school, Dr. Turk worked in a therapeutic primary school program with children with a range of diagnoses in a substantially separate setting. Since earning her doctoral degree Dr. Turk has worked with children, adolescents, and adults with a variety of disabilities including autism, intellectual disabilities, other neurodevelopmental disorders and neuropsychiatric disorders, in a wide range of inpatient and outpatient settings. Her work included running skills groups for youth with neurodevelopmental disorders, including intellectual disabilities, Attention Deficit Hyperactivity Disorder (ADHD), and autism, as well as communication and learning disabilities. She also maintains a private practice doing group and individual treatment and consulting with school districts to assist both special education and general education teams plan for students. (J-46, Turk)

For the past fourteen or fifteen years Dr. Turk's work has consisted primarily of consulting with a number of school districts in Massachusetts. She currently works with twelve different districts. In her consultation work, Dr. Turk regularly observes children in the classroom; meets with school psychologists or special education teams to discuss a particular child's needs and/or recommend further evaluations or changes to an IEP; and works with school districts to develop new programming for a child who might need more services than those the district presently offers. Dr. Turk also conducts risk assessments of students and runs professional development workshops in these districts. (Turk)

In addition to assisting schools in a broader sense, Dr. Turk often conducts clinical evaluations, including neuropsychological evaluations, neurocognitive assessments, social/emotional assessments, and functional assessments. She has conducted well over a thousand evaluations during the course of her career, most of which have included

⁶ See Findings 28, 29, 31, 32, and 38, below.

classroom observations. She has evaluated students with moderate to severe cognitive impairments, and has evaluated approximately four hundred students with autism. Approximately four to five hundred of the observations she has conducted were at the request of parents. (Turk)

Dr. Turk has testified at seven BSEA hearings prior to the present matter, each time as an expert for a school district. These cases involved students ranging in age from 10 to 17 with a variety of diagnosed disorders, including dyslexia and central auditory processing disorder; organic personality disorder and executive functioning disorder; severe emotional deficits and suicidal tendencies; ADHD and Pervasive Developmental Disorder; seizure disorder and learning disabilities; brain injury and associated seizures; and autism. Dr. Turk testified each time that her expertise in neuropsychiatric children's disorders and neurodevelopment in children and adolescents included these issues. (Turk)

22. Dr. Turk observed Jacqueline during academic instruction, occupational therapy group, lunchtime, and activities of daily living instruction as well as during transitions to and from activities. She noted that Ms. Hale utilized a range of behavior supports to assist with containing Jacqueline's distractibility and sustaining focus; continually recorded data to track independence; and utilized a range of multi modal prompts and cuing to assist with sensory stimulation and by extension, attention span. These interventions were observed to benefit Jacqueline albeit for short period of time. During a work break, Jacqueline appeared to smile, giggle and engage in an activity on her iPad where she identified animals and their actions within the context of a story with the assistance of a visual schedule. During facilitated one-to-one peer socialization with another student using an AAC, also supported and heavily facilitated by an adult, Jacqueline was able to sustain game play for approximately ten minutes. (J-27, Turk)

Dr. Turk observed that Jacqueline is responsive to the direct services she is provided. During her occupational therapy group, Jacqueline initially engaged in a task independently with intermittent minimal support, but then appeared sluggish and fatigued until engaged by the occupational therapist in sensory stimulation. She was receptive to her teacher, focused and compliant, and appeared to enjoy a portion of her lesson that involved a video about buttoning and unbuttoning a vest, which was followed by an activity during which Jacqueline buttoned and unbuttoned a vest. During lunch, Jacqueline was observed to be seated alongside typical peers and assisted by Ms. Hale who provided hand over hand assistance as they worked on a goal of chewing food with Jacqueline's molars. Jacqueline was also observed during discrete trial training on activities of daily living, specifically learning to build a sandwich with crackers and cheese and then take bites of it. The instruction was structured, incremental, systematic, and multi modal, and data was taken with regard to behavior. Jacqueline appeared to be engaged, motivated, and partially independent in the use of her ACC. Distractibility was variable and Jacqueline responded to adult redirection. Dr. Turk also noted that Jacqueline requested to use the restroom independently during her observation, and that she is able to make her way around the building with support. Jacqueline appears to be comfortable in her school community. (J-27, Turk)

23. Jacqueline was observed by Dr. Lisa Nowinski in her school setting on February 21, 2015. Dr. Nowinski evaluated Jacqueline in March 2013 and again in December 2014; her findings are discussed in detail below.⁷ Dr. Nowinski is licensed in the state of Massachusetts as a psychologist and certified as a health service provider. She earned her Bachelor's degree in Psychology and Spanish from University of the Pacific in 2004, her Master's degree in Counseling Psychology from the University of California in 2006, and her Ph.D. in Counseling, Clinical, and Social Psychology in 2009. She completed both pre-doctoral and post-doctoral fellowships at Massachusetts General Hospital, the former in the assessment of children and adolescents specifically at the learning and emotional assessment program, and the latter specializing exclusively in the assessment and evaluation of children and adolescents with broad learning and developmental issues. Dr. Nowinski then began working at the Lurie Center for Autism. In the course of her career Dr. Nowinski has published educational training materials for professionals about autism spectrum disorders and has coauthored several chapters on the assessment of individuals with ASD. She has also worked on multiple funded projects involving autism and the treatment of individuals affected by the condition. (J-49, Nowinski)

Since 2012, Dr. Nowinski has served as the Director of Psychology Training at the Lurie Center; in this capacity she supervises the assessment and treatment of close to 300 patients a year, most of whom have an autism spectrum disorder. She also sees approximately 100 patients a year herself, most of whom (upwards of 90 percent) have an autism spectrum disorder diagnosis. Dr. Nowinski estimated that close to 50 percent of these patients, both those she sees herself and those whose assessment or treatment she supervises, have a concurrent intellectual disability, and that 30 to 40 percent of her own patients are nonverbal and use augmentative communication devices. Dr. Nowinski also maintains a small private practice and has been hired by several school districts as a contracted evaluator and/or to provide educational consultation and observation of students placed in specialized out-of-district placements. She has conducted between 50 and 100 classroom observations of students with autism spectrum diagnoses and/or significant intellectual disabilities. (Nowinski)

24. During her ninety-minute observation at the Lincoln School, Dr. Nowinski observed Jacqueline with her classroom teacher, paraprofessional, and peers, and with her physical therapist. As to her time in the ALC classroom, Dr. Nowinski noted that both of the peers with whom Jacqueline was grouped were verbal and their understanding of social perspective-taking was well beyond Jacqueline's current capabilities. She observed that Jacqueline required prompting to respond to questions on her talker, and that she arched away from the group several times, flapping her arms and making increased vocalizations once. In her testimony Dr. Nowinski described these as Jacqueline's "task refusal behaviors/activities" that demonstrate "a lack of interest and motivation to participate in the learning task," distinguishable from her constipation behavior.⁸ (Nowinski) When Jacqueline independently requested that the book the teacher was reading be repeated,

⁷ See Findings 28-32, 37, 38, below.

⁸ Testimony was offered during the hearing to the effect that although Brookline Public Schools personnel told Dr. Nowinski that she had observed a typical day for Jacqueline, she was actually constipated on that day, which could account for some of the behaviors Dr. Nowinski observed.

she was told it was not her turn to choose the book. During object identification trials, Dr. Nowinski observed that Jacqueline appeared to master an object by identifying it correctly multiple times, but the task persisted without any variation or introduction of new items. (Nowinski) Moreover Jacqueline's spontaneous social requests for "my turn" were not honored. Dr. Nowinski concluded that Jacqueline understood a simple stimulus and response paradigm, but the exercise in which she was practicing it did not foster a meaningful reciprocal social interaction. Dr. Nowinski further observed tooth brushing, an additional discrete trial activity, and physical therapy, along with the transition between these activities. (J-31)

Dr. Nowinski described Jacqueline's physical therapy session as highly engaging and motivating for her. Jacqueline's physical therapist incorporated her communication device into programming that allowed Jacqueline to engage in preferred activities while working on skills. (Nowinski)

After her observation, Dr. Nowinski concluded that Jacqueline's staff are "engaged and dedicated to maintaining positive interactions with her throughout their day[,] observant of changes in her behavior and responsive with attempts to determine what her specific needs are." She also noted that Jacqueline's teacher "provided appropriate and consistent verbal warning for transitions." Despite these positive attributes, however, the program "did not consistently foster [Jacqueline's] spontaneous and appropriate communication attempts," and Jacqueline did not respond to this "attentive and responsive support" by engaging in "any meaningful, formal or informal peer interactions." (J-31)

25. Dr. Susan Bruce observed Jacqueline at the Lincoln School on April 6, 2015 and also completed a records review. (S-1, Bruce) Dr. Bruce is a full tenured professor at Boston College, where she coordinates the severe disabilities program and runs an optional specialization in deaf-blindness. She is licensed in elementary education in Michigan, where she taught children with multiple disabilities, and has both a Master's degree and a Ph.D. in Special Education. Her research and publications focus on communication intervention and disability, with a focus on deaf-blind individuals, and multiple disabilities, respectively. She consults with schools in the United States and other countries to help them build programs; she also consults with families. (J-47, Bruce)

Dr. Bruce observed Jacqueline with her classroom teacher and with the speech language pathologist. On the day she observed, the two peers generally grouped with Jacqueline in the ALC were absent. Dr. Bruce found Ms. Hale to have a good connection with Jacqueline, as demonstrated by her eye contact and Jacqueline's responsivity, and to be skillful in integrating Jacqueline's talker into her lessons. Dr. Bruce stated that much of what she saw would be called discrete trial training and that she also observed sensory breaks, which might be considered naturalistic teaching; she testified that Jacqueline responded well to both types of approaches. During the sensory break Jacqueline appeared to play a game with Ms. Hale, one that allowed her to enjoy a weighted blanket while practicing prepositions such as "under." (Bruce)

Like Dr. Nowinski and Ms. Timmel, Dr. Bruce expressed concern that some of Jacqueline's lessons taught skills too much in isolation, such as washing and drying hands. She was also concerned about the amount of prompting Jacqueline received. (Bruce)

Dr. Bruce observed Jacqueline on a scooter in the school hallway. When other children approached, they appeared interested in her and her activities. Jacqueline appeared to look at them, though she did not initiate communication with her device. Dr. Bruce testified that Jacqueline is an intentional pre-linguistic communicator who is capable of facilitated interaction with peers. (Bruce)

Dr. Bruce also observed Jacqueline during speech and language direct services. Jacqueline appeared disengaged, though Dr. Bruce noted that it may have been because she was tired or disinterested, and she was also fidgety. Jacqueline then took a sensory break, and incorporated her device into that break, choosing an activity and asking for more. (Bruce)

Dr. Bruce observed Jacqueline during lunch, where she noted that the time was more about eating than anything else. Jacqueline plugged her ears with her fingers during the first few minutes she was in the cafeteria and again about ten minutes later. Her observations led Dr. Bruce to conclude that exposure to this environment is not actually beneficial to Jacqueline. (Bruce)

26. Dr. Bruce's testimony conflicted with that of Dr. Nowinski and others in several respects. Although they expressed differing opinions as to other benefits of an inclusion environment for Jacqueline, Dr. Nowinski, Dr. Turk, Ms. Hale, and Ms. Francisco all believe that Jacqueline is not at a point where she is able to participate in or benefit much, if at all, from direct communication with non-disabled peers. (Nowinski, Turk, Hale, Francisco). Dr. Bruce, on the other hand, testified that non-disabled children would be the ideal peers for facilitated communication, perhaps through talking with Jacqueline on her own device. (Bruce) Moreover, in conflict with the findings of both Dr. Turk and Dr. Nowinski from their evaluations of Jacqueline, as detailed below, Dr. Bruce testified that a child's nonverbal IQ does not really change or grow over time. (Bruce) Considering these conflicts, combined with the fact that Dr. Bruce never actually met with or evaluated Jacqueline directly and observed her only once at school, I assign less weight to Dr. Bruce's recommendations than to those of other witnesses who testified at the hearing.
27. In addition to her time at the Lincoln School, Jacqueline receives home-based services, and her hours have increased recently. In her 2013 evaluation, Dr. Nowinski recommended that Jacqueline receive five to ten hours a week of home-based services. (J-35) Jacqueline was receiving six hours a week until April 2015, at which point services increased to ten hours per week. (Deutchman) Jacqueline receives those services through APEX Behavioral Consulting, a company that provides autism treatment through applied behavior analysis to children and adults with autism. APEX has been providing services for Jacqueline since December 2013, focused on the two components of ABA: DTT,

which entails direct systematic work on a skill through imitation with prompting as needed, and natural environment training, or working on skills in the real world. (Deutchman)

APEX has been working with Jacqueline on the skills targeted by her IEP, including hand washing, tooth brushing, and getting dressed. APEX is not working with her on toileting, as this was not identified as a goal on her IEP. According to Leslie Deutchman, the BCBA who serves as the Executive Director of APEX, with extensive ABA programming Jacqueline would likely be able to become more independent in her toileting, not just “holding” for longer but also being able to combine skills such as taking down her pants, sitting, pulling up her pants, and washing her hands. (J-48, J-29B, Deutchman)

28. Jacqueline was evaluated twice by Dr. Nowinski, first in March 2013 and again in December 2014. She was evaluated by Dr. Turk in October 2014. During her evaluation by Dr. Turk, Jacqueline was supported by her classroom teacher, Ms. Hale. Dr. Turk believed an incentive program would be necessary to help Jacqueline stay behaviorally focused and attentive; she also believed Ms. Hale’s presence would help make Jacqueline more comfortable during testing and would assist with transitions from breaks back to the evaluation setting. Finally, she believed Ms. Hale could assist with prompting when appropriate. (Turk)
29. Evaluating Jacqueline is difficult, as her performance may be variable, and obtaining an accurate result requires expertise in the evaluation of individuals with similar profiles. (Nowinski) For example, Ms. Francisco was unable to administer the Peabody Picture Vocabulary Test – 4th Edition (PPVT-4) during her evaluation of Jacqueline in November and December 2014 and Dr. Turk was unable to administer the Test of Nonverbal Intelligence – 4th Edition (TONI-4), as explained below, also in the fall of 2014. (J-23, Francisco, J-27, Turk) Furthermore, as discussed above, Dr. Turk arranged for Jacqueline to be supported by Ms. Hale during her evaluation. Dr. Nowinski, on the other hand, was able to obtain what she believes are accurate scores on the PPVT-4 and to test Jacqueline without the assistance of another individual. (Nowinski)
30. In all of her evaluations between March 2013 and December 2014, Jacqueline displayed severe autism-related symptomatology; her behavior over the same period has either flat-lined or worsened, according to her teacher and her parents. (J-35, J-31, J-27, Nowinski)

Dr. Nowinski administered the Autism Diagnostic Observation Schedule – 2nd Edition (ADOS-2) in 2013. Although she was able to demonstrate shared enjoyment and motivation to engage with the examiners around activities of interest, Jacqueline manifested significant autism-related symptomatology in each evaluation, in both her behavior during the evaluation (struggling to make eye contact, engaging in non-functional play and full-body complex mannerisms such as hand-flapping) and the reports of her teacher and parents on tools such as the Social Responsiveness Scale (SRS), administered in 2013, and the SRS-II, administered in 2014. (J-35, J-31, Nowinski) Jacqueline displayed frequent episodes of distractibility and motor stereotypy and required simplified instructions, repeated demonstration of tasks, guided practice, a

high level of behavioral support, redirection, and prompting, to which she responded well. Generally, Dr. Nowinski noted that although Jacqueline was still very friendly she protested more often and demonstrated more difficulty engaging in tasks in 2014 than she had during her 2013 evaluation. (J-31, Nowinski)

Dr. Nowinski administered the Behavior Assessment System for Children – 2nd Edition (BASC-2) in March 2013, but not in December 2014 because Dr. Turk had completed this measure two months earlier. The BASC-2 is not an autism-specific instrument but it does capture problems associated with autism spectrum disorder. Dr. Nowinski reviewed Dr. Turk’s report and concluded that Jacqueline’s behavioral issues, as reported by her teacher and her parents on the BASC-2, have increased since 2013. (Nowinski) Her attention and learning problems have increased,⁹ while her social withdrawal has remained consistent. (J-27, Nowinski) Generally, Dr. Nowinski noted that rather than increased capacity for engaging in sustained effort and learning tasks between the age of seven and the age of nine, which should be apparent even in a child with an autism spectrum diagnosis, Jacqueline demonstrated increased task refusal and difficulty becoming engaged. (Nowinski)

31. Jacqueline continues to struggle with working memory and visual attention. Between March 2013, when she was tested by Dr. Nowinski, and October 2014, when she was tested by Dr. Turk, Jacqueline’s performance on the WRAML-2 Finger Windows Test did not improve, and in fact her classification fell from a scaled score of two to a scaled score of one. This test measures visual attention and concentration, as well as executive functions such as the management of multiple demands simultaneously. Jacqueline demonstrated nonverbal working memory and visual attention skills below the first percentile. (J-27, Turk, Nowinski)
32. Despite these struggles, between March 2013 and December 2014 Jacqueline made significant cognitive progress.

During her 2013 evaluation of Jacqueline, Dr. Nowinski utilized the Leiter International Performance Scale –Revised (Leiter-R), which is designed to assess cognitive ability using an entirely nonverbal format, to measure Jacqueline’s Full Scale Intellectual Quotient (FSIQ). Although Jacqueline’s performance reflected substantial variability, ranging from low to very low, Dr. Nowinski estimated her FSIQ at 61, below the first percentile.¹⁰ (J-35)

⁹ Teacher reports of attention and learning problems increased by four and six points, respectively, between administrations of the Behavior Assessment System for Children – 2nd Edition (BASC-2) in March 2013 and October 2014.

¹⁰ At this time Dr. Nowinski also used the Peabody Picture Vocabulary Test – 4th Edition (PPVT-4) and the Differential Ability Scale – 2nd Edition (DAS-II) Verbal Comprehension task to measure Jacqueline’s receptive vocabulary and comprehension skills. Jacqueline’s performance on these tests demonstrated skills substantially below age-level expectations, falling well below the first percentile, and the need for substantial support in this area. As to school readiness, Jacqueline completed the Developmental Test of Visual Motor Integration – 6th Edition (VMI-6) to measure her visual-motor integration and portions of the Bracken School Readiness Assessment – 3rd edition. Her score on the VMI-6 fell in the very low range and her performance on the Bracken was inconsistent; she was unable to generalize skills she had demonstrated, such as identifying colors on her Vantage Lite augmentative

Between Jacqueline's two evaluations by Dr. Nowinski, Brookline Public Schools arranged for her to receive a neuropsychological evaluation conducted by Dr. Turk, whose formal testing included the Comprehensive Test of Nonverbal Intelligence (CTONI), the TONI-4, the BASC-2, the Behavior Rating Inventory of Executive Function (BRIEF), the WRAML-2 Finger Windows test, and the Adaptive Behavior Assessment System – Second Edition (ABAS-II). (J-27, Turk)

Dr. Turk noted that Jacqueline's scores on the CTONI were variable, making it difficult to form a conclusive impression. Though on some subtests she scored between the fifth and sixteenth percentiles, overall Jacqueline scored between the third and the fifth percentiles, placing her in the poor to below average range. Her Full Scale Nonverbal IQ of 72 placed her in the third percentile. Dr. Turk attempted to administer the TONI with Form A and Form B to get a more complete picture of Jacqueline's cognitive functioning. However Jacqueline had a very difficult time understanding the training phase on Form A and she could not get to the required Basal score of five to continue on Form B. (Turk)

For her 2014 evaluation of Jacqueline Dr. Nowinski used the Leiter International Performance Scale – 3rd Edition (Leiter-3). Again, Jacqueline's performance reflected substantial variability in neurocognitive skills, ranging from average to borderline. Her nonverbal IQ had increased to 82 (12th percentile). Jacqueline made approximately 21 months progress in 21 months on the Differential Ability Scale (DAS-II) Picture Similarities task, which measures nonverbal fluid reasoning skills. Though she continued to demonstrate some difficulty with selective visual attention and remained below average in this area, Jacqueline made steady progress as compared to her same age peers in her ability to arrange objects in appropriate sequential order. Most notably Jacqueline's progress on several subtests since 2013 reflected improved capacity for visual organization and nonverbal reasoning, with growth from the 16th percentile to the 37th between the 2013 and 2014 test administrations by Dr. Nowinski on subtests requiring her to complete a series of incomplete matrices, and growth from the 2nd to the 25th percentile on a subtest requiring her to synthesize and organize visual information.¹¹ (J-31, Nowinski)

Dr. Nowinski described the difference between Dr. Turk's estimate of Jacqueline's FSIQ at 72 and her own at 82 as significant, and attributed the disparity to her greater experience evaluating children like Jacqueline. She described her testing protocol as involving a high level of behavioral and visual supports, which are necessary in order to access the capacity that children like Jacqueline hold inside. She also suggested that the language demands placed on Jacqueline by the CTONI, which Dr. Turk administered

communication device. (J-35) Jacqueline's performance on the Wide Range Assessment of Memory and Learning – 2nd Edition (WRAML-2) Finger Windows test and her mother's and teacher's ratings of her on the Attention Deficit Hyperactivity Disorder Rating Scale (ADHD-RS) revealed substantially limited working memory, even when information was presented nonverbally, as well as very high levels of inattention. Overall, Jacqueline's cognitive abilities fell in the significantly impaired range. (J-35, Nowinski)

¹¹ In her testimony Dr. Nowinski noted that although she used a more recent version of the Leiter in her 2014 evaluation than she had in 2013, the increase in Jacqueline's raw score on the form completion test from 13 points to 21 points, which correlates to an increase from the 2nd to the 25th percentile, demonstrates significant progress.

orally with the use of gestures, as compared with the Leiter, which Dr. Nowinski administered with nonverbal gestural instructions, may have contributed to the difference in cognitive scores. Finally, Dr. Nowinski noted that evaluating Jacqueline requires skill in drawing out her attention and minimizing her anxiety, which she described as her specialty. Dr. Nowinski expressed some concern that Dr. Turk was unable to get a score on the TONI, because she believes that Jacqueline possesses the capacity to complete the cognitive tasks the test entails. (Nowinski)

Upon reviewing both her results and Dr. Turk's, Dr. Nowinski concluded that overall, although Jacqueline still meets the diagnostic criteria for an intellectual disability, the cognitive gap between Jacqueline and her same-age peers is "start[ing] to close just a little bit." (J-31, Nowinski)

33. Jacqueline demonstrates significant variability but has made slow to significantly slow progress toward the Communication goals and objectives on her IEP. (Francisco) Although she generally requires gestural or "light physical" support to respond, which reflects an improvement over the full hand over hand supports she used to need, Jacqueline's progress toward her Communication goals in her IEP has been variable. Jacqueline has been able to indicate that she is "all done" independently with 100% accuracy in two of four contexts, but she continues to require significant prompting for much of her functional communication. For example, Jacqueline requires gestural prompting in the other two "all done" contexts as well as to indicate that she needs help and to request reoccurrence of an activity in which she has engaged. (J-2, Francisco) Jacqueline has made some progress in her feeding, showing improvement in her chewing and accepting a wider variety of purees. (Francisco)
34. Jacqueline has become more adept at utilizing her AAC over the years. (Nowinski, Father) During Dr. Nowinski's 2012 evaluation, Jacqueline's "talker" was available to her but she did not use it independently to communicate with the examiner or respond to questions. In her 2014 evaluation, Dr. Nowinski noted that Jacqueline was more adept at accessing and navigating her AAC device this time. Though she did not independently initiate spontaneous communication or responding with her AAC device, when prompted Jacqueline was able to navigate through it fluently and with relative ease. (J-35, J-31, Nowinski) Ms. Francisco noted, similarly, that Jacqueline has made some improvement in using her talker for requests, but that she rarely initiates communication. (Francisco) Several witnesses testified that despite this lack of initiation, Jacqueline has become more purposeful in using her talker to let others know what she is thinking and is able to make connections using her talker to communicate something that she wants even when that particular object is not included within the symbols on the talker itself. (Francisco, Keenan, Father)
35. Despite increased facility with her AAC device (J-30, J-31), Jacqueline has made little progress in terms of her receptive language skills. On the ABLLS-R, as scored by Ms. Francisco with Ms. Hale, Jacqueline showed some growth in receptive language skills between November 2011 and December 2014. Again, this was slow progress; for example she went from five requests, some of them partial, in 2011, to ten requests out of

a possible 20 in 2014; in labeling she went from four of 47 categories in 2011 to thirteen of 47 in 2014. (J-22, Francisco)

36. During Ms. Francisco's evaluation of Jacqueline's communication skills in November and December 2014, she was unable to obtain a score on the PPVT-4, which measures receptive single word vocabulary, due to the amount of scaffolding and repetition she had to give. (J-23, Francisco) Ms. Francisco was able to administer the Preschool Language Scale, 5th Edition, which she had to score qualitatively rather than quantitatively because Jacqueline had aged out of the age range for the test. Jacqueline was able to complete receptive language skills through two years, five months of age, and demonstrated progress from an age equivalent of one year, five months to an age equivalent of one year, nine months over the three years since she had been tested in 2011. (Francisco) Jacqueline had difficulty identifying body parts or clothing items on herself, the examiner, or on a toy bear/doll. She could not consistently identify pronouns or follow commands without gestural cues. (J-23) Jacqueline's expressive language skills, measured with the use of her ACC, received an age equivalent of one year, three months of age; she completed all tasks through eleven months of age. (J-23) Ms. Francisco administered additional tests and provided age equivalencies, but did not report as to Jacqueline's growth since 2011 on these measures.

As recommended by Ms. Francisco, Jacqueline requires continued direct instruction in speech and language in order to progress in her acquisition of core functional communication targets and fluency. She also requires continuous oversight by a team that understands motor, language, communication, and academics to address her significant communication needs. (Francisco)

37. Dr. Nowinski, on the other hand, was able to administer the PPVT-4 during her evaluations of Jacqueline in both 2013 and 2014. Jacqueline's raw score on the test administered at the end of 2014 was the same as it had been during the March 2013 administration, reflecting a lack of progress during the 21 month period in addition to receptive language skills falling well below age-level. Dr. Nowinski expressed concern about this lack of progress in receptive vocabulary given her finding that Jacqueline had continued to progress cognitively during the same time period. (J-31) Consistent with her 2013 performance, at the end of 2014 Jacqueline scored below the 1st percentile on the DAS-II Verbal Comprehension task. Jacqueline utilized her AAC device on the Expressive Vocabulary Test – 2nd Edition; although she was able to locate familiar objects on her device, she was unable to find other words or objects with which she is familiar. On occasion she displayed emerging problem-solving skills, though her scores reflected substantially limited expressive vocabulary. (J-31) Moreover, according to teacher ratings on the BASC-2, Jacqueline's functional communication skills dropped from a 24 to a 19. Overall, Dr. Nowinski concluded that Jacqueline displayed little progress on tests of language and comprehension over a nearly two year period. She observed that clear gains in cognitive functioning should have been accompanied by similar progress in other areas of functioning, including vocabulary and comprehension.

Furthermore, as measured on the Bracken-3 and the VMI-6, both administered by Dr. Nowinski, Jacqueline's visual-motor integration skills and output did not progress between March 2013 and December 2014. As of the latter date she was unable to identify many items correctly on her AAC device, and functionally was unable to write, copy or trace her name or other letters. (J-31)

As a result of these findings as to Jacqueline's language, comprehension, and visual-motor integration skills, Dr. Nowinski concluded that Jacqueline's programming has not resulted in meaningful progress on standardized measures, which would have demonstrated that she has generalized the mastery of these skills.

38. Jacqueline has made little, if any, progress in her adaptive skills since March 2013. In fact, she has been working on some activities of daily living for many years, including toileting, which she began working on when she was three or four years old (Father). Jacqueline's occupational therapist's ratings of her progress on the ABLLS-R indicate that since 2011, of the seven items listed under grooming, she has only made partial progress in one of those. (J-22, Biele) After she observed Jacqueline at school in February 2015, Ms. Timmel noted similar findings: Jacqueline did not take her coat off by herself or hang it up, and she needed assistance and full prompts to put her shoes on and bring her materials to the DTT area. (J-30, Timmel) Minimal progress on adaptive skills is of particular concern for a student with Jacqueline's profile and as such should be "the most intensive focus of intervention." (Nowinski)

In 2013 Dr. Nowinski had Jacqueline's mother and teacher complete the BASC-2, the Vineland –II, and the BRIEF, and they reported similar observations. All of Jacqueline's skills fell below the first percentile, with age equivalents ranging from less than one year to approximately a four year-old level; across the board, she exhibited a very severe level of impairment in terms of her adaptive skills, though none of the externalizing symptoms (including shift and emotional control) were significantly elevated. Jacqueline experienced difficulty with her executive functioning skills, including inhibition and emotional control, task initiation, working memory, organization of materials, and monitoring her own behavior. (J-35, Nowinski)

In 2014, Dr. Turk had Jacqueline's parents and teacher complete the BASC-2 and the BRIEF. Their scores on the BRIEF reflected clinically significant elevations in behavioral regulation, particularly in terms of Jacqueline's ability to inhibit impulses and shift set, which refers to cognitive flexibility. Both sets of scores with regard to metacognitive challenges were also at the clinically significant level. On the BASC-2, both Jacqueline's parents and Ms. Hale reported clinically significant concerns around adaptive functioning, with significant elevations on the behavioral symptoms index, including attention problems, learning problems, school problems, atypicality, and withdrawal, as well as marked deficits in adaptive skills. (J-27, Turk, Nowinski) In addition to these areas being of clinical significance, Jacqueline's scores had increased since 2013 in terms of her hyperactivity per parent rating, her behavior symptom index per teacher rating, and school problems and study skills per teacher rating. The ABAS-II reflected extremely low ability within the conceptual, social and practical domains of

function, consistent with the Dr. Nowinski's findings on the Vineland in 2014, discussed below. (J-27, Turk, Nowinski)

For her 2014 evaluation of Jacqueline, Dr. Nowinski had her parents complete the Vineland-II. She did not have Jacqueline's teacher complete the assessment this time.¹² Dr. Nowinski noted that Jacqueline's profile reflected substantial deficits in functional adaptive skills, including all areas of communication, daily living skills, and socialization. Her skill equivalencies ranged from less than one year to three year old and revealed "limited to no progress since 2013." For example, in Receptive Communication Jacqueline had gained two months over the 21 month period between evaluations; in Expressive Communication she had lost one month; in Written Communication she had lost 14 months; in Personal Daily Living Skills she had gained two months; in Domestic Daily Living Skills she had stayed the same; in Community Daily Living Skills she had gained seven months; in Interpersonal Relationships she had lost one month; in Play and Leisure time she had gained seven months; and in Coping Skills she had gained one month. (J-31)

39. Jacqueline's limited progress on her adaptive skills is troubling. "In light of the notable progress seen in her nonverbal cognitive skills," Dr. Nowinski wrote in her 2014 evaluation of Jacqueline, "evidence of [Jacqueline]'s limited to no functional/adaptive skill acquisition is quite concerning." (J-31) Dr. Nowinski further testified at the hearing, "We would expect to see in somebody with an intellectual disability as their primary diagnosis adaptive skills reduced, but more or less consistent with their cognitive development. . . So when I think about the interplay between [Jacqueline]'s autism spectrum diagnosis and her intellectual disability, I start to become very concerned about the factors that are interfering with [her] ability to develop adaptive skills."
40. Jacqueline's autism spectrum disorder is likely the main reason she is not progressing in her adaptive and communication skills at rates commensurate with her cognitive growth.¹³ (Nowinski) Dr. Turk testified that Jacqueline's autism falls into the most severe category in the current Diagnostic and Statistical Manual of Mental Disorders such that she requires substantial support. As such her autism contributes to her intellectual profile because it contributes to the extent to which she is able to function. (Turk)

According to both Dr. Nowinski's and Dr. Turk's evaluations of Jacqueline, her nonverbal cognitive skills, particularly nonverbal reasoning and spatial visualization, have been progressing. Yet she has not made measurable progress on standardized testing in her language and comprehension skills since 2013, which indicates that her foundational language skills are not responding to her current programming. (Nowinski) Moreover, Jacqueline's adaptive skill profile reflected little to no meaningful skill

¹² Dr. Nowinski testified that because Dr. Turk had just had Ms. Hale complete the ABAS-II, which – like the Vineland – is a functional measure of adaptive skills, in October 2014 and she would not expect to see significant changes in less than two months' time, she reviewed Dr. Turk's evaluation and spoke with her briefly after the evaluation rather than have the teacher complete the Vineland-II for her own evaluation. (Nowinski)

¹³ At hearing, Dr. Nowinski testified, "I believe that the severity of her autism diagnosis is the number one contributing factor preventing her from making reasonable and meaningful progress in her adaptive skills."

acquisition since her 2013 evaluation, a disconcerting result given her underlying nonverbal cognitive capacity as reflected in her assessment. Given Jacqueline's marked lack of progress in her language, social communication and adaptive skills, Dr. Nowinski concluded that Jacqueline's autism spectrum disorder was likely the "main impediment to her progress – impacting not only her ability to interact with the world around her, but also her ability to acquire and consistently demonstrate meaningful functional life skills." (J-31)

41. The ALC does not provide an appropriate peer group for Jacqueline. A program such as the ALC that must serve such a range of students with a variety of presenting issues, challenges and needs, is less likely to be able to meet Jacqueline's needs than a program designed specifically for peers with profiles more similar to hers. In her typical day, Jacqueline encounters only one other student who uses a communication device, which is insufficient to support her language development and use of her AAC device. (J-30, Nowinski, Timmel)
42. Jacqueline's exposure in school to neuro-typical peers and to peers who are not on the autism spectrum is currently of limited benefit to her. Experts who testified otherwise were unable to identify many specific ways in which Jacqueline currently benefits from inclusion. Dr. Turk testified that she believes Jacqueline's time with her peers in the ALC, including the adult-facilitated one-on-one activity, is beneficial to her. She acknowledged, however, that the basis of this belief is only that Jacqueline appeared to be engaged and able to transition from these activities to other activities rather than protesting the shift to the next activity in each case. (Turk) Moreover when asked specifically whether Jacqueline benefits from the peers in her classroom, Dr. Turk testified that she benefits from her overall school experience, which includes peers in her classroom, the hallways, the cafeteria, and small group instruction. Dr. Turk did not identify specific ways in which having these peers in her school setting is beneficial to Jacqueline, except to the extent that they give her opportunities to be exposed to a community, a real world made up of diverse individuals, in an environment that is familiar and recognizable. (Turk) Dr. Nowinski testified that inclusion experiences in a school setting do not currently have value for Jacqueline as social interaction with neuro-typical peers in her age range is not appropriate for Jacqueline, given her profile. Instead, inclusion opportunities best tailored for Jacqueline come from exposure to generalized learning in the community and home environments. (Nowinski) Such opportunities are consistent with Dr. Turk's recommendation that Jacqueline be exposed to her larger community, and can occur outside of the school day.
43. Given her profile, the slow progress she appears to making in some areas, and the absence of progress in others, Jacqueline requires a full-year ABA program with consistency in staff and programming throughout her day, where she is educated alongside other students with ASD who utilize AACs. (Nowinski)

Although she made several positive observations about Jacqueline's current program, most notably the care for Jacqueline displayed by her teachers and the other professionals who work with her at the Lincoln School and observed that Jacqueline "is receiving some

aspects of ABA programming and discrete trial programming in her current program,” Dr. Nowinski expressed concern that Jacqueline is not progressing sufficiently. She concluded that “sprinklings of ABA are not sufficient for [Jacqueline, and that instead] she needs an intensive, systematic, full-time, year-round ABA program with consistency in staff, with consistency in programming throughout her day, throughout her year.” (Nowinski) Dr. Turk’s observation that Jacqueline “appears to learn best when skill instruction is delivered in a one to one, highly structured, systematic, incremental and repetitive manner with frequent shifts in content focus” is consistent with Dr. Nowinski’s recommendation that Jacqueline receive more intensive, highly specialized programming to support the social, communication, and adaptive skill deficits resulting from her primary and most interfering ASD diagnosis.¹⁴ (J-27, Nowinski)

Moreover, Jacqueline should be educated with other students who utilize augmentative communication devices. Dr. Nowinski noted that Jacqueline’s relative strength in social motivation suggests that “supported exposure to an appropriate peer group including children of similar abilities whose primary mode of communication is nonverbally mediated” will assist her in participating in meaningful social communication. (J-31, Nowinski)

Components of such a program include a substantially separate, full-year program (with no more than a week long break at any time) staffed consistently by individuals highly trained in autism spectrum disorders and the related language, social, communication, and behavioral needs of children with ASD; intensive language and communication supports throughout the day; formal instruction and informal support with an appropriate peer group with similar diagnostic profiles and similar AAC and nonverbal communication needs; a highly structured program based on the principles of ABA; and both natural environment training and sequential, systematic implementation of a formal discrete trial program. (J-31)

A DTT program for a student with ASD should be built to layer items that are mastered with new learning and novel learning as a way of scaffolding instruction, presenting children with new information in the context of mastery and thereby preventing frustration. (Nowinski) Ms. Timmel referred to this a “hierarchal sculpting,” beginning to expose a child to variations of a stimulus, in order to assist her in taking novel information she is learning in language and communication and use it in real life, and suggested that it be paired with an adaptive component for Jacqueline, which would enable her to interact with the world and generalize the skills. (Timmel) DTT of necessity involves focusing on tiny skills, but “in order to make the leap from those tiny skills in isolation to a successful ability to generalize . . . and use those skills in a functional

¹⁴ Leslie Deutchman, a board certified behavioral consultant with a Master’s degree in Special Education who has taught elementary school children and is now the Executive Director of APEX Behavioral Consulting (the vendor that provides Jacqueline’s home-based services), agrees. She testified that Jacqueline requires an intensive ABA program with forty hours a week of ABA, approximately thirty at school and ten at home. (J-48, Deutchman) Dr. Turk agrees that Jacqueline requires home-based supports focused on developing and generalizing the skills she is learning at school. (Turk)

manner, those tiny skills in isolation have to be part of a bigger, more comprehensive instructional programming curriculum.” (Nowinski)

In contrast, Jacqueline’s current program at the ALC appears to be focused on tiny skills in isolation, in the absence of a very clear, comprehensive plan addressing the full breadth of her needs. (Nowinski, Timmel) At least part of the time, Jacqueline is taught discrete trial lessons focused on a single object, tried repeatedly with success, rather than building in new items appropriately. Jacqueline is also being taught skills such as tooth brushing without the use of visuals or her talker, hand washing in isolation, and sandwich making in the classroom apart from the cafeteria and her lunch time. (Nowinski, Turk, Bruce) Adaptive skills should be taught in context, rather than in isolation, in order to promote generalization of concepts Jacqueline learns. These kinds of lessons, therefore, should be modified such that they are more purposeful. (Nowinski) Social communication must be taught purposefully as well, in a hands-on manner, and applied in the moment to enable Jacqueline to internalize the skills in context. (Turk)

44. Although Jacqueline does not engage in aggressive or self-injurious behaviors, she does require an integrated behavioral approach to address her lack of appropriate behaviors with respect to persisting in learning tasks and tolerating frustration, which may interfere with her ability to make meaningful progress and engage in her learning activities. These behaviors should be addressed as part of her program. (Nowinski)
45. Inclusion is not a required, or even recommended, component of a program tailored to meet Jacqueline’s current needs. Although Dr. Turk recommends inclusion for Jacqueline, she believes its primary objective at this point would be to enable Jacqueline to learn and generalize self-regulation skills so that she can continue to learn within a diverse, heterogeneous community. According to Dr. Turk, in this environment Jacqueline may work on regulating herself in a larger environment which, when well-designed, well-monitored with a lot of preview and review and task analysis around each step, in combination with good consultation from both inclusion specialists and individuals with severe special needs training “would inform a robust program that would allow her to benefit from that inclusion opportunity.” Dr. Turk recognized that she would not use inclusion for social interaction for Jacqueline; although inclusion opportunities are oftentimes calculated to provide social exposure and opportunities for social interaction, Jacqueline is not there yet in the fullest sense. (Turk) Moreover, in order for Jacqueline to learn, from an inclusion experience, how to desensitize herself to a noisy environment and build adaptive skills to increase her coping mechanisms and her tolerance, she would need an instructional component geared toward these goals. This did not appear to exist at the ALC. (Timmel)

In light of these limited benefits and the fact that Jacqueline may be exposed to larger environments in order to practice self-regulation outside of the school day, Jacqueline’s “current programming needs far outweigh the need for formal inclusion in her school environment.” (Nowinski) Jacqueline must be educated alongside peers who also communicate using AAC devices. (Nowinski)

46. RCS Learning Center is a nonprofit private day program for children diagnosed with autism and other developmental disabilities. (Yorlets) It is a full-year program, with no more than a one week break at any given time, and students remain in the same building on the same schedule during the summer. (Yorlets) RCS is based on and built around the principles of applied behavior analysis and provides systematic instruction of all learning tasks and goals, with consistent behavioral support, across the day. (Nowinski) Each student works on objectives based on her individualized needs through discrete trial instruction and incidental teaching. Discrete trial instruction is delivered on a one-to-one basis, allowing for repetition and combining maintenance tasks and acquisition tasks, including reinforcement, and avoiding the development of errors. Incidental teaching occurs in the more natural setting, walking through the hallway, at lunch or recess, or in the community, and promotes the generalization of the skills targeted during discrete trial instruction. Each student has a program book that contains guidelines for the student, her schedule, her primary mode of communication, behavioral guidelines and behavior support plans, information about eating and toileting, details about the programs and protocols she is working on, descriptions of targeted behavior, teaching procedures and prompting used, graphs to track progress toward objectives, etc. (P-2, Yorlets)

Students' days are divided into three, two-hour blocks, each with a different instructor. A typical day would involve three hours of discrete trial instruction, an hour of group instruction with groups divided by age working on skills such as taking turns, responding to questions, raising hands, etc., an hour of natural environment/incidental teaching, and lunch and recess. The discrete trial work occurs with several peers and their instructors in the same classroom. Instructors employ errorless instruction, whereby they might begin with a positional prompt and fade that prompt over time to build independence without creating error patterns. RCS develops reinforcement schedules to avoid satiation and capture children's motivation in incidental teaching. Incidental teaching may include community outings such as gymnastics classes and trips to the mall, the grocery store, or restaurants. (Yorlets) This model takes discrete individual sets of teaching moments and puts them into the framework of a broader context and more continuous learning program, which is what Jacqueline needs. (Nowinski)

Although the individuals who would work directly with Jacqueline at RCS are not currently licensed as educators by the Massachusetts Department of Elementary and Secondary Education, RCS staff are educated and trained in principles of applied behavior analysis. (J-52, Nowinski, Yorlets) RCS Behavior and Education Consulting Clinical Director Colleen Yorlets, a BCBA, has been at RCS since 2007.¹⁵ She began working there as a supervisor, then became assistant director, before she took on her current role as clinical director for the consulting company. She also serves on the executive team of the learning center and as a mentoring instructor in Simmons College's behavior analysis program. (J-52, Yorlets) When she first began working at RCS, before she earned her board certification, Ms. Yorlets received training on a variety of topics related to behavior analysis and met weekly with a BCBA. In order to maintain her

¹⁵ Although Ms. Yorlets testified that she serves as the Clinical Director for RCS Behavioral and Educational Consulting, she clarified on cross-examination that there is currently no clinical director at the school, and in fact the program director fulfills that function, overseeing all of the BCBAs. (J-52, Yorlets)

BCBA certification, she attends continuing education courses. (Yorlets) She testified at the hearing that all behavior therapists at RCS are currently working toward earning the Registered Behavior Technician credential offered by the board that certifies behavior analysts for individuals who provide mostly direct service. This entails a forty-hour training, a competency examination, and continuing education credits. RCS offers additional trainings for staff. (Yorlets)

At RCS, Jacqueline's special education instructor would be Nicole Whitney, who holds a Master's degree in Behavior Analysis and has obtained a waiver from the state while she works toward her Massachusetts teacher's license.¹⁶ (J-52, Yorlets) As Jacqueline's special education teacher, Ms. Whitney would be responsible for Jacqueline's academic programming, which entails administering assessments, choosing and evaluating curriculum, and working with the program manager on prompting methods and whatever else is appropriate. Ms. Whitney would be supervised by Erin Kostigan, RCS's educational administrator. (Yorlets) Ms. Kostigan has a Bachelor's degree in Special Education, a Master's degree in Elementary Education, and certification as a teacher of students with moderate special needs. She also has a graduate certificate in behavioral intervention and is licensed as a BCBA. (P-1, Yorlets) Jacqueline would work throughout her day with several behavior therapists, each of whom is pursuing a Master's degree in behavior analysis. (J-52, Yorlets) The behavior therapists are overseen by the program manager, who in Jacqueline's case would be Megan Breault. Ms. Breault is a BCBA who has her Master's degree in Behavior Analysis;¹⁷ she would provide at least two hours of consultation a week training staff on new programs, observing them, modeling different techniques or procedures, and monitoring the quality of services delivered to Jacqueline. She would also meet with Jacqueline's parents for two hours every month. (J-52, Yorlets) Ms. Breault is overseen by the director of the school, Chrissy Boyd-Pickard, who is also a BCBA and who is working toward her Doctorate in Behavior Analysis. (Yorlets)

Christina Nilsson, who has a Master of Arts degree in Communication Disorders, would be Jacqueline's speech and language pathologist. (Ms. Nilsson has available to her for consultation Jessica Padula, a licensed speech and language pathologist with a Master's degree in Speech and Language Pathology.) Although RCS usually employs a consultation or integrated model for speech, whereby Ms. Nilsson would provide consultation for approximately 30 minutes a week rather than direct services, speech and language can be individualized within the program. (J-52, Yorlets) Kathleen Larche, a certified speech and language pathologist with a doctorate in education, provides direct speech services to one current student at RCS and would be available to Jacqueline if needed. (J-52, Yorlets) Occupational therapy is generally delivered through a consult model by a registered, licensed occupational therapist. (J-52, Yorlets)

¹⁶ Collen Yorlets testified that the other teacher who works with students within the age group that would encompass Jacqueline is similarly waived and working toward her Massachusetts teachers' license.

¹⁷ Ms. Yorlets testified as to Ms. Breault's qualifications. The version of Ms. Breault's resume submitted within Joint Exhibit 52 does not reflect these qualifications, but it appears outdated in that it includes an anticipated graduation date from her undergraduate institution of May 2010. I find Ms. Yorlets' testimony on this point to be credible.

All members of Jacqueline’s team would attend weekly trainings offered by different specialists at the school, such as the director or the speech and language specialist, and would also meet weekly to discuss Jacqueline’s progress. (Yorlets)

Dr. Nowinski has observed RCS programming for students ranging from nine or ten years old through 12 years old, and she testified that RCS staff members are qualified to provide Jacqueline’s educational services. (Nowinski) Ms. Timmel has also observed other students at RCS, and she testified that the program is appropriate for Jacqueline because it contains all of the components she needs, integrated throughout the curriculum. (Timmel)

RCS students would form an appropriate peer group for Jacqueline. Of the 45 students between the ages of four and 18 currently enrolled at RCS, all of them are diagnosed with ASD, and 14 use assistive devices as their primary mode of communication. Three students have been identified as Jacqueline’s primary peer group. They each have autism spectrum disorder diagnoses, and two of them – one of whom has coexisting global developmental delays and the other of whom has an intellectual disability – use assistive technology devices to communicate. (J-52, Yorlets) Although they may use software or “language” different from Jacqueline’s on their communication devices, they are able to communicate with each other and model the use of their devices for each other. (Yorlets)

DISCUSSION

A. Legal Standards: Free Appropriate Education, Least Restrictive Environment and Burden of Proof

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education” (FAPE).¹⁸ FAPE is delivered primarily through a child’s individualized education program (IEP).¹⁹ An IEP must be tailored to address each student’s unique needs that result from his or her disability.²⁰ The IEP must be “reasonably calculated to confer a meaningful educational benefit.”²¹

Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the “least restrictive environment.”²² This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that “removal . . . from the regular educational environment occurs only when the 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.”²³ “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s

¹⁸ 20 U.S.C. § 1400 (d)(1)(A).

¹⁹ *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

²⁰ See *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982) (FAPE must be “tailored to the unique needs of the handicapped child”).

²¹ *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012).

²² 20 USC § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); MGL c 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

²³ 20 USC 1412(a)(5)(A).

legitimate needs.”²⁴ Removing a child from the mainstream setting is permissible when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting . . .”²⁵

FAPE is defined by the IDEA to include state educational standards, which may exceed the federal floor.²⁶ Massachusetts FAPE standards seek “to ensure that eligible Massachusetts students receive special educational services designed to develop the student’s individual educational potential in the least restrictive environment.”²⁷ Moreover a student’s IEP must be designed to enable the student to make “effective progress.”²⁸

As the Supreme Court, lower federal courts and Massachusetts special education statutes have recognized, the application of the meaningful benefit standard is individualized. “[L]evels of progress must be judged with respect to the potential of the particular child,”²⁹ unless the potential is unknowable,³⁰ because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.”³¹ The sufficiency of any student’s progress, including Jacqueline’s, must be judged within the context of her individual potential or capacity to learn.³²

As the party challenging the status quo in this matter, the Parents bear the burden of proof.³³

B. Brookline Public Schools’ Current IEP for Jacqueline Is Not Reasonably Calculated to Provide Her With FAPE.

It is not disputed that Jacqueline is a student with a disability under federal and state special education law. The issue is whether Brookline Public Schools’ IEP for Jacqueline is reasonably calculated to provide her with FAPE. Whether Jacqueline is making effective progress that allows her to benefit meaningfully from her IEP is, as explained above, an individualized determination based on her potential or capacity to learn.³⁴ Although several

²⁴ *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008).

²⁵ *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006)(internal citation omitted).

²⁶ 20 USC 1401(9)(b); see *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524-25 (2007); see also *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 11 (1st Cir. 2007) (state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

²⁷ 603 CMR 28.01(3); see MGL c. 69, § 1; MGL c. 71B, § 1.

²⁸ 603 CMR 28.05(4)(b) (IEP must be “designed to enable the student to progress effectively in the content areas of the general curriculum”).

²⁹ *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (*Lessard I*); see *Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP”).

³⁰ See *Esposito*, 675 F.3d at 36.

³¹ *Rowley*, 458 U.S. at 202.

³² See *id.*

³³ See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008). As such, to prevail they must prove, by a preponderance of the evidence, that Jacqueline’s current IEP does not provide her with a free appropriate public education. See *id.*

³⁴ See *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 592 F.3d 267, 270 (1st Cir. 2010) (upholding appropriateness of IEP where evidence demonstrated student “was progressing at a level commensurate with her

evaluators had difficulty obtaining reliable evaluations of Jacqueline's capabilities, I find that Dr. Nowinski's evaluations of Jacqueline and the scores she obtained are the most reliable, as she was able to complete each assessment she administered without the assistance of another individual, likely because she has more experience than other evaluators assessing students with autism spectrum disorders and co-occurring intellectual disabilities. There is no question that Jacqueline has made significant cognitive progress between March 2013 and the end of 2014, as measured by both Dr. Turk and Dr. Nowinski, and that this progress is manifested beyond the increased points on her FSIQ. Evidence was offered by both parties demonstrating that Jacqueline has made slow but steady progress since March 2013 on several speech and language goals, including the navigation and use of her talker and her ability to feed herself. Brookline Public Schools also offered evidence that Jacqueline has progressed toward independence from a gross motor standpoint.

At the same time, Jacqueline has made limited to no progress in key areas. These include nonverbal working memory, visual-motor integration, receptive language and, in particular, functional communication and adaptive skills. Because education for a student with Jacqueline's constellation of needs is in large part focused on increasing independence through functional communication and activities of daily living, without sufficient growth in her adaptive skills Jacqueline cannot be deemed to be making effective progress.

Dr. Nowinski, whose expertise in ASD specifically leads me to give particular weight to her recommendations, testified that Jacqueline's autism spectrum disorder is likely the reason Jacqueline has not made progress in her adaptive skills commensurate with her cognitive potential, when considered in the context of her cognitive progress over the same period of time. Dr. Nowinski also testified that in order to make such progress, Jacqueline requires an ABA-based program delivered with complete fidelity to the principles of applied behavior analysis that provides systematic instruction in all learning tasks and goals, with consistent behavioral support across the day. The discrete trial training must be embedded in a comprehensive curriculum that promotes functional use of and the ability to generalize the skills that are taught. It must also be delivered by individuals highly trained in autism spectrum disorders and the related language, social, communication, and behavioral needs of children with ASD, in an environment where Jacqueline is surrounded by peers who are also on the autism spectrum, have some degree of intellectual impairment, and use augmentative communication devices.

Brookline Public Schools' current IEP for Jacqueline continues her placement in the ALC at the Lincoln School, where she receives the majority of her services alongside other children who are more verbal than she is, who do not have ASD and who do not communicate using ACCs. A significant portion of Jacqueline's day is spent in discrete trial training, but some of her skills are taught in isolation, which may make it more difficult for her to generalize them, and she does not appear to benefit meaningfully from her time in inclusion settings. For Jacqueline, "any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting."³⁵ Although Jacqueline is comfortable and genuinely cared for at school by the people who work with her, for the reasons

cognitive profile"; *Lessard I*, 518 F.3d at 29 ("levels of progress must be judged with respect to the potential of the particular child").

³⁵ See *Pachl*, 453 F.3d at 1068.

detailed above, the IEP proposed by Brookline Public is not reasonably calculated to provide her a free appropriate public education to Jacqueline in the least restrictive setting. Jacqueline's Parents have met their burden of persuasion in this matter.³⁶

C. No evidence was presented as to additions or modifications that could be made to the IEP in order to provide Jacqueline with FAPE.

The evidence presented by Brookline Public Schools demonstrates that it has provided Jacqueline with a program staffed by highly qualified, well trained professionals who care deeply about her, and that Jacqueline's IEP has been amended to provide additional services or adjust goals as needed, to the degree these changes could be accommodated within the ALC. There is no evidence in the record to suggest that there are additional services Brookline Public Schools could provide for her, and given that Jacqueline requires such highly specialized programming I find that the current IEP placing Jacqueline in the ALC cannot be added to or modified in order to provide her with FAPE.

D. RCS is appropriate to meet Jacqueline's needs.

Jacqueline's Parents have proposed RCS as a placement that is capable of meeting Jacqueline's needs. Ms. Yorlets testified in detail, as described in Finding 46 above, about the structure of RCS, its application of ABA methodology, and the qualifications of the individuals who would be working with Jacqueline. Ms. Yorlets' description of RCS, particularly its systematic implementation of ABA instruction, is aligned with the components Dr. Nowinski testified are necessary for Jacqueline to make effective progress. Moreover, although RCS is clearly a more restrictive environment than the ALC, the program's incidental teaching includes community outings, which are likely to provide the types of opportunities for Jacqueline to practice self-regulation that Dr. Turk testified are the primary advantages of inclusion for Jacqueline at this time. The staff who would work with Jacqueline are all trained in ABA techniques, and although most current students appear to receive speech and language instruction through a consultative model, RCS would be able to provide Jacqueline with the direct speech and language services she needs.

RCS, therefore, is appropriate for Jacqueline, and an IEP providing for placement at RCS would provide Jacqueline with a free, appropriate education in the least restrictive environment.³⁷ In a strict ABA-based program such as RCS, Jacqueline may make effective progress in her adaptive, communication, and other skills, such that she can be reintegrated to a less restrictive environment in the future.

³⁶ See *Schaffer v. Weast*, 546 U.S. at 62.

³⁷ Cf. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15-16 (1993) (concluding that reimbursement for unilateral placement in private school is appropriate, as long as "public placement violated IDEA and . . . private school placement was proper under the Act").

CONCLUSION

Upon consideration of the testimony of the witnesses and the evidence before me, I conclude that the IEP proposed for Jacqueline by Brookline Public Schools on January 13, 2015 (as amended March 13, 2015) is not reasonably calculated to provide Jacqueline with a free appropriate public education in the least restrictive setting; that this IEP cannot be modified to conform to this standard; and that Jacqueline is entitled to public funding for placement at Realizing Children's Strengths.

ORDER

Brookline Public Schools is hereby directed to develop an IEP for Jacqueline placing her at RCS for the 2015-2016 school year.

By the Hearing Officer:

Amy M. Reichbach
Dated: July 13, 2015