

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

**In Re: Student v. Whitman-Hanson  
Regional School District**

**BSEA No. 2007520**

**DECISION**

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

Student in the instant case is a nearly four-year-old boy with a moderate to severe unilateral conductive hearing loss, dating from his birth. He uses a Bone Anchored Hearing Aid (“BAHA”) in his affected right ear. His communication mode is listening-speaking, although his ability to do both is compromised by his hearing loss. Parents assert that the primary focus of Student’s educational programming should be addressing language needs resulting from his hearing impairment. The District counters that Student has developmental delays separate from his hearing loss that should be addressed in his educational programming. The parties’ disagreement over Student’s disability category at least partially drives their dispute over what type of placement is appropriate. As a result of the conflict between the parties, Student was not enrolled in any school program between his third birthday and the dates of hearing. He has been receiving private services, obtained by Parents, from a speech/language therapist and a Teacher of the Deaf (TOD), and has been working intensively with Parent at home on communication and other skills.

On February 11, 2020, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) seeking an order directing the Whitman-Hanson Regional School District (Whitman-Hanson, District, or School) to place Student at the Clarke School for Hearing and Speech in Canton, MA (Clarke or Clarke School) for the 2020-2021 school year. Clarke is an approved private day school serving children with hearing loss. Whitman-Hanson responded by asserting that its proposed placement in the District’s integrated preschool could provide Student with a free, appropriate public education (FAPE), and that Parents’ proposed placement at the Clarke School was overly restrictive and otherwise inappropriate for Student.

Upon receipt of Parents’ hearing request, the BSEA scheduled an initial hearing date of March 17, 2020. At the joint request of the parties, the hearing was postponed for good cause until June 9 and 10, 2020. A pre-hearing conference was held on April 16, 2020. Pursuant to a second joint request, the hearing was further postponed for good cause to September 22 and 23, 2020. The hearing took place on those dates. Because the

BSEA has not been conducting in-person proceedings since March 2020 owing to the ongoing COVID-19 public health emergency, the hearing proceeded via video conference using the Zoom platform, with the consent of both parties. At the hearing, both parties were represented (Parents by an advocate, W-H by an attorney) and had an opportunity to examine and cross-examine witnesses as well as to submit documentary evidence for consideration by the Hearing Officer. The parties requested and were granted a postponement until October 19, 2020 to submit written closing arguments. The BSEA received the parties' written arguments and closed the record on that date.

The record in this case consists of Parents' Exhibits P-1 through P-15 and P-18, School's Exhibits S-1 through S-13, as well as stenographically-recorded witness testimony. Those present for all or part of the proceeding were the following:

Parent

Cara Della Villa	Teacher of the Deaf, Clarke School
Barbara Hecht	Director, Clarke School
Lindsay Kelley	Speech/Language Therapist, Whitman-Hanson RSD
Mary Ann LaBue	Teacher of the Deaf, READS Collaborative
Kelly Linehan	Private speech/language therapist
Jennifer MacMullen	Speech/Language Pathologist, Whitman-Hanson RSD
Lauren Mathiesen	Interim Director of Student Support Services, Whitman-Hanson RSD
Erin McNamara	Service Coordinator, South Bay Early Intervention
Melissa Newman	Mass. Commission for Deaf and Hard of Hearing
Patricia Poirier-Collins	Director, Preschool Academy, Whitman-Hanson RSD
Tracy Vale	Auditory/Verbal Therapist, Contractor with Whitman-Hanson
Ginny Brennan	Advocate for Parents
Alisia St. Florian	Attorney for School
Carol Kusinitz	Court Reporter
Sara Berman	Hearing Officer

### **ISSUES PRESENTED**

The issues for hearing are the following:

1. Whether the IEP covering the period from January 2020 to January 2021, calling for placement at the Preschool Academy, which is Whitman-Hanson's integrated preschool program, is reasonably calculated to provide Student with a free, appropriate public education (FAPE) in the least restrictive environment.
2. If not, whether the IEP and/or placement can be modified to make them appropriate.
3. If the IEP and placement are not appropriate and cannot be made appropriate whether the Clarke School can provide Student with a FAPE.

4. Whether Whitman-Hanson should change Student's secondary disability category from "developmental delay" to "communication disorder."

### **POSITION OF PARENTS**

Student's hearing loss is educationally and communicatively significant, even though it is unilateral, and has a continuing impact on his functional communication, learning and socialization. Because Student required treatment for serious and complex medical issues as an infant, he did not receive his BAHA until he was about 17 months old and has only recently begun to use it consistently. The BAHA enables Student to hear and attend to sound and assists with language development but does not eliminate the challenges associated with hearing loss. Evaluators and outside service providers have emphasized that to make effective progress, especially with language development, Student requires a program specifically designed for children with hearing loss. Such a program must have an acoustically treated classroom environment, appropriate technology, daily speech/language therapy, and daily instruction delivered by a Teacher of the Deaf (TOD). The preschool program offered by the District does not fulfill these requirements. The class size is too large, which will be distracting and overwhelming for Student, the peers are inappropriate, and the program is not taught by a TOD. Finally, the COVID-19 modifications at the preschool are contraindicated for education of hearing-impaired students such as Student. In proposing the preschool placement, the District demonstrates that it misapprehends the primacy and pervasive impact of Student's hearing impairment, the narrow window of time that he has to "train his brain" to listen and comprehend sound, and his consequent need for a comprehensive, specialized program designed for children with such impairment. The Clarke School has the expertise to provide Student with such a program during a critical period for his language development.

### **POSITION OF SCHOOL**

Student has a hearing loss which affects his communication, but with consistent use of his BAHA, Student's ability to listen, hear, and communicate have improved significantly. Contrary to Parents' assertions, Student has a diagnosis of developmental delay that is separate from his hearing loss. The integrated preschool program proposed by Whitman-Hanson is reasonably calculated to provide Student with FAPE in the least restrictive environment, addressing both his hearing loss and his developmental delays. The program is designed to accommodate and address the specialized needs of young children who, like Student, have diminished hearing and may use devices such as a BAHA. In the District's program, Student would have access to an acoustically treated classroom that has been physically modified to reduce background noise and is equipped with an FM amplification system. Student would receive daily therapy from a speech/language pathologist who specializes in working on listening and speaking skills with hearing-impaired children. He would be seen weekly by a TOD who would consult with preschool staff. Most importantly, Student would have the benefit of instruction from a full-time certified special education teacher to address his developmental issues. The Clarke School is overly restrictive, would isolate Student from hearing peers who

could be appropriate language models, and would not be equipped to address his developmental delay.

### **SUMMARY OF THE EVIDENCE**

1. Student is a three year, 10-month old child with disabilities who is a resident of a town served by the Whitman-Hanson Regional School District. His eligibility for special education and related services from Whitman-Hanson pursuant to the IDEA and MGL c. 71B is not in dispute. The District has offered Student a placement in its Preschool Academy, an integrated preschool located in Whitman-Hanson High School, but Parents have rejected that placement, and Student is not currently attending any school program. Parents also rejected “walk-in” services. As of the hearing dates, Student was receiving one session per week, each, of privately funded individual speech/language therapy and individual instruction from a TOD employed by the Clarke School for Hearing and Speech. (Parent, Linehan, Della Villa)
2. Student is a sweet, happy, energetic child. He loves toy cars and trucks, dinosaurs, and pretend play, as well as doing puzzles, and playing with his younger sister. He is shy and reserved when he first meets people outside of his family but will interact with them once they are familiar. (Parent, McNamara, P-12)
3. As an infant, Student endured multiple serious medical challenges. He was born with major heart defects for which he required surgery at 3 months of age. After his cardiac surgery, Student developed additional problems, including feeding/digestive issues resulting in weight loss, breathing difficulties necessitating a tonsillectomy, a vision impairment that required glasses and then corrective surgery, and gross motor delays. Much of Student’s first year or two of life was spent treating these medical issues. Fortunately, most of Student’s medical conditions have resolved or significantly improved, and he now is generally healthy. (Parent, McNamara, P-10, P-18)
4. In addition to his heart defects, Student was born with an incorrectly formed, non-functional outer and middle right ear. This condition, known as microtia/atresia, has caused a permanent, moderate to severe conductive hearing loss on the right side. Additionally, while Student’s left ear is normal, he probably has had periods of reduced hearing in that ear as well because of episodes of wax impaction, which has been treated periodically by his audiologist. Although Student’s hearing loss was diagnosed at the age of 10 months (P-10), he was not provided with a hearing aid until he was approximately 17 months old because of the need to prioritize treatment of his severe medical problems. (Mother, McNamara, Della Villa, P-10, P-18)
5. In or about July 2019, when Student was about 17 months old, he was fitted with a bone anchored hearing aid (BAHA) which he wears on a soft headband near his right ear. The BAHA enables sound to be conducted from his skull to his right inner ear.

Initially, Student resisted wearing the BAHA for more than a few minutes at a time. The record is unclear as to when he began using it consistently, during all waking hours. According to Parent, he did not do so until approximately July 2020. (Parent) Other documents in the record indicate that he had been consistently using the BAHA since approximately October or November 2019, (P-6), and still others report that he began tolerating the device in around October 2019, but that as late as December 2019, still had “good days and bad days” and would not use it consistently. (P-11) There is no dispute that beginning in around July 2020, he was using the BAHA during most or all of his waking hours. As of the hearing dates, Student was wearing the BAHA all day, but would still turn it off on occasion when Parents were not watching him. (Mother, P-18)

6. The BAHA has substantially aided Student’s ability to hear sounds and to learn language. There is a learning curve in using the BAHA, however. According to Cara Della Villa, a TOD employed by the Clarke School who has worked with Student, “...it’s not like we put [the BAHA] on like glasses and then we can suddenly see. You put it on, and you have to train the brain to listen through that piece of technology, and then you can work on developing receptive and expressive language.” (Della Cara, Tr I, p. 185). Student has been “learning to listen” with the device, *e.g.*, to locate and identify sounds, and to attend to relevant sounds such as speech directed to him while filtering out ambient sounds such as conversations by other people in the area or passing traffic. In hearing children, many of these listening skills are acquired during the first six months of life, during which period Student did not have full access to sound. (Della Villa, Linehan, Hecht). As of the hearing dates, Student would become overwhelmed by even mildly noisy environments, and had trouble screening out background noise when others attempted to engage him in conversation. For example, when extended family members came to visit, Student would “shut down” because of the increased noise in the home. (Parent, Linehan, Della Villa)
7. Student’s hearing loss has resulted in significant delays in his receptive and expressive language, including his intelligibility. Mother can understand Student but needs to “translate” much of what he says for others. Although Student is interested in playing with peers other than his younger sister, his communication difficulties and reduced intelligibility interfere with social interactions. He also has had limited exposure to children outside of the family, because of the current pandemic and other factors. He has had some play dates, during which either Student or the other children tend to retreat because they cannot communicate, and Student ends up playing on his own or seeking out an adult to play with. (Parent)
8. Student began receiving early intervention (EI) services at about three months of age from South Bay Early Intervention. Services initially consisted of weekly visits from a developmental specialist, Erin McNamara, as well as bimonthly physical therapy to address gross motor issues that emerged after his heart surgery. During Student’s

first two years, EI services focused on feeding and motor skills, as well as some language support. When Student was between ages 2 and 3, the emphasis shifted to work on language as well as on attention and play skills. After Student's second birthday in January 2019, the EI services were increased to include weekly in-home speech therapy from a speech/language pathologist (SLP) and sessions to work on speech and listening skills from a Clarke School TOD, Cara Della Villa. Clarke contracts with various EI provider agencies to provide specialized services to children who have hearing impairments. After Student received his BAHA, EI providers and Parent worked on increasing his ability to tolerate the device and wear it consistently. During the months preceding his third birthday in January 2020, Student was receiving approximately three hours per week of home-based services, consisting of one hour each with the developmental specialist, (Ms. McNamara), the speech therapist, and the TOD (Ms. Della Villa). The EI service model emphasized training and coaching of Parents, who were actively involved in working with Student. (McNamara, Della Villa, Hecht)

9. Beginning in approximately September 2019, Student's EI providers and Parents began preparing for Student's transition to public school in January 2020, when he would turn 3 years old. Patricia Poirier-Collins, who is the Director of Whitman-Hanson's integrated preschool program, together with a speech/language pathologist from the District, visited Student's family and EI providers at Student's home to discuss Student's history and needs as well as Parents' concerns. (Parent, Poirier-Collins, McNamara)
10. Student underwent both private and school-based evaluations as part of this transition process. On November 5, 2019, when Student was approximately 2 years, ten months of age, Cara Della Villa and Katie Jennings from the Clarke School conducted a modified Functional Listening Evaluation (FLE) in order to assess his ability to listen and understand information presented through audition, as well as to determine the impact of background noise and distance on Student's ability to access information. Student was assessed both with and without his BAHA. The evaluators concluded that Student "struggled to access auditory information even in a small room free of visual and auditory distractions." A language sample analysis showed that Student's mean length of utterance was 1.1, meaning that he was using approximately one-word utterances for most of his spontaneous language, placing him at below an 18-month age equivalency. His "listening age" was between 15 and 18 months, with gaps at the 6-12 month listening age. Only 67 of 100 utterances were intelligible. Most utterances were nouns. The evaluation report concluded that given Student's hearing loss, articulation errors and language-age equivalency, he would have a difficult time communicating with peers and adults. The evaluators recommended daily Auditory Speech and Language (AUSPLAN) services from a TOD or SLP, trained to work with Deaf or hard of hearing children using a Listening and Spoken Language approach. They further recommended a preschool placement with a low student-teacher ratio and an acoustically treated classroom. (P-6).

11. On November 21, 2019, Student received a Speech, Language, and Communication Evaluation from Nicole Salamy, a speech/language pathologist at the Deaf and Hard of Hearing Program of Boston Children’s Hospital. At the time of the evaluation, Parent reported that Student produced single words and some very familiar phrases such as “no thank you,” had an estimated vocabulary of 100 words, but was very difficult to understand. He became frustrated and angry if he was not understood. (P-12)
12. Student was wearing his BAHA during the evaluation, which took place in a quiet room with minimal background noise. Ms. Salamy used several instruments to assess Student’s skills, including the Reynell Developmental Language Scales, the Symbolic Play Test, the Rossetti Infant-Toddler Language Scale, and the MacArthur Bates Communicative Developmental Inventory—Words and Sentences. (The latter two instruments are parent questionnaires). (P-12)
13. The evaluation revealed that Student’s expressive, receptive, and social language skills were significantly behind his age matched peers. He was able to perform some skills in the following age ranges: 24-27 months, (*e.g.*, was able to pretend to type and talk on the phone, wipe his hands and face, and understand size concepts but could not use three-word phrases or action words); 27-30 months, (*e.g.*, enjoyed “trading,” could understand location phrases, named one color, but could not identify objects by function, refer to himself with pronouns, or use 2 sentence types); 33-36 months (*e.g.*, showed interest in how/why things work, responded to “who” questions, but did not follow 3-step commands or use verb forms). Student was able to engage in symbolic play, used toys appropriately, and generally showed play skills at the 24.5 month age range (at the approximate chronological age of 34 months). (P-12)
14. Ms. Salamy’s report stated that Student’s delays in expressive, receptive, and social language “cannot be explained by his unilateral hearing loss alone,” but did not elaborate, offer further explanations for Student’s language delays or suggest additional evaluations. (P-12)
15. The evaluation report contained multiple recommendations, including: “a significantly smaller class size with ample opportunities for direct instruction from a teacher of the Deaf throughout the school day,” staff with experience in working with children with hearing loss and significant language delays; peers/classmates who use hearing assistive technology and have similar learning needs; direct speech/language therapy by speech/language pathologist (SLP) with expertise in working with children with reduced hearing and significant language needs, 5x/week; direct and consultative services of an educational audiologist; repeated exposure to language to compensate for compromised access to incidental language due to hearing loss; and direct support for pragmatic language through monitored play activities. (P-12)

16. According to Parent, Student had not been using his BAHA regularly at the time of the Children's Hospital evaluation (although he was wearing it during the testing session) and was not very responsive to the evaluator's instructions, being more interested in playing with toys in the room. (Parent)
17. On December 13, 2019, District staff conducted a developmental functioning evaluation of Student. The evaluators were a special education teacher, a physical therapist, and a speech/language pathologist (SLP). Also present were Tracey Vale, a private Auditory Verbal Therapist (AVT) retained by the District and Patricia Poirier-Collins, who is the director of the Preschool Academy. Student was wearing his BAHA during the evaluation. (Kelley, P-3)
18. The evaluators attempted to administer the Bayley Scales of Infant and Toddler Development, Fourth Edition but were unable to do so because Student would only perform a few of the structured tasks before he began exploring the other toys in the testing room. (Kelley, Parent, P-3) Instead, they set up a structured play situation in which they observed him respond to a variety of play opportunities presented to him in the testing room. Later, they observed him in the preschool classroom, with other students present. (Kelley, P-3)
19. In the testing room, Student was self-directed, in that he played with preferred items rather than complying with test instructions, although he could be redirected to perform an activity chosen by an evaluator. He used toys appropriately and purposefully and was able to imitate 2-step actions. He was able to transition from a preferred to a non-preferred task without behavioral problems. His relational skills were "emerging." (Kelley, P-3)
20. Student and the adults present then moved into the preschool classroom. There were other children and adults present. Student independently sought out and worked at three different play centers, cooperated with adults on activities, and did not seem bothered by other children coming close to him. He became somewhat upset when it was time for him to leave the classroom. Parent disagreed that Student was comfortable in the classroom and felt that he was showing signs of being overwhelmed. (Parent, P-3, P-4)
21. Based on their observations, the evaluators concluded that in the cognitive domain, Student appeared to function in the low average range. (P-3) The evaluators further concluded that Student was an "emerging communicator" with significantly reduced receptive and expressive communication. At the time of the assessment, Student was using a total communication approach with adults and peers, including verbalizing and gestures. Student was able to attend to preferred play routines, identify some common nouns and verbs, and express himself through 1 to 3-word utterances. Student could understand and follow simple one-step directions. Student's weaknesses included the ability to use verbs, word combinations, pronouns, and

possessives. Student's intelligibility level was reported as 40%; however, Parent disagreed with that conclusion, and believes that at that time, the level was considerably lower. (Parent) Student's social/emotional skills as measured by Parent questionnaire were below average. (P-3)

22. The Whitman-Hanson evaluation recommended continued focus on receptive and expressive language skills, a language-based classroom that includes peers with strong language skills; a structured learning environment with accommodations and specially designed instruction targeting pre-academic and social skills; consultation/monitoring of motor skills by a physical and occupational therapist; school-based speech/language therapy focused on functional expressive, receptive, audition, and social language development; access to local community activities such as library story hours and museum passes. (P-3)
23. Lindsay Kelley, the speech/language therapist who participated in the evaluation, testified about Student's performance and her understanding of the impact of Student's hearing loss. Ms. Kelley holds a Masters' degree and certification in speech/language pathology and has been working as speech/language therapist in Whitman-Hanson since 2017. During the 2019-2020 school year, Ms. Kelley was on the team that evaluated children, including Student, who were transitioning from EI to preschool. She does not regularly work in the preschool program, however. Other than Student, she has not evaluated children with hearing impairments. She has no specialized training in working with such children other than one audiology course in graduate school. When asked whether Student's hearing appeared to interfere with his performance during the evaluation, Ms. Kelley responded in the negative, saying "I think he was able to hear fine," based on her observation that Student responded to many prompts even if he was not looking at the speaker. She did not know whether Student responded to prompts because he heard and understood them accurately or because of context. She attributed Student's reduced language performance to attentional issues but did not know whether hearing loss could contribute to inattention or self-directed play. (Kelley)
24. Tracey Vale also participated in the District's evaluation and testified about her findings. Ms. Vale has a Masters' degree and license in speech/language pathology as well as certification as an Auditory-Verbal Therapist (AVT), which required her to complete 4 years of additional post-graduate training and pass a national examination. After many years as an educator and SLP in public school settings, including 10 years in the Deaf and hard of hearing program at the Reads Collaborative, Ms. Vale began a private practice in which she works exclusively with Deaf and hard of hearing clients. Whitman-Hanson has contracted with Ms. Vale to work with the District serving this population of students. She is present in the Preschool Academy approximately once per week providing services to one child. (Vale)

25. Ms. Vale described auditory-verbal therapy (AVT) as a component of auditory verbal Deaf education, which is part of the oral Deaf education continuum.<sup>1</sup> She testified that AVT is primarily used with very young children, to train their brains to access sound (via their devices, if applicable) in the same way that hearing children do, and that this includes training children to learn incidentally, from ambient sound. (Vale)
26. Ms. Vale testified that at the start of the evaluation, Student was presented with Ling Sounds, which is a series of sounds at various frequencies, to ensure that his BAHA was working properly and that he had access to sound.<sup>2</sup> Student's responses indicated that he did have such access. She further testified that Student was "busy" and curious about the room, was responsive auditorily, and knew what questions were and was able to answer them. When asked whether Student's behavior (*e.g.*, being "self-directed," unwilling to do table-top assessments, and moving from one activity to another) and language delays were the result of lack of access to sound and hearing impairment or another type of developmental delay, Ms. Vale testified that this was unclear. She felt his access to sound was good, at least on the date of the evaluation, and if he generally had had that level of sound access, his language should have been more developed than it was; thus, the language delays might indicate issues in addition to hearing loss. On the other hand, she testified that his "listening age" could not be accurately determined because it was unclear whether and for how long he consistently had good hearing in his normal left ear, because of the history of wax impaction, as well as how long he had consistently been using his BAHA as of the date of the evaluation. (Vale)
27. The Team convened on January 2, 2020 to determine Student's eligibility for special education after considering the results of the School's evaluation as well as the Functional Listening Assessment conducted by Cara Della Villa. Parents and their advocate attended the meeting, as did a representative from the Clarke School (Cara Della Villa), Early Intervention, (Erin McNamara) and the Mass. Commission for the Deaf and Hard of Hearing. District representatives included Ms. Poirier- Collins (Early Childhood Coordinator), Ms. Vale, Ms. Woolf (a speech/language therapist from Whitman-Hanson), Ms. Galewski (special education preschool teacher) and a physical therapist. (S-5)
28. The meeting became contentious. Disagreements arose over the validity of the modified FLE conducted by Ms. Della Villa, as well as over whether the Team should

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<sup>1</sup>Approaches to Deaf education fall into two major categories: visual/total communication, in which students communicate primarily through American Sign Language (ASL) and other visual means, and oral or Listening/Speaking Deaf education (formerly called Aural-Oral), in which students access sound and communicate orally, often with hearing aids, amplification, and other technology. (Vale, Hecht, Della Villa, LaBue)

<sup>2</sup> Children with BAHAs and other devices should have them checked daily with the Ling Sounds when they come into school to ensure that the devices are working properly. (Vale)

designate Student's secondary disability as "developmental delay." (Parent, Tr. I., p. 47)

29. The meeting was suspended after about two hours, and a second meeting was convened on January 16, 2020. The same individuals attended the second meeting, with the addition of Dr. Barbara Hecht, Director of the Clarke School and Lauren Mathisen, Director of Student Services for Whitman-Hanson. (S-) The meeting began smoothly but became contentious after Ms. Mathisen left. (Parent, Della Villa)
30. On January 8, 2020, Cara Della Villa issued a report of Student's language skills as measured by the CASLLS. The report indicated that Student had mostly been listening with one ear because he was not yet consistently wearing his BAHA. Student's then-current listening age was in the 15-18-month range. Student exhibited gaps in the 6-12 month range in the following skill areas: echoing pitch, duration and intensity, locating the sound source, responding to speech in a moderately noisy environment, stopping an activity when his name was called, and associating onomatopoeias (sounds such as "vroom" or "moo") with objects. Student's vocabulary included approximately 29 nouns, 2 verbs, 5 exclamations/greetings, and 3 onomatopoeias. (P-7, Della Villa)
31. Between the first and second Team meeting Parents and Erin McNamara (the family's EI service coordinator) visited the Preschool Academy classroom that Whitman-Hanson planned to propose for Student. Parent testified that while she felt the class had some positive features, such as visual displays, it would not be appropriate. She felt that the room was too noisy, even though there were tennis balls on chair legs and some type of insulating materials on the walls. She was also concerned because she observed that the other children in the class had language skills that were much more advanced than Student's. For example, one child told a complex story about her weekend ski trip. Parent did not want Student to feel that he was "not smart" because his verbal skills were less developed than his classmates'. She also was concerned because she observed a child wearing hearing aids who did not speak for about 30 minutes. Parent wondered if anyone would be checking on him. A staff member told Parents that there was a small, quiet classroom available if needed, but only on Thursdays. In general, Parents felt that Student would be overwhelmed by the noise and activity level in the preschool setting, that he would become isolated from peers because his language proficiency would be much lower than theirs, and that he would shut down, becoming unavailable for learning. (Parent) Erin McNamara, the family's EI provider, testified that she was concerned about the noise level, but otherwise felt unable to comment on the appropriateness of the preschool. (McNamara)
32. On January 20, 2020, Whitman-Hanson issued an IEP covering the period 1/2/20 to 1/4/21. The N-1 form indicated that Parents disagreed with the District's view that Student's secondary disability category should be "Developmental Delay." School-

based Team members believed this category was accurate based on Student's having significantly reduced language, social, play, and self-help skills that could not be explained solely by his reduced hearing. Parents sought an outside placement at the Clarke School. The District rejected this option because the school-based Team members felt that Clarke could not adequately address Student's "fundamental delays," but that the Preschool Academy would be capable of doing so. (P-4)

33. The IEP contained goals in Self Advocacy (*i.e.*, wearing BAHA consistently and informing adults when the BAHA isn't working); School Readiness (following classroom routines, participating in non-preferred activities, transitioning between activities, and responding when his name is called); speech/language (expanding vocabulary by 100 words including varied parts of speech, following one-step directions, producing 2-3 word utterance; imitating environmental sounds, expanding social language); speech/language-intelligibility (increase intelligibility). (P-4)

34. Accommodations for Student's hearing loss included instructional accommodations (*e.g.*, visual supports, repetition, listening breaks, reduced background noise); physical accommodations (*e.g.*, an acoustically modified learning environment to provide recommended signal to noise ratio); and access to technology, including an audiologist-recommended HAT (Hearing Access Technology, formerly called an FM system), daily equipment checks; staff training on hearing loss, unilateral hearing loss, and the BAHA; and an educational audiologist to assess the classroom. Student would receive small group and individual instruction to teach or practice new skills, as well as activity based/incidental learning, and a multi-sensory approach with consistent HAT use during instruction. (P-4)

35. The service delivery grid provided for the following:

Grid A, consultation time of 1x15 minutes/week from Deaf and Hard of Hearing (DHH) teacher; 1x30 minutes/month from the Auditory Visual Therapist (AVT), 1x10 minutes/month from the physical therapist, 1x15 minutes/month each from the occupational therapist and speech/language therapist;

Grid B, within the integrated preschool classroom, 5x164 minutes/week from special education staff, 1x45 minutes/week from the DHH teacher, 1x 30 minutes/week each of individual service from the AVT and speech/language therapist, and 1x20 minutes/week of small group physical therapy services.

Grid C, 2x30 minutes/week individual AVT; and 1x30 minutes/week individual speech/language therapy.

36. The IEP also provided for ESY services between July 6 and August 6, 2020 consisting of 4 x 180 minutes per week of special education instruction and 1x 60 minutes/week of individual AVT. (P-3)

37. Under “Additional Information,” the IEP provided for at least annual assessment of the acoustically modified classroom, a low student/staff ratio until Student can tolerate the BAHA at school, consultation with Parents, and development of self-advocacy skills to avoid and respond to bullying and teasing. (P-3)
38. On January 30, 2020, Parents partially rejected the IEP, rejected the placement at the Preschool Academy and renewed their request for placement at the Clarke School. In a letter accompanying their response, Parents listed multiple, detailed objections to the accommodations and benchmarks, because of omissions (*e.g.*, of weekly checks of classroom acoustics by an audiologist), because benchmarks were too low in that they addressed skills that Student already possessed, vagueness, or insufficient specialization for a child with hearing loss. Parents rejected the provision for a HAT system, which Student’s audiologist had not recommended, and for a low student/staff ratio, noting that they felt Student needed a small classroom population and not just a lowered ratio. (P-5) Parent testified that she felt the related services such as speech therapy would be provided too infrequently to meet Student’s needs. (Parent, P-4)
39. After Parents had rejected the IEP, the School offered Parent “walk-in” speech/language and AVT services. (Poirier-Collins) Parents rejected those services and stated that they would be seeking private services instead. Between Parents’ rejection of the IEP on January 30, 2020 and the date of the COVID-related school shutdown in March 2020, Student did not receive services from EI (because he had aged out of EI eligibility in mid-January) or Whitman-Hanson. (Parent)
40. On February 4 and 18, 2020, Student underwent a psychological assessment and consultation by Anjali Sadhwani, PhD at the Boston Children’s Hospital Cardiac Neurodevelopmental Program. The purpose of the assessment was to follow up on Student’s progress in light of “developmental risk factors presented by his medical history.” The evaluation consisted of two visits comprising assessment procedures as well as a feedback and planning session with Parents, which included a review of the proposed IEP from Whitman-Hanson. (P-13)
41. Student’s behavior and activity level during the evaluation were appropriate. He was highly cooperative, attentive, engaged with the clinician, socially interested, and was able to work on tasks for a sustained period. Student communicated with single word approximations and facial expressions. He had reduced intelligibility and could mainly be understood via context and translation by Parent. (P-13)
42. The evaluator administered an extensive battery of standardized tests and rating scales. These assessments indicated that Student’s general cognitive ability fell in the low average range, with solidly average visual-spatial skills and “borderline” verbal comprehension and working memory skills. At age 37 months, Student’s receptive

and expressive language skills were at the 34 and 20-month levels, respectively. Assessment of Student's emotional and adaptive functioning showed difficulties with communication, problem-solving, and personal-social skills, as well as social awareness, social cognition, and repetitive and restrictive behaviors. On the other hand, Student's overall adaptive skills (such as activities of daily living) were age-appropriate. (P-13)

43. The evaluation noted that Student had "numerous strengths and competencies," in that Student was cooperative, put forth effort, was cheerful, had strong social skills, and intact visual-spatial and gross motor skills. His weaknesses were in the areas of language comprehension and working memory. The evaluator gave Student a diagnosis of a "neurodevelopmental disorder associated with medical history" as well as a language disorder. (P-13)
44. The evaluation contained multiple recommendations, including placement in an acoustically treated classroom in a "small sized language-based program with low student-teacher ratio designed for children with hearing loss," classroom, 4 to 5 sessions per week of intensive speech/language therapy from a therapist skilled at working with children with hearing loss, and ongoing consultation with an educational audiologist. (P-13)
45. The evaluation further stated that "[a]ll of [Student's] learning should take place in a quiet listening environment with minimal distractions and be provided by a teacher of the deaf" using an auditory verbal approach. (P-13)
46. It is not clear from the record whether this report was forwarded to Whitman-Hanson, but there is no indication on the record that it was considered at a Team meeting.
47. Between January and July 2020, Parents were in the process of arranging services from private providers, but Student received no services from the District. In approximately March 2020, Parent began doing daily 1:1 work with Student on language and related skills. Parent created a dedicated learning space in Student's room with new toys such as farm animals, different colored cars (to work on colors), flash cards, and other visual supports. Parent had received much coaching and instruction when Student was in EI and applied what she had learned to work with Student in this setting. Parent found that in the quiet, 1:1 environment, without even his toddler sister present, Student worked very well with her and was excited about learning. Parent worked with Student on using the BAHAs consistently and there is no dispute that by approximately July 2020, Student was using the BAHAs during most or all of his waking hours. (Parent)
48. In July 2020, Student began receiving weekly in-person speech/language services from Kelly Linehan, a private speech therapist. Ms. Linehan has a Masters' degree in speech/language pathology and has prior experience working with children with

hearing loss. As of the hearing dates, Ms. Linehan had met with Student a total of 8 times. Before she began working with Student, she reviewed prior evaluations and the rejected IEP from Whitman-Hanson. Ms. Linehan worked with student 1:1, in a quiet office with very little noise coming in from outside, using a combination of structured activities and unstructured play. She established goals of making student a better communicator, with improved intelligibility, expressive and expressive language. In particular, she worked with Student on increasing his length of utterance. The goals had an approximate age-equivalence of 2 to 2.5 years. Ms. Linehan took data after every session and tracked his progress using a criterion-referenced instrument called the Milestones Guide. (Linehan)

49. Ms. Linehan observed that Student was very timid and shy until he got to know her, but subsequently warmed up to her. He wore his BAHA during all sessions. From the outset, Student would point to the source of a sound (such as an air conditioner switching on) and then to his ear, to indicate that he had heard it. When working with Ms. Linehan, Student has been very distracted by extraneous noises and has needed breaks between activities. Ms. Linehan testified that the 40% intelligibility estimate in the School's evaluation was higher than her observation. She has found his intelligibility to be quite low, although she became better able to understand him as she got to know him better. (Linehan)
50. When asked for recommendations for Student's educational placement, Ms. Linehan stated that he would need individual speech/language therapy, a quiet acoustically-treated classroom, frequent breaks between activities, and support from staff in having directions reworded and rephrased to ensure understanding. Ms. Linehan had read the proposed IEP but was not familiar with the proposed preschool classroom and was not prepared to give an opinion on the appropriateness of the proposed IEP or placement. She did not have enough information to determine whether Student had developmental delays in addition to language delays stemming from hearing loss. (Linehan)
51. In addition to the speech/language sessions with Ms. Linehan, Student also began receiving weekly 1:1 sessions with Cara Della Villa in July 2020. Because of the pandemic, these sessions have been virtual. Ms. Della Villa testified that Student has made progress since July 2020, in that his intelligibility has increased somewhat and that as of the hearing date, he was able to engage in short conversations consisting of about four conversational turns. Student was still distracted by outside noises, however. When asked what she believed were necessary components of an appropriate preschool placement for Student, Ms. Della Villa stated that he needed a quiet environment in an acoustically treated classroom. Such a classroom would be modified to reduce background noise and reverberation by use of carpeting on the floors and walls, as well as other measures of noise reduction. Ms. Della Villa stated that Student could have peers in the classroom if the room was adequately treated. She observed that Student's ability to attend, follow directions, and engage in verbal

exchanges had improved since he had begun wearing the BAHA consistently; however, he still needed a quiet environment to demonstrate these skills. In a quiet setting, he was just beginning to “hear to learn,” but with background noise he would still sometimes fail to attend to a targeted sound or respond to his name. (Della Villa)

52. Additionally, Ms. Della Villa felt that Student needed daily instruction from a Teacher of the Deaf, which was not provided in the proposed IEP. She testified that the TOD would be trained and experienced in monitoring and regulating the classroom noise level to meet the needs of hearing-impaired students, and emphasized that the level of training required was “frequent...not just once a year.” (Della Villa, Tr. 1, p. 272) Additionally, the TOD would be experienced in targeting skills such as vocabulary building from an “auditory first” or “listening first” standpoint,” *i.e.*, determining what Student is listening to and how he is hearing, and not just from an expressive language standpoint. (Della Villa)
53. With respect to peers, Ms. Della Villa testified that Student should be grouped with children who communicated at a level close to his. Based on her experience with Student, she believed that if grouped with typically-developing peers at this stage of his development, Student would find it impossible to understand or communicate with them, and, rather than using them as models, would simply retreat, since this was what he was doing when he was having difficulty communicating with her, in a highly structured 1:1 situation. (Della Villa)
54. Ms. Della Villa testified that she did not have enough information about Student to conclude whether he had developmental delays in addition to language delays attributable to hearing loss. She believed his play skills, for the most part, were age-appropriate. He had not yet developed peer play skills, but she was unsure whether this was because of a developmental issue or simply lack of exposure, since Student had very little experience interacting with children outside of his immediate family. When asked whether a TOD would be able to work with Student’s developmental delays, if such exist apart from his hearing loss, she responded in the affirmative. She stated that any developmental challenges that Student might experience were not atypical of children with hearing loss and that a TOD is, in fact, a special education teacher, with additional expertise, who could address such issues, unless the child needs highly specialized behavioral interventions or has severe physical impairments, which Student does not. (Della Villa)
55. Several witnesses testified generally about the impact of unilateral hearing loss on language development and its effect on Student. Dr. Barbara Hecht has been the director of the Clarke Schools for Hearing and Speech for nearly ten years. She holds a doctoral degree in linguistics and language development in children. Prior to taking on her current position, Dr. Hecht was a faculty member at UCLA in special education. She later served there as Director of the Teacher of Deaf education program and then as president of a clinic serving Deaf and hard of hearing children.

Since coming to Massachusetts, Dr. Hecht has served on several task forces and committees relating to Deaf and hard of hearing children with the Massachusetts Department of Elementary and Secondary Education (DESE) and the Mass. Commission for the Deaf and Hard of Hearing (MCDHH). Dr. Hecht also has served on several committees and task forces on the federal level and is on the board of the national accrediting body for TOD training programs. She has authored multiple publications in the area of language development, language disorders and deafness, including a guidebook for educators on best practices in Deaf education. Finally, Dr. Hecht has consulted informally with DESE on supporting Deaf and hard of hearing students in response to the COVID-19 pandemic. (Hecht)

56. Dr. Hecht testified that contrary to former assumptions that a child with adequate hearing in one ear would not have problems, recent research has shown that “unilateral hearing loss can have a significantly negative effect on children’s language development and subsequent academic progress,,” including “significant language delays beginning in early childhood.” (Hecht, Tr. I, p. 233-4). She further testified that according to the research, “right-sided unilateral loss has a more significant impact on language development than left side.” (Hecht, Tr. I, p. 235). She stated that while there is still debate in the field about the best forms of amplification for children with microtia/atresia in particular, the consensus is that such children should be provided with access to sound via an amplification device, as well as speech-language therapy, as young as possible. She noted that one challenge of unilateral hearing loss is discriminating relevant sounds in a noisy environment, because research has shown that screening out background noise is more difficult if there is only one functional ear. (Hecht)
57. Dr. Hecht has never evaluated or provided direct services to Student, but gleaned information about him in her role as director of the Clarke EI program, as the supervisor for Cara Della Villa, with whom she met weekly, and from reviewing his records from Children’s Hospital and Whitman-Hanson. She testified that Student had reduced auditory access during the first three years of his life because he did not receive the BAHA until he was over a year old, and did not use it consistently until he was at least 3 years old. “So the concern for [Student] is that he really missed out on early auditory access, and therefore early auditory brain development, in a way that a child without hearing loss would not have experienced.” (Tr. 1, p. 236)
58. She further testified that given the severity of his reduced auditory access and language deficits, it was too early to determine whether or not he had additional developmental delays or disabilities, but that a TOD would be able to address both his current listening and language needs and support any learning needs that might be co-occurring with his hearing loss. After some time in such a setting, if Student were making less than expected progress, further evaluation could be done to determine the need for additional services. (Hecht)

59. Tracey Vale, the AVT who contracts with the District to provide services to hearing-impaired children, testified that she agreed with Dr. Hecht regarding the seriousness of unilateral hearing loss; however, she felt that many of the negative outcomes for language and academic development did not appear in preschool, but in later grades;<sup>3</sup> therefore, she could not attribute Student's language issues solely to hearing loss. (Vale) She did not state, however, that Student's hearing loss had no effect on his development.
60. Cara Della Villa, who provided Student with services through EI and, later, privately, has an undergraduate degree in communication sciences and disorders and a graduate degree in Deaf education and hearing sciences. She holds Massachusetts certification as a Teacher of the Deaf (TOD) in listening and spoken language. Ms. Della Villa has worked as a TOD in several states, including Massachusetts, and is in her third year of employment at the Clarke School. She has worked with multiple children with unilateral hearing loss, including from microtia/atresia, and has received training and reviewed literature on these conditions. Ms. Della Villa testified that according to her understanding of pertinent research, unilateral hearing loss, particularly on the right side, is associated with speech/language delays, and that children with unilateral loss should be provided with hearing aids and intensive speech/language therapy from an early age, and, in school, should be placed in small classes in acoustically treated classrooms, taught by a TOD, until they progress enough to function in mainstream environments. (Della Villa)
61. Dr. Hecht and Ms. Della Villa agreed that the brain develops the ability to localize and recognize sound between early infancy and the ages of 2 or 3, and that ideally, a child with hearing loss would be fitted with a hearing aid very early to provide access to sound during this window of time. They noted that the delays in fitting Student with a hearing aid, which were necessary because of his medical condition, delayed his consistent access to sound. They pointed out that for at least some of this period, Student may, in addition, have had compromised hearing in both ears due to wax impaction in his left ear. It was difficult to determine Student's precise "listening age" because it was unclear when, and to what degree, he has had consistent access to sound. (Hecht, Della Villa, Vale, MacMullen)

### **Placement Proposed by District**

62. Whitman-Hanson proposed placing Student in the Preschool Academy, which is its integrated preschool program located at Whitman-Hanson High School. As of the hearing dates, the program was providing in-person services to approximately 85 children, 30 of whom were receiving special education services and 55 of whom were

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<sup>3</sup> According to Dr. Vale, until recently, children with unilateral hearing loss were presumed to have adequate hearing and were neither aided nor given services or accommodations because they were able to mask the deficits caused by their hearing loss until about third or fourth grade, when they began to struggle. (Vale)

typically developing. The children are divided among three classrooms. The preschool holds 2 half-day sessions per day. Most children attend either a morning or afternoon session, but a child could attend both sessions if the IEP Team finds it appropriate. The preschool is language-based, meaning that language is incorporated into all activities, and typically-developing students serve as language models for the children on IEPs. In addition to certified special education teachers, the preschool staff includes two speech/language pathologists, an occupational therapist (OT), a physical therapist (PT) and a BCBA. (Poirier-Collins)

63. The classroom envisioned for Student would serve 8 or 9 children, of whom 3 or 4 would be on IEPs with the remainder typically-developing. One of Student's potential classmates has hearing loss and uses an augmentative device. Student's classroom instruction would come from a certified special education teacher, assisted by a paraprofessional. In addition to the teacher and paraprofessional, other service providers would be in the classroom periodically as required by the students' IEPs. Thus, Student's speech/language pathologist and AVT would each be in the classroom for 30 minutes per week, the TOD for 45 minutes per week and the physical therapist for 20 minutes per week. (Poirier-Collins)
64. The proposed classroom has been acoustically treated according to the recommendations of an educational audiologist who assesses the room at least annually. Currently, the room is outfitted with sound-absorbing panels on the walls and mats on the floor and has other modifications to reduce reverberations and background noise. These modifications could be adjusted if necessary to meet the needs of Student or any other child in the classroom. (Poirier-Collins) Although the preschool is located in the high school building, it is in a walled off, self-contained area so that other than bells, preschool occupants are not exposed to typical high school sounds, such as students passing in the hallways, announcements, etc. (MacMullen)
65. Whitman-Hanson has identified a particular classroom teacher for Student, but she did not appear at the hearing and was not identified elsewhere in the record. This teacher is not a TOD but has had prior experience teaching children with hearing loss in her preschool classroom, including one child who currently is placed there. (Poirier-Collins, MacMullen)
66. When necessary to serve one or more children with hearing loss, the District has contracted with the READS Collaborative for consultation services from the Collaborative's Deaf education program. As of the hearing dates, the District was not utilizing READS' services, but could reinstate them, if necessary, to meet Student's needs. Mary Ann LaBue, a Teacher of the Deaf and literacy specialist from READS,

provided such consultation services for several years, until March 2019.<sup>4</sup> Most recently her services consisted of general and child-specific in-service training to teachers as well as classroom observation to ensure that teachers were using best practices with respect to visual supports, seating, language precision to assist with access to the curriculum, use of the FM system, and the like. If Whitman-Hanson were to consult with READS, the Collaborative would select an individual to perform the service, either Ms. LaBue or another staff member. (LaBue)

67. Several witnesses testified about the appropriateness of the preschool as a placement for Student. Ms. LaBue testified that although she had not met Student, she had reviewed his IEP as well as reports from evaluations and audiology assessments, and that Student could receive FAPE in the Preschool Academy. She based her conclusion on her experience that Whitman-Hanson “provides for the needs of children with hearing loss, no matter what those needs are, and are able to adjust any needs as they come up.” (LaBue, Tr. II, p. 225) She further stated that the amount of time with the TOD, 15 minutes per week of Grid A consultation and 45 minutes per week in the classroom would be “a good starting point.” (*Id.*, p. 226) Ms. LaBue has worked with the classroom teacher designated for Student and felt that this teacher was “well-versed” in strategies for students with hearing loss, including using concise language and visual supports. Ms. LaBue further testified that since the classroom teacher is not a TOD, she might need “refresher or some reminders of the kinds of language skills, attention skills, that a student with hearing loss might need, and ways to identify or notice when a student is either having difficulty or...when they need specialized attention.” (LaBue, Tr. II, p. 233)

68. Jennifer MacMullen is a speech/language pathologist (SLP) employed by the District. Ms. MacMullen holds undergraduate and graduate degrees in communication sciences. She has been a SLP for 18 years, and has worked in Whitman-Hanson for 12 years. Between 2008 and 2018, Ms. MacMullen was the school-based SLP for the Preschool Academy. Ms. MacMullen has experience working with children with hearing impairments, including approximately 13 through the District’s preschool. She is familiar with AVT, and has consulted with Teachers of the Deaf, educational audiologists, and professionals from Clarke and READS Collaborative. (MacMullen)

69. Ms. MacMullen has never met or evaluated Student, but has reviewed his previous evaluations and the proposed IEP. When asked if Student could succeed in the District’s proposed placement, she stated that “I do sincerely believe it can happen, but it needs to be a very careful, balanced approach in making it occur.” (Tr. II., p. 197) She felt that it would be “invaluable” for Student to participate in the preschool, but “equally invaluable” to have the SLP and AVT in the classroom for periods of time. She believed that Student would benefit from an inclusion setting, but that it

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<sup>4</sup> Ms. LaBue has been a certified TOD for the past 30 years and has taught both preschool and college. For the past 8 years, she has worked at READS as a TOD and literacy specialist, as well as a consultant to school districts including Whitman-Hanson. (LaBue)

should not be “extraordinarily large,” and “he should be placed in as small a preschool setting as possible within the public schools.” (Tr. II, p. 202)

70. Ms. MacMullen further stated that Student was “a kid with a tricky history and tricky beginning on many different levels, and there’s questions about his auditory access—and I have questions about his ears, how old are his ears versus his chronological age--and ensuring that when we’re putting him into a classroom setting, that we’re not overwhelming him, and doing that slowly and surely...” (Tr. II. Pp. 107-198) Ms. MacMullen felt that the Preschool Academy would be capable of such a transition because of the amount of training that the classroom teacher has had, the availability of extensive consultation, the collaboration among providers, the acoustically-treated classroom, and the positive experiences of other children with hearing loss who have attended the preschool. (MacMullen)

### **Placement Requested by Parents**

71. Parents seek placement in the preschool program operated by the Clarke Schools for Hearing and Speech at its Canton location.<sup>5</sup> Clarke is an approved special education day school for Deaf and hard-of-hearing children. In addition to its on-site school, Clarke contracts with multiple EI agencies to provide specialty services to children aged birth to 3, and also provides extensive consultation services to public school districts. The Canton location serves children aged 3 to approximately 8 in an ungraded program. Clarke utilizes a listening/spoken language approach; that is, all instruction and communication is in spoken or written English as opposed to ASL or other visual modes. Many of the students at Clarke have access to sound with hearing aids or cochlear implants. (Hecht, Della Villa)
72. Clarke’s mission is to equip children who have hearing loss with enough language and self-advocacy skills to transition to mainstream settings in public schools. At Clarke in Canton, about 80% of the students transition to public school by the age of 8, some during preschool and most by kindergarten or first grade. Often, Clarke and the child’s receiving home school district will arrange for a TOD from Clarke to work with the child and/or consult with staff at the new school. (Hecht)
73. The Clarke classrooms are acoustically treated to reduce reverberations with specialized wall coverings, carpeted floors, and sound-absorbing acoustical tiles. Classrooms are set up with a sound field system. When ready, children use hearing assistive technology (HAT, formerly called FM systems). Every classroom has an adjoining observation booth for parents and staff training.

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<sup>5</sup> The Clarke Schools have two locations in Massachusetts, in Canton and Northampton, as well as in several other states.

74. Approximately three days after the COVID shutdown of schools in March 2020, Clarke implemented fully remote service delivery, and was operating in that mode as of the hearing dates. This entailed approximately three sessions per week each of individual/parent coaching sessions with a TOD and speech/language therapist, as well as two sessions per week of group work with the TOD. Clarke planned to move to a hybrid model in October 2020. To prepare for the return to school, children were to be grouped in “pods” and set up in classrooms with no more than 3 or 4 children per room. The school received permission not to remove carpeting but has removed soft toys and cushions. After investigating face coverings to maximize protection while minimizing visual and auditory interference, Clarke decided to adopt specially made face shields with a cloth apron that can accommodate an FM microphone, and is investigating additional alternatives. Also, the school is in the process of setting up opportunities for outdoor instruction when feasible. (Hecht)
75. If Student were to attend Clarke, he would be placed in a class with approximately 4 or 5 other children (3 or 4 under the hybrid model) close to him in age and language ability. Under the hybrid model, he would attend school in person 2 to 3 days per week and remotely for the remaining days, for 4 hours per day. Instruction would be by a TOD plus a teaching assistant. The teaching assistants at Clarke are generally in graduate programs preparing to qualify as teachers of the Deaf. Student would also receive individual speech/language therapy. Parent education and coaching would be a significant part of Student’s instruction. (Hecht)
76. According to Dr. Hecht and Ms. Della Villa, the Clarke program would be appropriate for Student because Student is still a “developing listener,” whose ability to access and comprehend sound is still emerging. Additionally, his lack of intelligibility would be a barrier to communication with typical peers. They believe he needs a specialized program with a TOD who is trained to perceive when a child is not hearing accurately, monitor ambient noise level, trouble-shoot devices, and facilitate communication with peers from the standpoint of access to sound. (Hecht, Della Villa) In light of the progress that he has made since wearing his BAHA regularly, Dr. Hecht anticipated that Student would only need a relatively short period in an intensive, specialized program. (Hecht)

## DISCUSSION

There is no dispute that Student is a school-aged child with a disability who at all relevant times was eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B (“Chapter 766”). Student was and is entitled, therefore, to a free appropriate public education (FAPE), which “comprises ‘special education and related services’--both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘supportive services’ to permit the child to benefit from that instruction.” *C.D. v. Natick Public School District, et al.*, No. 18-1794, at 4 (1<sup>st</sup> Cir. 2019), quoting *Fry v. Napoleon*

*Community Schools*, 137 S. Ct. 743, 748-749 (2017); and 20 USC§1401 (9), (26), (29).<sup>6</sup> Student’s IEP, which is “the primary vehicle for delivery of FAPE, *C.D. v. Natick*, 18-1794 at 4, quoting *D. B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012), must be “reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.” *C.D. v. Natick*, 18-1794 at 4, quoting *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1001 (2017).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but “meaningful” educational benefit. *C.D. v. Natick*, 18-1794 at 12-13; *D.B. v. Esposito*, 675 F.3d at 34-35; *Johnson v. Boston Public Schools*, 906 F.3d 182 (1<sup>st</sup> Cir. 2018). See also, *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982); *Town of Burlington v. Dept. of Education (“Burlington II”)*, 736 F.2d 773, 789 (1<sup>st</sup> Cir. 1984). Whether educational benefit is “meaningful” must be determined in the context of a student’s potential to learn. *Andrew F.* 137 S. Ct. at 1000, *Rowley*, 458 US at 202; *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008); *D.B. v. Esposito*, 675 F.3d at 34-35. Within the context of each child’s unique profile, a disabled child’s goals should be “appropriately ambitious in light of [the child’s] circumstances, *Andrew F.* 137 S. Ct. at 1001; *C.D. v. Natick*, 18-1794 at 14.

Finally, eligible children must be educated in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, “the desirability of mainstreaming must be weighed in concert with the Act’s mandate for educational improvement.” *C.D. v. Natick*, 18-1794 at 5-6, quoting *Roland M. v. Concord School Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990).

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child, the burden of proof is on the party seeking to challenge the *status quo*. Here, as the moving party challenging Student’s proposed IEP and placement, Parents bear this burden. That is, in order to prevail, Parents must prove, by a preponderance of the evidence, that the proposed IEP and placement are not reasonably calculated to provide Student with FAPE, and that Student requires placement in the Clarke School. Parents must also prove that Whitman-Hanson’s designation of “developmental delay” as Student’s secondary disability category was incorrect. *Schaffer v. Weast*, 546 U.S. 49 (2005).

In light of the foregoing, I will examine each of the Issues Presented, in turn.

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<sup>6</sup> In *C.D.*, the First Circuit reiterated its formulation of FAPE set forth in earlier cases, *i.e.*, educational programming that is tailored to a child’s unique needs and potential, and designed to provide “‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); *Burlington II*, *supra*; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993); *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012)

**Issues 1, 2: Was the IEP covering the period from January 2020 to January 2021, calling for placement at the Preschool Academy reasonably calculated to provide Student with a free, appropriate public education (FAPE) in the least restrictive environment? If not, can the IEP and/or placement be made appropriate?**

Based on a careful review of the record in light of applicable law, I find that the IEP and placement proposed by Whitman-Hanson are not appropriate, but can be made appropriate with several modifications. My reasoning follows.

There is much in this case on which the parties agree. They do not dispute that Student's unilateral<sup>7</sup> hearing loss has significantly impaired his ability to acquire receptive and expressive language and may also have affected other areas of his development. The parties also agree that because Student unavoidably received his BAHA relatively late, at the age of 17 months, and did not use it consistently until he was well over 3 years old, much is unknown about his prior access to sound and his true "hearing age," as well as whether or not he has developmental issues in addition to hearing loss. (See, e.g., testimony of MacMullen, Vale, Della Cara, Hecht.) Finally, the parties agree on many of the elements of an appropriate educational program for Student, including an acoustically-treated, quiet classroom with a low student-teacher ratio, multiple accommodations to hearing loss, intensive speech/language therapy, access to a TOD and educational audiologist, and consultation and collaboration among teachers and specialists. (See, e.g., testimony of MacMillan, Vale, LaBue, Hecht, Della Cara, Linehan, Parent.)

The only major dispute between the parties is over the setting in which Student's education should take place: the District's integrated preschool, with various accommodations and related services, or the specialized, out-of-district placement at the Clarke School. The core of that dispute boils down to first, the role of the TOD, and, second, the appropriateness of the classroom and peer grouping.

Regarding, first, the TOD, the record establishes that Student must have daily, direct access to a TOD in his classroom in order to receive FAPE, and that the 45 minutes per week classroom access to a TOD, as proposed by the IEP, is inadequate, even given the AVT and speech/language services and consultation time. I credit the testimony of Ms. Della Cara, who has worked with Student for 8 months and is a TOD, and Dr. Hecht, who supervises Ms. Della Cara, has reviewed Student's records, and has expertise in the training and role of the TOD, that at this stage of his development, Student needs most of his instruction from a TOD who is qualified in the listening/spoken language methodology. The same recommendation was made by two evaluators from Boston Children's Hospital. In her report regarding a speech/language evaluation, which report

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<sup>7</sup> And there is evidence in the record that due to episodic wax impaction in the left ear, it may have been bilateral, at times.

was considered by the Team, Children’s Hospital Nicole Salamy stated that Student should “have ample opportunities for direct instruction from a teacher of the deaf throughout his school day.” (Paragraph 15, *supra*; P-12) Additionally, Dr. Anjali Sadhwani, also from Boston Children’s Hospital, made a similar recommendation after conducting a neuropsychological evaluation, stating that “[a]ll of [Student’s] learning should take place in a quite listening environment with minimal distractions and should be provided by a teacher of the deaf...[using]...an auditory verbal approach.” (Paragraph 45, *supra*; P-13)

A TOD will have had training and experience in handling issues unique to hearing-impaired students who communicate orally, including ensuring auditory access by, *e.g.*, monitoring ambient room noise, facilitating peer interactions, and generally, modifying curriculum, and assessing such skills as expressive language from the standpoint of Student’s access to sound. If the TOD is present in the classroom for most or all of the school day, s/he can intervene with regard to these issues on an ongoing, in the moment basis. Additionally, I credit the testimony of Dr. Hecht and Ms. Della Cara that developmental issues that Student has in addition to hearing impairment, if in fact he has such issues, are well within the capacity of a TOD to address, especially given that Student has no complex behavioral or medical issues, and that a special education teacher, SLP, AVT and consultants from READS would continue to be available.

I note that while District witnesses Jennifer MacMullen, Tracey Vale, and Mary Anne LaBue testified that the 45 minutes per week of TOD time set forth in the IEP would be adequate, they also testified that they reached this conclusion because the proposed classroom teacher is experienced in working with hearing-impaired children, has a teaching style that is compatible with such children’s needs, and, is willing to collaborate with specialists. I also note, however, that the proposed classroom teacher was not named and did not testify at the hearing, and the District presented no formal evidence of her credentials. In fact, while Patricia Poirier-Collins testified that she planned to place Student with the above-described teacher, the District did not—and perhaps could not—give assurances that this would happen.

The second point of contention between the parties is the appropriateness of the setting. Parents assert that the physical setup will be overly noisy and that Student will not be able to access sound. There is no dispute that those who have worked with Student (Lindsay Kelley, Erin McNamara, Cara Della Villa, Parent) have found that he becomes very distracted by sounds and works best in a quiet setting. Parents have not established a basis for their claim of noise in the preschool, however, other than Parent’s observation from her brief visit, and also have presented no persuasive evidence that Whitman-Hanson’s acoustical treatment of the proposed classroom is not adequate or could not be made adequate with the assistance of the consultant educational audiologist.

Parents also allege that the peer grouping would be inappropriate, and that the language skills of peers would be so much more advanced than Student’s that he would simply shut down and be unable to communicate with classmates or benefit from them as language models. Again, other than an anecdote about a child that Parent observed

telling an elaborate story, Parents have presented no evidence about proposed peers or their language proficiency, or that there wouldn't be any children in the classroom who could be communication partners with Student. Parents have not met their burden on this issue, particularly if a TOD is added to the classroom, who could facilitate peer communication. I would caution the parties, however, that it will be critical for all staff, including the TOD, special education teacher, SLP, and AVT to monitor Student's peer interactions to ensure that he actually is able to have meaningful communication with other children.

In sum, the IEP and Preschool Academy placement are not appropriate as written and proposed, but can be made appropriate with the addition of a TOD who will be in Student's classroom during all of the time that Student is in the classroom, who would be responsible for providing a significant amount of Student's direct instruction. That said, I note that Student is nearing the end of a critical window to "train his brain" to access sound, and already has—unavoidably—missed opportunities to do so when he was an infant and young toddler. He has had very little exposure to children outside of his immediate family. As District witness Jennifer MacMullen testified, Student will need a slow, gentle, planful introduction to the preschool environment, making full use of all consultative resources, if he is to succeed.

**3. If the IEP and placement proposed by Whitman-Hanson is not appropriate and cannot be made appropriate, is the Clarke School in Canton an appropriate placement for Student?**

Because I have determined that the IEP and placement proposed by Whitman-Hanson can be made appropriate with the addition of a TOD in Student's classroom whenever Student is present, I would normally not reach the issue of the appropriateness of the Clarke School. However, in the event that Whitman-Hanson is unable to provide a TOD consistent with this Decision, I find that the Clarke School would be an appropriate placement for Student. Clarke is an approved private day school for young children with hearing loss that uses Student's mode of communication, listening and speaking. The record indicates that Clarke could provide Student with individualized instruction in a quiet environment by appropriately credentialed teachers of the Deaf and speech/language pathologists, and already has worked successfully with Student in EI and, subsequently, through private services, and has a history of working collaboratively with school districts to transition children to public school settings.

**4. Should Whitman-Hanson change Student's secondary disability category from "developmental delay" to "communication impairment?"**

Massachusetts special education regulations define developmental delay at 603 CMR 28.02(b) as follows:

*Developmental Delay*-The learning capacity of a young child (3- 9 years old) is significantly limited, impaired or delayed and is exhibited by difficulties in one or more of the following areas:

receptive and/or expressive language; cognitive abilities; physical functioning; social, emotional or adaptive functioning; and/or self-help skills.

The regulations also define communication impairment at 603 CMR 28.02(g):

*Communication Impairment*-The capacity to use expressive and/or receptive language is significantly limited, impaired, or delayed and is exhibited by difficulties in one or more of the following areas: speech, such as articulation and/or voice; conveying, understanding, or using spoken, written, or symbolic language. The term may include a student with impaired articulation, stuttering, language impairment, or voice impairment if such impairment adversely affects the student's educational performance. *Id.*

These definitions are included in a list of disability categories. To be eligible for special education, a student must have one or more of the disabilities on that list, and, by reason thereof, be unable to progress effectively in general education without specially designed instruction, or be unable to access education without related services. 603 CMR 28.05(2)(a)(1). The categories do not purport to be diagnoses and do not state the cause or etiology of the listed disabilities; rather they are descriptions of functional limitations that may affect a child's educational performance. The main relevance of the disability categories is to provide schools with standardized eligibility criteria. Once the Team has decided that a child is eligible, the disability "label" loses importance, as stated in 603 CMR 28.05(2)(b):

Once eligibility has been determined, the type of disability of the student shall not be used to provide a basis for labeling or stigmatizing the student. Additionally, the type of disability shall not define the needs of the student and shall in no way limit the services, programs, or opportunities provided to the student. *Id.*

The regulations clearly contemplate that services to an eligible child must be based not on the category used to establish eligibility, but on "evaluative data" that informs the individual educational needs of the child. 603 CMR 28.05(3).

In the instant case, Student clearly meets the criteria for "communication impairment." There is no dispute that his "capacity to use expressive and/or receptive language is significantly limited, impaired or delayed." Parents have met their burden for adding this disability category to Student's IEP.

With respect to "developmental delay," based on the evidence in the record Student appears to meet the criteria by virtue of undisputed evidence of delayed expressive and receptive language as well as social skills. The parties dispute whether these delays are a manifestation of Student's hearing loss or are independently co-occurring. In fact, there appears to be near consensus that given Student's young age and

relatively recent consistent access to sound, as well as his lack of preschool experience, there is not enough information available to answer this question. In any event, causation of Student's language and other delays is irrelevant for purposes of a disability category, which, again, is merely a description of Student's developmental level at a certain point in time, and not a diagnosis. Parents have not met their burden of persuasion that the District's use of the term "developmental delay" is incorrect.

Notwithstanding the above, the parties are reminded that the focus in this case should be on the services that Student requires to meet his unique needs, regardless of the label used to establish his eligibility. And it is clear from the record that development of his ability to hear, listen, make sense of what he hears, and acquire language during this critical period of his life is of primary importance. The "developmental delay" designation in no way alters this fact.

### **CONCLUSION AND ORDER**

Based on the foregoing, I conclude that the IEP and placement proposed by Whitman-Hanson for the 2020-2021 school year are not appropriate as written but can be made appropriate with the addition of a Teacher of the Deaf, qualified in listening/spoken language, to be responsible for providing the majority of Student's direct instruction. The Teacher of the Deaf shall be available in Student's classroom throughout each school day when Student is present.

I further note that Student's most recent school-based evaluation was conducted in January 2020. Since that time, Student has apparently made noticeable progress with the consistent use of his BAHA and regular receipt of private TOD and SLP services, as well as daily 1:1 instruction by Parent. It is suggested that after Student has had time to adjust to the preschool setting, and those working with him have had a chance to assess his progress, the District consider advancing his 3-year evaluation, otherwise not due until approximately December 2022, to better assess his status and needs.

By the Hearing Officer,

*/s/ Sara Berman*

Dated: November 27, 2020



