**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

# **In Re: Leominster Public Schools BSEA #11-5123**

##

## **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.

The Student in this case is a fourteen-year-old child diagnosed with Pervasive Developmental Disorder (PDD) as well as a seizure disorder. At all relevant times, Student has been attending a private, special education day school funded by the Leominster Public Schools (Leominster or School). While Parents have consented to this placement, they did not accept the goals and objectives in the corresponding IEP issued by Leominster which covered the period from December 2010 to December 2011, and also had disputes with Leominster over procedural matters. Parents contended that pending resolution of their disputes with Leominster, they and Student were entitled to “stay put” services based on an IEP from Haverhill, where the family had lived before moving to Leominster.

On February 8, 2011, Leominster requested a hearing before the Bureau of Special Education Appeals (BSEA), seeking a determination that (1) the IEP referred to above was reasonably calculated to provide the Student with a free, appropriate public education (FAPE) in the least restrictive environment (LRE); and (2) Parents were not entitled to “stay put” rights to the contents of the previous IEP drafter by the Haverhill Public Schools.

After several postponements requested by the parties and granted for good cause, the hearing took place on July 13 and 14, 2011 at the offices of the Leominster Public Schools and telephonically at the office of the BSEA in Malden on June 21, 2012[[1]](#footnote-1) The School was represented by counsel, and the Parents proceeded pro se. Both parties had an opportunity to examine and cross examine witnesses. The record consists of School's exhibits S-1 through S-46, Parents' exhibits P-1 through P-14 and P-16 through P-24 (P-15 was excluded as irrelevant), several hours of tape recorded testimony and the transcript created by the court reporter. Parents' closing argument was presented on June 21, 2012 and the record closed on that day.

 Those present for some or all of the hearing were the following:

 Student's Father

 Student's Mother (by speaker phone)

 Jan Bolton Educational Administrator, Darnell School

 Jennifer Platt Student's Teacher, Darnell School

 Michele Mayer Clinical Director, Darnell School

 Susan Brown Former Out of District Liaison, Leominster P.S.[[2]](#footnote-2) Courtney Muller Adminstrator of Special Education and Pupil Personnel Services, Leominster Public Schools

 Regina W. Tate, Esq. Counsel for Leominster Public Schools

 Brenda M. Ginisi Court Reporter

**ISSUES**

* + 1. Whether the Leominster's proposed IEP for December 2010 to December 2011 was reasonably calculated to provide the Student with FAPE in the LRE, or whether Student required an extended school day to receive FAPE;
		2. Whether the Parents and Student were entitled to the contents of a former IEP issued by Haverhill as “stay put” services pending resolution of this matter.

**POSITION OF THE SCHOOL**

 The IEP at issue addressed all of Student's documented areas of need, including modified academics, communication, daily living skills, behavior, and social skills, and contained measurable goals and objectives. Moreover, this IEP was to be implemented within Student's accepted private day school placement, the Darnell School, which has provided Student with intensive, structured, individualized ABA-based instruction, and where Student has made very good progress in light of his needs and potential.

**POSITION OF THE PARENTS**

 Leominster's IEP was developed without meaningful participation from Parents and without adequate attention to Student's complex educational, health and safety needs. Parents have been denied access to direct communication with providers, which compromised Student's safety. Shortly after Student was accepted at the Darnell School, his classroom teacher left, and Student was expected to attend anyway, before adequate arrangements had been made to transition to a new teacher. Student was entitled to have Leominster implement his prior, Haverhill IEP, which addressed his safety needs, until an appropriate IEP could be drafted and implemented.

**FACTS**

1. Student is a fourteen-year-old boy who lives with his family within the district served by the Leominster Public Schools. Student's eligibility for special education and related services is not in dispute.

1. Student has a well-documented diagnosis of PDD-NOS, as well as a seizure disorder. Student's disabilities affect virtual all areas of his life, including communication, academic performance, self-care, self-direction, and social interaction. Student communicates with Mayer-Johnson picture symbols, an augmentive communication device called a “Mini-Auggie,”gestures, word approximations, and some manual signs. (Bolton, Platt) Standarized testing administered in late 2010, when Student was 12 years old, indicated that Student had some skills in the under-5 to 7 year old range (general information, reading comprehension, and math, as measured by the PIAT-R) At that time, he was able to identify one color, 10 uppercase letters, 7 lowercase letters, and 9 numbers. He obtained a standard score of 62 on the Vineland Adaptive Behavior Scale, Teacher Rating Form. As of the time of hearing, Student was in the process of being toilet trained. (S-18)
2. Student has strengths in the areas of imitation, receptive language, and learning from visual information. He enjoys learning, is outgoing, happy-natured and playful, and enjoys being with peers. He enjoys many activities, including Legos and computer games. He is able to sit and focus on a task he is interested in for up to half an hour. (Bolton, Platt, Mayer S-18) He has had some interfering behaviors, including coming too close to others when he wants to interact, flopping on the ground, “bolting;” i.e., moving quickly away from the area in which he is supposed to be; resisting transitioning between activities, and non-compliance with teacher directions. While he has occasionally hit adults as a component of non-compliance, and in the past has gotten a little too rough when trying to interact with peers, he does not currently have any major difficulties with aggression. (Bolton, Platt, Mayer, P-5o )
3. Before moving to Leominster in 2010, Student lived in Haverhill and attended the Haverhill Public Schools. For the 2007-2008 and 2008-2009 school years, Student attended a substantially-separate “Developmental Support” classroom in Haverhill. (P-5)
4. In June of 2009, at the end of Student's fourth grade year, Haverhill proposed a change of placement to the TEACH program, which is a substantially separate public school program for students on the autism spectrum. The IEP issued at that time, which covered the period from October 2009 to October 2010, called for, among other things: 1:1 support throughout the day, structured social skill opportunities, a total communication approach, multi-sensory teaching, a functional approach to teaching, opportunities to repeat and generalize, positive reinforcement, and regular communication with Parents. In addition to the substantially separate classroom, this IEP called for weekly 30-minute pullout sessions of occupational therapy, speech therapy, and adaptive physical education. (P-6) This IEP also provided for extended day (until 5 pm 4 days per week) and extended school year (8 weeks) services. (P-6)

6. Parents consented to the placement and accepted many of the services in the IEP, but disagreed with some services. As a result of mediation by a BSEA mediator as well as updated evaluations, Haverhill made modifications to this IEP during the 2009-2010 school year during which Student attended the TEACH program. In late April, 2010, Parent accepted the entire IEP and placement, and also notified Haverhill that the family would be moving out of that district in May 2010. (P-9)

1. Parents and Student moved to Leominster on or about May 1, 2010, and shortly thereafter, Father enrolled Student in the Leominster Public Schools. For a variety of reasons, Student's school records from Haverhill were not initially made available to Leominster, but Parent did provide Leominster with the IEP referred to above. (Muller)
2. Leominster did not have an in-house program comparable to the Haverhill TEACH program; therefore, almost immediately after Parent enrolled Student in the Leominster Public Schools, Leominster sent redacted referral information to two collaboratives of which it is a member, CAPS and FLACC, which would have programs similar to the one in Haverhill. The information was incomplete because Leominster still did not have records from Haverhill, and redacted, because Parents had refused to authorize Leominster to send information to prospective placements. (Muller)
3. Parent visited both the FLACC program and two CAPS programs suggested by Leominster. Parents and School agreed that the FLACC program was not appropriate. The School felt that one of the CAPS programs, located in a public middle school, would be appropriate. Parents felt that while the program itself was appropriate, the location of the program in the midst of a public middle school, would not be workable for Student. By this time it was mid-June 2010, and Student still had not started school. The School urged Parents to enroll the Student in the CAPS program for the summer of 2010, since only CAPS students would be in the building during the summer months. Parents declined, and informed the School that they would be home-schooling Student. (Muller, S-26)
4. In August 2011, Leominster convened a Team meeting at which it offered placements at both the CAPS programs and at the private Darnell School. (Muller, S-8)
5. The Darnell School, located in Hudson, MA, is a private, Chapter 766-approved day school designed for children aged 9 to 22 with autism spectrum disorders and other developmental disabilities. Darnell provides intensive educational and behavioral services using the frameworks of Applied Behavioral Analysis (ABA). Darnell is part of the children's services division of HMEA, which is a large provider of services to children and adults with disabilities. (Bolton)

1. Darnell has a capacity to educate 18 students. As of the hearing date, Darnell had a student population of 12, divided among 3 classrooms. The classroom to which Student was assigned had available to it, in addition to the class teacher, a Board Certified Behavior Analyst (BCBA) and several aides. For therapies (OT, PT, Speech) Darnell generally uses a consultative model, rather than having students removed from the classroom. (Bolton)
2. Darnell's school year is 221 days; the summer programming is a continuation of the instruction delivered during the regular academic year. There also is an optional home component, under which students are released 2 hours early and accompanied home by a teacher to work on skills in the home setting. (Bolton)
3. The Darnell program accepted Student in early September 2010, but indicated that it would not be ready for Student to start there, because, among other things, staff had to be hired and trained. (Bolton, Muller, S-26) Leominster offered interim services at the FLACC collaborative, so that Student could receive some services until the Darnell placement was ready.
4. Parents were prepared to allow Student to attend a FLACC program already attended by their other child; however, Student was too old to attend this program, and Parents felt that a different FLACC, program designed for students of Student's age, was not appropriate. (Muller)
5. Student actually began attending the Darnell School program in mid-October 2010. (Bolton)
6. In November and December 2010, the Darnell School conducted evaluations in preparation for development of a new IEP. These evaluations included an educational and behavioral assessment, initial assessments in speech/language and occupational therapy (OT), and a physical therapy (PT). In sum, the evaluations recommended skill development and acquisition in the areas of communication, basic academic skills, safety skills, self-management, daily living skills, and behavioral self-control. Additionally, the speech/language evaluation recommended speech/language consultation as well as work on use of the voice output device, work on improvement in expressive language. The OT evaluation recommended ongoing consultation to the class teacher, and the PT evaluation recommended participation in structured games and physical skill instruction. (S-13 – S-16).
7. Leominster convened a Team meeting on December 15, 2010 to develop the IEP that is at issue in this hearing. This IEP called for continued placement at the Darnell School. Accommodations included: 1:1 staff to student ratio; a behavior support plan; use of ABA techniques; total communication approach (signs, pictures, speech, voice output devices); visual aids and supports, visual and verbal prompting; and a structured environment. (S-18) The designated methodology for delivery of instruction was ABA: “The principles of Applied Behavior Analysis are the overreaching foundation for all of [Student's] programming..” Curriculum was to be modified and individualized to develop “skills to access content areas as close to grade level as possible.” A skill would be considered mastered when Student was able to demonstrate it across settings, people, and over time. (S-18)
8. The IEP contained goals for reducing maladaptive behavior, teaching daily living skills (including toileting and hygiene), improving communication, teaching functional academics, improving community safety awareness, developing independent leisure skills, and teaching self-management (i.e., independently following a daily schedule) (S- As stated above, the program runs for 221 days per year. There is an optional home training component, but Parents have not chosen to participate in it. (Bolton, S-18)
9. On January 10, 2011, Parents accepted the placement but rejected the remainder of the IEP and requested implementation of the April 2010 IEP from Haverhill. (S-18)
10. The relationship between Parents and Leominster has been strained almost since Student moved to Leominster. Parents felt that Leominster did not give adequate advance notice of Team meetings, convened Teams that were not properly constituted, improperly failed to implement the extended day services (among other things) that were provided by the Haverhill IEP, excluded Parents from the decision-making process, and made placement decisions without regard for the Student's safety and well-being. Parents refused to attend certain Team meetings. On two occasions—in June 2010 and January 2011, Parents kept Student out of school for a period of time because they felt he was not safe there, not because of a particular incident or condition, but because they felt that the School had not put adequate safeguards in place. (S-39 – S-42)
11. In fact, the School made multiple attempts to schedule Team meetings at times convenient for the Parents, including inviting them to participate by telephone if necessary. The Parent refused to participate in the December 2010 Team meeting to develop the IEP at issue. (Brown) The parties had at least one mediation session with the BSEA mediator and the School attempted to set up at least one facilitated Team meeting with the BSEA Mediation Coordinator.
12. Meanwhile, Student made progress in the Darnell program as reflected in improvements in targeted skill areas and reductions in maladaptive behaviors. (Platt, Mayer, Bolton)

**DISCUSSION AND CONCLUSION**

 After careful review of the testimony and exhibits, I conclude that the School has demonstrated that the IEP and placement for December 2010 to December 2011 were reasonably calculated to provide Student with FAPE in the least restrictive environment. The IEP addressed all identified areas of need, contained measurable goals and objectives, called for 1:1 instruction for much of the school day, and used methodologies (including ABA) designed for students on the autism spectrum. Moreover, the IEP was designed by the staff of the Darnell School, the placement that Parents had accepted. Even without full implementation of the goals and objectives of the IEP, the parties do not dispute that Student was making good progress at Darnell. It is reasonable to infer that Student would have made even more progress if the IEP had been implemented.

 Leominster's obligations to Student prior to its offer of the Darnell placement are governed by 603 CMR 28.03(1)(c) which provides that when an eligible student changes residence, “the last IEP written by the former school district and accepted by the parent shall be provided in a comparable setting without delay until a new IEP is developed and accepted.” While a parent does not necessarily have the right—under principles of “stay put” or pursuant to this regulation—to a precise replication of the previous IEP, the parent and student do have the right to receive services in a “comparable” setting, until a new IEP is both developed and accepted.

 In the instant case, Student's Haverhill placement had been in a substantially separate setting operated by the Haverhill Public Schools. Since Leominster did not have such a program in-house, it offered immediate placement in a collaborative. The record contains little or no information about the programs and services offered in either the CAPS program, which was offered for the summer of 2010 and which Parent felt would be appropriate but for its location in a public school, or the FLACC program offered as an interim placement for the period before the Darnell School was ready for Student to start attending. The record contains no information about the services, approach, methodologies, or population served by the placements in question. Under such circumstances, I can make no findings as to whether the “interim” programs were “comparable” to Haverhill's program, and must find that the School has not met its burden on this issue.

 The School's failure to meet its burden of proof on this issue does not give rise to an entitlement to compensatory service, however. It is clear that Leominster made great efforts to get the Student involved in an educational program as quickly as possible, and was very flexible in terms of scheduling and rescheduling Team meetings, and participating in mediation and facilitated Team meetings in order to achieve this objective. It also is clear that Parents' conduct interfered with Leominster's efforts. At the outset, Leominster's ability to implement a program “comparable” to Haverhill's was hampered by Parents' refusal to allow Haverhill to release records to Leominster. Similarly, Parents' refusal to participate in certain Team meetings, statements that they intended to home-school Student, and similar actions derailed any attempts to implement Haverhill's program, and undermine any claim for compensatory relief.

 On the other hand, the record indicates that the Darnell program was, in fact comparable to the Haverhill TEACH program not because it is identical—it is not—but because it is a full-day, full-year, intensive educational program specifically designed to serve children on the autism spectrum; therefore, Parents are not entitled to compensatory service attributable to any time after Student was placed at Darnell.

**ORDER**

 For the reasons stated above, the IEP proposed by Leominster for the period December 2010 to December 2011 was and is appropriate. The School has not demonstrated that the CAPS and FLACC programs offered to the Student were comparable to the services Student was receiving in Haverhill. Parents are not entitled to compensatory service, however, in light of their own actions which tended to impede the School's ability to provide immediate help to Student.

By the Hearing Officer:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Sara Berman

1. The lengthy gap was the result of serious illness of one of the Parents. [↑](#footnote-ref-1)
2. Ms. Brown was no longer employed by Leominster as of the hearing date. [↑](#footnote-ref-2)