**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

# **In Re: Barnstable Public Schools BSEA #11-1387**

##

## **DECISION**

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

On, August 19, 2010, Parents filed a hearing request with the Bureau of Special Education Appeals (BSEA) alleging that the Barnstable Public Schools (Barnstable or School) had failed to offer the Student with a free, appropriate public education (FAPE) addressing his needs stemming from Asperger’s Syndrome and related issues.[[1]](#footnote-1) Parents unilaterally placed Student in an out-of-state residential program and seek reimbursement for their expenditures.

 The parties requested and were granted several postponements of the hearing date for good cause. A hearing took place on November 29 and 30, 2011 and January 20, 2012 at the offices of the Bureau of Special Education Appeals (BSEA) in Malden, MA. Both parties were represented by counsel. Each party had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P- 1 through P- 20, and Supplemental Exhibits P-A through P-T; School’s exhibits S-1 through S- 35, tape recorded testimony and argument and the written transcript created by the certified court reporter. At the parties’ request, the conclusion of the hearing was postponed until July 30, 2012 for submission of written closing arguments and the record closed on that day.

Those present for all or part of the proceeding were:

Parents

Peter Bertucci Team Chair, Barnstable High School

Karen Megathlin Tutor, Barnstable Public Schools

Ronald Tosti Tutor, Barnstable Public Schools

Charlyne Broderick, Special Education Coordinator, Barnstable High School

Jane Jezard Special Education Director, Barnstable Public Schools

Ann Kane School Psychologist, Barnstable High School

Traci Wyse Education Director, Southeast Alternative School

Thomas Hays Franklin Academy

Michael Turner, Esq. Attorney for Parents

William Butler, Esq. Attorney for School

John Champlin Paralegal trainee, observer

John C. Dorn Attorney, observer

Laurie Jordan Court Reporter

### ISSUES PRESENTED

1. Whether the Barnstable Public Schools provided the Student with FAPE during the 2010-2011 and 2011-2012 school years, including appropriate transition planning; specifically, whether the School’s proposed placement at the Southeast Alternative School was appropriate;
2. If not, whether the Parent’s unilateral placement at Franklin Academy was appropriate such that the Parents are entitled to reimbursement.

#### POSITION OF PARENT

 Student is a highly intelligent, academically talented teenager with Asperger’s Syndrome. Barnstable failed to properly evaluate Student and failed to develop an IEP and placement in a timely manner. As a result, the Parents had no choice but to unilaterally place Student in the only private program that was available and appropriate at the time. Moreover, the placement that Barnstable finally did offer was completely inappropriate for the Student. Unlike the School’s proposed placement, Student’s placement at Franklin Academy is designed to address the needs of very bright individuals with Asperger’s, like Student. Parents are entitled to reimbursement.

POSITION OF SCHOOL

 The IEP and services offered to Student at the Southeast Alternative School were reasonably calculated to provide the Student with a FAPE for both 2010-2011 and 2011 – 2012. Moreover, even if the program were not appropriate, the residential school in which Parents unilaterally placed Student was overly restrictive. There is no support in the record for such placement and no evidence that Student would not have made meaningful progress in the day program offered by Barnstable.

**FINDINGS OF FACT**

1. Student is now 19 years old, has a disability and is a resident of Barnstable. His eligibility for special education services from the Barnstable Public Schools is not in dispute. As of the time of hearing, Student had been accepted by at least one four-year college, and planned to start college at the start of the 2012-2013 school year. (Parents)
2. Student is highly intelligent and academically capable, especially in math and science. He is motivated to succeed academically. He wants to attend college and possibly major in math. Student has leadership skills. Student is articulate and outspoken, with strong views on various subjects. On the other hand, Student has some difficulties with reading (decoding and fluency) and with written expression. He can be argumentative and can have difficulty reading social cues, which leads him to withdraw from social interactions that he does not understand or to respond in a rigid manner. (Father, Hays, S-19)
3. During elementary and middle school, school, Student received IEP services and accommodations to address weaknesses in reading fluency, writing, and attention, as well as a medically-diagnosed anxiety disorder. Student’s eighth grade IEP noted that Student sometimes had trouble working with partners or in groups, that he was selective about friends, had difficulty with transitions, and that he did not want others to view him as having disabilities. (P-6)
4. In June 2008, at the end of Student’s eighth grade year, the Barnstable Team terminated Student’s special education eligibility. The Team’s rationale was that despite Student’s diagnoses of ADHD, specific learning disabilities, and difficulties with processing speed, he was able to make academic progress in the general curriculum with accommodations and did not require or want pullout services. Student’s plan was to enter Cape Cod Regional Technical School (Cape Cod Tech.) in the fall of 2008. The Team suggested “consideration” of a 504 plan to be developed at the new placement.
5. Student entered Cape Cod Tech. as planned in the fall of 2008 for ninth grade. He was involved in some incidents which led to several delinquency charges. Student was not expelled from Cape Cod Tech. but received some tutoring through the 2008-2009 school year. In the spring of 2009, Student was convicted on one of the charges and acquitted on the others. Parents decided to withdraw Student from Cape Cod Tech. at the end of ninth grade. (Parents)
6. In January and June 2009, the Parents requested Cape Cod Tech. to conduct evaluations of Student, but the requests were denied. (P-1, P-2)
7. In September 2009, Parents obtained a private neuropsychological evaluation of Student from David Callahan, Ph.D. After conducting a battery of cognitive, academic and projective tests and interviewing Student and Parent, Dr. Callahan concluded that in addition to some weakness in reading, written language, and attention, Student’s “pattern of response and his history seem to [be] strongly supportive of the presence of Asperger’s Disorder,” on the “healthier end of the spectrum.” (P-10) Dr. Callahan further concluded that the “most prominent feature” of Student’s emotional functioning was “difficulty he has in forming lasting reciprocal bonds and ties with others….[that he] “is underdeveloped in those spheres, tending to prefer his own company and having difficulty understanding the needs and desires of others.” Dr. Callahan believed Student would have problems with social isolation and misreading social and interpersonal cues. The report noted that Student was motivated to return to school, and expressed the hope that he could do so, but explicitly declined to make specific educational recommendations. (P-10)
8. In October 2009, Student enrolled at Barnstable High School. By agreement of the Parents and the School, in consideration of Student’s legal situation, he did not physically attend the high school. Rather, from November 2009 to June 2010, Student received home tutoring from Barnstable in regular education high school subjects. Student received some accommodations pursuant to a Sec. 504 Plan, (e.g., extra time on tests, use of word processor) but was working on grade-level subjects (including “honors” courses). Student completed tenth grade with grades of A and A+. He passed the MCAS in English Language Arts (ELA) (“Proficient”), Math (“Advanced”) and Biology (“Advanced”) Student’s tutors found him to be highly intelligent, well-organized, diligent, and hard-working. His behavior was always polite and appropriate in the tutorial setting. (P-10. P-11, Tosti, Megathlin)
9. In March 2010, the Barnstable Team convened to review Dr. Callahan’s report and determined that Student was eligible for special education based on diagnoses of Asperger’s Syndrome, ADHD and specific learning disabilities in reading and written expression. The eligibility flow sheet stated “Team proposes developing an IEP utilizing updated information. The initial IEP will be a draft IEP.” (P-13) The School members of the Team and Parents discussed placement possibilities at the Team meeting, and Parent signed a blanket release to allow Barnstable to send referral packets to out of district placements. (Broderick, P-14)
10. After the Team meeting, the Barnstable High School Special Education Coordinator, Charlyne Broderick, created what was intended as a draft IEP. This draft contained two goals, in reading and social skills, which were developed on the basis of prior IEPs from 2007. The IEP did not contain a placement page. Barnstable sent Parents this proposed IEP in mid-April 2010, May 2010, August 2010 and October 2010. None of the drafts contained a placement page. The term “Draft” did not appear anywhere on the IEP. The Transition Planning section of the IEP did not suggest particular transition assessments. It was the understanding of the Team chair that updated goals and objectives would be developed after Student had been placed. (Broderick) Parents never accepted or rejected the draft IEP. Barnstable did not forward the unsigned IEP to the BSEA. (Mother, Broderick)
11. After the Team meeting, Parents explored placement possibilities for the Student, and Parents’ and Barnstable’s counsel communicated regarding possible placements. For example, Parents approached Chamberlain School and were advised that Student would not be accepted there. Both parties investigated South Shore Collaborative, and learned that its Asperger’s program had been disbanded. Parents visited Franklin Academy, a private residential school in East Haddam, CT, and felt that it would be an appropriate placement for the Student. (Mother)
12. In a letter dated June 1, 2010, Parents counsel requested Barnstable to fund Student’s placement at Franklin Academy for the next three school years. (P-14) On July 10, 2010, Barnstable sent referral packets to Franklin Academy and Southeast Alternative School, which is a private, DESE-approved special education day school located in Hyannis, MA. (Jezard, P-15) Franklin Academy sent an acceptance letter to Parents and the School shortly thereafter. (Mother)
13. Neither Parents nor the School received any written response to the referral packet from SAS. Apparently, because SAS was in the process of moving from Hyannis to Sandwich during the summer of 2010, its receipt of the packet was delayed. (Wyse) Both School personnel and Parents attempted to reach SAS by phone during July and August 2010, but were unsuccessful. (Jezard) At some point in September 2010, Parents and Student toured SAS. Shortly thereafter, SAS informed Barnstable, by telephone, that Student was an appropriate candidate for the program. At no time did SAS send a written notice of acceptance to either Barnstable or the Parents. (Wyse, Jezard)
14. Meanwhile, on August 19, 2010, Parents filed the instant hearing request seeking funding for the Franklin Academy placement and stating that Parents already had incurred expenses for this placement. (P-20)
15. Parents unilaterally placed Student at Franklin Academy in in or about early September 2010. (Parents)
16. Student completed tenth grade (2010-2011) at Franklin Academy as a residential student, funded by Parents. (Parents) Barnstable was aware that Student was attending Franklin Academy. Barnstable sent no representatives to observe or assess Student there during 2010-2011. (Jezard, Broderick)
17. In a notice dated August 17, 2011 Barnstable issued an invitation for a Team meeting to be held on August 31, 2011. The stated purpose of the meeting was to review Student’s progress, develop an IEP for the 2011-2012 school year, and discuss transition planning. (S-17) The meeting was rescheduled and held on September 8, 2011. In attendance were Parents, Student, counsel for Parents and for the School, and the following Barnstable personnel: Ann Cane (school psychologist), James Buckman (high school guidance counselor), Ron Tosti (tutor), and Charlyne Broderick (Barnstable High School Special Education Coordinator). The education director from Franklin Academy was invited to the Team meeting but did not attend. (S-19)
18. On October 10, 2011 the Team issued an IEP for the 2011-2012 school year. This IEP contained two goals: social skills and reading. The social skills goal was for Student to “use strategies to communicate with peers in 8 out of 10 trials…” Benchmarks/objectives were generally for Student to identify verbal and non-verbal social cues, as well as the motivations and intentions of other people. (S-19)
19. The reading goal was to improve reading fluency by addressing decoding weaknesses (S-19)
20. Attached to the IEP was a Transition Plan which reflected Student’s Post -Secondary Vision (attending college, majoring in math), and Disability Related Needs (oral reading skills, social skills). There was an Action Plan that suggested various academic and other steps that Student should take, such as participation in advanced academic coursework, meeting with a counselor for an interest inventory and college search, and participation in clubs to improve social skills. (S-19)
21. Although the copy of the IEP in the record does not contain a placement page, it is undisputed that the School proposed placing Student at Southeast Alternative School in Sandwich, MA. Parents rejected the proposed placement, stating, in sum, that SAS did not have the ability to teach Student, that it could not meet his emotional needs because the school day ends at 2:30 PM, and that it has not placed students in colleges. (S-19)

**Program Sought by Parents**

1. For the 2010-2011 and 2011-2012 school years, Student was enrolled in Franklin Academy in East Haddam, CT. Franklin Academy is a college preparatory residential school that specializes in serving approximately 90 students with Asperger’s Syndrome and Nonverbal Learning Disorders. (Hays, P-16) The school is accredited by the New England Association of Schools and Colleges, and is approved as a private school by the State of Connecticut. (P-16) The school is not approved by Connecticut as a special education school. All students enrolled at Franklin Academy have at least average intelligence, as well as diagnoses of either Asperger’s Syndrome or non-verbal learning disorders (NVLD). They may have other, related issues such as anxiety, mood disorders, or ADHD (Hays, P-19). Franklin Academy does not serve students with serious acting out or violent behavior and does not tolerate such behavior. The majority of students graduating from Franklin Academy attend college. (Hays)
2. Franklin Academy’s stated approach is to use both academic and residential settings to teach its students the self-regulation, social, and executive functioning skills they will need to manage their disabilities and function independently, especially in college. While advanced content classes are available, the school features slower pacing, presentation of material that accounts for visual-perceptual weaknesses, reduced numbers of transitions, use of technology, and small class sizes. For both academic and non-academic activities, Students are organized into teams of 16 to 24 students, served by a team comprising a learning specialist, residential dean, and counselor. Related services such as counseling, psychiatric consultation, social skills instruction and occupational and speech therapy are available. (P-19)
3. Franklin Academy embeds instruction and practice in social and life skills both within and outside of the regular school day, including in the residential component. The school views itself as providing a “safety net” to teach the life skills its student population may lack but will need in a college setting. (Hays)
4. Consistent with prior evaluators, Franklin Academy staff determined that Student had very strong skills in higher-level reasoning, impaired by decoding weaknesses and difficulty interpreting social situations. The former slowed down Student’s reading and writing performance considerably. The latter caused Student to withdraw from social interactions that he did not understand and rely on rigid rules to govern his actions. (P-19)
5. Franklin Academy addressed Student’s reading weaknesses with various accommodations (assistive technology, additional time for tasks, help in securing audio versions of books). As with all students, staff addressed social weaknesses with in-the-moment interventions during academic and non-academic/dormitory periods. (Hays, P-19)
6. Student was very successful at Franklin Academy during all relevant periods. He was placed academically in a high-level track. During 2010-2011, he earned high grades in all academic subjects, including an extra honors math course. For 2011-2012, corresponding to Student’s senior year, Student was enrolled in Franklin Academy’s “Fly” program, which allows for more student autonomy and attempts to replicate college life (including shared dorm rooms, and more freedom to choose classes). As in the prior year, Student was excelling academically in high-level classes at the time of the hearing. Socially, Student increased his involvement in school life (e.g., he was elected student body president) and his ability to self-advocate, but continued to struggle with understanding social nuances and resolving conflicts arising from his confusion. (Hays, P-19)
7. As of the hearing date, Student had been accepted at one college. (Parents)

**Program Proposed by the School**

1. For 2010-2011 and 2011-2012, Barnstable proposed placing Student at Southeast Alternative School (SAS). SAS is a DESE-approved private day school operated by Community Care Services, a large human-service provider. (Wyse) During the times at issue, SAS served approximately 22 high school aged students with average to above average intellectual ability and Asperger’s Syndrome or Asperger’s-like characteristics. (Wyse)
2. SAS shifted its focus to the above-described population about 5 or 6 years ago, from a focus on court-involved youth. The program has made physical modifications to its facility and conducted staff training to prepare for the current focus. (Wyse)
3. In addition to academic subjects, SAS provides individual and group counseling to all students, and does transition planning, including college counseling and assistance. (Wyse)
4. At the time of the hearing, there were three teachers at SAS. Two were certified in special education, one was teaching under a waiver, and none was certified in a content area. The school has no biology or chemistry labs. (Wyse)
5. At one time, SAS offered a dual enrollment program at Cape Cod Community College, but that program lost its funding. (Wyse)

**FINDINGS AND CONCLUSIONS**

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, et seq., and the Massachusetts special education statute, G.L. c. 71B (“Chapter 766”). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to his unique needs and potential, and is designed to provide ‘effective results’ and ‘demonstrable improvement’ in the educational and personal skills identified as special needs.” 34 C.F.R. 300.300(3)(ii); North Reading School Committee v. BSEA, 480 F. Supp. 2d 489 (D. Mass. 2007); citing Lenn v. Portland School Committee, 998 F.2d 1083 (1st Cir. 1993).

While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing “meaningful” educational benefit, in light of his potential. See Bd.of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 176, 201 (1982), Town of Burlington v. Dept. of Education, 736 F.2d 773, 789 (1st Cir. 1984); D.B., et al v. Esposito, et al., 675 F.3d 26, 34 (1st Cir. 2012) That is, a school must consider a child’s potential in determining whether an IEP is calculated to provide that child with FAPE. Rowley, supra, at 202, Lessard v. Wilton Lyndeborough Cooperative School District, 518 F3d 18, 29 (1st Cir. 2008).

Education must be provided in the least restrictive environment (LRE) consistent with an appropriate program; that is, students should be placed in more restrictive environments, such as private day or residential schools, only when the nature or severity of the child’s disability is such that the child cannot receive FAPE in a less restrictive setting. On the other hand, the opportunity to be educated with non-disabled students does not cure a program that otherwise is inappropriate. School Committee of Town of Burlington v. Dept. of Education of Mass., 471 U.S. 359 (1985).

A school may be required to reimburse parents for the cost of unilaterally placing a child in a private school, if the parents can demonstrate that (1) the school failed to offer the child an appropriate program and (2) that the placement provided by the parent is appropriate. Florence County School District Four v. Carter, 510 US 7, 13 (1993). Parents are not required to meet state education standards in making a unilateral placement, as long as the school chosen is capable of providing the student with FAPE; that is, the placement is “appropriately responsive to [a student’s] special needs,” so that the student can receive educational benefit. Matthew J. v. Mass. Dept. of Education, 989 F. Supp. at 387, 27 IDELR 339 at 343-344 (1998), citing Florence County , supra.

 In the instant case, Parents, as the parties challenging the program and services offered by the School, must demonstrate, by a preponderance of the evidence, that Barnstable failed to offer or provide the Student with an appropriate program for the 2010-2011 and 2011-2012 school years. If Parents meet that threshold, they must establish that the program they selected, Franklin Academy, was appropriate for the Student. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), Florence County, supra.

 The parties here are in substantial agreement on Student’s profile as a very intelligent young man with considerable academic potential whose educational progress is impeded by features of his Asperger’s Syndrome, namely, difficulty in reading, interpreting, and responding to verbal and non-verbal social cues, to resolving conflicts arising from this difficulty, and a tendency to be rigid and argumentative. Student’s academic progress also has been slowed by difficulties with decoding, encoding, and reading fluency. The only dispute is whether Barnstable’s proposed placement, the SAS, was appropriate for Student for the school years in question, and, if not, whether Franklin Academy was appropriate.

 Based on the evidence, I find that the Parents have met their burden for both school years at issue. My reasoning follows.

**2010-2011 School Year**

 The uncontroverted evidence on the record is despite having found Student eligible for special education in March and April 0f 2010, and reaching a consensus with Parents at that time that an outside placement would be sought, no placement was offered until early September 2010, when SAS notified Barnstable by phone that the Student would be an appropriate candidate. Neither SAS nor Barnstable ever made a formal placement proposal for SAS to Parents.

By this time, Student had already begun attending Franklin Academy. The “draft” IEP, which was the only IEP in existence at that time, essentially copied goals and objectives based on information from 2007 contained no placement page, and lacked a transition plan. Faced with the failure of SAS to respond to the referral packets throughout the summer of 2010, Barnstable did not take steps to ensure that an appropriate IEP and placement would be available at the start of the school year. Barnstable did not conduct updated assessments, agree to place Student at Franklin Academy (where it already had sent a referral packet and where Student was accepted as of June or July 2010) or locate any available, appropriate alternative to Franklin Academy.

 This failure to offer an appropriate, complete IEP and placement in a timely matter made the Parents’ action in placing the Student at Franklin Academy completely reasonable. Parents communicated with the School throughout the summer of 2010 regarding placements for Student, attempted, like the School, to reach SAS by telephone, and September 2010, took a tour of the SAS facility. Nonetheless, Parents faced the start of the 2010-2011 school year with no clear idea of where Barnstable proposed that Student attend school. Parents have effectively demonstrated Barnstable’s responsibility to reimburse them for an appropriate unilateral placement.[[2]](#footnote-2)

**2011-2012 School Year**

 Although the Team was prepared to convene in late August 2011, and did convene in early September, no IEP was issued until October 2011, after Student already had begun attending Franklin Academy for the second year. There was, thus, again, no Barnstable-proposed alternative to Franklin, available to Student at the beginning of the academic year. Further, even if I find that the Parents were well aware that the School intended to place Student at SAS, I find that the proposed SAS placement was not appropriate.

 Student is academically capable but has significant, neurologically based social disabilities. His transition plan calls for him to prepare for college, and his ability to live independently will likely depend, in large part, both on improvement of his social skills and on his ability to develop his area of strength via post high-school education. Based on the record, I must conclude that SAS is not capable of providing the level of course work that Student needs in order to provide Student with meaningful educational benefit in light of his potential. Student is capable of doing well in high-level courses, especially in math and science. For the periods at issue, SAS teachers were not certified in content areas. Advanced courses were available only on a limited basis. The social skills instruction offered by SAS might have been beneficial for Student, but does not make up for the academic shortcomings in light of Student’s potential and need for rigorous academics to progress toward self-sufficiency.

**Appropriateness of Placement Proposed by Parents**

The record shows that Franklin Academy is appropriate for Student, who made both academic and social gains while there. The record also establishes that like SAS, Franklin Academy is designed to serve students with Asperger’s Syndrome and similar disabilities, and gears its academic and social skills instruction to this population. Unlike SAS, however, Franklin Academy offers the level of academic challenge that Student needs to obtain meaningful educational benefit in light of his potential and make meaningful progress towards transition goals. While the record does not support a finding that Student could not receive FAPE in a non-residential setting, the Parents cannot be penalized for the School’s failure to propose an appropriate day school setting within commuting distance of Student’s home.

**ORDER**

 Upon receipt from Parents of appropriate documentation of expenditures, Barnstable shall reimburse Parents for their out-of-pocket tuition and related expenditures for Student’s placement at Franklin Academy for the 2010-2011 and 2011-2012 school years.[[3]](#footnote-3)

By the Hearing Officer:

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Sara Berman Date: September 7, 2012

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1. The original hearing request also named Cape Cod Regional Technical School (Cape Cod Tech.) as a responding school district. By order dated June 9, 2011, the original hearing officer in this matter, Rosa Figueroa, Dismissed Cape Cod Tech. as a party, with prejudice. This matter was administratively reassigned to the current hearing officer in November 2011. [↑](#footnote-ref-1)
2. Reimbursement is not barred by the absence of an explicit letter of intent to unilaterally place Student as the School was clearly on notice in from counsel’s letter of June 1, 2010 that Parents had paid a deposit to Franklin Academy, and would need to make further payments. See Para. 12, above. Further, the School has made no showing to the contrary, and has made no showing of any prejudice resulting from the lack of formal written notice. [↑](#footnote-ref-2)
3. In their hearing request, Parents requested findings fact on issues pertaining to a potential future damages claim under Section 504 of the Rehabilitation Act. Because this Decision provides the Parents with all relief, supported by the record, that I am authorized to provide under the IDEA, I decline to make such findings at this time. [↑](#footnote-ref-3)