

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

---

IN RE: PABLO<sup>1</sup>

&

BSEA #1904924

FAIRHAVEN PUBLIC SCHOOLS

---

**DECISION**

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1400 *et seq.* and 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on June 6 and 10 at Offices of Murphy, Hesse, Toomey and Lehane in Quincy, Ma. The Parent was represented by Attorney Jeffrey Sankey. Fairhaven Public Schools (“the School”) was represented by Attorney Mary Ellen Sowyrda.

The official record of the Hearing consists of exhibits submitted by the Parent marked P-1 through P-37, exhibits submitted by the School marked S-1 through S-16, and approximately 18 hours of recorded testimony and arguments. The Parties elected to submit written closing arguments which were received by the Hearing Officer on July 10, 2019. The record closed on that date.

**ISSUES**

Whether the March 2019- March 2020 Individualized Education Program proposed by Fairhaven is reasonably calculated to provide a free appropriate public education to Pablo?

If not, is the Parent’s proposed placement, the Riverview School, the least restrictive, appropriate available alternative?

---

<sup>1</sup> “Pablo” and its derivative “Ms. P.” are pseudonyms chosen by the Hearing Officer for use in publicly accessible documents to protect the privacy of the Student and family.

## POSITIONS OF THE PARTIES

Parent: Fairhaven has failed to develop an IEP that appropriately addresses all of Pablo's significant academic, language and social deficits. He is not able to access grade level academic material in the general classroom even with the support of a dedicated paraprofessional. He requires placement in a specialized day program which offers highly structured, coordinated, specialized academic instruction from skilled special education teachers in small groups of peers with similar cognitive abilities. He needs daily, direct specialized instruction in reading and written language. He needs social, pragmatic language and executive functioning skills instruction and practice in all settings. The partial inclusion program at Fairhaven High School does not meet these criteria. The "Life Skills" program at Fairhaven High School does not meet these criteria. Pablo's current partial inclusion program is not appropriately staffed. It is not monitored to ensure that his needs are being met. Despite years of instruction in variants of the proposed program, Pablo has not made meaningful progress academically or socially. The Riverview School offers the appropriate academic, social pragmatics and behavioral instruction, with the staff and in the environment that is necessary for Pablo to make meaningful educational progress in the least restrictive environment for him.

School: Pablo has shown that he can thrive in the partial inclusion program at Fairhaven High School. He has been able to access the general curriculum and has been an engaged, active participant in his classes. Removing Pablo from the High School and the Fairhaven community would take away valuable opportunities for Pablo to exercise his independence and socialize with non-disabled peers. He would no longer be able to participate in his beloved band. If required, additional supports can be added to the partial inclusion program. Placement in the High School's substantially separate "Life Skills" program is also an available option.

## SUMMARY OF THE EVIDENCE

1. Pablo is a fifteen year old Fairhaven High School student presenting with autism spectrum disorder and intellectual impairment. By all accounts Pablo is a positive, engaged and happy young man. He has a particular affinity for music. Pablo ably plays various instruments and enjoys participating in the Fairhaven High School Band. He has received special education services through Fairhaven since kindergarten. His intellectual functioning has been consistently reported to range between very low and low on standardized measures of cognitive potential administered in 2015 and 2018. (P-14; P-16; P-16, S-7; P-6, S-10; P-12, S-6) Pablo demonstrates significant weaknesses in language functioning, particularly in areas requiring inferential or abstract thinking and social pragmatics such as interpreting the tone or facial expression of a conversation partner. (P-10, S-7; P-17; P-6, S-10; Murphy-Mello; Muirhead) Scores on standardized academic achievement tests have been consistently reported in the low and below average range. Pablo demonstrates a grasp of multiplication facts in the average range. Otherwise his math computation and problem-solving skills fall at the first percentile or lower. Similarly, Pablo demonstrates significantly stronger reading decoding and spelling skills, approaching a fifth grade functional level, than he does reading comprehension and independent writing skills which fall at the first percentile or beginning first grade level. In general, weak memory, attention, concentration, organization and language comprehension

skills affect all areas of Pablo's educational performance and require specialized educational interventions. In addition, Pablo's social functioning is poor. While he is consistently described as cheerful, engaged, positive and charming, Pablo also demonstrates idiosyncratic, routinized and shallow behaviors that are not age appropriate and require remediation and/or accommodation. (Muirhead; Engelman; Ms. P.) Though he demonstrates a strong desire to please others and make social connections, delays in the areas of speech/language, cognitive development, sensorimotor/adaptive skills and attention weaknesses, negatively affect his ability to learn, to perform academically and to interact socially at his expected age and grade level. (P-1, P-2, P-3, P-4, P-5, P-6, P-10, P-12, P-13; Ms. P.; Engelman; Muirhead)

Evaluations conducted by Fairhaven in 2015 and 2018, as well as independent evaluators and service providers arranged by the Parent, paint a consistent portrait of Pablo as a student and make strikingly similar recommendations for special education services. (P-16; P-12, S-6; P-6, S-10). They agree that Pablo requires a small classroom setting with specialized instruction in all academic areas in order to make meaningful progress toward his educational goals. He learns best with a high degree of structure and predictability, consistent routines and clear expectations throughout the school day. He benefits from slow, clear, repetitive presentation of information and visual supports. He needs direct instruction in language, adaptive and social skills with structured practice and repetition embedded throughout all classes and educational activities in order to facilitate development of independent learning and living skills. (P-6, S-10; P-16; P-11; P-12, S-6)

2. During his middle school years, 2016-2018, Pablo received special education services in a partial inclusion program. He participated in small group classes in English Language Arts and mathematics, and attended general education social studies and science classes with the support of a 1:1 paraprofessional (P-4; P-5) The "measurable annual goals" and benchmarks remained largely identical from year to year, with some lowered performance expectations, throughout the sequence of middle school IEPs. (Compare P-3, P-4, P-5) While some social skills and written expression benchmarks had been reported as "achieved" in 2017 and 2018 they continued to appear unchanged in subsequent IEPs (P-29; P-30). There are no objective measures of academic performance in the record from the 2016-2017 or 2017-2018 school years. The IEPs indicate that social/behavioral progress would be measured through ABA based data collection on a behavioral intervention plan. There are no social/behavioral records in evidence.

3. The Team met on March 9, 2018 and again on June 15, 2018 to plan Pablo's 9<sup>th</sup> grade program at Fairhaven High School. The School based members recommended that Pablo enter the "Life Skills" program, a substantially separate classroom with a small group of similarly able peers, staffed by a special educator and paraprofessionals. (Sullivan) Ms. P. objected and requested continuation of a partial inclusion program. The Team then developed an IEP for the 2018-2019 school year calling for Pablo to continue receiving small group instruction in math and English, and instruction in general education science and social studies with a dedicated paraprofessional. The IEP also provided for a daily academic support class and a weekly half hour social skills group conducted by a speech-language pathologist. Ms. P. accepted the proposed High School services on July 9, 2018. (P-3, S-3)

4. The Parent arranged for a privately funded psychoeducational evaluation to be conducted by Dr. Marilyn Engelman, an educational psychologist with more than thirty years of experience evaluating students with special learning needs. Dr. Engelman met with the Parent, reviewed Pablo's educational records and previous evaluations and conducted formal and informal assessments of Pablo's intellectual, academic, executive functioning, behavioral and social skills, over the course of two days in June 2018. (P-6, S-10)

Dr. Engelman found that Pablo achieved higher scores on the intellectual function measures she administered than he had in his previous tests in 2016 indicating "maturing" in the areas of fluid reasoning, verbal comprehension and visual-spatial skills. She cautioned, however, that all scores remained low and that memory and processing skills were weak. According to Dr. Engelman this is significant because in content based courses a student must be able to independently retain information in order to evaluate, organize, contextualize and link it to previously learned material.

Dr. Engelman's testing revealed that Pablo's academic skills clustered at the 4<sup>th</sup> grade level with support and at the 1<sup>st</sup> grade independent level. According to Dr. Engelman, this lack of growth since the previous testing in 2015 indicates that Pablo was not receiving the skilled instruction necessary to take advantage of the maturation of his foundational intellectual skills. It also means that he does not have the skills to independently or meaningfully access curriculum or instruction at his grade placement level (8-9<sup>th</sup> grade) nor the abstract reasoning skills to understand grade level content even with support and modifications. (Compare P-6, S-10 and P-16, P-14)

Dr. Engelman recommended placement in a small, structured classroom in a group of 7-8 students with educational profiles similar to Pablo's, receiving specialized instruction in basic academics in a concrete, repetitive, slow paced manner, using simple language, reinforcement, previews/reviews, and consistent methodological and organizational approaches across the curriculum. She emphasized that Pablo needs direct, specialized instruction in all subject areas, with direct teaching of executive function, organization, social and Activities of Daily Living (ADL) skills embedded in all subject areas and practiced in all settings.

Dr. Engelman testified that in order to make progress toward independent learning Pablo requires skilled teachers who are certified in both their subject area and in special education. His learning environment needs to offer opportunities for instruction and structured practice in 1:1 and small group settings as well as during activities outside of formal academics. Significant resources should be devoted to improving Pablo's weak expressive and social pragmatic language and social skills. (Engelman; P-6, S-10)

5. Pablo entered the 9<sup>th</sup> grade, the 2018-2019 school year, in a partial inclusion program similar to that he had during middle school. (P-3, S-3) The Team reconvened on September 27, 2018 to review the results of Dr. Engelman's evaluation. After a discussion which included reconsideration of the High School "Life Skills" program the Team proposed an Amendment to the 2018-2019 IEP memorializing the partial inclusion placement: substantially separate small group classes in English, math and academic support; general education classes in science and

social studies, each for 6 class periods in a 7 day cycle; small group social skills training with a speech-language pathologist for one half hour per 7 day cycle; the assistance of a dedicated ABA paraprofessional in all classes; and consultation services from a speech-language pathologist for 15 minutes every 10 days, from a school counselor for 10 minutes every 5 days, and from a BCBA for 30 minutes every 5 days. (P-2, S-2; Ms. P; Engelman)

6. Dr. Engelman observed Pablo in the partial inclusion program in November 2018. She noted that Pablo was a “rule-based” learner and his behavior in school is not problematic in any setting. In the two “ISC” classes, math and academic support, there were 11 students, one teacher and one paraprofessional. The students were occupied with individual seat work. Pablo worked directly with his dedicated paraprofessional. When she left his side he lost focus and did not produce accurate work. In the substantially separate English language arts class there were five students, one teacher and one paraprofessional. The teacher used a whole group multisensory approach and provided simplified, concrete language-based instruction with scaffolding exercises, executive functioning strategies, teaching methodologies and curricular content which were appropriate for Pablo’s learning style and level. Dr. Engelman reported that the English class was appropriately leveled and taught and that the teacher was skilled in using the strategies and methodologies Pablo requires in order to learn the material. Nevertheless Pablo continued to need and use support from the paraprofessional in the English class. In the general education history class there were 22 students, one teacher and three paraprofessionals. Pablo and one other student worked exclusively with a paraprofessional on a modified test. Dr. Engelman found that the curriculum content in the history class was too abstract for Pablo, the vocabulary was too advanced and the classroom instruction was too fast paced. The movement and noise of the large group distracted him. (Engelman; P-6, S-10; P-31)

7. Dr. Engelman also briefly observed the substantially separate “Life Skills” program at the High School. There were six students in grades 9-12 present in the basement level class with one teacher and one paraprofessional. The instructional content and method appeared appropriate for Pablo, but Dr. Engelman had lingering concerns about the appropriateness of the peer group, the capacity of the classroom to focus on Pablo’s need for development of social skills, executive function skills and pragmatic language through direct, continual instruction and promotion of Pablo’s capacity for independent learning through reduction in use of a paraprofessional. (Engelman; P-6, S10)

8. Dr. Engelman concluded that the partial inclusion program in which Pablo was participating was not appropriate for him. There was no consistent, cohesive instructional methodology or organization to address his need for routine, predictability and structure. There was no emphasis on, or delivery of, organizational skills instruction that would permit Pablo to independently access the academic content. There was no direct, concrete or embedded social skills instruction. The classes lacked the concrete, methodical, repetitive quality of presentation and production that Pablo needs in order to learn independently. Thus, in the partial inclusion program model, Pablo requires the direct assistance of the paraprofessional at all times to modify and interpret all instruction, content and assessment.

Dr. Engelman emphasized that one critical goal of an appropriate educational program for Pablo is development of his capacity for independent learning. It would be reasonable to

expect, based on Pablo's intellectual potential, that with appropriate teaching he could develop sufficient reading comprehension and mathematical reasoning skills to independently access material at the 4-5<sup>th</sup> grade level. By continuing in an environment which requires an intermediary for access to all knowledge, the partial inclusion program does not meet the goal either of increasing Pablo's academic skill set or his independent access to materials using those skills.

Another critical goal for Pablo is development of social pragmatics. Dr. Engelman did not observe any interventions addressing this goal in the partial inclusion program. Dr. Engelman testified that, based on her testing and observations, the partial inclusion program was not appropriate for Pablo. (Engelman)

9. On December 4, 2018 Ms. P. rejected the 2018-2019 IEP and Amendment developed by Fairhaven. She accepted the proffered services on an interim basis. Relying on the conclusions of Dr. Engelman, Ms. P. requested that Fairhaven place Pablo in an out-of-district placement with the educational characteristics Dr. Engelman deemed necessary, specifically the Riverview School. (Ms. P.; P-20)

10. Fairhaven conducted Pablo's three year re-evaluation during the fall/winter 2018-2019. Timothy Luz, Fairhaven's Master's level school psychologist conducted a psychological evaluation on December 19, 2018. His results were congruent with those reported earlier by Dr. Engelman. Mr. Luz found that Pablo had grossly delayed cognitive functioning, with significant weaknesses in memory and processing speed, and associated deficits in social and adaptive living skills. Mr. Luz stated that Pablo required specialized academic and functional academic instruction with both direct teaching of executive functioning, social and adaptive living skills and skills practice embedded in all instruction. He noted that the High School "Life Skills" program would meet his educational recommendations for Pablo. Mr. Luz had not observed any of the specialized services or methodologies recommended for Pablo in the partial inclusion program. Mr. Luz wrote:

[Pablo] requires significant adaptive skills intervention. His academics should often times focus on practical application and daily living skills should be emphasized where possible within [Pablo]'s curriculum. In order for [Pablo] to become as independent as possible in the future he should be given explicit opportunities to practice daily living skills and encounter diverse situations in the real world regarding self-care, communication with trusted adults and peers as well as navigating social/community situations. Efforts to teach [Pablo] these adaptive life skills should happen across settings, both in and outside of school.

[Pablo] continues to require social skills supports as well. These supports should focus on social pragmatics, the nuances of communication, appropriate conversational norms, and other-awareness'. Learning to appropriately and effectively communicate with those around him will open many doors for [Pablo] especially considering his likely need for ongoing supports in the future. (P-12, S-6)

Mr. Luz testified that an afterschool social skills instructional group would be an important component of an appropriate special education program for Pablo. (Luz; P-12, S-6)

11. Mr. Luz testified that Pablo appeared to be making academic progress with the supports he was receiving through the partial inclusion program. He based this opinion on teacher reports and Pablo's report card. (S-13; Luz) His evaluation report states:

Although [Pablo]'s cognitive abilities are underdeveloped academic data suggests that he is performing well at FHS. Analyzing [Pablo]'s achievement scores alongside the data contained within this psychological report will be very important as his team considers his ongoing educational plan and ensure that it is sufficiently rigorous and supportive.

(P-12; S-6)

12. No academic achievement testing was conducted as part of the School's re-evaluation process. None of the teachers conducted any objective measures of academic performance at the beginning of, during or at the conclusion of the 2018-2019 school year. The Educational Assessment completed on January 2, 2019 as part of the three year re-evaluation reported that Pablo was not making progress in the general curriculum and "requires a small classroom setting in all academic areas for success. He works at a slower pace and needs curriculum taught with the use of specialized material. . . [Pablo] needs specialized instruction to be successful." (P-11)

13. Ann Lacasse-Elliott is a certified special education teacher. She is not certified in an academic content area. She taught Pablo's math and instructional support classes during the 2018-2019 school year. She did not do any baseline academic skill testing at the beginning of the school year. She did not read Dr. Engelman's evaluation report. The math textbook used in class is written at a 9<sup>th</sup> grade reading level. Ms. Lacasse-Elliott testified that the class focuses on concepts and operations that will be tested on MCAS, including one and two step equations. The class is slow paced with significant repetition and modifications. There are ten students in the class with one teacher and two paraprofessionals.

Ms. Lacasse-Elliott described Pablo as engaged, happy and well-behaved. He works primarily with the paraprofessional, who administers all assessments outside the classroom, reports back on Pablo's activities and achievements and suggests modifications and support strategies. Ms. Lacasse-Elliott testified that Pablo needs the assistance of the 1:1 paraprofessional to access the curriculum in the ten student group class, to slow down and focus on the process and to absorb the content. Pablo can retake a test as many times as he likes. Grades are based on the last retake. Ms. Lacasse-Elliott has not independently verified any assessment results. There is no social skills curriculum embedded in the math class. Ms. Lacasse-Elliott has not received a social skills consult from a speech-language pathologist or an ABA consult from the BCBA as outlined in Pablo's IEP. Ms. Lacasse-Elliott recommends that Pablo move on to MCAS prep geometry, functional math instruction and consumer literacy. (Lacasse-Elliott)

14. Amanda Pedersen teaches Pablo's 9<sup>th</sup> grade biology class. She does not have special education certification. Pablo is one of 24 students in the class. Eleven students have IEPs; 6 students have Section 504 plans; 7 students are general education students. The class is staffed by one teacher and one general paraprofessional, in addition to the paraprofessional for Pablo, who also works with another student in his group. Students are taught in groups of four. In Pablo's group, three students are on the autism spectrum. One is a typical peer. Social skills are promoted by interactive learning and turn-taking. Ms. Pedersen described her class as multisensory, hand-on, lab-based. The text is a 9<sup>th</sup> grade reading level but is rarely used. Pablo has been learning well but has been having difficulty absorbing the content, even with modifications, specialized tools and the direct assistance of the paraprofessional. Pablo requires the assistance of the paraprofessional due to class size. (Pedersen)

15. Robert Gesualdo teaches Pablo's 9<sup>th</sup> grade history class. He is not certified in special education. Pablo is one of 23 students in the class. Thirteen students have IEPs. Four students are on the autism spectrum. There is one teacher and 2 general para-educators, in addition to the paraprofessional working with Pablo and one other student. The curriculum is a 9<sup>th</sup> grade level world history and geography consistent with the Massachusetts curriculum frameworks. The class is highly structured, with clear expectations and routines. Mr. Gesualdo uses modified texts for all students through appropriately leveled handouts with highlights to emphasize key points. Typical students get different activities than those modified for students on IEPs. Pablo does all assessments individually with the paraprofessional outside the classroom. Mr. Gesualdo did not read Dr. Engelman's evaluation report, pretest Pablo at the beginning of the 2018-2019 school year, or assess Pablo's reading level. He testified that, for Pablo, access to grade level content is gained through modified materials and the direct assistance of the paraprofessional. Independent or assisted access to print at the 9<sup>th</sup> grade level is not expected of Pablo. Pablo would not be able to access the class at all without the assistance of the paraprofessional. (Gesualdo)

16. Bryan Young is the Director of Music for Fairhaven. He has known Pablo since the 4<sup>th</sup> grade. He testified that Pablo participates independently in the High School band as a mallet percussionist. According to Mr. Young, Pablo's behavior, instructional receptivity, learning pace and musical performance is indistinguishable from his typical peers. Pablo has perfect pitch and a genuine gift and enthusiasm for music. During the spring 2019 Pablo participated successfully, without paraprofessional assistance, in a multi-day band field trip to Washington, D.C. (Young)

17. Patricia Murphy-Mello, speech-language pathologist for Fairhaven, re-evaluated Pablo in December 2018. All language function scores fell at the 5<sup>th</sup> percentile or below indicating a highly significant degree of language impairment. As a result, Ms. Murphy-Mello recommended adding one half hour per cycle of direct speech-language service to Pablo's IEP. Ms. Murphy-Mello was responsible for supervising the social skills/pragmatic language intervention provided by the speech-language assistant one half hour per cycle, developing speech-language goals for Pablo's 2018-2019 and 2019-2020 IEP and assessing his progress toward those goals.

Pablo's speech-language goals remained the same for the 2018-2019 and 2019-2020 consecutive IEPs. Ms. Murphy-Mello testified she did not collect any speech-language related data, nor review any speech-language data collected by her assistant, during the 2018-2019 school year. Ms. Murphy-Mello did not meet with Pablo's paraprofessional or English Language Arts teacher. She did not provide any speech-language or social skills consultation specifically about Pablo to any of his teachers during the 2018-2019 school year. She testified that embedding a social skills curriculum in the general education biology and history classes would be too difficult. She also stated that she was aware that the social skills "group" instruction was delivered to Pablo in a 1:1 setting by the speech-language assistant. She acknowledged that it was not an ideal setting for learning and practicing social skills but reflected the reality of scheduling other students. There is no information in the record about the education, training or experience of the speech-language assistant assigned to provide social skills instruction to Pablo during the 2018-2019 or 2019-2020 school years. (Murphy-Mello; S-7, P-10; P-17; S-14; P-28; P-29)

18. Elizabeth Swible of the Southwestern Massachusetts Educational Collaborative ("SMEC") conducted a formal Transition Assessment in February 2018. She reported that Pablo:

required ongoing support and skill development in all areas of transition planning including independent living skills, personal money management, community usage and safety; health; social skills, functional communication, career choice and employment knowledge and skills.

(P-13, S-11)

19. The Team reconvened on January 4, 2019 to review the results of Fairhaven's re-evaluation. The Team added one half hour per cycle of speech-language service to Pablo's partial inclusion program. The Team also offered to add extended day services through SMEC, targeted to developing Pablo's functional and adaptive life skills. The resulting IEP lists the SMEC program under the Additional Information section. It does not appear in the service delivery grid. There are no goals or objectives associated with functional life skills, transition skills or attend attendance at SMEC. No information about the SMEC program, or how Fairhaven contemplated integrating/extending any social skills training available there to Pablo's school day program, was produced at the Hearing. (P-2, S-1) Apart from the continuation of the ½ hour weekly of social skills instruction to be provided by the speech-language assistant the proposed 2019-2020 IEP does not address any service area recommended in the Transition Assessment. The Parent rejected the proposed IEP resulting from the January 2019 Team meeting.

20. In January 2019 HMEA conducted an Assistive Technology Evaluation at Fairhaven's request. The evaluator observed Pablo in the academic support class. She reported that Pablo required the assistance of his paraprofessional to read, explain and scribe all aspects of the assignment. The evaluator concluded that Pablo lacks the capacity or means to independently access the curriculum even with modifications. On the one-to-one computer assisted evaluation, Pablo demonstrated knowledge of the keyboard but was unable to independently access or generate documents with a variety of supportive writing, reading and speech-to-text programs. The evaluator recommended the consistent coordinated use of computer

(Chromebook) assistance in all classes with trials of various listed supportive programs in order to increase independence in learning and production. (P-8; S-4)

21. The Team reconvened on March 5, 2019 to develop an IEP for the 2019-2020 school year. It is identical to the 2018-2019 IEP proposed in January 2019. (P-1) The proposed 2019-2020 IEP does not incorporate any recommendations made in the January 2019 HMEA Assistive Technology Evaluation (P-8, S-4)

22. Kerry Corcoran is the paraprofessional who has worked directly with Pablo throughout the 2018-2019 school year. It is not known if she will continue in that capacity under the proposed 2019-2020 IEP. She did not testify at the hearing. She did not author any reports nor collect any data that appears in the evidence. According to all witnesses she is highly skilled and effective at her job. According to her resume she has no teaching certifications. There are no ABA related certifications, trainings, workshops or other relevant educational experiences reflected in her resume. It is not clear that Ms. Corcoran has had any training or experience providing educational interventions, curricular modification or social skills instruction to students with autism spectrum disorders, other than those she provided to Pablo during the 2018-2019 school year. It is also unclear whether she received on going supervision from a special educator. (S-16)

23. Robert Mota, Assistant Director of Student Services at Fairhaven testified that he knew Pablo and his paraprofessional, Ms. Corcoran from their earlier careers at the Middle School and Whitney Academy respectively. Pablo's IEP calls for day long support by a person/people trained in ABA techniques. Mr. Mota testified that Pablo needed an instructional assistant who was familiar with ABA principles, could discriminate between appropriate assistance and independence, was skilled at encouraging development of social skills and could carry over the instructions of the occupational therapist, speech-language pathologist, and academic instructors in all settings. He also stated that the paraprofessional would be responsible for collecting data relevant to Pablo's behavioral program. Mr. Mota endorsed Ms. Corcoran's qualifications for this position based on her experience at Whitney Academy, a private school serving troubled adolescent boys. (Mota)

24. Diane Sullivan, Director of Student Services for Fairhaven Public Schools, testified that Pablo's functional language and social skills are areas of significant weakness requiring intensive educational services. She stated that social skills instructions should be embedded in a natural environment rather than in a rote, artificial classroom presentation. She acknowledged, however, that Pablo's critical social skills curriculum at Fairhaven High School consisted of one half hour of direct teaching by a speech-language assistant alone at a desk in a hallway while other students passed by. She further acknowledged that no objective data concerning Pablo's baseline language functioning in the therapy or academic setting, or his language progress in those settings, exists. (Sullivan)

25. There are no Functional Behavioral Assessments ("FBA"), no Behavioral Intervention Plans ("BIP") and no behavioral data collection records developed by Fairhaven in evidence.

26. Activities and instruction related to transition to adulthood, such as pre-vocational training and exploration, are not available in the partial inclusion program. Transition-related education is a component of the “Life Skills” program. (Ms. P; Mota)

27. Throughout the 2018-2019 school year Pablo attended a social/adaptive skills development program arranged and funded by the Parent. Donna Marie Muirhead, Director of Operations for Positive Behavioral Solutions, (“PBS”) described the services and program Pablo attends there. PBS offers instruction after school, on Saturdays, and during vacation periods to students with autism spectrum disorders. Based on the VB-MAP system PBS provides direct, explicit instruction in social skills as well as opportunities for group practice in the PBS setting and the community. The goal is to increase each participant’s independent, age appropriate, social language and behavior skills. Skills are assessed and data collected to document current levels and progress toward goals. Ms. Muirhead testified that Pablo has the potential to acquire age appropriate social skills but requires more intensive, consistent intervention. He currently attends PBS 5.5 hours per week during school weeks and 20 hours per week during school vacations. Behavioral therapists work with Pablo in structured group activities to learn and practice social language, pragmatics and behavior in the Center and in the community. Ms. Muirhead testified that Fairhaven has not coordinated any services with PBS, nor observed Pablo in that setting. (Muirhead; P-9)

28. Nancy Hopkins, Director of Admissions at Riverview School, described the program available there. Riverview is an independent boarding and day school designed for, and exclusively attended by, students with impaired cognitive functioning, complex language disabilities and autism spectrum disorders. It is approved by the Commonwealth of Massachusetts to provide special education pursuant to M.G.L. c. 71B and to grant diplomas. It currently serves 88 students, ages 11-19 in grades 6-12. The students present with a variety of disabilities that include intellectual functioning measuring in the 55-90 range and significant social and pragmatic language deficits. About 60% of the students carry an autism spectrum disorder diagnosis. All teachers are certified in moderate special education. Speech-language pathologists, speech-language assistants and licensed clinical social workers provide direct and group services designed to remediate social skills, pragmatic language and executive functioning deficits. Reading specialists and Wilson tutors address reading weaknesses.

Academic classes contain no more than 8 students per teacher, and often fewer. Students are grouped by academic functioning level so they can exercise independent access to the curriculum and environment. Classes are highly structured, with a predictable routine and schedule. Each day includes math, reading, writing, history, science and an elective. Social skills and executive function instruction are embedded and coordinated throughout the academic day and reinforced/supported in less structured after school activities such as sports, art, band, photography. Transition skills are directly taught to all students beginning in 11<sup>th</sup> grade. (Hopkins; P-35; Ms. P)

## LEGAL FRAMEWORK

A student with special learning needs as defined by 20 U.S.C. 1401 et seq. and M.G.L.c 71B is entitled to receive a free, appropriate public education. A free, appropriate public

education, often referred to as “FAPE”, is a set of specialized instructional methods, materials and services, curricular modifications, related therapeutic, supportive and health services, equipment, environmental adaptations and settings that are specifically tailored to an individual student’s unique learning needs and designed to provide a meaningful educational benefit to the student. 34 CFR 300.300(3)(iii); *Endrew F. v. Douglas County School District*, 580 U.S. \_\_\_, 137 S. Ct 988(2017); 603 CMR 28.02(17). See also discussion at *Johnson v. Boston Public Schools*, 906 F.3d 182(1<sup>st</sup> Cir. 2018)<sup>2</sup>

The primary vehicle for delivery of a FAPE is an Individualized Education Program (“IEP”). The IEP must be custom tailored to the student’s unique needs and potential and designed to produce “meaningful educational benefit” and “demonstrable improvement” in the educational, behavioral and personal skills identified as special needs. *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993) Whether an educational benefit is meaningful must be determined in the context of the individual student’s “circumstances” and potential to learn. A student’s goals should be appropriately ambitious . . . just as advancement from grade to grade is appropriately ambitious for most students in a typical classroom, *Endrew F.*, *supra*, and be reasonably likely to measurably advance the student toward the goal of increased learning and independence. *D.B. v. Esposito*, 675 F.3d 26 (1<sup>st</sup> Cir. 2012).

To the maximum extent appropriate, students should be educated in the “least restrictive environment” (“LRE”), with the greatest exposure to and integration in the mainstream of typical school life, students and curriculum that is possible while still delivering the necessary special services. Students with disabilities should be placed in separate settings, such as a private day school, only if the nature or severity of the disability is such that the student cannot benefit from a general education setting with supports and services, or the student has demonstrated an inability to make appropriate educational progress with carefully designed and provided special education services in a mainstream setting.

The requirements of LRE and meaningful educational benefit are “correlative”: “a placement . . . considered better for academic reasons” does not relieve the State from the requirement to comply with the LRE provisions, and compliance with the LRE provisions does not “cure” an inappropriate placement. The desirability of mainstreaming must be weighed “in concert with” the IDEA’s mandate for educational improvement: an appropriate educational plan balances the benefits gained or lost on both sides. *Roland M. v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990); 20 U.S.C. 1412(a)(5)(A).

---

<sup>2</sup> In *Johnson*, *supra*, the First Circuit U.S. Court of Appeals confirmed that the FAPE standard in use throughout the 1<sup>st</sup> Circuit, and by the U.S. District Court for Massachusetts and the Bureau of Special Education Appeals, as enunciated consistently in previous reviews of disputed special education programs and placements, was consistent with the standard cited by the U.S. Supreme Court in *Endrew F.*, *supra*. See e.g. *D.B. v. Esposito*, 675 F.3d 26 (1<sup>st</sup> Cir. 2012); *Sebastian M. v. King Philip RSD*, 685 F.3d 79 (1<sup>st</sup> Cir. 2012); *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 18 (1<sup>st</sup> Cir. 2008); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990); *Town of Burlington v. Department of Education*, 736 F.2d 773 (1<sup>st</sup> Cir. 1984). The Court of Appeals recently re-confirmed, and more fully explained, its formulation of the FAPE standard and that standard’s alignment with *Endrew F.* in *C.D. v. Natick*, C.A. 18-1794, U.S. Court of Appeals for 1<sup>st</sup> Circuit, May 22, 2019.

In a due process proceeding to determine whether a school district has offered or provided a free appropriate public education to an IDEA-eligible student the burden of proof is on the party seeking to change the *status quo*. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter the Parent is seeking to move the student to a more restrictive setting than that which he currently attends. Thus, the Parent bears the burden of proof.

Should the Parent prove at hearing that the public school has failed in its duty to develop and/or implement an appropriate IEP for an eligible student the Parent may request that the Hearing Officer order an individually tailored remedy for the lapse. Here, the Parent is seeking a publicly funded placement in a private special education day school. That type of prospective relief may be available to a Parent who demonstrates hearing both that the IEP and/or placement offered by the public school cannot meet the student's identified special learning needs and provide a meaningful educational benefit to him, and that her proposed alternative can.

### FINDINGS AND CONCLUSIONS

There is no dispute that Pablo is a student with special learning needs and is entitled to receive a free appropriate public education pursuant to M.G.L.c. 71B and 20 U.S.C. § 1400 *et seq.*. The issue for decision here is whether Fairhaven has proposed an Individualized Education Program that is appropriately responsive to Pablo's unique, documented special education needs and is reasonably likely to enable him to make meaningful, effective educational progress in the least restrictive setting. After careful consideration of the evidence presented at hearing and the arguments of counsel for both parties, it is my determination that it has not. My reasoning follows:

First, the proposed 2019-2020 IEP calling for Pablo's placement in a partial inclusion program ignores the recommendations of expert evaluators. There is only one evaluation in the record, a December 2015 special education teacher evaluation, that could support a placement in a "highly structured" inclusion class with support. (P-16) The more current reports of Dr. Engelman and Mr. Luz, as well as those authored by Fairhaven's teachers, related service providers, and contracted specialists, recommend full-time placement in a substantially separate special education setting. The partial inclusion program outlined in the proposed 2019-2020 is not set in, and does not have the characteristics consistent with, a substantially separate special education placement. (P-6, S-10; P-12, S-6; P-13, S-11; S-5; Engelman; Luz; see also: Mota, Sullivan)

Second, Fairhaven did not adequately explain how the proposed inclusion placement could address the consistent methodological and instructional recommendations of the evaluations presented to the Team. For example, Dr. Engelman and Mr. Luz recommended continuing direct, structured attention to the development of social skills. In particular, Dr. Engelman noted that social skills instruction needed to be embedded in every aspect of Pablo's educational experience. The proposed IEP offers social skills instruction for only one half hour "session" per seven day cycle in a segregated setting with a speech-language assistant. Fairhaven's speech language expert testified that appropriate social skills instruction could not be embedded in the general education classes contemplated for Pablo. Thus the type and level of services Fairhaven proposed to address Pablo's critical social skills deficits is not consistent

with the unchallenged expert educational recommendations made to the Team. The record contains no credible recommendations which could reasonably support Fairhaven's proposed service level or model of service delivery.

While the development of social skills appears as the first goal on Pablo's IEP, there is no evidence of the relevant training or experience of the speech language assistant tasked with developing and implementing Pablo's program of direct social skills instruction. There is no evidence that such instruction, if delivered, was documented or shared with other service providers. There is no evidence that any other teacher, paraprofessional or service provider had training and/or experience in developing or implementing a program of social skills instruction or incorporating the principles and techniques of such a program into their work with Pablo to extend and generalize learned skills. Furthermore, though the School was aware that Pablo was receiving intensive social/behavioral instruction through Positive Behavioral Solutions outside school hours, there is no evidence that the School requested relevant information from PBS or incorporated any of PBS' social/behavioral strategies or principles into its program in order to promote consistency of intervention and expectation or generalization of skills. I find, therefore, that Fairhaven did not appropriately address one of Pablo's critical learning needs, as identified by then current evaluations, during the 2018-2019 school year. There is no evidence from which I could conclude that that would change under the proposed 2019-2020 IEP.

Similarly, Dr. Engelman, Mr. Luz and Speech-Language Pathologist Ms. Murphy-Mello noted that another of Pablo's most significant educational needs was for improvement in social pragmatic language skills. All recommended direct, intense speech-language services to address this deficit. While the proposed IEP does add one half hour of direct speech-language service, the focus of the service is improving Pablo's understanding of academic text: a necessary service to be sure, but neither pragmatic social language focused nor as intense as recommended. (Engelman, Luz, Murphy-Mello; P-6, S-12; P-12, S-6; P-10)

In the academic realm, Dr. Engelman recommended that Pablo participate in a direct, highly structured reading curriculum designed to remediate significant fluency and comprehension deficits. The proposed IEP does not provide any such intervention. Dr. Engelman also recommended that math instruction focus on developing computational and problem-solving skills at the basic level to improve Pablo's functional capacity. The proposed IEP continues to present a high school/MCAS aligned math approach, continuing objectives and benchmarks that have appeared on Pablo's IEP for at least three years. (P-5; P-4; P-3; P-2; S-1; P-1)

It is also important to note that the proposed IEP fails to provide services, or to craft responsive goals, as recommended in several important, timely evaluations. Mr. Luz, Dr. Engelman and the Transitional Services Evaluator, Ms. Swible, recommended services targeted to develop Pablo's adaptive life skills, including money management, health, community use, functional communication and employment skills. (P-6, P-12, S-6; P-13) The proposed IEP does not set out goals or services designed to address these skills. It also ignores the recommendations contained in the Assistive Technology Evaluation for instruction in, and consistent use of, appropriate technological devices and materials. (P-8, S-4) Therefore, I find that Fairhaven's proposed 2019-2020 IEP fails to take into account and incorporate the

consistent and unchallenged educational programming recommendations made by both Parent evaluators and Fairhaven's own experts.

Third, by proposing a partial inclusion IEP for 2019-2020, Fairhaven sought to continue the services Pablo received during the 2018-2019 school year. Fairhaven argued that Pablo "flourished" and "thrived" in the substantially similar partial inclusion program he attended during the 2018-2019 school year. While by all accounts Pablo appeared happy and engaged in school, particularly during his band classes and practice, this is not the sole, or even the most important, standard for assessing the appropriateness of an IEP. There are no objective measures of academic performance in the record from which I could conclude that Pablo was making effective educational progress in Fairhaven's partial inclusion program, either during the 2018-2019 school year or during the previous two years in a substantially similar model. No teachers conducted academic assessments during the first and last months of the school year which could show either a change in standardized scores or attainment of a measurable IEP goal. While Pablo's teachers uniformly reported that he "made progress", none could point to an assessment(s) s/he did to support that conclusion. All relied on the assessments and reports of Pablo's paraprofessional who was charged with modifying all curriculum and materials, doing all direct teaching and evaluating and reporting on all Pablo's assignments and tests. The paraprofessional did not testify at the hearing to explain her actions and judgments. No written data or reports authored by Ms. Corcoran or linked to her interventions were introduced. Without that information I cannot be certain that the second hand reports of the teachers are accurate. Furthermore, in reaching his conclusion that Pablo was progressing academically, Mr. Luz relied on teacher reports and Pablo's report cards. In addition to the reliability difficulties associated with the reports of teachers who have not provided direct services to Pablo, report card grades are, for the most part, subjective and global reports of class participation rather than objective measures of academic skill level or progress. That is particularly true here, where Pablo's program is modified in every aspect, carried out by a paraprofessional and assessed out of the sight and hearing of the grading teacher. (See also Lacasse-Elliott)

It is not clear who actually provided the information set out in Pablo's progress reports, but I note that the goals, objectives and benchmarks in the 2018-2019 IEP themselves a near *verbatim* continuation of goals set out in the 2016-2017 and 2017-2018 IEPs, are continued largely unchanged in the proposed 2019-2020 IEP. I also note that there is no evidence that any one special educator was responsible for ensuring the delivery of appropriate special education services to Pablo, including coordinating the consultation schedule, ensuring appropriate supervision of service providers, collecting data and assessments, and reporting on progress or lack thereof, during the 2018-2019 school year. That role remains vacant under the proposed 2019-2020 IEP. Therefore, I find there is no persuasive evidence that Pablo made effective educational progress under the 2018-2019 IEP and, by extension, there is no predictive evidence that he would make effective educational progress under the substantially similar IEP proposed for the 2019-2020 school year.

Finally, with the past as a barometer, I am not convinced that Fairhaven would fully implement the proposed 2019-2020 IEP as written. It failed to implement the 2018-2019 IEP in very important ways. One glaring example is the promise of a social skills group to be conducted by the speech-language assistant. The service was not provided consistently. The service was not provided in a group. The service was provided in a busy, noisy hallway. The

service was not extended to any other class or activity. No data on the provision of the service, or the Student's progress, was collected or reported. This was not appropriate or adequate social skills instruction for a student whose primary IEP goal is the development of social skills. (P-2; Sullivan; Murphy-Mello; see also Engleman; Muirhead)

Another example: the 2018-2019 IEP provided "All staff working with [Pablo] have an understanding of Autism... Instruction should be small group and direct, incorporating the principles of Applied Behavioral Analysis to teach developmental skills and concepts." None of the teachers working with Pablo testified that (s)he incorporated ABA principles or methodology into their instruction. Instead they relied on Pablo's paraprofessional to devise an appropriate instructional strategy for Pablo. While Ms. Corcoran, by all accounts, is highly skilled and responsible, she is not a teacher. She has no educational certifications. She has no formal training in autism education, in curriculum and instruction, or in Applied Behavioral Analysis. (S-16) While Mr. Mota noted Ms. Corcoran's long experience in a special education school, there is no evidence that Fairhaven provided her with the training or supervision she needed to appropriately address Pablo's educational needs or to implement his IEP. This is particularly noteworthy as the entire academic component of Pablo's IEP appears to have rested on her shoulders. Similarly, there was no showing that Fairhaven contemplated a training regime responsive to Pablo's needs and to the proposed 2019-2020 IEP for the teachers, therapists and paraprofessionals who would be responsible for implementing it.

Based on the above I find that the Parent has carried her burden of proving that the March 2019-March 2020 IEP Fairhaven developed for Pablo is not reasonably calculated to address his unique special learning needs and to result in meaningful educational progress. *Schaffer v. Weast*, 549 U.S. 49 (2005). Fairhaven argues that its partial inclusion program has a significant educational, and legal, advantage over the out-of-district placement sought by the Parent: it offers access and integration into the mainstream of high school and community life. That is true. But in this case that advantage has been compromised as Fairhaven has not offered Pablo the academic, behavioral, language or social skills instruction, services and settings recommended by expert educational evaluators, and without which he is not likely to make effective educational progress. The deficiencies in the proposed 2019-2020 IEP outweigh any potential benefits that could arguably accrue to Pablo as a result of casual mainstream experiences available to him at Fairhaven High School. The opportunity to be educated with non-disabled students does not cure a program that is otherwise inappropriate. *School Committee of the Town of Burlington v. Department of Education of Mass.*, 471 U.S. 359 (1985).

The Parent has demonstrated that the Riverview School offers a comprehensive special education program that contains the elements identified as appropriate for Pablo in his most recent evaluations. It has small, highly structured, ability-level based classrooms that use a teaching and organizational approach that is consistent and predictable. Teachers are appropriately certified. The curriculum is designed to address student needs for both high school equivalency and functional application. Social skills and executive function skills instruction and practice are embedded in academic classes and supported student activities. Direct instruction in a systematic reading program is available. The school's focus is on developing a student's academic, behavioral, social and adaptive living skills to promote

independent access to and integration with the mainstream adult community. (See ¶28) I am persuaded that the Riverview School can offer Pablo the type, intensity, pace and setting of special educational services that are consistent with the recommendations set out in the most recent evaluations and are likely to result in meaningful educational progress for Pablo.

Therefore, I find that the Parent has shown, by a preponderance of the evidence, both that the IEP offered by Fairhaven is not appropriate, and that her proposed alternative, the Riverview School, is. In reaching this conclusion I rely heavily on the expert observations and recommendations of Dr. Engelman whose educational background and professional experience is particularly pertinent, whose evaluation report was thorough and comprehensive, and whose testimony was candid and student-focused. I note also that Fairhaven’s teachers impressed me as talented at juggling the competing interests of the students in their classrooms and sincere in their efforts to accommodate Pablo. The model in which they teach, however, is not appropriate for Pablo at this time.

ORDER

The March 2019- March 2020 IEP developed by Fairhaven Public Schools is not reasonably calculated to provide a free, appropriate public education to Pablo. Based on the totality of the record, the Riverside School placement advocated by the Parent is the least restrictive, appropriate special education option for Pablo. Fairhaven shall develop an IEP consistent with this Decision no later than August 30, 2019, including arranging for Pablo’s day placement at the Riverview School, with associated transportation and related services, for the 2019-2020 school year.

By the Hearing Officer<sup>3</sup>

---

Lindsay Byrne  
Dated: August 6, 2019

---

<sup>3</sup> The Hearing Officer gratefully acknowledges the invaluable assistance of BSEA summer intern, Melanie Howland, in the preparation of this Decision.