**COMMONWEALTH OF MASSACHUSETTS**

**Division of Administrative Law Appeals**

**Bureau of Special Education Appeals**

**In Re: Ford[[1]](#footnote-1) Charter School BSEA #11-5882 & #12-2883**

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A) and the regulations promulgated under these statutes.

A Hearing was held on November 28 and 30, 2011 and January 3 and 9, 2012 in Worcester, MA before Ann F. Scannell, Hearing Officer. Those present for all or part of the Hearing were:

Cole’s[[2]](#footnote-2) Parents

Jill Yvon Academic Coordinator, Ford Charter School

Eleni Rock Math Teacher, Ford Charter School

Angela Esh School Psychologist, Ford Charter School

Deborah Worten School Counselor, Ford Charter School

William Foley Head Supervisor, Ford Charter School

Frank Hurrye Student Management Coordinator, Ford Charter School

Andrea Salvas Academic Quality Control, Ford Charter School

Karen Reuter Director, Ford Charter School

Garrett Colson Advocate, Parents

Peter Smith Attorney, Ford Charter School

Brenda Ginisi Court Reporter

The official record of the Hearing consists of documents submitted by Ford Charter School (“Ford”) and marked as Exhibits S-1 through S-40, documents submitted by the parents and marked as Exhibits P-1 through P-28, and four days of oral testimony. Written closing arguments were submitted on March 1, 2012[[3]](#footnote-3) and the record closed on that date.

**INTRODUCTION**

Cole is a 13 year old boy who lives with his family in Springfield. He is an eighth grade student at Ford. Cole has been a student at Ford since 6th grade. Cole has had difficulty controlling his behavior while a student at Ford. He lacks anger control, acts impulsively and has used inappropriate and sexualized language and behavior towards his peers. Cole has not been identified as a special education student.

On March 8, 2011, Cole’s parents filed a Request for Hearing with the Bureau of Special Education Appeals (“BSEA”) seeking an order from the BSEA finding Cole eligible for special education services, or accommodations under section 504, if not found eligible for special education services. The parents further sought compensatory damages for Ford’s failure to provide Cole a free, appropriate public education (“FAPE”) as a result of procedural violations[[4]](#footnote-4).

Ford filed a response to the parents’ Request for Hearing on March 22, 2012. Ford argued that Cole was not entitled to special education services or accommodations pursuant to section 504 of the Rehabilitation Act and therefore at no time denied a FAPE.

Subsequently a prehearing conference was requested by the parents. The conference went forward on September 16, 2011, at which time the matter was scheduled for Hearing on November 15 and 16, 2011.

The parents filed an amended Hearing Request on September 26, 2011. This Hearing Request contained additional factual information and an additional issue involving transportation expenses. Ford filed a Motion to Join Springfield Public Schools. This motion was opposed by Springfield Public Schools and the parents.[[5]](#footnote-5)

On October 24, 2011, Ford received a request from the parents for an expedited health assessment for Cole. On October 25, 2011, Ford filed a Request for Hearing seeking an order from the BSEA denying the health assessment on the grounds that Ford’s evaluations were comprehensive and appropriate. The parents requested that this new matter (BSEA# 12-2883) be consolidated with the pending matter (BSEA # 11-5882). Ford assented to the parents’ request. These matters were consolidated and the Hearing remained scheduled for November 15 and 16, 2011.[[6]](#footnote-6) This matter was administratively reassigned to Hearing Officer Ann F. Scannell on November 7, 2011.

On November 9, 2011, the parents requested a postponement of the Hearing. Ford opposed the request. A conference call was held with the parties on November 11, 2011. The Hearing was postponed to November 28 and 30, 2011.[[7]](#footnote-7) The matter proceeded to Hearing on November 28 and 30, 2011 and January 3 and 9, 2012.

**ISSUES**

The issues to be decided in this matter are:

1. Whether the school district improperly determined that Cole was not eligible for special education services;
2. Whether the school district improperly determined that Cole was ineligible for accommodations pursuant to section 504 of the Rehabilitation Act of 1973; and,
3. Whether the school district committed procedural and substantive violations that denied Cole a FAPE.

**FACTS**

Cole is a 13 year old boy who lives with his parents and brother in Springfield. He attended Springfield Public Schools through 5th grade. In September of 2009, Cole began 6th grade at the local charter school. He is currently an 8th grader at Ford. Cole did not receive any special education services while in the Springfield Public Schools or at Ford. His academic abilities fall in the average to high average range. Cole’s overall intellectual quotient (“IQ”) falls in the superior range (120). (Exhibits P-9 and S-2 and testimony of Esh and Cole’s parents)

Although Cole has maintained C and B grades while a student at Ford, he has had behavioral issues that have resulted in both in-house and out of school suspensions. During the 6th grade, Cole exhibited inappropriate behavior numerous times which resulted in suspension of extra-curricular activities, out of school suspensions and attendance at Saturday Academy. This behavior included fighting with peers, bullying, inappropriate touching of peers, sexualized language towards peers, and disrespectful behavior towards school staff. Cole received academic probation on numerous occasions for missing assignments and being unprepared for class. (Exhibits P-15 and 17 and S-6, 7, 11 and 33 and testimony of Hurrye, Foley and Cole’s parents)

Cole was suspended from school for two days in early April 2010 for his chronic disruptive behavior. Cole had recently verbally abused a student, wrote on him and was disrespectful to staff. During the remainder of the month, staff received several reports that Cole had made sexually offensive comments to other students on more than one occasion. A parent reported that Cole had inappropriately touched her son, who was Cole’s classmate. On May 4, 2010, as a result of these incidents, Ford requested the parents’ consent to conduct a risk assessment of Cole. The parents consented to the assessment on May 5, 2010. (Exhibits P-1 and 15 and S-7 and 14 and testimony of Hurrye, Worten and Cole’s parents)

On May 6, 2010, Cole was suspended from school for 7 days for inappropriately touching another student.[[8]](#footnote-8) A police report was also filed. On May 10, 2010, Ford sent Cole’s parents notice that a hearing would be held on May 13, 2010 to determine if Cole had violated Rule 9 of the Student Code of Conduct for sexual misconduct. The notice further stated that a “manifestation determination,”[[9]](#footnote-9) team meeting and placement review would be held at this time. No determination was made at the meeting because there were no current assessments of Cole to review. A student safety plan was developed for Cole. (Exhibits P-4 and 15 and S-7, 15 and 32 and testimony of Hurrye, Worten, Foley and Cole’s parents)

Cole’s student safety plan called for an in-house suspension, that is, removing Cole from the regular classroom until his risk assessment was completed. Cole’s parents consented to this safety plan on May 17, 2010. Under the agreed upon safety plan, Cole would receive all of his class work and instruction in the in-house classroom. He would receive an escort to and from the bus. He was assigned a single seat on the bus behind the driver. He would also meet with the school counselor. Cole’s plan would be reviewed upon receipt of the risk assessment. (Exhibits P-25 and S-15 and 17 and testimony of Hurrye, Foley and Cole’s parents)

Rebecca Anderson, Ph.D conducted a risk assessment of Cole on May 20, 2010. Dr. Anderson used various rating scales to assess Cole, including the Adolescent Psychopathy Score (“APS”), the Children’s Depression Scale (“CDS”), the Trauma Symptom Inventory, the Connors Rating Scale, the Behavior Assessment System for Children (“BASC”) and the Estimate of Risk of Adolescent Sexual Offense Recidivism (“ERASOR”). She also interviewed Cole and reviewed his school records. (Exhibits P-2 and S-1)

Cole told Dr. Anderson that he has anger problems, difficulty sleeping, attention difficulties and difficulty controlling his impulses. He told her he enjoys basketball and video games. Cole denied the allegations that precipitated the risk assessment. (Exhibits P-2 and S-1)

After reviewing her findings, Dr. Anderson opined that Cole presents at low to moderate risk for sexual reoffending. She noted that the rating scale completed by one of Cole’s teachers indicated clinically significant scores for oppositional behavior, aggression and hyperactivity. Another teacher’s scores were significant for social concerns and withdrawal from others. Both teachers’ responses identified concerns that Cole seems unaware of others and acts strangely. Cole’s parents’ responses were unremarkable. Cole’s responses suggested he had concerns with sleeping, depersonalization and mild panic symptoms. He also reported concerns with his appearance, dissatisfaction with himself, and social problems with peers at school. Dr. Anderson noted that Cole has difficulty with attention and impulsivity, although this was not consistent across all settings. (Exhibits P-2 and S-1)

Dr. Anderson recommended that Cole receive sexual offense specific treatment focused on altering his sexualized language, addressing his impulsivity and interpersonal difficulties at school and providing him with education on appropriate sexual boundaries, non-abusive sexual behavior, and healthy masculinity. She felt that Cole would also benefit from anger management and impulse control training. If found innocent of the impending sexual charges, however, Dr. Anderson emphasized that the sexual offender treatment would not be necessary. Cole would, however, still benefit from counseling to address his difficulties with anger and impulse control. (Exhibits P-2 and S-1)

A meeting was held on June 9, 2010 to discuss Dr. Anderson’s risk assessment and develop a plan of action. There was agreement that Cole would remain on the safety plan for the remainder of the school year and into the start of school year 2010-2011, until the school received information from Cole’s outside therapist. The team planned to reconvene when this information was received. On June 29, 2010, Cole, his parents and outside therapist Jennifer Stodulski, developed an action plan to address Cole’s difficulties with anger and aggression. Cole underwent outside therapy until December 16, 2010 when he was discharged from treatment. At the time of discharge, Cole was diagnosed with an Adjustment Disorder with anxiety.[[10]](#footnote-10) (Exhibits P-5, 8 and 19 and S-13 and 21 and testimony of Hurrye, Foley and Cole’s parents)

When Cole returned to Ford in September of 2010 to start 7th grade, his safety plan remained in place. Cole remained in the in-house classroom where he received his class work and tutoring. Beginning in October 2010, the plan was revised to allow Cole to eat lunch with his peers. His privilege to ride the bus, however, was terminated indefinitely after Cole assaulted another student on the bus. Cole was suspended from school for 10 days following this incident. (Exhibits P-16 and 23 and S-16 and 32 and testimony of Foley and Cole’s parents)

At about the same time, in the fall of 2010, Cole’s parents were pursuing an outside risk assessment with Daniel Pilachowski. This assessment was funded by the school. The assessment was not completed, however, until January 12, 2011. During this time, Cole remained in in-house suspension. (Exhibits S-16 and S-31 and P-7 and P-25 and testimony of Foley and Cole’s parents)

In assessing Cole, Mr. Pilachowski gathered information from Cole’s parents, Cole, Jennifer Stodulski, William Foley and other Ford staff. He also utilized various testing instruments including the Adolescent Cognitions Scale, the Adolescent Sexual Interest Card Sort and the Jesness Inventory. Mr. Pilachowski opined that Cole does not present as a child who is sexually reactive, sexually aggressive, sexually compulsive, or group influenced to be sexually inappropriate. Mr. Pilachowski stated that Cole’s sexually inappropriate behavior is best described as experimental. (Exhibits P-7 and S-31)

Mr. Pilachowski made several recommendations. He suggested that Cole undergo formal anger management training, spend more quality time with his father and develop a healthy support network. Mr. Pilachowski supported the safety plan developed by Ford and the recommendation for family therapy to learn to communicate better. He did not recommend specific treatment for sex offending behaviors because Cole was not yet sexually active. (Exhibits P-7 and S-31)

On January 28, 2011, a meeting was held to develop a transition plan to move Cole from in-house suspension back to the regular education classroom. The proposed plan called for Cole to begin transitioning on January 31, 2011 and fully return to the regular classroom by February 28, 2011. Cole would eat lunch with his peers, check-in with his homeroom teacher or in-house staff when he had no assigned first period class and receive weekly counseling with school counselor, Deborah Worten. The plan also proposed that Cole meet with Dr. Skeene[[11]](#footnote-11) once per week. Cole’s parents did not agree to have Cole meet with Dr. Skeene and therefore did not sign the proposed plan. A revised plan was subsequently offered. Cole’s parents signed this plan on February 11, 2011. (Exhibits P-22 and testimony of Cole’s parents)

Cole’s parents filed a Request for Hearing on March 8, 2011 and a resolution meeting was held on March 23, 2011. The parties agreed that Cole would undergo a school based comprehensive evaluation, including cognitive testing, academic testing and a functional behavioral assessment. Following these evaluations, the team would reconvene to discuss eligibility for special education services or accommodations pursuant to a 504 plan. (Exhibits P-23 and S-34 and testimony of Reuter, Foley, Salvas, Yvon, Esh and Cole’s parents)

On March 24, 2011, Ford’s school psychologist, Angela Esh, conducted a psychoeducational evaluation of Cole. She utilized the Wechsler Individual Achievement Test (“WIAT”), the Wechsler Intelligence Scale for Children (“WISC”), the Behavior Assessment Scale for Children (“BASC”), the Vineland Adaptive Behavior Scale (“VABS”), the Childhood Depression Inventory (“CDI”) and the Scale for Assessing Emotional Disturbance (“SAED”). She also observed Cole in class and received teacher input. (Exhibits P-9 and S-2 and testimony of Esh)

Cole obtained a full scale IQ score of 120 (superior range) and overall demonstrated average to above average academic skills. Ms. Esh found no evidence of a learning disability. Despite some elevated ratings by the parents, Cole’s teachers and Cole, Ms. Esh opined that Cole does not have an emotional impairment. She further opined based on her results, that Cole had the adaptive skills to function in the school environment. In her opinion, Cole did not qualify as a student with a disability. Based on Cole’s history of behavioral difficulties, however, Ms. Esh did recommend implementing a behavior support plan, with preferential seating and access to the school counselor. (Exhibits P-9 and S-2 and testimony of Esh)

Deborah Worten, Ford’s school counselor, conducted a functional behavioral assessment of Cole in the spring of 2011. The target behaviors included anger control, impulse control and inappropriate language and behavior. These behaviors were noted by staff to occur in the cafeteria and during lecture time. Cole had been referred for 23 infractions and 11 of those infractions were for academic reasons, (ie. not being prepared for class, missing homework). (Exhibits P-11 and S-27 and testimony of Worten)

On April 14, 2011, the TEAM met to discuss these evaluations and Cole’s eligibility for special education services. The TEAM concluded that Cole manifested no specific learning disability and no emotional impairment. Cole was found ineligible for special education services and ineligible for a 504 plan. It was recommended that a behavior support plan be put in place for Cole. Ms. Worten composed a behavior intervention plan to address these targeted behaviors. Cole would report to the in-house classroom when he exhibited disruptive behavior, his student life activities would be modified if he was involved in conflict with one identified student, his fatigue would be addressed by monitoring his use of Lorazapan, and he would report conflicts with students to the staff and discuss these conflicts with his school counselor. Cole’s parents have not agreed with the plan. (Exhibits P-24 and S-24, 25 and 26 and testimony of Reuter, Worten, Yvon, Salves, Hurrye, Foley and Cole’s parents)

Cole continued to exhibit some inappropriate behavior during the spring of 2011. None of this behavior, however, resulted in any out of school suspensions. Cole maintained a 77 academic average in his classes for the second term of 2010-2011. Presently, Cole remains at Ford in 8th grade regular education classes. (Exhibits P-16 and 17 and S-33 and testimony of Hurrye, Worten and Cole’s parents)

**DISCUSSION**

Cole has difficulty regulating his behavior at home and in school. He has exhibited inappropriate and disruptive behavior at school which has resulted in out of school suspensions, police involvement and social services involvement. Some of this inappropriate behavior includes sexualized language and inappropriate touching. Cole’s parents argue that Cole requires an individualized Education Program (“IEP”) to address his behaviors. Ford contends that Cole has no qualifying disability that requires special education services, and even if he had a qualifying disability, he is making effective progress in school. Therefore, Ford argues that no IEP is required.

Cole attended Springfield Public Schools prior to enrolling in Ford in the fall of 2009. At no time has Cole received special education services. The staff from Ford testified that he is making effective progress in the regular education classroom, and although his behavior is problematic at times, Cole is not eligible for special education services.

Cole’s parents further argue that if Cole is not entitled to special education services, he is entitled to accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (“Section 504”). Ford contends that Cole is not entitled to section 504 accommodations because he does not have an eligible impairment and, even if he did, there is no substantial impairment to his major life activity of learning.

The parents have the burden of persuasion in this matter to show that Ford improperly determined that Cole was ineligible for special education services and ineligible for Section 504 accommodations.[[12]](#footnote-12)

Determining eligibility for special education services is a two-part process; M.G.L. c. 71B § 1, 603 C.M.R. § 28.104.0a. First, a student must be found to have a disability, which, as defined by state and federal law, encompasses a number of specifically enumerated conditions, *to wit:* developmental delay, intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment; *see* M.G.L. c. 71B § 1, 20 U.S.C. § 1401(a)(1)(A)(i); 603 C.M.R. § 28.104.0b(i); Massachusetts Department of Education, Eligibility Guidelines for Special Education, 1994.

Although the finding of a disability is always a predicate to receiving special education services, it is not, by itself sufficient to trigger eligibility. In order for a child to be eligible for special education, it must also be shown that because of the identified disability, the student is unable to progress effectively [[13]](#footnote-13) in the general education program without specially designed instruction or is unable to access the general curriculum without a related service.[[14]](#footnote-14)

Turning to the first issue as to whether Ford improperly determined that Cole was ineligible for special education services, I find that the parents have failed to sustain their burden of proof in this regard. The testimony was not persuasive that Cole has a defined disability pursuant to federal and state special education law. Assuming arguendo that the parents had established that Cole had a qualified disability, I am not persuaded by the evidence that Cole is unable to progress effectively in the general education program.

The parents produced letters from some of Cole’s health care providers that indicated particular diagnoses, including adjustment disorder with anxiety and disruptive behavior disorder.[[15]](#footnote-15) None of these individuals, however, stated that Cole had an emotional impairment as that term is defined by federal and state special education law.[[16]](#footnote-16) Rebecca Anderson, Ph.D. who conducted a sexual risk assessment with Cole in May of 2010, opined that Cole was not displaying a clear pattern of symptoms that would indicate an emotional impairment. She further opined that Cole was displaying symptoms indicative of a Disruptive Behavior Disorder Not Otherwise Specified. The second risk assessment completed by Daniel Pilachowski concurred that Cole did not have an emotional impairment. In addition, Ford’s school psychologist, Ms. Esh, testified that the results of her assessment of Cole did not indicate that Cole had an emotional impairment. Ms. Esh utilized various assessment tools, reviewed prior assessments of Cole, received teacher and parent input and conducted a comprehensive assessment. All of this information, including letters from Cole’s providers, two risk assessments, Ms. Esh’s evaluation and Ms. Worten’s Functional Behavioral Assessment was considered by the TEAM in making its determination that Cole was not eligible for an IEP or a 504 plan.

Although, there was some evidence regarding Cole’s impulsivity and some attention difficulty, there was no persuasive evidence that Cole had Attention Deficit Hyperactivity Disorder (“ADHD”) which is defined as “other health impairment” pursuant to state and federal special education law. In fact, Dr. Wondriska, Cole’s treating physician, formally assessed Cole for ADHD in June of 2010 and concluded that he did not meet the criteria for an ADHD diagnosis.

Even if the parents had presented persuasive evidence that Cole has a qualifying disability, the evidence was not persuasive that Cole is unable to progress effectively in the general education program. Cole is in the regular education classroom and is able to effectively access the curriculum. His math teacher, e.g., testified that Cole has no difficulty with the math curriculum. She described Cole as very bright. All testimony from Ford staff indicated that Cole was making academic progress commensurate with his cognitive profile.

Cole’s parents argued that Cole is not progressing effectively because he is not making documented growth in the acquisition and knowledge of social and emotional skills. They rely on the number of behavioral problems he has experienced at school and the fact that Cole was confined to in-house suspension from May of 2010 to February of 2011 to support their argument that Cole is not making social and emotional progress. The length of his confinement in in-house suspension was not due to continuing behavioral issues, but rather the delay in completing the two risk assessments (When Cole entered in-house suspension, the school and parents agreed that he would remain there until a sexual risk assessment was conducted. Dr. Anderson completed the assessment on May 20, 2010 and the results were discussed at a meeting shortly thereafter on June 9, 2010. Cole remained in in-house suspension while his parents sought a second assessment, completed in January 2011. Once Mr. Pilachowski completed his assessment, Cole’s plan was modified and he transitioned into the regular education program). The testimony was persuasive that Cole’s team met promptly and modified his plan once the risk assessments were completed and there was consensus that he was not a risk to other students.

To support their argument further, the parents rely on additional behavioral incidents subsequent to his release from in-house suspension. The mere fact that Cole has had a few additional behavioral issues following his release from in-house suspension does not in and of itself establish that Cole was not making effective progress in his social and emotional skills. Ford’s staff testified that Cole has friends in school and solid relationships with many of the staff and teachers, particularly Deputy Student Manager Frank Hurrye, school counselor Deborah Worten and teacher Elena Rock. They further testified that the number and frequency of Cole’s behavioral problems has decreased over time. Cole, himself, indicated to both Dr. Anderson and Mr. Pilachowski that he has friends at school. He also admitted that he has anger issues, particularly towards his father. Overall, there was strong evidence presented that Cole was progressing effectively in the general education program and despite his behavior problems, was making social connections at school.

The parents have failed to meet their burden to show that the determination that Cole is ineligible for special education services was improper. The TEAM gathered significant information from outside providers[[17]](#footnote-17), staff, teachers and parents, reviewed prior evaluations and conducted their own assessments in making their determination. I find that Ford complied with the requirements of federal and state special education law regarding eligibility determinations.

Turning now to the second issue in this matter, that is, whether Ford improperly determined that Cole was not eligible to receive accommodations pursuant to a Section 504 plan. After a careful review of the evidence, I find that the parents have failed to meet their burden in this regard. There was little evidence to persuade me that Cole is eligible for a Section 504 plan.

Section 504 provides in relevant part:

No otherwise qualified individual with a disability…shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…[[18]](#footnote-18)

In order to establish a claim under Section 504, the parents must demonstrate that 1)Ford receives Federal financial assistance, 2) Cole has a “disability” within the meaning of the statute, 3) Cole is a qualified individual, either with or without a reasonable accommodations and 4) he is subject to unlawful discrimination.

Pursuant to the statute, the parents must show that Cole has a physical or mental impairment[[19]](#footnote-19) which substantially limits one or more of his major life activities; has a record of such impairment, or is regarded as having such impairment.

The testimony does not support the parents’ contention that Cole has a mental impairment which substantially impairs one of more of his major life activities. Although some of the documentary evidence states that Cole has an adjustment disorder with anxiety, or exhibits symptoms indicative of a disruptive behavior disorder, there is no persuasive evidence that Cole suffers from a mental impairment. No one testified at Hearing in this regard. Even if one were to conclude that Cole has a mental impairment, the evidence is overwhelming that it does not substantially impair[[20]](#footnote-20) Cole’s major life activity (ie. learning). The uncontradicted testimony from Ford staff established that Cole is able to access the curriculum and is able to maintain and develop appropriate staff and peer relationships.

Ford has addressed Cole’s behavioral problems by developing a safety plan which Ford would do for any student. Mr. Pilachowski supported Cole’s safety plan noting that Ford “had developed an effective safety plan.” He also supported Cole’s therapist’s recommendation of family therapy to work on better communication within the home so Cole would not express his frustration in the community. Mr. Pilachowski also suggested that Cole’s parents stop sharing information with Cole regarding the conflicts between them and Ford. Ford staff testified that despite numerous attempts, the parents have been unwilling to meet to develop a mutually agreeable safety plan. Nonetheless, when elements of the plan have been implemented, such as weekly school counseling with Ms. Worten, Cole has responded positively.

I find no error in Ford’s determination that Cole is not eligible for accommodations pursuant to a Section 504 plan. I agree with the parents that the relationship has deteriorated to the point where this is little trust between the parties. However, as unfortunate as that is, it does not entitle Cole to an IEP or Section 504 plan for which he would not otherwise be eligible for.

Finally, the third issue is whether Ford committed procedural violations that denied Cole a FAPE. The parents carry the burden of proof on this issue as well. After careful consideration of the evidence, I find that the parents did not meet their burden to show that Ford committed procedural violations that denied Cole a FAPE.

In order to find that procedural violations denied a student a FAPE, the procedural inadequacies must have 1) impeded the child’s right to a free, appropriate education; 2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free, appropriate public education; or 3) caused a deprivation of educational benefits.[[21]](#footnote-21)

The parents raised a number of alleged procedural violations in their Request for Hearing. First, the parents allege that they signed an evaluation consent form for a risk assessment on May 5, 2010 but failed to convene a TEAM meeting to determine special education eligibility no later than 14 days after the end of the school year. The evidence, as presented, does not support the parents’ allegation that Ford should have held a meeting to determine eligibility following the risk assessment conducted by Dr. Anderson on May 20, 2010. Neither Dr. Anderson nor anyone else gave any indication that Cole was a student with a disability that may require special education services. Cole had never received special education services and his parents never requested an initial evaluation. Cole was making effective progress so no staff or teacher from Ford had any reason to believe that Cole needed an initial evaluation.

The parents signed a second independent risk assessment evaluation consent form on October 12, 2010 and assert that the school failed to convene a TEAM meeting within 10 days of receipt of the report. Karen Reuter, Director of Ford, credibly testified that the evaluation by Mr. Pilchowski was completed on January 11, 2011 and received by Ford on January 19, 2011. A meeting to discuss the results of the evaluation was held on January 28, 2011, well within the 10 school day requirement of 603 CMR 28.04(5)(c)(4)(f). Accordingly I find that Ford did not commit any procedural violations in regards to either of these two evaluation consent forms.

Second, the parents allege that upon reviewing Dr. Anderson’s risk assessment report, Ford did not assess Cole in all areas of suspected disability by conducting a functional behavioral assessment, thereby violating the procedural requirements of 603 CMR 28.04(1)(a)(1). I find no merit in parents’ allegations. As previously stated, there was no indication that Cole was a student with a disability. Not every student who exhibits inappropriate behavior has a defined disability pursuant to special education laws requiring special education services.

Third, parents allege that Ford failed to use a variety of assessment tools in making the eligibility determination. As previously stated, the testimony showed that Ford did use a variety of assessment tools in evaluating Cole.

Lastly, the parents alleged that the school used assessments that were unreliable and invalid for the purpose for which they were used. Specifically, the parents allege that Dr. Anderson erroneously used the ERASOR tool in assessing Cole for at risk sexual behavior. Dr. Anderson used a number of tools to assess Cole. Even if the ERASOR was erroneously used, and the evidence was not conclusive that it was, this procedural violation does not rise to the level where it denied Cole a free, appropriate education.

I find that the parents failed to prove that Ford committed any procedural violations that denied Cole a FAPE.

The parents have not met their burden of persuasion in this matter. Cole is a bright student with much to offer and much to gain from his experience at Ford. It is unrefuted that Cole has anger issues that contribute to his occasional inappropriate behavior. I would strongly urge the parents and the Ford staff to work collaboratively to agree on a safety plan for Cole that will benefit Cole. I would also urge the parents to share information from outside therapists with Ford as it will enhance Cole’s continued progress.

**ORDER**

Ford’s determination that Cole is ineligible for special education services is upheld. Ford’s determination that Cole is ineligible for a Section 504 plan is also upheld. Ford did not commit any procedural violations that denied Cole a FAPE.

So Ordered by the Hearing Officer,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Ann F. Scannell

Dated: March 21, 2012

1. At the request of the parents, the name of the school district is not identified in this decision in order to protect the privacy of the student. [↑](#footnote-ref-1)
2. Cole is a pseudonym used for confidentiality and classification purposes in publicly available documents. [↑](#footnote-ref-2)
3. The submission of written closings arguments was postponed at the parties’ request to allow the Hearing Officer to rule on Ford’s Partial Motion for Summary Judgment. [↑](#footnote-ref-3)
4. The parents had also requested transportation services but that issue was later withdrawn by the parents. [↑](#footnote-ref-4)
5. The joinder motion was not ruled upon because Springfield Public Schools adjusted their position and the transportation issue was withdrawn by the parents. [↑](#footnote-ref-5)
6. During the second day of Hearing Ford withdrew its Request for Hearing because the parents had withdrawn their request for an expedited health assessment. No testimony was taken in this matter. [↑](#footnote-ref-6)
7. Following the first two days of Hearing, two additional days of Hearing were scheduled. [↑](#footnote-ref-7)
8. This matter was referred to the District Attorney’s office. After an investigation, Cole’s parents were informed that the District Attorney’s office was unable to prosecute the case at that time. (Exhibits P-4 and S-7 and testimony of Foley and Cole’s parents) [↑](#footnote-ref-8)
9. So termed by Ford although Cole was neither on a 504 plan nor an IEP at this time. [↑](#footnote-ref-9)
10. Cole’s treating physician, Alison Wondriska, M.D. evaluated Cole on June 23, 2010. Based on teacher and parent reports, history and physical examination, Dr. Wondriska opined that Cole did not meet the criteria for attention deficit disorder. (Exhibit S-30) [↑](#footnote-ref-10)
11. Dr. Skeene is an outside therapist hired by Ford to work with Ford students at Ford. [↑](#footnote-ref-11)
12. *Shaffer v. Weast*, 546 U.S. 49 (2005) [↑](#footnote-ref-12)
13. To “progress effectively in the general education program” shall mean to make documented growth in the acquisition of knowledge and skills, including emotional/social development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.” 603 CMR 28.02(17) [↑](#footnote-ref-13)
14. M.G.L. c. 71B § 1, 603 C.M.R. 28.02(9); 603 CMR 28.05(2)(a)(1) [↑](#footnote-ref-14)
15. None of Cole’s treating physicians or therapists testified at Hearing. [↑](#footnote-ref-15)
16. Massachusetts has adopted the federal definition of emotional impairment. As defined by federal law, an emotional impairment is present “when the student exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects educational performance: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal school problems. The determination of disability should not be made solely because the student’s behavior violates the school’s discipline code, because the student is involved with a state court or social service agency, or because the student is socially maladjusted, unless the TEAM determines that the student has a serious emotional disturbance.” 603 CMR 28.02(f) [↑](#footnote-ref-16)
17. Ford has and continues to be limited in their ability to receive information from outside providers because the parents have not provided Ford with full consents to share/receive information. [↑](#footnote-ref-17)
18. 29 U.S.C.A. section 794(a) [↑](#footnote-ref-18)
19. “Physical or mental impairment” means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs… or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” [↑](#footnote-ref-19)
20. “Substantially impair” has been interpreted by the Supreme Court to mean “considerable” or “specified to a large degree”. *Sutton v. United Air Lines*, 527 U.S. 47 (1999) [↑](#footnote-ref-20)
21. 20 U.S.C. 1415(f)(3)(E)(2)(ii) [↑](#footnote-ref-21)