**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

# **In Re: Andover Public Schools BSEA #12-7315**

##

## **DECISION**

 This decision is issued pursuant to the Individuals with Disabilities Education Act or 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) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

 At issue here is whether the school district has demonstrated that the placement of a fourteen-year-old special education student must be changed to a substantially separate, therapeutic day school in order to provide the Student with a free, appropriate public education (FAPE). The Parents dispute Andover Public Schools’ position, and assert that the School has not proven that Student could not be educated in Andover High School with additional supports or services.

On April 12, 2012 the Andover Public Schools (Andover or School) filed a request for a hearing with the Bureau of Special Education Appeals (BSEA), seeking a determination that Student must be placed in a substantially separate therapeutic day school placement, namely, the Gifford School, in order to address his educational needs. Andover alleged that Student’s social-emotional disabilities stemming from his diagnosis of Asperger’s Syndrome were interfering with his educational progress, and that the Parents’ refusal to place the Student at Gifford denied the Student a FAPE.

After several postponements requested by the parties and granted for good cause, and unsuccessful attempts at settlement, the hearing took place on August 15, 16 and 17, 2012 at the office of the Division of Administrative Law Appeals-BSEA at 1 Congress Street, Boston, Massachusetts.

The School was represented by counsel, and the Parents represented themselves and the Student pro se*.* Each party presented documentary evidence and examined and cross-examined witnesses. The parties waived written closing arguments, and the record closed on August 17, 2012.

The record in this case consists of the School’s exhibits S-1 through S-16, the Parent’s exhibits P-1 through P-18, several hours of tape-recorded testimony, and the transcript created by the court reporter.

Those present for all or part of the proceeding were:

Parents

Student

Amy Bader Student’s private therapist

Jeff Bostic, M.D., Ed.D. Consulting Psychiatrist, Andover Public Schools

Patrick Bucco Middle School Principal, Andover Public schools

Linda Croteau Program Advisor for Special Education, Middle School

Susan Healey Special Education Teacher, Andover Public Schools

Martha Hyslip Teaching Assistant, Andover Public Schools

Stephen Jankauskas Out of District Coordinator, Andover Public Schools

Joyce Laundre Director of Student Services, Andover Public Schools

John Norton Program Advisor for Special Education, Andover High School

### ISSUE PRESENTED

The sole issue to be decided is whether the Andover Public Schools has proven that Student requires placement in the Gifford School for the 2012-2013 school year in order to receive a free, appropriate public education (FAPE).

#### POSITION OF ANDOVER PUBLIC

#### SCHOOLS

 Student’s social-emotional disabilities preclude him from making meaningful progress in a large, socially complex public high school such as Andover High School. He requires a small, structured therapeutic setting, where social and emotional issues can be processed in the moment, to learn how to form relationships with peers and adults and to accept help. Student consistently has refused help and support offered within the public school setting. Moreover, his behavior can be disruptive and upsetting to others. He is not making progress in this area.

 The Gifford School, which is the only private day school that has accepted Student, would provide a therapeutic setting to address Student’s social-emotional needs and enable him to make meaningful educational progress.

#### POSITION OF PARENTS AND STUDENT

 Andover is seeking to have the Student removed from public school without having provided him with the supports and services that he needs in order to make effective progress. Moreover, Andover has ignored evidence of Student’s social-emotional progress, both within school and in outside activities. An out-of-district therapeutic placement is overly restrictive for Student. Finally, the Gifford School is inappropriate because it is geared to children who are less intellectually capable than Student and would not provide Student with appropriately challenging academic work.

**FINDINGS OF FACT**

1. Student is a fourteen year old boy who is enrolled in the Andover Public Schools. His eligibility for special education services from Andover is not in dispute. As of the hearing dates, Student had completed eighth grade at a middle school in Andover.
2. Student is highly intelligent with well-developed academic skills. Student also is a very talented cartoonist, who creates comic books with complex, elaborate drawings, characters and plot lines. Student spends a tremendous amount of time on this drawing activity, both outside of school and in class, and does not like to be told to stop.
3. Student has been diagnosed with Asperger’s Syndrome. As a result, Student has difficulty forming relationships with peers and adults, and in taking the perspective of others. Student says and writes things that others (adults and students) find disturbing and/or threatening, and has difficulty understanding why this might be the case. Student can be argumentative with teachers when he is asked to do something he does not want to do, or to stop drawing before he is ready.

1. Student entered kindergarten in a neighboring district. In grades K through 2, Student had significant behavioral issues, including distractibility, inattention, oppositional behavior, physical aggression, rigidity and poor social skills. (S-5)
2. In October 2004 (first grade), Student underwent a neuropsychological evaluation and was diagnosed with Asperger’s Syndrome. The former school district issued a 504 plan encompassing occupational therapy, a 1:1 aide, and a behavior intervention plan. (S-5) In second grade (2005-2006), Student had several major episodes of physical outbursts to staff and peers, or attempts to flee or hurt himself, all when he was asked to do something he did not want to do. The neighboring district developed an IEP and more structured behavior plan for Student (S-5)
3. Student entered the Andover Public Schools in third grade (2006-2007). Student continued to have behavior problems when asked to do something he did not want to do. Student became less physically aggressive, but between third and fifth grade, there were several incidents of threatening behavior or gestures towards staff and peers which led to multiple suspensions. (S-5)
4. Student entered middle school in sixth grade (2009-2010). He had continued behavior difficulties in sixth grade, including cartooning instead of doing classwork, and making loud noises or verbal demands when he was redirected. School staff were disturbed by Student’s drawings, which often featured guns or bombs. (S-5, Croteau)
5. In November 2009, Andover conducted a three-year re-evaluation. Student’s performance on both cognitive and achievement testing was all in the average to superior range but his behavior was problematic. The record does not indicate whether Andover conducted a formal functional behavioral assessment as part of this evaluation. On November 12, 2009, Andover issued an IEP with goals in “School function/Self Regu[lation] and Sensory Processing. The IEP called for full inclusion for all classes, with special education or paraprofessional support, and regular access to the school adjustment counselor. Accommodations included a behavior plan and written models or examples of completed assignments, as well as communication with Parents. (S-17) The record does not contain a copy of the behavior plan. Parents accepted this IEP in February 2010.
6. Student continued to struggle in sixth grade with “severe inflexibility, aggressive verbal outbursts, one verbal threat to an adult, violent/inappropriate drawings including those of his peers, and 9 incidents leading to suspensions.” (S-5) School interventions included multiple Team meetings, consultations with a psychologist, and Andover’s consulting psychiatrist, Dr. Jeff Bostic. In approximately December 2009, after a manifestation meeting, the Andover Team recommended a 45-day extended evaluation at the North Shore Consortium. Parents rejected this recommendation. (S-5, Bostic)
7. Student’s behavior problems continued and escalated during seventh grade (2010-2011). The School continued with consultations, attempts at behavior plans, and communication with Parents, but found limited success. (Croteau, S-5)
8. In December 2010, Parents agreed to an extended evaluation of Student at the Northshore Prep program, which was an educational program operated by the North Shore Consortium. (Bostic, Croteau, S-7)
9. Student was very successful at the Northshore Prep program, which he attended from early January 2011 to February 10, 2011. (Bostic) He seemed solely motivated by the desire to return to his middle school. Student excelled academically. Student continued to be very “focused and somewhat obsessed with doodling and cartooning.” Northshore Prep staff tried to channel this activity into art class, and required him to complete classwork before turning to drawing. Student had to be prompted daily by teachers not to rush through his work so that he could draw, or to complete work before drawing. Student complied with teacher prompts. The themes of Student’s drawings were not inappropriate while he was at Northshore. (Bostic, S-7)
10. Student was quite isolated at Northshore Prep, and rarely initiated conversations with adults or peers. (S7)
11. After completion of the extended evaluation Northshore Prep recommended a small, structured, predictable therapeutic placement with staff trained to understand and manage Student’s complex profile. (S-7, Croteau, Jankauskas) In February 2011, after a Team meeting to review the results of the extended evaluation, Andover offered to place Student at Northshore Prep or at the Gifford School.
12. Parents rejected the Team’s recommendation, and Student returned to his middle school. (Croteau)
13. In February 2011, Andover conducted a Functional Behavioral Assessment (FBA) consisting of a review of past testing, classroom observations, interviews with teachers and Parents, and consultations with the school psychologist and Dr. Bostic. (S-5)
14. The FBA report attributed Student’s increased behavioral problems in middle school to Student’s own rigidity and non-compliance, to the academic and social complexity of middle school, including the need to work with multiple teachers with different classroom structures, and Student’s resistance to help from the special education teacher and/or paraprofessional who had been assigned to support him. Student responded to the aide with “anxiety and stress leading to paranoid thinking which in turn exacerbated his behavioral responses.” (S-5) The report noted that Student benefited from consistency and immediate, direct feedback regarding his behavior, he responded to these supports with requests to leave him alone, increased rigidity, and non-compliance.[[1]](#footnote-1) The report further stated that past behavioral intervention plans had not led to progress. (S-5) The FBA did not contain data on particular target behaviors, antecedents, or Student’s responses to interventions. (S-5, Doyle)
15. The FBA report recommended a behavior plan with clear and consistent expectations, direct and immediate feedback on behavior, encouragement for Student to verbalize anxiety or frustration appropriately, classroom assistant support, rubrics to demonstrate academic expectations, written contracts for non-preferred activities, teaching of explicit social skills, self-regulation, and self-monitoring across all settings, communication with Parents, and “consideration for a more limited environment in order to provide immediate feedback to [Student] regarding his progress.” (S-5)
16. Student completed seventh grade at the middle school. A year-end progress report indicated that Student was able to comply with classroom rules in his core academic subject about 65% of the time (the goal was 70%) but was not able to do so across all school settings. He completed about 40% to 50% of his assigned work, and rarely used words to express his feelings or needs. (P-IV)
17. Student returned to the middle school for eighth grade. In or about December 2011 or January 2012, Student was suspended after writing an essay about conflicts with previous teachers and plans to prove the teachers wrong, and after he was overheard discussing a “surprise type of action to alter the school.” (Bostic, Hyslip, Croteau, S-1)
18. On January 10, 2012, Dr. Jeff Bostic, a consulting psychiatrist for Andover Public Schools, conducted a “Psychiatric and Risk Assessment” of Student. This assessment consisted of interviews with Student, Mother, and school staff members. Dr. Bostic concluded that Student was, at that time, at “low risk” of harming himself or others. In reaching that conclusion, Dr. Bostic noted that Student had not harmed others in the past, had no access to weapons, made no attempts at overpowering other children, and expressed no desire to harm others or himself. (Bostic, S-1)
19. On the other hand, Dr. Bostic’s major concern (which had been ongoing since he met Student in around 2009) was Student’s “isolation toward his own fantasy life and disinterest in engaging in the worlds of others,” and “fundamental distrust of a wider world” which prevented him from interacting meaningfully with teachers and peers.” (S-1, Bostic). This disengagement was Student’s major impairment (S-1, Bostic)
20. Additionally, according to Dr. Bostic, Student was “making no forward movement toward that which most impairs him (his lack of connection or engagement wituh others, or ability to respond to requests by teachers…Ultimately, this increases his risk for acting out toward others he perceives as trying to control him…and he is not, as he ages, engaging more effectively with others, but instead employing different tactics (tantrums to comic drawing, etc.) to persist in this behavior.” Further, the violent themes in Student’s drawings or statements would tend to further isolate him from peers, even if they do not indicate actual, imminent risk. (S-1, Bostic)
21. Dr. Bostic concluded that Student needed a small educational environment where he could learn to develop trust, and where therapeutic interventions could be infused throughout the school day. (S-1, Bostic)
22. On January 27, 2012, Parents and the School entered into a mediation agreement (“Agreement”) stipulating that Parents would consent to the School sending referral packets to the Arlington School, New England Academy, and the Gifford School to assess Student’s suitability for placement. Parents further agreed to visit these programs and the School agreed to fund Student’s placement at a school that accepted him. (S-2)
23. The only school that accepted Student was Gifford. Parents and Student visited that program twice, but deemed it inappropriate. Parents felt that the academics at Gifford were not challenging enough for Student and were concerned that the peer grouping would be inappropriate. (Mother, P-4)
24. At some point after the risk assessment, Student returned to middle school. The School assigned teaching assistants to “shadow” Student for the duration of the school day, gather behavioral data, and redirect Student if he was off-task or drawing objectionable pictures. (Hyslip, Croteau, P-3) Student found this objectionable, and felt that people were spying on him. (Father)
25. In an effort to change Student’s placement, the School filed the instant hearing request on April 12, 2012. Meanwhile, Student finished out the 2011-2012 school year at the middle school.
26. Student’s year-end report card reflected mostly B’s and C’s. Effort and Conduct grades had improved over the year to mostly “Good” and “Excellent,” with “Room for Improvement” in English (Conduct only; Effort was “Good”), and Math. (P-3)
27. School staff felt that Student had made little real progress in his areas of need. They believed that he had few real friends, continued to be obsessively involved with drawing cartoons that were often disturbing, and was non-compliant and disruptive. (Laundre, Healey, Croteau, Hyslip) Parents felt, on the other hand, that Student had made significant behavioral progress, especially in eighth grade, as evidenced by his report card. (P-4, Father)
28. Parents also disagree that Student was socially isolated. They stated that Student had friends outside of school, and participated in many activities (including summer camp and a rowing team) without problems. (Father, P-6)
29. In June 2012, shortly before the end of the school year, Parents obtained an FBA for Student from Brian Doyle, Ed.D., who is a Board Certified Behavior Analyst (BCBA). Dr. Doyle reviewed records, interviewed Student, Parents and some teachers, and observed Student for approximately two hours. (Doyle) There were no behavioral incidents during the observation; School staff opined that Student was better behaved than usual. (Laundre, Croteau)
30. In a report issued during the summer of 2012, Dr. Doyle stated that based on his review of records, Andover had not provided Student with ongoing behavioral support from a behavior analyst. Further, despite references by School personnel to failed behavior plans, the School produced only one such plan for Dr. Doyle’s review, which was primarily a set of guidelines for the Student, with no prescribed interventions by teachers. Dr. Doyle described the FBA of February 2011 as largely anecdotal, with no data on antecedents, specific behaviors, or consequences. Finally, Dr. Doyle stated that in the absence of data, it was difficult to track Student’s progress. (P-3, Doyle)
31. Dr. Doyle stated that he felt Student could function in a public school setting because he could maintain passing grades, posed little risk to himself or others, had motivation to remain in public school, and had demonstrated the ability to modify his behavior when provided with “a clear goal, consistent structure, and supportive response to his documented disabilities.” (P-3, Doyle) Dr. Doyle testified that he was not familiar with Andover High School, however. (Doyle)
32. Dr. Doyle recommended a data driven FBA to “reevaluate the possible functions of specifically targeted behaviors, their situational occurrence, and response to intervention,” a behavior intervention plan based on the FBA, consultation to Student and staff from a doctoral level and or board Certified Behavior Analyst familiar with working with children similar to Student, consultation to Parents, counseling, a social pragmatics program, and an academic tutor. (P-3, Doyle)
33. On August 10, 2012 the Team convened to consider Dr. Doyle’s report[[2]](#footnote-2) and issued an N-1 form proposing to conduct a new FBA, speech/language (pragmatics) assessment, and transition assessment. (The School had proposed these assessments in July 2012, but Parents had not consented to them) The School proposed creating a behavior intervention plan, if warranted, and proposing a pragmatics goal, if appropriate. Finally, the School also proposed retaining a BCBA to consult with the School and Parents, as well as after-school tutoring for Student. The School maintained its position that Student needed an outside, therapeutic placement, and that it would implement the specific recommendations within that setting. (Croteau, S-16) Parents rejected this proposal.

**PROGRAM PROPOSED BY SCHOOL**

1. The School has proposed placing Student at the Gifford School (“Gifford”) in Weston, MA. Gifford is a private, Chapter 766-approved day school serving middle and high school students of at least average cognitive ability with a wide variety of emotional and behavioral needs, although acting out behavior is not the norm at the high school level. Academically, Gifford follows the Massachusetts Curriculum Frameworks. (Jankauskas)
2. Gifford’s high school section, in which Student would be enrolled if he were to attend, features class sizes of 8 to 10, each staffed with a teacher plus an assistant. The program has a supervising psychiatrist as well as staff clinicians, provides individual and group counseling, and is capable of providing “in the moment” behavioral interventions. The high school uses a point and level system, under which students earn increasing amounts of freedom (e.g, being escorted to classes at the lowest level to eating in the school cafeteria, and going on field trips at the highest level) based on meeting academic and behavioral expectations. (Jankauskas)
3. Andover’s out of district coordinator, Stephen Jankauskas, testified that he is familiar with Gifford, has placed other Andover students there, including a younger student with high-functioning autism, and believed it would be very appropriate for Student. Andover could supplement Student’s academics with tutoring, if necessary to provide him with sufficient challenge. Additionally, Mr. Jankauskas testified that the point and level system kept potential behavioral incidents in check. (Jankauskas)

**PROGRAM PROPOSED BY THE PARENTS**

1. Parents seek to have Student attend Andover High School, (AHS) with the support of a behavior intervention plan as recommended by Dr. Doyle. They believe that he is motivated and capable of success in that setting. (Father)

1. According to John Norton, the Program Advisor for Special Education at AHS, the high school has a population of approximately 1800 students including approximately 250 on IEPs. AHS has a wide variety of special education programs and services. (Norton) After attending a Team meeting and reviewing various evaluations of Student, Mr. Norton concluded that Student requires a self-contained, structured program with in-the-moment interventions available to him, and that AHS cannot provide such a program. Mr. Norton was concerned that the size and complexity of AHS, the number of interactions Student would be required to have during the day, the difficulty in establishing consistent responses to Student, and the emphasis on group work at AHS all would make placement there extremely challenging and difficult for Student. There are students with Asperger’s at AHS; however, these students are willing to accept and cooperate with supports offered. (Norton)

### FINDINGS AND CONCLUSIONS

After reviewing the testimony and documents on the record, I conclude that the School has amply demonstrated[[3]](#footnote-3) that despite his high intelligence and artistic gifts, Student would likely have tremendous difficulty receiving FAPE at Andover High School. As a result of his disability, Student tends to be extremely rigid, oppositional and sometimes disruptive when asked to do tasks that he does not want to do. Although I credit the Parents’ testimony that Student has friends and participates in activities outside of school, I also must credit the unanimous testimony of the School’s witnesses to the effect that Student has been consistently isolated from interactions with peers and adults in a school setting, has tremendous difficulty when another person, such as a teacher, requires him to operate outside of his own sphere of thinking, and does not appear to have made much progress in this arena.[[4]](#footnote-4) Student is now fourteen years old; it will be very difficult for him to move towards self-sufficiency if he does not develop more functional social and emotional skills in the near future.

 The uncontroverted evidence on the record is that Student requires a small, structured setting capable of explicitly and consistently teaching him these skills, during the course of the school day. John Norton, AHS’ Program Advisor for Special Education testified without contradiction that AHS could not adequately serve Student at this time, despite the wide range of services available at AHS. Although Dr. Doyle testified that Student could probably be educated within a public high school, he also testified that he is not familiar with AHS, and, further, that Student would benefit from a level of in-the-moment intervention that Andover acknowledges that AHS cannot provide. While the IDEA requires schools to remove students from public school settings only when they cannot be provided FAPE with appropriate supports and services, I am persuaded that AHS is not currently able to provide such services.

I further conclude, however, that the School has not met its burden of persuasion that Gifford is an appropriate setting for the Student. Based on the testimony of Mr. Jankauskas,[[5]](#footnote-5) who clearly is familiar with Student, Gifford serves students with a wide variety of challenges. There is no evidence on the record about the experience of the school or the staff in dealing with students with Asperger’s Syndrome and similar issues, and no evidence as to the appropriateness of the proposed peer group for Student. Student has a unique profile, and requires a setting where staff have expertise in addressing needs similar to his, using not only appropriate therapeutic interventions as recommended by Dr. Bostic, but also by implementing a behavioral intervention plan informed by a data-driven FBA as recommended by Dr. Doyle.

Finally, I must note that the record does not reveal that Student was ever provided with interventions designed for students on the autism spectrum, including functional behavioral assessments and behavior intervention plans created from objective data about Student’s behavior and responses to intervention.

**ORDER**

Within thirty calendar days from the date of this Decision, the Andover Public Schools shall locate or create a placement designed for highly intelligent students with Asperger’s Syndrome and similar disorders, and shall fund Student’s placement in such program.

By the Hearing Officer:

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Sara Berman Date

**Appendix A**

**COMMONWEALTH OF MASSACHUSETTS**

**SPECIAL EDUCATION APPEALS**

**In Re: Ludlow Public Schools BSEA #11-7933**

**CONCLUSION AND ORDER**

This Conclusion and Order is issued pursuant to 20 USC Sec. 1400 et seq (Individuals with Disabilities Education Act or IDEA), 29 USC Sec. 794 (Section 504 of the Rehabilitation Act); MGL c. 71B (the Massachusetts special education statute; “Chapter 766”); MGL ch. 30A (the Massachusetts Administrative Procedures Act), and the regulations promulgated under these statutes. A complete decision with findings of fact and conclusions of law will be issued in the near future. The appeal period will not begin to run until issuance of the complete decision.

A hearing was held on May 24, June 26 and June 28, 2011. The parties filed written closing arguments by July 11, 2011, and the record closed on that day.

Based on the documents and testimony presented at the hearing, I find and conclude that

1. The Ludlow Public Schools has not met its burden of proving that Student requires a change in placement to a substantially separate therapeutic private day school.
2. However, the Ludlow Public Schools has met its burden of proving that the Student requires an extended evaluation of his emotional and behavioral functioning by a facility with the ability to conduct such an evaluation.
3. Additionally, the record establishes that Student requires a comprehensive evaluation of his academic achievement and functioning as well as his communication skills. Finally, the record establishes that Student requires an assessment of the contributions, if any, that his emotional functioning, cognitive profile and communication skills make to his behavior and ability to function in school.
4. In addition to clinical evaluations of Student’s emotional status and needs, the extended evaluation shall include but not be limited to standardized testing in the areas of reading, math, and written expression. Such evaluation also shall include a comprehensive assessment by a speech/language pathologist of Student’s expressive, receptive, and pragmatic language skills.
5. The evaluation shall take place in a substantially-separate, public or private educational program that is capable of conducting both the clinical/therapeutic and educational components.
6. Within fifteen calendar days from the date the parties receive this Order, Ludlow shall convene a TEAM meeting to formulate a proposal for the extended evaluation, including a proposal for possible sites for said evaluation. In the event that the Parent and the School cannot agree on a suitable site for the evaluation, the School’s choice shall prevail.
7. The extended evaluation shall be conducted according to the provisions of 603 CMR 28.05(2)(b).
8. This Order shall not be construed to bar Student from attendance at Ludlow High School prior to the start of the extended evaluation.

By the Hearing Officer:

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Date Sara Berman

1. This apparent inconsistency is contained in the report, and was not clarified by witnesses. [↑](#footnote-ref-1)
2. The Team also reviewed a private neuropsychological evaluation by Dr. Abrams. Parents had obtained this evaluation in April 2011, but had not previously shared it with the School. The School obtained the report via discovery in the instant litigation. The evaluator noted that Student was able to behave in a conventional manner, but had a strong oppositional stance, and was in the process of cutting himself off from man of his own emotional experiences.” Dr. Abrams diagnosed Student with a Major Depressive Disorder, and recommended psychotherapy and group activities. (S-8) [↑](#footnote-ref-2)
3. As the party seeking a change in the status quo, the School has the burden of showing, by a preponderance of the evidence, that the current program is inappropriate and the proposed program is appropriate. Schaffer v. Weast, et al, 126 S.Ct. 528, 441 IDELR 150 (2005) [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. No witnesses from Gifford testified at the hearing. [↑](#footnote-ref-5)