

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

Student v. Mercy Centre &
Brockton Public Schools

BSEA #1304173

DECISION

This decision is issued pursuant to M.G.L. c. 71B and 30A, 20 U.S.C. § 1401 et seq., 29 U.S.C. § 794, and the regulations promulgated under said statutes.

A hearing was held on June 11 and June 12, 2013 at One Ashburton Place, Boston, Massachusetts before Catherine M. Putney-Yaceshyn, Hearing Officer.

PROCEDURAL HISTORY

Parent requested a hearing on December 18, 2012. The hearing was granted expedited status and was scheduled for January 2, 2013. On December 21, 2012, this matter was reassigned to the undersigned hearing officer. On December 24, 2012, Parent requested a postponement of the hearing. There was a telephone conference call on January 8, 2013. The Postponement was allowed and an Amended Notice of Hearing was issued on January 8, 2013 which took the matter off the expedited track. The hearing was rescheduled for February 26 and February 27, 2013. On January 25, 2013 Brockton requested a postponement of the hearing due to the unavailability of its primary witness. The request was unopposed and allowed. The hearing was rescheduled for April 3 and 4, 2013. On March 27, 2013, Parent filed a Motion to Postpone the Hearing and an Amended hearing request. A flurry of motions were filed including Brockton's Motion to Join the Father as a party, Brockton's Motion to Dismiss claims contained in the Amended Hearing Request, and the Mercy Centre's Motion to Allow Telephonic Testimony for two witnesses. The Parent's request to postpone was allowed and the matter was rescheduled for May 8 and 9, 2013. Another postponement was allowed when Brockton's key witness was hospitalized days prior to the hearing.

The hearing was held on June 11 and 12, 2013. The Parties made oral closing arguments immediately following the hearing and the record closed on June 12, 2013.

Those present for all or part of the Hearing were:

Mother

Father

Kay Seale

Former Director of Special Education, Brockton
Public Schools

Olga Garriga	Out of District Coordinator, Brockton Public Schools
Paige Tobin	Attorney, Brockton Public Schools
Patrick Gann ¹	Adaptive Physical Education Teacher, Mercy Centre
Jessica Beer ²	Special Education Teacher, Mercy Centre
Lynne Wennerberg ³	Program Assistant, Mercy Centre School Program
Patricia Waterhouse	Director of School Program, Mercy Centre
Karen Bunton	Mercy Centre
Matthew MacAvoy	Attorney, Mercy Centre
Anne H. Bohan	Court Reporter
Catherine Putney-Yaceshyn	Hearing Officer

The official record of this hearing consists of Parent’s exhibits marked P-1 through P-20A and P-22, Brockton Public Schools’ exhibits marked B-1 through B-40, Mercy Centre’s exhibits marked MC-1 through MC-20 and approximately eleven hours of recorded oral testimony.

ISSUES

1. Whether the Mercy Centre committed any procedural violations with respect to Student’s termination on or about December 11, 2012.
2. If so, what if any relief is Student entitled to from Mercy Centre?
3. Whether Brockton Public Schools failed to provide Student with any home services to which he was entitled during the period from February 4, 2012 to the present.
4. If so, whether Student is entitled to compensatory home services from Brockton.
5. Whether Brockton failed to provide Student with a free and appropriate public education from December 11, 2012 through the present.
6. If so, whether Student is entitled to compensatory education.
7. What is the appropriate placement for Student?

SUMMARY OF THE EVIDENCE

1. The student (hereinafter, “Student”) is an eleven year old student who resides in Brockton and attended the Mercy Centre until on or about December 5, 2012. (B-35, MC-1, MC-3) Student has a diagnosis of autism which manifests itself in the

¹ Mr. Gann testified via speaker phone.

² Ms. Beer testified via speaker phone.

³ Ms. Wennerberg testified via speaker phone.

following areas: cognitive deficits, social skills deficits, impaired sensory processing, impulsivity, decreased attention, language and communication (expressive and receptive) deficits, poor self-regulation and emotional outbursts, poor safety awareness, low frustration tolerance, self-care deficits, poor problem solving, bolting, flopping, and aggressive behaviors. (B-6, B-9)

2. Student began attending Mercy Centre, in Worcester, Massachusetts on or around February 2011 pursuant to a settlement agreement entered into between Parents and Brockton and signed by Mother on January 19, 2011, by Father on January 31, 2011, and by Brockton on February 4, 2011. (B-37) Prior to Student's placement at Mercy Centre, he had been terminated from his previous placement and Mother had kept him at home for several months. Brockton Public Schools filed a "failure to send" complaint in the juvenile court when Mother continued to keep him at home. As indicated by the settlement agreement, "Mercy Centre is wholly of [Parents'] own selection" and Parents relied wholly on their own evaluation of the placement to determine its appropriateness. Parents agreed to indemnify and hold Brockton harmless for any claims arising from Student's enrollment and participation in the program and placement at Mercy Center. (B-37, ¶ 12)
3. Student's last accepted IEP is dated March 27, 2009 and covers the period from March 27, 2009 through September 23, 2009. Mother accepted an amendment which added a brushing program to Student's services on May 20, 2009. Mother partially accepted an amendment on December 6, 2011. (B-35)
4. Between February and June 2011, Student made slow progress at Mercy Centre and had challenges consistent with his profile and his having been out of school for several months prior to his placement. He showed marked improvement during the summer of 2011 and he maintained that progress during the 2011-2012 school year. He decreased episodes of bolting flopping, and aggression and became more tolerant of participating in groups. He was integrated in the classroom group during the 2011-2012 school year. (Bunton, Mother, Beer) During that time, Ms. Bunton worked very closely with Mother and discussed strategies that were effective at school and home. (Bunton) The Mercy Centre staff recommended that he attend the summer program as he had the previous summer. Mother chose not to enroll him in the summer program. After speaking to Mother about her decision not to send Student during the summer, Karen Bunton e-mailed Olga Garriga on June 19, 2012. Ms. Bunton informed Ms. Garriga that Mother had stated that she had other things she wanted to do with Student during the summer. Ms. Bunton expressed her concern over Mother's decision and informed Mother that the team believed Student required the summer program to prevent a regression in skills and they were concerned about his transition back to school in September after a ten week break in service. Ms. Bunton informed Mother that it could take Student some time to regain skills he had in June upon his return in September. Mother told Ms. Bunton she was aware of the risks that came with her decision. (MC-14)

5. When Student returned to Mercy Centre in September 2012 after not attending the summer program, there was a noticeable change in his behaviors. His bolting, flopping, and aggressive behaviors had increased and his aggressive behaviors were occurring with regularity and with greater intensity than they had before. The behaviors were no longer directed specifically toward staff placing demands upon him and were completely spontaneous. Student engaged in aggressive behaviors directed at both peers and staff beginning in September 2012. (MC-9I, Beer) Although during the previous school year Mother often shared techniques that worked at home with Mercy Centre staff, in the fall of 2012 Mother no longer offered suggestions in her conversations with Ms. Bunton. When Ms. Bunton approached Mother to tell her about the aggressive behaviors the staff was observing, Mother told her the staff must be doing something wrong. During the first few weeks of school, Student's level of resistance to demands increased. He was bolting, not just to escape demands, but also to gain access to things. He began slamming doors so hard that he twice knocked the hinges off and broke doors. Prior to September 2012, when Student was aggressive, his aggression was always directed at staff and always at a low level of intensity. By the end of September, Student was increasingly aggressive to staff and was charging at them, tackling them and pulling their hair and biting them with ferocity. (Bunton)
6. Student's aggressions toward staff as reported by Mercy Centre included the following incidents. On September 7, 2012, Student bit a female staff member who was sent out for immediate medical treatment. On September 19, 2012, Student was calmly working with another female staff member when he suddenly grabbed her hair with both hands and pulled it. On September 20, 2012 Student was involved in an incident during which he bolted, disrobed, pushed a female staff member and then bit her for approximately five seconds. The staff member was sent out for medical treatment. On September 25, 2012, Student attempted to bite a male staff member after the staff member blocked Student when he attempted to bolt from the room. On September 28, during lunch, Student lunged over a table at a staff member and pulled her hair with two hands. The staff member had to manually release Student's hands from her hair. Student then made multiple and repeated attempts to bite the staff member. On October 2, 2012, Student lunged toward a female staff member on the stairs while transitioning. He grabbed her hair with both hands and did not release. He thrashed her head around while on the stairs and a second staff member had to release her hair. The staff member was sent out for immediate medical treatment. On November 26, 2012, Student pulled the hair of another female staff member. (MC-7, MC-8)
7. Student's aggressions toward peers included the following incidents. On October 10, 2012, Student bolted out of the classroom to another room where another student was using a swing which was a preferred activity for Student. Student ran toward the other student, pulled the student's hair and staff were required to release Student's grip on the peer's hair. When staff released Student he bolted again. On

October 15, 2012, Student grabbed a peer's⁴ hair and pushed him approximately 10-15 feet while continuing to grab and pull the peer's hair. Student weighed approximately twice as much as the peer who is legally blind and has multiple other disabilities. On October 16, 2012, Student ran toward the peer involved in the previous incident, grabbed his collar and pushed him to the floor. The peer slid into a refrigerator and hit his head. On October 18, 2012, Student was sitting calmly and the peer from the prior two incidents walked calmly across the room⁵. Student jumped up, ran toward the student and pushed him from behind. Student fell to the floor and hit his head on a cabinet. The peer was sent out for immediate medical attention. On November 26, 2012, Student lunged toward a peer who was attending his first day at Mercy Centre. Student was considerably larger than this peer, weighing approximately twice as much. Two staff stepped between Student and the peer to prevent injury. Staff members were injured in the process. (MC-7)

8. Student's peers at Mercy Centre have multiple and varied disabilities. Many are medically fragile and cannot physically protect themselves from Student's aggressive physical behaviors. (MC-9C) Many peers are unable to defend themselves or move out of the way if Student is charging toward them. (Beer, Gann) Some peers have visual impairments and thus cannot see Student coming toward them. (Gann) Some students are physically unable to put up their hands to protect their head and face if they are knocked over by Student. At least one student has a traumatic brain injury, which makes him vulnerable to Student's aggressions. (Waterhouse) Some peers have cognitive deficits, decreased visual motor skills, issues impacting balance, coordination, strength and endurance. (Mc-9H, MC-9I) Additionally, Student is much larger than most of his peers. (Gann)
9. Throughout the fall Mercy Centre staff took a number of steps to address Student's behavior. They talked as a team to determine what was causing the behaviors. Staff was asked not to sit when they were working with Student because his behavior was so unpredictable that they needed to be on their feet to be able to evade his aggressive behaviors. Additionally, staff with long hair was asked to secure their hair in a ponytail to avoid Student's hair pulls. Similarly, staff was asked to wear heavy sweatshirts or denim jackets to protect against Student's bites. Mother was informed about the increasingly aggressive behaviors via Student's daily home school communication log and during scheduled two-hour meetings with staff which occurred in September, October, and November 2012. (Bunton) Ms. Bunton raised concerns about Student's behaviors during the October 11, 2012 Team meeting. Brockton sought consent to conduct a functional behavior assessment (in addition to other assessments) and Ms. Garriga contacted Kay Seale regarding having Dr. Robert Putnam of the May Center observe Student and make recommendations. (Garriga)

⁴⁴ The peer makes vocalizations. Although Student was successfully grouped with this peer during the previous year, staff hypothesized that Student's sensitivity to student's vocalizations may have triggered his aggression toward this peer. (MC-7)

⁵ The peer was not vocalizing at the time of the aggression. (MC-7)

10. Mother wrote a letter to Olga Garriga, dated November 28, 2012, regarding some concerns about Student's Mercy Centre program. First, she stated that Student had a brushing protocol which she understood to be part of his daily program. She stated that she witnessed a staff member asking him whether he wanted to be brushed or not before providing the therapy. Mother wanted an explanation as to why the staff member was asking Student if he wanted to be brushed before brushing him. Second, Mother stated that Student had been exhibiting "a dangerous behavior after he comes back from Community Trips." She stated that when she asked "Karen" about the purpose of community trips she told her "to be safe." Mother then asked Ms. Garriga to obtain information about Mercy Centre's community trip program for students and inform her of her findings. Lastly, Mother stated that since Student returned to Mercy Centre in September 2012 she noticed he no longer had a one to one aide and "he has been behaving very badly. He was not like that last year when he started attending Mercy Centre" Mother requested that Ms. Garriga find out about changes to his program and get back to her. (B-21)

Ms. Garriga forwarded the letter to Ms. Waterhouse and Ms. Bunton and asked them to review Mother's concerns with her so she could reply to Mother's letter. (MC-18) Ms. Bunton responded via letter dated December 5, 2012. She informed Ms. Garriga that Mercy Centre staff had addressed with Mother her concerns regarding the brushing protocol on numerous occasions. They had informed Mother on several occasions that Student often refuses brushing or escalates his behaviors such as bolting, aggression and throwing the brush in response to brushing. Per Student's IEP, Mercy Centre staff implement his brushing program at scheduled times and record his response to it in his daily communication log. Regarding Mother's concern about Student's community behavior, Ms. Bunton explained that Mercy Centre staff has kept Mother informed about Student's challenging behavior in the community. Student had engaged in an incident in October at an area mall in which he kicked his shoes in the air and at community members. During transport back to school, he removed his seatbelt and climbed around the van. Mercy Centre staff had told Mother that Student required retraining on safe van transportation, but Mother expressed her desire for staff to be implementing curriculum based activities such as math and English during community trips. Finally, Ms. Bunton explained that Student had never had a 1:1 aide while at Mercy Centre and was not being staffed differently in the 2012-2013 school year than he had been in the 2011-2012 school year⁶. Ms. Bunton concluded her letter by telling Ms. Garriga that given Student's behavioral incidents that occurred in the fall and have grown in intensity, Mercy Centre would welcome discussion regarding the necessity of a 1:1 aide with the district. (MC-19)

⁶ Although Student did not have a 1:1 aide, he was always provided with 1:1 direct staffing. (Bunton, Gann)

11. On December 5, 2012, at 9:00 a.m., Student was engaged in gross motor activity in the Gross Motor Room. During the activity, another peer became agitated. Student's teacher cued Student to leave and go to his classroom to prevent Student from being in the presence of another student's behavior. Student initially did not respond, but when his teacher used a different cue, he complied and transitioned into the classroom. When he entered the classroom, Student ran across the classroom and slammed the door. Student then screeched and began charging toward the teacher. The teacher evaded his first attempt to charge at her. Student then charged again and leapt in the air toward the teacher, grabbing two fists full of her hair. Student then began to thrash the teacher's head back and forth. The teacher shouted for assistance, and three other staff entered the classroom. One staff assisted in releasing Student's hands from the teacher's hair. The teacher then left the area and the remaining two staff cued Student to sit. Student remained seated on the classroom floor and was provided with an activity that was known to be calming for him. The injured teacher went to see the school nurse and a fourth staff person entered the room. Two staff members remained with Student to support him. Student was then directed to engage in a sensory/calming activity. He complied and remained calm and was able to return to his scheduled activities.

At approximately 10:15 a.m. that morning, Student was in the lunchroom for snack time and was directed to return to the classroom after his snack. Student complied and was walking with two staff. As he passed the trash can, he suddenly turned and grabbed an empty chocolate pudding container, dove on the floor and crawled under the table. Staff removed the pudding container and Student remained on the floor calmly for approximately thirty seconds. Staff cued him to stand and return to the classroom for a preferred activity. Student complied after the second cue and began to walk toward the exit of the lunchroom. When he was approximately six feet from the door, Student took a fast left turn and began to run toward a younger and much smaller peer (who he had charged at the previous week.) A staff member physically redirected Student from the peer and toward the door, but Student spun back and charged at a second peer and grabbed two fists full of his hair with great force. Because there were other students in the lunchroom at the time and Student had injured a staff person that morning and had a history of continued attempts when targeting others, staff determined there was an immediate risk to the safety of those around Student. Student's hands were removed from the peer's hair and he was placed in a twenty second hold by a staff member. Staff not immediately involved in the incident with Student began removing all other students from the area. When Student was released from the hold he immediately charged at a staff member with intensity and an open mouth for biting. He made multiple attempts to grab the staff member. A second staff member called for help. The first staff member evaded Student's charging until it was again deemed necessary to secure safety by physically holding Student. As the first staff member moved to implement the hold, Student attacked her by grabbing two fists full of her hair and making multiple attempts to bite her body and ultimately biting the top of her head multiple times while pushing her to the ground. Two staff members attempted to release Student from his hold on the other staff member. Two staff

then implemented a fifteen second two person hold. Two other staff members attempted to assist in securing Student's legs. The staff then assessed that Student was continuing to escalate and they released the hold.

12. By this time, all other students had been removed from the area and the staff implemented an environmental containment within the lunchroom to secure safety. Staff stationed themselves at all of the exits and observed Student. Student approached each exit and attempted to exit through them. Each time he was cued verbally and with the sign for "calm body." Student then exited the door to the stage to access the back stairwell. Two staff tried to re-enter the lunchroom to assist and found the door jammed. Unable to enter the lunchroom they directed a third staff member to assist. Student then calmly entered the stage from the back stairwell and ran toward the "unmanned" door, exiting the lunchroom to the outside. He closed the door behind him. Staff approached the door and found Student standing just outside the door. They cued him to go to his classroom and he complied and calmly proceeded to the classroom. Two staff continued the environmental containment to the classroom and remained at each of the two doors. Staff determined that Student would be staffed 2:1 and remain in the classroom for the rest of the day. (MC-2)

13. Mother arrived unannounced and early to pick up Student from school that day. Ms. Bunton let Mother into the building when she arrived. She did not discuss the day's events at that time because she had not gathered all of the relevant information yet and had not yet discussed it with Ms. Waterhouse, who was on her way to the school from a vacation day. Ms. Bunton and Ms. Waterhouse made multiple attempts to contact both parents later in the day to discuss the situation. The home number provided to Mercy Centre by Mother was out of service and the cell phone number she had provided had a full voicemail box that was not accepting messages⁷. Ms. Waterhouse reached Father at his business phone number and told him that there had been several incidents at school that day and Student had been suspended. Father asked if he could call Ms. Waterhouse back from a private area to continue the conversation and she assented. Father never called back. Ms. Waterhouse was not able to reach Father later in the day when she again attempted to contact him. (Bunton, Waterhouse)

14. Patricia Waterhouse, the Director of Specialized Education at the Mercy Centre, sent a letter dated December 5, 2012 to Parent⁸. She informed Parent that Student had been suspended from Mercy Centre for four days running from December 6, 2012 through and including December 11, 2012. She explained the above-described incidents in great detail. The letter then informed Parent that Mercy

⁷ Throughout the time that Student attended Mercy Centre communication with the Parents was difficult. The phone numbers that Parents provided to Mercy Centre were often out of service or had full mailboxes and were not accepting messages. (Bunton)

⁸ She sent the letter after many unsuccessful attempts to reach the Parents by phone and engage them in a conversation. (Waterhouse)

Centre was suspending Student while they assessed the necessity of programmatic modifications in order to ensure safety. (MC-1, B-19, P-8)

15. Ms. Waterhouse sent Parent a letter dated December 11, 2012. She informed Parent that she had attempted to reach her on the phone numbers Mother had provided to Mercy Centre. Mother's cell phone did not accept voicemail and her home number was no longer in service. Ms. Waterhouse then left Father a message at work asking for him to return the call or contact Mother and ask her to return the call. She then left the same message for Father at his home phone.

Ms. Waterhouse's letter stated that Mercy Centre could no longer meet Student's needs and could therefore no longer provide programming for him. She cited to the increase in frequency and intensity of Student's behaviors during the fall and the increase in injuries to staff (6 injuries since September 2012 significant enough to warrant documentation and three significant enough to send staff for immediate medical treatment.) She additionally cited to at least 6 attempts at aggression toward 4 other students which resulted in one student being sent for immediate medical attention. Ms. Waterhouse stated Mercy Centre's concern for the safety of Student and those around him especially given the student population which consists of students who are medically fragile and quite vulnerable. The letter stated that over the course of the fall, it became clear that the staff cannot keep other students safe due to Student's behavioral challenges.

Ms. Waterhouse explained that prior to reaching its decision, Mercy Centre considered plans for modifying staffing, the environment, and Student's IEP as well as increasing staff training and consultation with outside specialists, but were unable to design a program that would provide for "the certainty of a safe environment for all those at Mercy Centre." The letter informed Mother that Brockton and the Massachusetts Department of Elementary and Secondary Education had been notified and encouraged Mother to contact Olga Garriga at Brockton as soon as possible to discuss the next steps for Student. Ms. Waterhouse also expressed her regret that she had been unsuccessful in her attempts to reach Mother by telephone to discuss the matter personally and provided her phone number for Mother to reach her to discuss Mercy Centre's decision. (MC-3, B-17, P-7) Neither Parent contacted Ms. Waterhouse.

It is extremely unusual for Mercy Centre to suspend a student⁹ and it is only done to secure safety. Student's suspension was not a disciplinary suspension, but was done to allow staff to explore options for maintaining safety. Mercy Centre staff put a great deal of time and energy into determining whether they could safely maintain Student based upon the unpredictability and intensity of his behaviors. (Waterhouse, Bunton) Ms. Bunton described the decision to terminate Student's placement as disheartening and difficult. She explained that if Mercy Centre had the capacity to safely maintain Student's placement it would not have terminated his placement. (Bunton) Even with 1:1 staffing, Student's behavior was causing

⁹ Ms. Waterhouse could only recall two or three suspensions during the past twenty years. (Waterhouse)

injury to other students and staff. Even 2:1 staffing was not always enough to maintain safety when Student was aggressive. (Gann) Even if Mercy Centre had made all of the modifications to its program that it discussed, and had moved Student to a remote location, it could not have guaranteed safety because of the impossibility of contain Student when he engaged in bolting behavior. (Waterhouse)

16. On December 11, 2012, Brockton sent a notice of a December 14, 2012 Emergency Team Meeting to Parents. (B-16)
17. On December 12, 2012, Brockton's counsel sent Parent's then counsel an e-mail informing him that Mercy Centre had terminated Student's placement effective immediately. She informed him of the emergency Team meeting scheduled for December 14 and that Brockton and Mercy Centre had tried repeatedly to reach the parents by telephone. Parent's counsel replied in an e-mail to Brockton's counsel requesting that the December 14 Team meeting be rescheduled. He informed Brockton's counsel that he would contact her to discuss rescheduling. (B-14, P-5)
18. On December 14, 2012, Parent's counsel informed Brockton's counsel that he was no longer providing legal representation to Parent. (B-13)
19. Olga Garriga sent Parent a letter dated December 17, 2012, stating that Brockton had yet to hear from her regarding Student's educational programming given Student's recent termination from Mercy Centre. She informed Parent that Brockton sought to meet to discuss interim educational services and to obtain consent to send out referral packets to appropriate programs. Ms. Garriga stated that the Team meeting was rescheduled until December 20 at the Brockton Public Schools Administration Building. Ms. Garriga encouraged Parent to contact her with concerns regarding Student's educational programming. (B-12) Parent did not contact Ms. Garriga. (Garriga)
20. On December 19, 2012, Brockton's counsel wrote a letter to Mercy Centre's counsel requesting that Mercy Centre maintain Student's placement to allow Brockton to locate another appropriate placement for Student. (B-11)
21. On December 20, 2012, Ms. Garriga sent a letter to Parent reminding her that there had been a Team meeting scheduled at 10:00 a.m. that day that Parent had not attended¹⁰. Ms. Garriga reiterated Brockton's concern that Student was not attending an educational program or receiving services. She enclosed a release of records seeking Parent's consent to send referral packets to approved day programs deemed appropriate by Brockton and to approved appropriate placements of Parent's choosing. Ms. Garriga requested that Parent sign the release and return it to Brockton as soon as possible. She also informed Parent that Brockton was willing to provide educational services for Student. She asked Parent to contact

¹⁰ Ms. Garriga also informed Parent that Brockton sought to reschedule the meeting for January 17, 2013 at 10:30 a.m.

her with any questions or concerns or if she wished to implement interim educational services. (B-10, P-6) Parent did not contact Ms. Garriga. (Garriga)

22. On January 7, 2013, Kay Seale, Brockton's Director of Special Education, sent a letter to Parent informing her Brockton had attempted to reach her by phone regarding her request for interim tutorial services for Student. She reminded Parent of the need for Brockton to obtain a record release to allow the district to forward copies of Student's educational records to educational agencies. She informed Parent that Brockton considered finding an appropriate placement for Student to be their top priority. (B-9)
23. Brockton sent a meeting invitation to Parents, dated January 11, 2013, for a January 17, 2013 Team meeting. (B-8)
24. On January 14, 2012, Kay Seale sent Mother a letter reminding her that she had sent her a "Student Record Release Form" to allow Brockton to share Student's information with identified providers of tutorial services. She informed Mother that Brockton had identified service providers that could immediately begin providing Student with interim services, but could not do so without Parent's consent to share Student's information with the providers. She enclosed another Student Record Release Form for Parent's review and informed her that Brockton would move forward with hiring the tutors as soon as it received the signed consent form from Mother. (B-7)
25. The Team convened on January 17, 2013. Neither parent attended the meeting. In light of the fact that neither parent had attended the December 20, 2012 meeting, Student remained out of school, and the Team had yet to review the updated evaluations, the Team decided to proceed in parents' absence. (B-6) The Team reviewed an educational, speech and language, occupational therapy, FBA, psychological and music therapy evaluation. Although Student was no longer attending Mercy Centre, its staff participated and provided progress updates and input. The Team proposed an IEP and forwarded it to Parents for their review. (B-6)
26. The speech language evaluation noted that Student's overall language function appears to be around the three year level with receptive language abilities better developed than expressive. He uses a combination of verbal speech, gestures and actions. His speech intelligibility is decreased primarily due to habitual low volume and rapid speech. He responds best to using a total communication approach and to pictures and sign cues to increase his word retrieval. He primarily views interactions with others as a means to achieve a desired end. He prefers staff to peers and has limited play skills with peers. (B-6)
27. On the Scales of Independent Behavior Revised, conducted by Brockton in December 2012, Student's functional independence was noted to be very limited and negligible. His performance compared to that of a three year old. His motor

skills tested at the 4.5 year old level. His social interaction and communication skills were noted to be at the 1.8 year level. Community living skills were assessed at the 3.8 year level. In reading, Student was able to recall many pre-primer and primer words. His word recognition is inconsistent and he does not use decoding skills to read unfamiliar words. He can write his name and many “consonant-vowel-consonant” words. He is able to identify shapes and colors and to count and sort pictures. He can identify various parts of the body. (B-6)

28. The functional behavioral assessment (FBA) was conducted in December 2012 while Student was at the Mercy Centre. Student demonstrated flopping, bolting, and aggressive behaviors. His bolting behaviors included attempts to and actual running from the designated area along with being unresponsive to verbal cues to stop. He also often engaged in door slamming and/or screeching. Bolting was most often observed upon returning from a break (when flopping was unsuccessful). The bolting and flopping may have served as an escape behavior from demands. Aggression was observed in isolation and following flopping and bolting behaviors. Prior to June 2012, aggressions were infrequent in Student’s day. However, upon his return to school in September 2012, following a break in service over the summer, Student’s aggressive episodes increased and included biting and tackling people. A potential hypothesis for aggression to staff included being provoked by demands or frustration. Aggressions toward peers were unprovoked. (B-6)
29. The Team reviewed an occupational therapy evaluation in December 2012. Student’s ability to copy figures of increasing complexity was found to be at the 5.11 year level. He was able to write his name and the upper case alphabet with fair legibility. His self-care skills are below age level and he has difficulty manipulating zippers and belt buckles. A sensory assessment demonstrated that some of Student’s behaviors have a sensory basis, both to obtain and avoid sensory stimulation. His current accommodations include frequent movement breaks and alternating work and sensory tasks. Student had a brushing protocol at Mercy Centre which was intended to be conducted twice a day, but Student frequently refused it and at times it was noted to trigger aggression and bolting. (B-6)
30. The IEP indicates that Student requires a highly structured, 1:1 or small group environment incorporating total communication, sensorimotor and interdisciplinary instruction administered within a concrete, functional program that utilizes the principles of ABA. It includes a number of accommodations including small group instruction in structured settings with individualized assistance; a consistent, predictable, structured daily routine; use of total communication; a calm, quiet verbal approach; use of an individualized behavior plan and supports including positive reinforcement; motor breaks; use of mouth tools such as a “chewy tube”; repetition of lessons with regular reinforcement in various settings; and assistive technology including computer software to support academics, communication, and activities of daily living. The IEP includes goals in the following areas: academics, handwriting, communication, behavior-self regulation, social skills-

group tolerance, social, ADL-toileting, and feeding. The service delivery grid includes consultation with a speech language pathologist or speech assistant in the area of communication 1 x 60 minutes per month, consultation with an OTR 1 x 60 minutes per month, and parent-home consultation with “ABA/trained Sped Staff” 1 x 60 minutes per month. All proposed direct services are in the C grid and include functional academics with “ABA/Trained Sped Staff” for 5 x 282 minutes per week, occupational therapy with the OTR 2 x 30 minutes per week, communication with the speech pathologist/speech assistant 3 x 30 minutes per week, APE with the special education staff 3 x 30 minutes per week, extended school year services for seven weeks with “ABA/Trained Sped Staff” 5 x 360 minutes per week, and summer speech language services with the speech pathologist/speech assistant 2 x 30 minutes per week for seven weeks. The Additional Information section includes information about Student’s diet and his toileting protocol. It also requires a daily communication form between home and school. Brockton proposed implementing the IEP in a private day school. As of the date of the hearing, Parent did not respond to the IEP. (B-6)

31. On January 22, 2013, Ms. Garriga sent a letter to Parent reminding her of Brockton’s concern that Student was not attending an educational program. She stated that although Brockton had sent her multiple release of records forms seeking consent to send referral packets to appropriate approved day programs, they were sending another form because Parent had not signed and returned the form to Brockton. She informed Parent that until an appropriate placement was identified and accepted by Parent Brockton was willing to provide educational services for Student. Ms. Garriga informed Parent that Brockton had hired RCS Behavioral and Educational Consultants to provide ten hours of educational services per week. Brockton had also contacted speech language and occupational therapy providers who would contact Parent directly to set up home visits. Ms. Garriga informed Parent that she had tried to reach her multiple times at the phone number they had in their records without success. She asked Parent to notify Brockton if she had a new phone number so that service providers would be able to contact her directly. (B-5)
32. Olga Garriga sent Mother a letter dated February 6, 2013 informing her that Brockton had contracted with RCS Behavioral and Educational Consulting to provide ten hours of educational services per week for Student. Additionally, Brockton had identified an occupational therapist to provide services 1 x 60 minutes for Student. Brockton had not yet identified staff to provide speech language services or an occupational therapist to provide services 2 x 30 per week. Ms. Garriga informed Mother that Brockton would be willing to consider providers identified by Mother if they were appropriately credentialed, and provided contact information for providers to send their credentials to Brockton’s Assistant Director of Special Education. Ms. Garriga also responded to Mother’s concerns regarding compensatory services and outlined the number of hours owed to Student from January 16, 2013 (when Parent provided consent) through February 8, 2013. (B-4, P-3)

33. Parent sent a letter dated March 4, 2013 to Olga Garriga. In her letter she reports that the provider sent by Brockton to provide Student's home tutorial services is not an appropriate tutor for Student because she is an employee of Brockton and is elderly. She states that although the tutor is a nice person she can "barely stand[s] for five minutes to tutor an energized and dangerous (according to Mercy Center [sic]) autistic child." Mother requested that for the tutor's safety and for Student's benefit Brockton sign a "new and appropriate contract with RCS Learning Center." Mother states that if Brockton does not sign a new contract with RCS Learning Center by March 11, 2013, she will hire a new service provider at Brockton's expense. (P-1)
34. Ms. Garriga responded to Mother's March 4, 2013 letter with a letter dated March 6, 2013. She clarified that the tutor that began providing services to Student was an employee of RCS and not of Brockton Public Schools. Ms. Garriga informed Mother that she had contacted RCS regarding her concerns about the tutor's qualifications to work with Student. RCS informed Ms. Garriga that it was confident that the tutor was highly qualified to work with Student and keep him safe. Despite its confidence in its tutor, RCS offered to assign a new tutor for Student. RCS informed Ms. Garriga that Mother had instructed the tutor she would not be permitted to return to her home and she refused her continued services. Ms. Garriga informed Mother that Brockton would not provide compensatory services for the period until a new tutor was identified because it was Mother's choice to cease tutoring and was not the recommendation of RCS or Brockton. Ms. Garriga reminded Mother that it is critical for Student to return to a school setting as soon as possible and that tutoring is a short term support that does not replicate school. She again asked Mother to sign a release of records to permit Brockton to send referral packets to identify an appropriate school placement for Student. She again reminded Mother that Brockton would send referral packets to any approved special education school in Massachusetts that Mother identified. (B-3)
35. On March 19, 2013 an admissions coordinator, Melissa Scarry, from the May Institute contacted Ms. Garriga in response to a redacted packet Brockton had sent. Ms. Scarry informed Ms. Garriga that student seemed to fit the profile of the students they serve at the May Center. She informed Ms. Garriga that it would be appropriate for their clinical and educational teams to conduct a screening with the student to determine whether or not they could accept him into their day program. (B-2)
36. On March 26, 2013, Katherine Canada, Ph.D., of the Guild for Human Services sent Ms. Garriga an e-mail in which she informed her that upon their review of Student's file they found his profile to be similar to those of the students that they serve. They wished to invite Student and his parents to the Guild for an intake visit and tour. (B-1)

37. Ms. Garriga sent Parents a letter dated June 3, 2013. She outlined the steps that Brockton had taken to return Student to an educational setting since his termination from Mercy Center, including making numerous requests that Parent consent to sending referral packets to appropriate private special education schools. She reviewed that status of the referral packets that Mother had agreed to allow the district to send on Student's behalf¹¹. Dearborn, Manville and Milestones had determined that Student would not be a good fit for their programs. The Beverly School requested an updated IEP for Student prior to making a decision, because Parent had only consented to releasing the last accepted 2009 IEP and would not consent to the release of updated evaluations or recent proposed IEPs. Ms. Garriga requested that Parent notify her in writing if she assented to allowing Brockton to provide the requested updated information to the Beverly School.

Ms. Garriga reiterated that Brockton had sent blind referral packets to May Institute and the Protestant Guild School and that both schools determined that Student appeared to be a good fit for their programs, although they would require a full referral packet and intake. Ms. Garriga provided Parent a signature consent form to send referral packets to Darnell, May Institute and Protestant Guild and stated that the district would immediately send them upon her consent. She again informed Parents that Brockton was willing to send packets to other schools chosen by the Parents.

Ms. Garriga then summarized part of her March 4, 2013 correspondence regarding Mother's rejection of services from RCS Learning Center. She explained that Brockton had then arranged for HMEA to provide interim educational services and stated that Mother was now refusing to allow HMEA to provide the services to Student. Ms. Garriga informed Mother that Brockton continued to offer to provide Student with HMEA's educational services focusing on his IEP goals at his home until a school placement could be identified and asked Mother to contact her if she wished to access the services. Ms. Garriga reminded Mother of the importance of Mother working with Brockton to identify an appropriate school setting for Student as soon as possible. She urged Mother to sign the enclosed consent form and to reconsider her rejection of interim educational services. (B-39)

38. Ms. Bunton used to work for the May Center and is familiar with their program. She believes that May would be an appropriate placement for Student because it uses applied behavioral analysis and discrete trials. Additionally, it is a large organization with extensive expertise in behavior and behavior modification and can support students with intensive behaviors. (Bunton) Ms. Garriga has placed students at the May Center and the Guild and believes that both schools could implement Student's last accepted IEP.

¹¹ The record is unclear as to when Parent provided her consent to certain packets being sent. However, Ms. Garriga testified that Parent consented to send out some packets at some point in the spring of 2013. (Garriga)

39. Mother noticed a great deal of improvement in Student's functioning after he began attending Mercy Centre. She began to have concerns in 2012 that Student was able to do more than what he was doing at Mercy Centre. Mother does not understand for what purpose Brockton wants Student to go back to school. She does not believe that Student engaged in the behaviors described by Mercy Centre. She believes that Student was terminated from Mercy Centre because of the November 28, 2012 letter she sent to Mercy Centre raising concerns with the program. Mother received letters and invitations to meetings from Brockton. She did not attend the January Team meeting because she wanted to know why Student was out of school and the purpose of the meeting was to discuss eligibility, reevaluation, and IEP Reevaluation. (Mother)

FINDINGS AND CONCLUSIONS:

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)¹² and the state special education statute.¹³ As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute.

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In this case, Parent is the party seeking relief, and thus has the burden of persuading the hearing officer of her position.

The issues before me as set out in the Issues section, *supra*, deal with Student's termination from Mercy Centre and the response to the termination by Brockton Public Schools and Parent.

I. Mercy Centre

The regulations found at 603 CMR 18(05) define an emergency termination as "circumstances in which the student presents a clear and present threat to the health and safety of him/herself or others." The regulation directs that in such a circumstance, the school shall follow the procedures required under 603 CMR 28.09(12).

The record before me presents ample evidence that Student's continued attendance at the Mercy Centre presented a "clear and present threat to the health and safety of him/herself or others." The credible testimony of Ms. Beers, Mr. Gann, Ms. Bunton, and Ms. Waterhouse demonstrated that even when Student was staffed at a 2:1 ratio, it was impossible to guarantee the safety of the staff, Student's peers, and even Student. His behavior had become so unpredictable and aggressive that it was not possible to maintain safety in the building while Student was there. The record further included sworn affidavits of ten members at Mercy Centre who unanimously agreed that Student's

¹² 20 USC 1400 *et seq.*

¹³ MGL c. 71B.

presence presented a threat to his health and safety as well as the health and safety of staff, and peers. (See MC-9A-J) Mother did not rebut the testimony and affidavits. Although she testified that she did not believe that Student engaged in the aggressive behaviors described by Mercy Centre staff, her testimony was not credible. Parent's own exhibit book contained documentation that Student had been suspended and ultimately terminated from a prior placement due to unmanageable behaviors that jeopardized the health and safety of students and staff. (P-20)

Having determined that Student's continued placement at Mercy Centre presented a clear and present threat to the health and safety of peers and staff, I turn to the relevant regulations, addressing procedures to be followed in such circumstance.

603 CMR 28.09(12)(b) prescribes the procedure with which a school must comply when terminating a student and states

The special education school shall not terminate the enrollment of any student, even in emergency circumstances, until the enrolling public school district is informed and assumes responsibility for the student. At the request of the public school district, the special education school shall delay termination of the student for up to two calendar weeks to allow the public school district the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to the student's termination from the special education school program. With the mutual agreement of the approved special education school and the public school district, termination of enrollment may be delayed for longer than two calendar weeks.

In this matter, Mercy Centre immediately notified Brockton, the enrolling public school, and Brockton immediately assumed responsibility for the Student by attempting to contact the Parents and scheduling an emergency Team meeting. (Garriga) Although Brockton requested that Mercy Centre maintain Student's placement while it sought an appropriate placement for Student, the evidence is convincing that maintaining Student's placement, even for a two week period, would have presented an unreasonable risk of harm to the students and staff at Mercy Centre and to Student himself. (Bunton, Waterhouse) Brockton and Mercy Centre immediately attempted to communicate with Parents (by phone calls and letters) to convene an emergency Team meeting (the invitation was sent on December 11, 2012 and the meeting scheduled for December 14, 2012) and to begin sending out referral packets and discussing interim educational services. (Garriga, B-16, B-12) Parent's then-attorney cancelled the meeting, and Parent refused to communicate with Brockton or the Mercy Centre or to respond to the numerous correspondence sent to her by both Brockton and the Mercy Centre. Neither Parent attended the rescheduled emergency Team meeting on December 20, 2012.

Given the above, I find no procedural violation on the part of the Mercy Centre. Although the regulation requires that a student's placement be maintained for a period of up to two weeks when a public school districts it be maintained, I find that adherence to that requirement in this matter would have posed an unreasonable risk of harm to peers, staff and Student at Mercy Centre. I further find that Mercy Centre and Brockton took

every reasonable step to engage Parent in the Team process to identify an appropriate placement and appropriate interim services. Brockton immediately took responsibility and scheduled an emergency Team meeting in order to begin planning discussions to continue Student's special education services. Unfortunately, Parent failed to communicate with Brockton and the Mercy Centre or to cooperate in the process in any way. Had Parent cooperated, Brockton and Parent could have identified appropriate placements and sent placement packets to them and identified interim educational services for Student. Because Parent has refused to cooperate and communicate, Student remains without services as of the date of the hearing. I find that Mercy Centre has not committed any procedural violations with respect to Student's termination. Thus, Student is not entitled to any relief from Mercy Centre¹⁴.

II. Brockton

Parent has also failed to meet her burden with respect to Brockton's alleged obligation to provide Student with home services from February 4, 2012 to the present. She did not present any evidence that Brockton was required to provide any home services. The last accepted IEP did not require home services. Additionally, in the settlement agreement Parent signed with Brockton Public Schools in January 2011, just prior to Student's Mercy Centre placement, Parent specifically waived home services. (B-37) Because Parent has not met her burden of showing that Student was entitled to and not provided with home services, Student is not entitled to compensatory home services.

Furthermore, the evidence overwhelmingly shows that Brockton did everything that it possibly could to offer Student a free appropriate public education subsequent to his termination from Mercy Centre and continues to attempt to provide Student with appropriate services. Upon learning of Student's emergency termination, Brockton immediately began attempting to engage Parent (and Student's father) in the process of identifying an appropriate placement and interim educational services. Parent has refused to participate and cooperate and has continued to do so up to the date of the hearing. Parent failed to attend the emergency Team meeting on December 20, 2012, despite having received notice of the meeting from Brockton. She failed to respond to Ms. Garriga's December 17, 2012 letter requesting Parent's participation in identifying potential placements and interim educational services. She failed to respond to Kay Seale's December 7, 2012 letter which again sought consent for providing educational records to educational service providers and again sought cooperation in identifying an educational placement for Student. She failed to attend the January 13, 2013 Team meeting that was attended by both Brockton and Mercy Centre staff. She failed to respond to Kay Seale's January 14, 2013 letter that again requested parental consent to share Student's records with educational service providers. Parent did not respond to the IEP proposed by the Team on January 17, 2013 and mailed to Parent on January 22, 2013. Although Parent eventually agreed to provide consent to release records to educational service providers and Brockton identified an appropriate provider, Parent refused to allow the service provider from RCS to provide services to Student after her first day in Parent's home.

¹⁴ It is relevant to note that although Parent's hearing request sought an Order requiring Mercy Centre to readmit Student, Parent testified that she was no longer seeking a placement at Mercy Centre.

The record shows that Brockton has made multiple attempts to provide Student with a free appropriate public education in the least restrictive environment, but has been hampered by Parent's refusal to participate and cooperate. Brockton has been unable to send referral packets to placements that it has deemed appropriate for Student. Although Parent has agreed to allow the mailing of some referral packets, she has not agreed to send packets that contain Student's updated evaluations and proposed IEPs. Thus, potential placements, such as the Beverly School, have requested updated information and have not been able to state whether they can meet Student's needs. Brockton has been unable to send updated information to potential placements, has been unable to send non-redacted packets to potential placements, and has been hampered in its efforts to provide interim educational services. Therefore, I find that Brockton has not failed to provide Student with a free appropriate public education in the least restrictive environment. Unfortunately for Student, Parent has failed to cooperate to the point that it is she who is obstructing all of Brockton's efforts to provide educational services to this very needy student. Having found that Student's failure to receive FAPE stemmed from the parents' refusal to cooperate with the IEP process, I find that the district is not liable for the Student's loss of educational services. See *Horen v. Board of Educ. Of the City of Toledo Pub. Sch. Dist.*, 113 LRP 23332 (N.D. Ohio, 2013) Therefore, Student is not entitled to compensatory services for the period from December 11, 2012 through the present.

Parent's reason for refusing to participate was unclear from her testimony. She stated that she does not understand why Brockton insists that Student requires an educational placement. She also stated that she does not believe that Student engages in the aggressive behaviors described by Mercy Centre staff, despite the credible testimony of Mercy Centre staff and Student's prior history at his previous placement. Clearly, Parent's refusal to participate or collaborate in any manner is preventing Student from receiving a free appropriate public education. Brockton must take whatever steps are necessary to ensure that Student receive a free appropriate public education even if it means involving other agencies or the court system.

III. Placement

The record does not contain detailed testimony regarding an appropriate placement for Student. Parent did not present any evidence regarding an appropriate placement.¹⁵ Ms. Bunton, who once worked at the May Center, testified that the May Center would be an appropriate placement for Student. She stated that the May Center uses ABA and discrete trials which have been recommended for Student. She further stated that May Center has extensive expertise in behavior modification and is able to assist students with intensive behaviors. Ms. Garriga also believes the May Center would be an appropriate

¹⁵ Brockton presented limited testimony regarding the appropriateness of the IEPs it proposed on January 17, 2013 and January 24, 2012, but the issue of the appropriateness of the IEPs is not before me. Although they did not testify at length regarding the IEP proposed on January 17, 2013, Ms. Waterhouse, Ms. Bunton, and Ms. Beer all testified that the IEP was appropriate to meet Student's needs. Their testimony was not rebutted by Parent.

placement for Student. She has placed other students there and is familiar with the program. Additionally, she identified the Guild School, a placement with which she is familiar and where she has placed other students, as an appropriate placement that would be able to implement Student's last proposed IEP. Mother did not rebut the testimony as to the appropriateness of the May Center and of the Guild School and thus I find them to be appropriate. Additionally, there was testimony and documentary evidence that the Beverly School for the Deaf was identified as a potential placement by Mother and a packet was sent there. However, the Beverly School for the Deaf requested updated information before making a determination as to whether it could meet Student's needs. If Mother continues to be interested in that placement, it is imperative that she cooperate with Brockton and allow them to release updated information to the Beverly School.

ORDER

Based upon the foregoing, I find that the Mercy Centre did not commit any procedural violations with respect to its termination of Student on or about December 11, 2012, and thus, Student is not entitled to any relief from Mercy Centre. I find that Brockton Public Schools was not under any obligation to provide Student with home services during the period from February 4, 2012 to the present, and thus, Student is not entitled to compensatory home services from Brockton Public Schools. I find that Brockton did not fail to provide Student with a free appropriate public education in the least restrictive environment from December 11, 2012 through the present and that Parent's refusal to participate and cooperate in the process is the reason Student has not been provided with a free appropriate public education in the least restrictive environment. I find that the May Center and the Guild School are both appropriate placements for Student.

Brockton is directed to take whatever steps are necessary to ensure that it will be allowed to provide Student with a free appropriate public education in the least restrictive environment including involving other agencies and the court system as necessary.

By the Hearing Officer,

Catherine M. Putney-Yaceshyn
Dated: June 27, 2013