

**COMMONWEALTH OF MASSACHUSETTS
BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student v.
Worcester Public Schools**

BSEA # 09-4367

**RULING ON WORCESTER PUBLIC SCHOOLS' MOTION
FOR DIRECTED VERDICT**

A hearing in the above-referenced matter was held on June 8, 9 and 23, 2009 in Worcester and Malden, Massachusetts. On June 23, 2009, at the close of Parent's case, Worcester Public Schools (Worcester) filed a Motion for Directed Verdict/Involuntary Dismissal (Motion for Directed Verdict). Worcester presented a written Motion and argued the motion on the record. Parent's attorney stated her opposition and was provided an extension of time through June 30, 2009 to file a written opposition. For purposes of this Ruling, the record closed on June 30, 2009 upon receipt of Parent's Opposition.

POSITIONS OF THE PARTIES

Worcester's Position: Worcester contends that Student's current placement at the Gates Lane School provides him with a Free Appropriate Public Education (FAPE) in the least restrictive environment. It argues that Parent has failed to show by a preponderance of the evidence that this placement is inappropriate. Furthermore, Worcester asserts that Parent failed to meet her burden in showing that the New England Center for Children (NECC) would be an appropriate placement because she submitted no evidence on the proposed program. Therefore, as the evidence could not be construed in any manner that would support a finding for the Parent, Worcester seeks a directed verdict denying Parent's request for relief.

Parent's Position: Parent contends that Student has not been making adequate progress at Worcester's Gates Lane School, that his behavior has regressed during his time there, and that the placement thus fails to provide FAPE. Further, Parent contends that witness Dr. Alvarez-Altalef did testify to the appropriateness of the NECC placement. Parent contends that the evidence presented, construed in the light most favorable to Parent, is sufficient to support a conclusion in favor of the Parent, and that a directed verdict is therefore unwarranted.

STANDARD FOR DECIDING MOTION FOR DIRECTED VERDICT

Massachusetts Rule of Civil Procedure 50(a) states:

Motion for Directed Verdict: When Made; Effect. A party may move for a directed verdict at the close of the evidence offered by an

opponent, and may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A party may also move for a directed verdict at the close of all the evidence.

Commentary on Mass. R. Civ. Pro. 50(a) goes on to indicate,

[Mass. R. Civ. Pro.] Rule 50(a) is patterned upon Federal Rule 50(a), with the first sentence revised for clarity. It liberalizes the Massachusetts practice governing defendant's motion for a directed verdict at the close of the plaintiff's evidence.¹

Given the intention that the Massachusetts rule emulate the federal rule, I look to the federal courts for guidance on the standard concerning Motions for Directed Verdict. The federal courts have explained that a decision maker may grant a motion for judgment as a matter of law, including directed verdict, only if the evidence, viewed in the light most favorable to the non-moving party, points so “strongly and overwhelmingly” in favor of the moving party, that a reasonable person could conclude only in favor of that moving party. *Sullivan v. NFL*, 34 F.3d 1091, 1096 (1st Cir. Mass. 1994). *See also e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (U.S. 1986); *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120, 124 (1st Cir. Mass. 1992); *Caldwell Tanks, Inc. v. Haley & Ward, Inc.*, 471 F.3d 210, 214 (1st Cir. Mass. 2006).

Massachusetts state courts have further ruled, in accordance with the federal standard, that “the [non-moving] party may not rest on the allegations of the pleadings, nor rely on ‘bare assertions and conclusions regarding [his own] understandings, beliefs, and assumptions’” to oppose judgment as a matter of law. *Quirk v. Commonwealth*, 15 Mass. L. Rep. 515 (Mass. Super. Ct. 2002) (citing *Key Capital Corp. v. M & S Liquidating Corp.*, 27 Mass.App.Ct. 721, 728, 542 N.E.2d 603 (1989)). Rather, the non-moving party must demonstrate “the existence of admissible evidence sufficient to meet the burden of proof on the issues raised” by the moving party in order to survive the motion. *Id.*

Additionally, the Executive Office of Administration and Finance Adjudicatory Rules of Practice and Procedure govern the conduct of all adjudicatory proceedings of Massachusetts agencies governed by M.G.L. c. 30A.² The regulation concerning a Motion to Dismiss reads as follows:

Upon completion by the Petitioner of the presentation of his evidence, the Respondent may move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his case.

¹ *ALM R. Civ. P. Rule 50*

² 801 CMR 1.00

The Presiding Officer may act upon the dismissal motion when presented, or during a stay or continuance of proceedings, or *may wait until the close of all the evidence*.³ (emphasis added). The granting of such motion may be considered a decision and a written decision shall be made as provided in 801 CMR 1.01(10)(m)2 (Final Decisions).

In the present case, both parties had completed the presentation of their evidence before Worcester moved for directed verdict and the dismissal of the case.⁴ The language in 801 CMR 1.01(7)(f), which governs BSEA proceedings, allows Worcester to move for dismissal of the case at the close of the presentation of the evidence at hearing. Furthermore, the granting of said motion results in the final disposal of the case. In this sense, the Motion to Dismiss can be seen as a Massachusetts Adjudicatory Rules equivalent to the Motion for Directed Verdict used in jury trials. *See, Kendall v. Selvaggio*, 413 Mass. 619, 620 (Mass. 1992) (“only juries reach verdicts; judges make findings.”⁵ The [moving party], if they believed that the evidence presented was insufficient... should have moved for involuntary dismissal”). Given the fairly unique circumstances of this case, and in light of the guidance provided under the adjudicatory rules of practice and procedure, Worcester’s Motion for Directed Verdict shall be construed as a Motion to Dismiss.

In applying the above rules to the instant case, and consistent with the guidance provided by federal and Massachusetts state courts, as well as 801 CMR 1.01(7)(f), Worcester is the moving party for purposes of this motion. Therefore, I must consider the evidence in the light most favorable to the Parent. Having done so, only if there is no way a reasonable person could find in favor of Parent’s position will Worcester’s Motion to Dismiss be granted.

This case was originally brought by Parent who sought a finding that Student’s placement at Gates Lane did not offer Student a Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE) and seeking public funding for placement of Student at NECC. As the moving party, at Hearing, Parent carried the burden of persuasion pursuant to *Shaffer v. Weast*, 546 U.S. 49, 62 (2005)⁶. Worcester asserted that its proposed program and placement embodied in SE-1 offered Student a FAPE in the LRE.

³ 801 CMR 1.01(7)(f).

⁴ Due to the unavailability of one of Parent’s witnesses, Dr. Alvarez-Altalef, on the first day of Hearing (6/8/09), it was agreed that Dr. Alvarez-Altalef would be allowed to testify out of order at the conclusion of the Hearing. Worcester’s right to present rebuttal evidence to this final witness was preserved. At the conclusion of the taking of Dr. Alvarez-Altalef’s testimony on 6/23/09, Worcester presented the Motion for Directed Verdict here concerned.

⁵ In the context of BSEA Hearings, Hearing Officers are also charged with the responsibility of making findings.

⁶ In the context of an administrative hearing involving a challenge to an IEP, the burden of persuasion is carried by the party seeking relief. If the evidence presented at hearing is closely balanced, the party carrying the burden of proof loses.

For purposes of this Ruling, the burden shifts to Worcester to show that Parent has offered no proof, beyond bare assertions and conclusions, that the IEP (SE-1) implemented at the Gates Lane School is an inappropriate program and placement for Student, and that NECC is the appropriate placement. It is in this light that I now turn to the facts of this case.

FACTS:

1. Student is a five year old boy (date of birth: 4/30/2004) who resides in Worcester, MA. Student has been diagnosed with autism and is non-verbal. He has been attending Worcester's Specialized Approaches to Individualized Learning (SAIL) preschool program at Gates Lane School (Gates Lane) since September of 2006. The SAIL program is a small inclusionary developmental half-day preschool class for children on the autism spectrum (SE-2).
2. Student lives with Parent and his twin⁷, but also spends a great deal of time with his maternal grandparents. Even though Student utters sounds such as "aaa", "hmm" or "ee", neither of the grandparents or Parent has heard Student utter a word. (Testimony of Grandparent, Parent, Grandmother). According to them, Student knows some sign language but must be prompted to initiate signing. In the home, when he wants something he grabs it, points at it or takes an adult over to, e.g., the refrigerator and points at what he wants. If he does not get what he wants, he becomes aggressive, pushes others and takes what he wants. He has also been observed to throw things, bite, pinch and punch others in the home and at the park. Other than his sibling, he does not initiate interactions with other children in the community even if they are all engaged in the same activity, such as going down the slide in the park. Parent is concerned about some bolting/ running away behavior which occurs when Parent tries to get Student to do something he does not want to do, such as putting on his coat. Parent, Grandparents and Ms. Sarah Harvey⁸ all testified that when they try to stop Student from doing something he is not supposed to do, or are trying to get him to comply with a request, it is very difficult to re-direct him or get him to comply because he screams in a very high pitch, falls to the ground and cries for several minutes. At times, his bad mood may last into the next day. It is difficult for the adults in the home to know what Student's triggers are because he is non-verbal, although they have all witnessed great difficulties with transitions from one activity to another and when changing his diaper. At home, Student gets what he wants when he wants it. (Testimony of Grandparent, Parent, Grandmother). Parent testified

⁷ Student's sibling is also autistic although less severely so than Student.

⁸ Sarah Harvey is Parent's neighbor and Student's respite worker since March 2009. She is a college Student receiving training in sign language. She has worked with two other autistic children, including Student's sibling. Her experience with autistic children has been in the context of adventure based camps. Ms. Harvey has not been trained in ABA, she does not use the Picture Exchange Board, and she was unaware of some of the sign language used with Student in school.

- that she is unable to re-direct Student and that when he is very angry he does not want to be touched. Furthermore, he hits himself on the head or thighs with his hands when frustrated. These self-injurious behaviors have not been observed in school. (Testimony of Ms. Wood, Ms. St. Peter).
3. Student's proposed IEP covering the period from 4/12/08 to 4/11/09 provides for speech therapy (2 x 30), occupational therapy (1 x 30), ABA therapy (5 x 120 at home until 6/20/08, at school from 8/25/08 onwards), and 900 minutes per week of preschool instruction with a teacher and an instructional assistant (SE- 4). The 4/12/08 – 4/11/09 IEP also provides speech therapy (1 x 30), occupational therapy (1 x 30), and 360 minutes of instruction per week during the extended school year (SE- 4). This IEP calls for continued placement at Gates Lane. The portion of the IEP addressing extended school year programming and the 2009-2010 school year proposed by Worcester, covering the period from 6/1/09 to 5/31/10 increases almost all domains of services. This IEP continues Student's placement in a substantially separate classroom in the SAIL preschool program at Gates Lane. As Student moves up to kindergarten, Worcester proposes 1050 minutes per week of instruction with a special education teacher, an instructional assistant, and a classroom aide. The proposed IEP also calls for an additional speech therapy session and occupational therapy session each week and two hours of daily ABA at school *and* at home, as well as an extra hour of ABA home program consultation. It also increases the extended year services by an extra speech therapy session each week (SE-1).
 4. Parent filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) on January 15, 2009, claiming that Gates Lane was not providing Student an appropriate education and seeking relief in the form of a private placement for Student at NECC. This IEP, SE-1, has not been accepted by Parent. (SE-1).
 5. During the 2008-2009 school year, the ABA therapy in Worcester has been provided by Elizabeth Wood, who is supervised and observed once per week during the two hour session by Kimberly Herron. She provides Student two hours of ABA services Mondays through Fridays. (Testimony of Ms. Wood, Ms. Herron). Ms. Wood was responsible for recording the data regarding the target behaviors (e.g., bolting, flapping, tantruming, aggressions, echolalia). According to Ms. Wood, Student's tantrums never lasted more than 10 to 15 minutes with her, and she was able to use the ABA techniques to redirect him and decrease the target behaviors. When conducting the ABA trial runs, Ms. Wood uses a token economy system to reward Student. She used sign language to communicate with him and testified that Student knew the sign for eat, more, all done, help, play, thank you, drink, please, break, and others, and that he used the first six more independently. (SE-5; Testimony of Ms. Wood).

- Student demonstrates good imitation skills. (Testimony of Ms. Wood; Ms. St. Peter, Mr. Proos, Ms. Herron).
6. During vacation time, Ms. Wood provided the home ABA training both at home and at the day care. Ms. Wood testified that Student has difficulties with transitions and that transition response tantrums are more common when he is transitioned back into the classroom after the ABA sessions. She noted that Student displayed more aggressive behaviors during the ABA sessions in the home than in school and remembered one specific instance in December 2008 when he attempted to bite her. Student had very good rapport with Ms. Wood and generally enjoyed going with her to the sessions. During the sessions in school he seemed happy, smiled and clapped his hands. He often sought hugs and tried to kiss Ms. Wood on the cheek during the sessions. When he presented difficulties, Ms. Wood was able to re-direct him by using the behavior plan and the First/Then board. By the end of the 2008-2009 school year, Student had mastered most of his one-step direction program, it took no longer than two minutes to re-engage him when he cried, he was able to work for most of the two hour session, his eye contact was excellent, and he initiated some communication by signing or responding when prompted. (Testimony of Ms. Wood).
 7. At Parent's request, Student's home ABA services were provided at the Simon Center, his day care. Neither Parent nor Grandparents were present during ABA services, and they themselves have not participated in any ABA training. (Testimony of Parent, Grandparents).
 8. The Picture Exchange System and the First/Then Board provided by Worcester, are not used in either Parent's or Grandparent's home, although at Grandparents' house the First/Then Board is kept on the refrigerator door. ABA techniques are not used in either Parent's or Grandparents' home. According to Parent and Grandparents, Student seems to be regressing in term of his behavior in the home, and is becoming more difficult to re-direct. In February 2009, Student's unsafe behaviors caused him to be terminated from the Simon Center, the after school day care he attended. (Testimony of Parent).
 9. Sara St. Peter was Student's Pre-Kindergarten lead teacher during the 2008-2009 school year. She is a Massachusetts certified special education teacher and is assisted by two other individuals who are not certified in special education. The student to teacher ratio in her classroom was three students to one staff, with a total of eight students participating in the morning session and nine in the afternoon session, all with a diagnosis within the autism spectrum. (Testimony of Ms. St. Peter). According to this witness, because of the pull-out sessions, there is often fewer than the assigned number of students present in the room at any given time. Ms. St. Peter testified that Student was not the

- neediest child in her class, and she has never had to use restraints on him. (Testimony of Ms. St. Peter). Cognitively, he is on the higher end of the students in his group. His ability to communicate his needs is moderate compared to others in his class. Receptive language skills are found to be an area of strength for him. (Testimony of Ms. St. Peter).
10. Ms. St. Peter's classroom is divided into centers for the different activities and has a bathroom. (Testimony of Ms. St. Peter). Students are met at the bus and escorted to the classroom where they are brought to take off their coats and get ready for the day. After approximately five or ten minutes of play, students participate in circle time where the language-based activities begin. Student does well with the arrival routine and on days where he has shown non-compliance with a demand (by shaking his head no), he is able to collect himself within one or two minutes and follow the routines. In school he does not show tantrum behavior and handles transitions well. Routines are predictable and clear expectations are set consistently. The behavioral plan is followed by all the adults in the classroom and Student responds well to it. (Testimony of Ms. St. Peter). At this time he does not require a dedicated one-to-one aide to manage him. (Testimony of Ms. Carr).
 11. At the beginning of the year, Student bolted out of the classroom twice but this behavior ceased by November 2008. In class, Student is able to sit for approximately half an hour for preferred activities and a few minutes for non-preferred activities. He shakes his head "no" to indicate non-preferred activity. When excited about a book or activity, he jumps up, claps his hands, and makes vocalizations. Ms. St. Peter testified that this behavior is not disruptive to the other pre-kindergarten students. The adults in the classroom are trained to identify whether the non-compliant behaviors are attention seeking or task avoidance. When the tantrum is task avoidance, he is verbally and via sign prompted to stand-up and the First/Then Board is used to indicate that "first you work and then you play." (SE-16). Student's classroom is next to a class for typically developing students and the children have an opportunity to interact with support and modeling from the adults. (Testimony of Ms. St. Peter). Ms. St. Peter explained that most of the interactions involve parallel play. She testified that at times, Student may initiate the interactions but the other child may not be interested in play. Student will shake his head "no" and walk away, or he may flap his arms for a couple of minutes. Student and Ms. St. Peter enjoy a good relationship. He likes to give her hugs and sometimes puts his head on her lap. (Testimony of Ms. St. Peter)
 12. Overall, Ms. St. Peter found Student to be fairly independent in class. She found that he had made good progress during the year in the classroom and towards meeting the goals in his IEP, especially after spring break. Attention to task, and participation in class improved over the course of the year. During circle time, he is able to sit for 30 minutes, as opposed to three to five minutes

at the beginning of the school year, and does the hand motions that go along with the songs. He is able to select between two possible choices, understands the concept of a book, is able to hold it correctly, and tracks or moves his finger along while they read. Ms. St. Peter can handle Student in class and has no safety concerns regarding his behavior. She estimated that approximately twenty percent of the 9:15 a.m. to 3:15 p.m. day may be challenging for Student. The staff, including the teacher, ABA coordinator, speech and language therapist, occupational therapist and the physical therapist, consults regularly with each other. Kimberly Herron conducts assessments to ascertain Student's progress. (See SE-6). The staff anticipates that he will be promoted to kindergarten next year. (Testimony of Ms. St. Peter). In Ms. St. Peter's opinion, the proposed IEP (SE-1) is appropriate and designed to meet Student's needs.

13. Betty Carr is the school principal at Gates Lane. She testified that the school is a neighborhood school which was specially re-configured by architects to house children on the autism spectrum. Of the approximately five hundred and fifty children assigned to this school, approximately one hundred and fifty are in the autism spectrum. All of the staff participates in training regarding autism and other areas. A number of BCBA and BCBI staff, under the direction of Jeffrey Robinson, coordinate and provide the ABA services. Gates Lane seeks staff experienced in dealing with autistic children and has employed individuals who were former employees of NECC. The staff is composed of occupational therapists, speech and language therapists, physical therapists, assistive technology staff, special education teachers, regular education teachers, a full time nurse, a school psychologist (who is also a BCBA formerly at the May Institute), and others, all of whom work to create an accepting environment. Medically fragile students can also be effectively educated at Gates Lane. (Testimony of Ms. Carr).
14. Danielle Calcagni, was the lead teacher at the Simon Center, Student's after-school program. She is not certified in special education, has no training in ABA techniques, and had no previous experience working with autistic children other than Student and his brother. There are no other special needs children at the center and the center does not run autism programs. (Testimony of Ms. Calcagni, Ms. Carr). Student attended the center after school, from around 3:30 pm to 4:00 p.m. until 5:30 p.m., from September 2007 through January 2009. There were thirteen children in Ms. Calcagni's room with two adults. According to Ms. Calcagni, Student presented limited communication in this setting, mostly using sign language to communicate. Ms. Calcagni is not trained in sign language. (Testimony of Ms. Calcagni). In this setting, he was able to play for approximately ten minutes. When Student became frustrated, it took the staff approximately five to fifteen minutes to re-direct him. He did not interact with other children, ran from one end of the room to the other screaming and hitting himself on the head. He would also throw his

- shoes, and at times displayed aggression towards other children requiring removal from the general area to a cool-down area for five or ten minutes. Ms. Calcagni discussed her difficulties with Ms. Kimberly Herron, who made suggestions which Ms. Calcagni found difficult to implement in her setting, except for the signing which she found useful. Ms. Calcagni did not know what Student's triggers were and could not tell whether Student was tired or agitated. At the Simon Center, Student required a one-to-one assistant to handle him. At Parent's request, Worcester provided ABA sessions during part of the time that Student was at the center. (Testimony of Ms. Calcagni).
15. During the 2008-2009 school year Parent did not observe Student in the school setting. Maternal grandmother briefly observed once in December 2008. (Testimony of Parent, Grandmother). Prior to hearing, Parent had not spoken to Student's teachers in a long while. (Testimony of Parent). She did not communicate with Ms. Wood or Ms. St. Peter via telephone, e-mail, or the home communication log. (SE-10; SE-11; Testimony of Ms. Wood, Ms. St. Peter). Parent did not participate in the Team meeting scheduled in April 2009 or the annual review meeting held in June 2009. (Testimony of Parent).
 16. In December 2008, Ms. Wood attended a monthly clinic to demonstrate to Parent one of the skills that Ms. Wood worked on. (Testimony of Ms. Wood; Ms. Herron). Parent testified that she believes that the Parent clinics are designed to discuss issues she may be having with Student.
 17. At Parent's request, Student has been examined by Dr. Rebeca Alvarez-Altalef of the Floating Hospital for Children at Tufts Medical Center. Dr. Alvarez-Altalef, Student's neurologist, has seen Student twice between October 2008 and June 2009. She reported that Student's EEG of March 2009 was normal and that Dr. Heilman, the neurosurgeon who evaluated Student at her request, was categorical that the small to medium left middle cranial fossa arachnoid cyst, originally a great concern to Parent, was an incidental finding, not symptomatic and that it had no effect on Student's speech and language function. The cyst requires no treatment. Similarly, it had no effect on Student's speech delay which was attributable to his autism. Dr. Alvarez-Altalef also explained that the abnormal white matter finding was likely the result of an infection process suffered during pregnancy. She stated that there was no risk of breakage of the cyst and no need to have Student wear a helmet. (Testimony of Dr. Alvarez-Altalef).
 18. On October 27, 2008, Dr. Alvarez-Altalef, conducted the Denver Screening assessment to get a rough estimate of Student's language, social, gross and fine motor development, and adaptive behaviors. She agreed that most of the Denver relies on Parental interview, therefore, its accuracy and reliability depends on Parent's honesty and ability to provide accurate information. Student was approximately four years, four months old when the Denver was

conducted. Student obtained scattered scores with fine and gross motor skills within the three to four year old range, while language and social development fell in the eighteen to twenty-four month old range. A full neurological examination conducted on April 27, 2009 showed poor eye contact, inability to follow commands and no verbal skills. Student's gait and coordination were found to be normal. All of the information available to Dr. Alvarez-Altalef came from verbal reports made by Parent and Grandparent who reported not having seen any improvement over the previous two years. (Testimony of Dr. Alvarez-Altalef). According to Dr. Alvarez-Altalef, Student's rolling of the eyes was a behavioral issue as she did not find any neurological basis for it. She recommended that Student be placed in a small special education classroom; that he receive fourteen hours of ABA services per week, and three sessions per week of "aggressive" speech and language therapy; and that Parent pursue a neuropsychological evaluation for Student. She further recommended that a one-to-one paraprofessional be assigned to Student in the classroom to assist in addressing his behaviors. Dr. Alvarez-Altalef stated in her letter of April 27, 2009, that if the aforementioned interventions failed, Student may be better placed in a specialized autism school. (PE-13; Testimony of Dr. Alvarez-Altalef). Dr. Alvarez-Altalef was not provided with SE-1 or the results of any of the evaluations or progress reports from Worcester. Based on information provided by Parent, she supported Parent's efforts to have Student placed at NECC. (See PE-13; testimony, Alvarez-Altalef).

19. Angelina LaRose, M. Ed, is a certified special education teacher who also holds a certificate in moderate special needs and is trained in ABA. (SE-13; Testimony of Ms. LaRose). Ms. LaRose, an employee of Worcester, has been a moderate special needs teacher for the past seven years and will be responsible for the substantially separate Kindergarten class (to which Student is assigned) for the second consecutive year. She testified that ten students, all in the autism spectrum, are assigned to this class, along with four adults (including her). Ms. LaRose and her staff are CPI trained. She uses sign language for basic communication within a very structured classroom with predictable routines. As a certified Wilson reading teacher, she also incorporates this methodology. Some of her responsibilities include working on toileting skills and helping students become more self-sufficient in the classroom setting through a variety of activities. She explained that some of the specials taught in small groups may be provided in the classroom and that for students who may need to leave her classroom to receive related services, the specialists meet the students in her room and escort them to ease transitions. Appropriate behavior is one of the goals for students in her class, but expectations for each student vary from one child to another. Progress in terms of IEP goals and objectives is measured through data collection, ABLES, observation and consultation. (Testimony of Ms. LaRose).

20. Elizabeth Coakley holds a bachelors degree in special education and is a certified speech language pathologist in Massachusetts. She knows sign language and uses it in her lessons as does Student. She has worked with autistic children at Gates Lane since 1992, and was responsible to offer speech and language to Student during the 2008-2009 school year. She met with Student twice per week in a small group setting to work on verbal and non-verbal communication skills such as responding, eye contact, greetings, etc. She noted that Student demonstrated progress, explaining that at the beginning of the school year she would have to guide him to his chair and that he did not stay seated or on task for more than a few minutes. By April 2009 he would sit on his own and stay seated for the entire 30 minute session, got ready for class, hold a book properly, and engaged her. He acquired some consonant sounds although this was not one of his benchmarks. He displayed good imitation skills. In her sessions with him, Student responds to her directions. She did not see Student tantruming or flopping. He did however, clap his hands, smiled, and made high pitched very excited sounds in her class demonstrating intent to communicate. He has also learned to take turns. Student's progress had surpassed Ms. Coakley expectations. She testified that Student would meet the goals and objectives in his IEP by the end of the 2008-2009 school year. (SE-6; Testimony of Ms. Coakley).
21. Ms. Coakley, who assisted with the drafting of Student's speech and language IEP goals and objectives for next academic year, testified that she recommended that speech and language increase to three times per week for thirty minutes each in a small group setting. She indicated that when Student's transitioning skills improved, he would be ready for one to one speech and language therapy. This however, was not yet the time. (Testimony of Ms. Coakley).
22. Student's occupational therapist for the 2008-2009 school year was Nancy Sullivan. Ms. Sullivan, who has taken courses in ABA, has been a registered occupational therapist since 1990. This year's individual session began with sensory motor activities. She testified that given Student's sensory state of development, he requires movement breaks in order to be better able to sit and attend to task. He was required to come into her room, choose an activity and bring it to the adult and engage in it. She did not see Student display any behaviors during the transition time between the classroom and her room. In her opinion, once Student masters some of the basic skills, they will move on to fine motor skills activities. Student was able to hold the scissors, sit down, take directions to complete tasks and engage in them. According to Ms. Sullivan, Student was happy when he came into her room, and looked happy during the sessions. He only came in crying on one occasion and she was able to comfort him and sent him back to class within a few minutes. In addition to verbal directions, she and Student used sign language to communicate with each other. Student signs "all done, more, help and thank you". According to

- Ms. Sullivan, Student had no trouble transitioning to occupational therapy. She attributed his ease in transitioning to the fact that he knew the staff, the room, and the routine, and he enjoyed occupational therapy. Student has movement breaks built into his classroom routine including opportunities to jump on the trampoline. He worked on paper tearing, scissor grasping, crayon coloring within specific areas, and puzzles by matching pieces to the slot in which they belong. In her opinion, Student made effective progress in occupational therapy during the 2008-2009 school year. (Testimony of Ms. Sullivan).
23. Ms. Sullivan contributed to the drafting of Student's 2009-2010 IEP, for Kindergarten, regarding goals and objectives for fine motor skills development and functional living skills. (Goals 6 and 7, SE-1; Testimony of Ms. Sullivan).
24. Kimberly Herron is Student's Coordinator of ABA instruction through HMEA in Worcester, and is responsible for analyzing the Applied Behavior Analysis (ABA) data collected by Ms. Wood. Ms. Herron holds a Bachelor's degree, begins a Masters program in the fall of 2009 and has had experience working with autistic children one-to-one. (SE-13). She is supervised by Vicky Nett, who holds BCBA certification. (SE-13). According to Ms. Herron, she tailors the program to the needs of the student by engaging in direct observation, and reviewing the ABC data to assess function, as well as the motivation assessment scales. The actual data on the ABA analysis forms is collected by Ms. Wood, the person working with Student, and she analyzes them and prepares the graphs. Ms. Nett reviews the graphs and data prepared by Ms. Herron and evaluates her work. Ms. Nett is in turn supervised by Jeff Proos. (Testimony of Ms. Herron, Mr. Proos). During 2008-2009, Ms. Herron was responsible for ten students. She reviewed Student's progress weekly and made adjustments as necessary. Ms. Herron provided two hours of consultation once per week, in school, during one of Student's direct ABA sessions. She is also responsible for the monthly clinics in Student's home. The clinics are designed to answer questions, and to offer tools and advice regarding parental concerns. These clinics were implemented during December 2008. (Testimony of Ms. Herron).
25. Parent testified that during a Team meeting in November 2008, she requested that the clinics take place to help her with Student's behaviors in the home. During the clinics, which began in December 2008, Parent expressed concern that Student had difficulties with transitions from the bus to the home, and with tantrums, and that he was not able to share toys with his sibling. (Testimony of Parent; Ms. Herron). Ms. Herron offered techniques to help Parent deal with the bus to home transition issue, but Parent stated that she tried it and it did not work for her. Ms. Nett attempted to complete a Functional Behavioral Analysis (FBA) in the home to work on an antecedent/behavior/consequence (ABC), but Parent did not complete the FBA.

Additionally, Parent received from Ms. Wood a daily communication log which provided information regarding Student's behaviors, performance and routines. (SE-10; Testimony of Ms. Herron).

26. Ms. Herron explained that ABA works by learning items in isolation, breaking down task into small targets, and working on one target at a time. During the 2008-2009 school year, Student's program was changed to "delayed prompting" which teaches three targets at a time. In her opinion, this method will help Student with generalization skills. As Student met with success regarding his targets⁹, the learned skills were placed in the master program and drills were randomly run weekly to ensure that he does not lose the skills he has mastered. The staff consults regularly to ascertain what has been mastered and to modify the strategies accordingly. According to Ms. Herron, the data shows that Student met with success regarding his ABA goals and is more easily re-directed by the staff. (SE-5; SE-7, SE-8; Testimony of Ms. Herron). Student has been taught nineteen signs out of which he uses six independently. She explained that because of the number of skills involved in a program, the fact that Student was able to master two programs in six months was indication of good progress. Between March and June 2009, he had mastered forty nine targets with a zero-second delay. (Testimony of Ms. Herron).
27. Ms. Herron first met Student in April of 2008 as the person responsible for the one-to-one ABA services. At the time, Student was less compliant, had less eye contact, imitation skills were not as good as they are now, he presented reduced receptive skills, flopping, tantrum and bolting behaviors, all of which decreased or disappeared over time. She testified that Student's frustration level has decreased in school because he is better able to communicate. (Testimony of Ms. Herron).
28. For the 2009-2010 school year, Ms. Herron is recommending ten hours of home services to include Parent and Grandparents, in addition to ten hours of ABA services in school, for a total of 20 hours per week. An additional two and a half hour of consultation was also recommended. (Testimony of Ms. Herron).
29. Jeffrey E. Proos is a Board Certified Behavioral Analyst and the Director of Children Services at HMEA. (SE-13). He oversees all of the assistant directors. Mr. Proos also conducts FBAs in many different school systems such as Fitchburg, Shrewsbury, Milton, Attleboro, and Sharon. Mr. Proos testified that all of the ABA staff working with Student possesses the competency necessary to provide the services for which they are responsible. He has observed the ABA services offered by Ms. Wood, who has been with HMEA for four and a half years. He opined that the fact that Student had

⁹ Forty nine targets had been met at the time of the hearing. (SE-7; Testimony of Ms. Herron).

- mastered thirty two targets in one quarter was very good, given Student's profile. (Testimony of Mr. Proos).
30. During the past school year (08-09), Student has made significant progress in the SAIL program at Gates Lane. An HMEA progress report, dated 11/18/2008, indicated that even early in the school year, Student had already made notable progress across several domains. Student went from willingly making no sounds to imitating 18 different sounds. He learned to communicate through sign language, using "eat", "more", "drink", "all done", "break", and "help" incidentally through his school day (SE-5). By contrast, Student's developmental profile of 4/30/07 reported that he "hummed" only two sounds and expressed himself only by physically pulling adults to what he wanted (PE-3). The HMEA clinical coordinator also noted that Student's disruptive behaviors "significantly decreased" and that he made progress in eye contact, interacting with peers, and responding to directions during the first few months in the SAIL program (SE-5).
 31. As a result of consistent interventions, the SAIL program at Gates Lane managed to reduce the frequency of certain of Student's targeted undesirable behaviors. For example, Student's ABA therapists began targeting his aggressive outbursts (hitting, kicking, biting, pushing, etc) in December 2008 by blocking the aggressive attack, avoiding eye contact until it ceased, and whenever possible continuing the activity in progress (SE-7). In December there were eight days where Student acted aggressively, with a mean of 3.5 separate aggressive outbursts during those days. In February 2009, there were four days where Student acted aggressively, with a mean of 2.25 outbursts on those days. In April 2009, there were three days where Student acted aggressively, and there was only one such incident on each of those days (SE-8). This steady rate of decline attests to the effectiveness of the program in isolating Student's problem behaviors and teaching Student to keep them under control.
 32. During his time in the SAIL preschool program, Student has received consistently positive reports on his progress in occupational therapy, sign language communication, eye contact in social settings, and receptive language skills, as well as progress overall towards his IEP goals. (See SE-5; SE-6). Student also receives regular speech therapy, ABA therapy at school and at the day care, and occupational therapy.
 33. Parent and Grandparents testified that Student's pre-school progress reports (PE-5; SE-6) state the same thing from one quarter to the next, that they contain the same goals and objectives and that after two years in the same pre-school program in Worcester, Student is still unable to speak and has made no progress. (Testimony of Parent, Grandmother, Grandfather). Parent seeks public funding for Student's placement at NECC.

RULING:

In rendering this Ruling, I rely upon and incorporate by reference all of the facts delineated in the Fact section of this Ruling. This case involves Parent's assertion that the proposed IEP (SE-1) does not vary from the previous one, that it is inappropriate and does not offer Student a FAPE, and that Student would only progress with the one-to-one services offered at NECC. (Testimony of Parent). She seeks public funding for Student's placement at NECC. As the moving party, at the hearing, she carried the burden of proof pursuant to *Shaffer v. Weast*. However, the burden shifts to Worcester for purposes of this Ruling. As discussed below, Worcester is persuasive that the evidence, when viewed in the light most favorable to Parent, whether presented by her or Worcester, does not support Parent's position.

Parent raised concerns that Student, who is borderline mentally retarded, also suffers from white matter disease in the brain and has an arachnoid cyst, full of liquid, in the left temporal lobe which he can rupture by hitting himself. She is afraid that if it ruptures, Student could die. Parent further believes that Student's arachnoid cyst causes brain damage. This testimony is entirely unsupported by the evidence.

Quoting Dr. Heilman, Dr. Alvarez-Altalef testified that the arachnoid cyst has no impact on Student's disabilities, need not be removed, and is not life-threatening. (Testimony of Dr. Alvarez-Altalef). Dr. Alvarez-Altalef concluded that the white matter disease and arachnoid cyst have no impact on Student and require no intervention. Similarly, she found no neurological basis to conclude that the rolling of his eyes was anything but a behavioral response.

The only expert testimony provided by Parent was offered by Dr. Alvarez Altalef. But outside of her neurological/medical findings, which contradict Parent's testimony, Dr. Alvarez-Altalef's testimony is not reliable for multiple reasons. Dr. Alvarez-Altalef never participated in any Team meetings convened for Student, she never spoke with any of the school personnel, any of the service providers, or the Simon Center staff. She has never observed Student in Worcester, and she has never been to Gates Lane. She also was unable to review the evaluation reports conducted by Worcester as Parent did not forward those evaluations to her. She had not reviewed Student's IEP (SE-1) and was unaware that said IEP offered twenty hours of ABA services, six more than what she recommended. She is not trained in speech and language therapy, and was unaware of Student's strong imitating skills, his ability to sign, and use of sign language to communicate. Similarly, she was unaware that Student was easily managed within the school setting. The only two settings in which Dr. Alvarez-Altalef observed Student were the waiting room and the examination room, for a total of two hours between October 2008 and April 2009, together with Student's twin sibling and Parent. Some of the time of the visit was spent talking to Parent while Student played with toys. She has never seen him with same age peers. All of the information she had regarding Student's program, educational progress and behaviors came from reports made to her by Parent and Grandmother, neither of

whom provided a complete or balanced picture of what was going on and provided nothing regarding Worcester's position. (Testimony of Dr. Alvarez-Altalef).

Ms. Carr opined that Student could be safely handled and effectively educated in one-to-one and small group settings without the need for a dedicated one-to-one aide. (Testimony of Ms. Carr). She raised concerns that some students become dependent on the one-to-one aide; however, were the teacher to believe that a one to one-aide were needed, she could request one. Notably, none of the teachers, administrators or service providers who interact with Student opined that Student required a one-to-one aide in Worcester. Dr. Alvarez-Altalef's and Parent's preference for Student to be educated exclusively in a one-to-one setting at NECC is inconsistent with current information regarding Student's needs and profile.

Dr. Alvarez-Altalef recommended fourteen hours of ABA services, inclusive of home-based services, and stressed the need for speech and language services. Worcester's IEP (SE-1) surpasses her recommendations, offering Student a well-balanced program with the intensity sufficient to assure Student a FAPE. However, Student's progress is tightly linked to the cooperation and participation of those responsible for Student's care in the home.

Parent's whole case stems from the difficulties encountered by a number of individuals, none of whom: (a) has been trained in ABA, or (b) consistently uses sign language or the First/Then Board effectively to communicate with Student.

According to Grandmother, at the Team meeting in November 2008, Parent requested that ABA training be provided in the home. To date, Parent has not accepted delivery of ABA services in the home. Neither Parent nor Grandparents has received training in ABA. Grandparents testified that they would be willing to participate in ABA services, but that how to go about the delivery of ABA services and the location to do so was up to Parent. It is clear that Parent is totally overwhelmed with raising two autistic children. (Testimony of Ms. Calcagni). However, she does not consistently implement any of the techniques which have proven helpful in school and continues to reject ABA services in the home inclusive of consistent training of those responsible for Student's care, something that has been highly recommended by the ABA professionals. (Testimony of Mr. Proos, Ms. Herron). As a result, Student displays great frustration in the home which translates into difficult and trying behaviors. It is worth noting that Parent submitted two audio/visual examples of Student's behaviors in the home with Parent and Grandparents. According to Ms. Herron, the video clip depicting Student transitioning into Parent's building, presumably upon arrival from school, does not depict any of the techniques Parent was given during the home clinics¹⁰. Mr. Proos opined that the transition was

¹⁰ Ms. Herron pointed out several wrong approaches as well as failure to implement ABA techniques in the video depicting Student's transition into Parent's building. Those were: the person bringing Student into the building was not Parent; the video does not show Student upon exiting the bus; and the technique

overwhelming for Student because he was being given too many commands by too many people. (Testimony of Mr. Proos). These video clips, showing Student's transitioning into Parent's building, and play time and table time at Grandparents' home, demonstrate the difference in Student's response to Parent, who is not seen implementing any ABA techniques or using sign language with Student, and Student's response to Grandmother, who is able to engage him after getting him to look at her, using clear instructions and signing. Grandmother testified that Student uses sign language when prompted. Grandmother's rapport with Student was evidenced in her ability to truly connect with him, and Student's positive response. Ms. Herron explained that aggressive behaviors usually follow a tantrum as a means for Student to get away or to seek attention. Flopping may happen with or without a tantrum and is a means of work avoidance or attention seeking. (Testimony of Ms. Herron). These behaviors, which the family is seeing in the home are not as prevalent within the structure of the school, although Student presents fairly evenly in both environments. According to Ms. Herron, Student's behaviors are not overly challenging.

I further note that Parent requested that I meet Student on the second day of hearing. I met Student, Parent and Ms. Sarah Harvey in the hotel lobby.¹¹ When introduced to me, Student looked at me and then looked at Worcester's attorney when introduced to her. Parent proceeded to tell Student that he would then need to go to school, at which time he ran around the area, uttered noises and resisted being picked up by Parent and/or the caretaker. Neither Parent nor the caretaker was observed to use sign language to communicate with Student, or apply any ABA techniques in seeking Student's compliance. There is no doubt that Student's behaviors are challenging. The severity of his autism, which is not disputed, will cause progress to be slow and painstaking, but Worcester is persuasive that with proper ABA and sign language training of all of the responsible adults, as well as consistency across all settings, the progress seen in school may be achieved in the home as well. (Testimony of Mr. Proos). There will not be easy or quick fixes, and it may still be a long time before Student speaks, but the evidence is convincing that without Parent's and Grandparents' total commitment to the methodologies recommended and offered by Worcester, progress will be even slower. The success of the home program will depend on the involvement of the adults in that setting and their consistent use of the communication tools employed by Worcester, in the home; those are the First/Then Board, the Behavioral plan, and sign language. All those responsible for Student's education must work as a Team. (Testimony of Ms. Carr).

The evidence supports a finding that some of Student's behaviors are the result of frustration over his inability to communicate. (Testimony of Ms. Carr). Worcester's IEP appropriately addresses this issue through the ABA program and the

offered to Parent (i.e., stay and sign "stand-up", wait a minute, and when he stands use a reinforcer technique) is not followed. (Testimony of Ms. Herron).

¹¹ The two first days of hearing were held in a conference room at a hotel in Worcester.

communication goals, developed in conjunction with the speech and language pathologist. Worcester's witnesses, who were credible and persuasive, spoke convincingly about how the consistent use of sign language, PECS and First/Then board are effective methods to communicate with Student. This in conjunction with the ABA, related services, the constant communication among the staff, the structure and predictability of the program, is helping Student make effective progress even if he is not able to speak. I was impressed by the high level of expertise, commitment and enthusiasm displayed by Ms. St. Peter, Ms. Wood, Ms. Herron, Ms. Sullivan, Mr. Proos and Ms. Carr, all of whom came across as genuine, truly caring and credible. As Student continues to develop, he must continue to be re-assessed for speech and language, ABA and other areas, to ascertain the progress made, and to modify his plan accordingly. (Testimony of Dr. Alvarez-Atelef; Ms. Sullivan).

As Ms. Carr explained, Student needs to learn skills in the school environment, first in the one-to-one and small group settings and then generalize these skills to other settings. At the present time, he is demonstrating some of the learned skills in the one-to-one setting when in small groups. As described by Mr. Proos, the level of expertise at Gates Lane is impressive. Worcester's Gate Lane program (SE-1) is clearly solid.

Contrary to Parent's position, the evidence supports a finding that the proposed program at Gates Lane is appropriate and capable of providing Student a FAPE. Worcester has met its burden with regard to its proposed IEP.

NECC:

The available testimony regarding NECC came mostly from Ms. Carr, as part of Worcester's case. Other than a comment from Grandmother, who believed that NECC provides home services, no other testimony regarding the program was presented as part of Parent's case in chief. Not one individual employed by NECC testified about said program. There was also no document submitted into the record that provided any information regarding this program.

Ms. Carr explained that at NECC there were no opportunities for inclusion. All of the instruction is delivered on a one-to-one basis in a cubicle. No direct services are offered for physical therapy, and occupational therapy, and speech and language therapy is offered on a consultation basis. Consultation is provided to the home, but NECC does not offer home services. (Testimony of Ms. Carr). Since Student has demonstrated the ability to progress without the need for a one-to-one aide, providing him with one at this time is not only unnecessary but would also be a detriment to his development. The point as Mr. Proos stated is to make him more independent. (Testimony of Mr. Proos).

Ms. Carr was the only witness who had any substantive knowledge regarding NECC and she was persuasive that it would be inappropriate for Student. (Testimony of Ms.

Carr). No further explanation was offered regarding Parent's proposed program. Parent's only expert witness, Dr. Alvarez-Altalef, had never visited NECC or spoken to anyone in that facility with regard to Student. (Testimony of Dr. Alvarez-Altalef) Additionally, the evidence is persuasive that given Student's good imitating skills, he will benefit from opportunities to interact, albeit minimally at the present time, with typically-developing peers, and with other students with special needs in small group settings. Dr. Alvarez-Altalef recommended that Student participate in a small substantially separate classroom, presumably not what NECC would offer him.

The record is simply devoid of substantive information that positively supports the NECC program in general and/or specifically for Student.

RULING:

Worcester has met its burden of showing that Parent offered no proof, beyond bare assertions and conclusions, to demonstrate that the Gates Lane program (SE-1) is an inappropriate placement and that NECC would be appropriate for Student. The evidence, considered in the light most favorable to Parent, weighs heavily against the NECC program for Student, and in favor of Worcester's proposed program and placement (SE-1). As such, Worcester's Motion for Directed Verdict/ Motion to Dismiss, presented at the closure of the presentation of the evidence is therefore **GRANTED**.

Case Dismissed.

So Ordered by the Hearing Officer,

Rosa I. Figueroa
Dated: August 7, 2009