COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

SPECIAL EDUCATION APPEALS

Falmouth Public Schools v. Student BSEA #12-7897

**DECISION**

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

A hearing was held on June 5, 2012 at the Falmouth Public Schools Administration Building, 340 Teaticket Highway, Falmouth, Massachusetts before Catherine M. Putney-Yaceshyn, Hearing Officer.

**PROCEDURAL HISTORY**

Falmouth Public Schools requested a hearing on May 2, 2012 and the hearing was scheduled to proceed on May 22, 2010. Falmouth requested that the matter be postponed until June 5, 2012 due to its counsel’s unavailability. Falmouth also requested that a telephone conference call be scheduled with Parent in order to discuss the issues for hearing, attempt to resolve the dispute, and ascertain Parent’s availability. The BSEA scheduling coordinator contacted Parent and she refused to participate in any telephone conference. The hearing was held in Falmouth to enable Parent to conveniently participate in the hearing. The Parent was provided with the phone number of the Director of the BSEA and informed that she could direct any questions to her or any hearing officer other than the one assigned to her case.

The hearing was held on June 5, 2012. Falmouth requested a postponement to submit a written closing argument. The hearing officer allowed Falmouth’s request and set a deadline of July 2, 2012 for the submission of the closing argument. Because Parent did not attend the hearing, the BSEA sent Parent copies of cassette tapes of the hearing and a letter informing her that she would be permitted to submit a written statement of her position with respect to the hearing issues by June 15, 2012. Falmouth submitted its written closing argument on July 3, 2012[[1]](#footnote-1) and the record closed. Parent did not submit any written statement.

Those present for all or part of the Hearing were:

Beverly Shea Director of Pupil Personnel Services, Falmouth Public Schools

Karen Karson Principal, North Falmouth Elementary School

Tara Simpson School Psychologist, Falmouth Public Schools

Cathleen Edwards Special Education Teacher, Falmouth Public Schools

Ann M. McDonald Integrated Two Classroom Teacher

Jennifer Butler Special Education Department Head, K-4, Assistant Principal, East Falmouth Elementary School

Joan Stein Attorney, Falmouth Public Schools

Catherine Putney-Yaceshyn Hearing Officer

The official record of this hearing consists of Falmouth’s exhibits marked “S-1 through S-19 and approximately three hours of recorded oral testimony.

# ISSUES

1. Whether the BSEA should override Parent’s lack of consent and allow Falmouth to conduct a functional behavioral assessment of Student.
2. Whether Falmouth’s proposed IEP and placement in the Structured Learning Center for the period from April 9, 2012 until April 8, 2013 is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

**SUMMARY OF THE EVIDENCE**

1. The student (hereinafter, “Student”) is a nine-year-student who resides in Falmouth and will be entering the third grade in the fall of 2012. (S-2)
2. Student entered Kindergarten in the Falmouth Public Schools during the 2008-2009 school year. He had an extremely difficult start to the year and required small group instruction. He was impulsive and engaged in problematic behaviors such as refusing to complete academic work. He had difficulty with early literacy skills such as learning letters and sounds. In November 2008 Student was transferred to an integrated kindergarten program where he was more successful. At the end of the year Falmouth recommended that Student repeat his kindergarten year, but Student’s mother, (hereinafter, “Mother”) chose to send him to first grade. (S-1, S-2)
3. During the 2009-2010 school year Student had a difficult transition academically and behaviorally. (S-1, S-2, Simpson) Dr. Tara Simpson conducted a functional behavioral assessment (fba) of Student in October 2009 because Student had been displaying aggressive and unsafe behaviors and had not been producing much work. The target behaviors were: Noncompliant/Refusal Behavior, Unsafe Behavior, and Aggressive Behavior. Student’s teacher, Mrs. Johnson, reported that he was refusing to complete work even with a one-on-one aide. Additionally, she reported Student was engaging in unsafe behaviors such as running around the classroom and leaving the room without permission. Mrs. Johnson also reported that Student had been aggressive toward others. He had hit and spit on other individuals and punched a student in the stomach. He had even been aggressive toward a teacher, trying to hit her with his hand and a chair. (S-1) Dr. Simpson conducted several observations and concluded that Student tended to engage in noncompliant/refusal behavior during academic tasks or when a demand was placed on him. His aggressive behaviors tended to occur during unstructured times such as recess or in the cafeteria. It appeared that he was trying to engage with peers, but lacked the social skills to do so appropriately. Dr. Simpson made several recommendations, including providing Student with instruction in social skills, and drafted a behavior plan which reduced the amount of work required of Student and rewarded him with drawing. (Simpson, S-1, See S-17)

Student was transferred to the integrated program at North Falmouth Elementary School in January 2010. Student’s transition was slow and he was frustrated with the curriculum and following classroom rules. He was given limited academic demands so he could meet with success and he continued to be on a behavior plan. By the end of the year he had made great progress academically, but remained behind his peers in all subjects. He was better able to monitor his behavior. (Simpson, S-2)

1. Student repeated the first grade in the integrated program during the 2010-2011 school year. He required a great deal of adult support and was below grade level in reading and writing. He was at grade level for math. His behavior had improved and he was noted to be using strategies to help him feel less angry. He continued to have difficulty with his self-control, completing his class work, and attending. (S-2)
2. Student was initially evaluated during his second year of first grade due to academic and behavioral concerns. Results of the WISC IV showed Student had a significant discrepancy between his verbal comprehension (SS of 69) and perceptual reasoning (SS of 90). Teacher ratings suggested Student’s adaptive skills at school were below average as compared to his peers. Additionally, teacher ratings were notable for significantly elevated levels of aggression, depression, and learning problems. Mild concerns were noted in the area of attention. Parent ratings indicated Student’s adaptive skills at home were significantly accelerated in daily living and socialization, but weaker in communication. Parent ratings further indicated normal social/emotional functioning. (S-2)
3. Tara Clark (now Tara Simpson), Ph.D., administered a psychological evaluation of Student at the North Falmouth Elementary School on March 31 and April 6, 2011. In addition to administering the WISC IV, she administered the WNV (Wechsler Nonverbal Scale of Ability) due to Student’s difficulty with communication skills. She noted that Student’s full scale score on the WNV was in the high average range while his full scale score on the WISC-IV was in the low average range. This indicated that the language-based requirements of the WISC-IV may have had an impact on Student’s performance.

Dr. Clark compiled the results of the BASC-II teacher version. The results indicated that Student “is displaying externalizing problems in class.” He was displaying clinically significant levels of hyperactivity and mild conduct problems. There were significant concerns in the area of learning problems and with atypicality because he sometimes seemed unaware of others. Clinically significant levels were found with functional communication or his ability to express and communicate ideas others can understand.

Dr. Clark concluded that Student has difficulties in reading and writing. She noted that a large part of his behavior issues seemed to have stemmed from his academic issues. His nonverbal ability is much more accelerated than his verbal ability which continues to show up on memory testing as well. That is why Student becomes frustrated with English language arts tasks and does better with math tasks, the report noted. Dr. Clark noted that Student continues to be more active than his peers and manifests difficulty sitting still. Additionally, there has been concern regarding Student’s mood instability. His moods were noted to fluctuate quickly from happiness to anger. Dr. Clark made a number of recommendations in the areas of reading, spelling, writing, and attention/hyperactivity. (Clark, See S-2)

1. Marysia Messer, a speech language pathologist and the special education teacher in Student’s integrated first grade classroom, conducted a special education evaluation on March 28 and April 1, 2011. She noted that Student was in his second year of the first grade, but still required strict limits and boundaries and his behavior could still flare up on occasion. She noted that Student is a remarkable artist who takes great pride in his artistic ability. She reported that Student is a sensitive and warm child who has a lengthy history of behavioral difficulties. He requires an intensive and highly consistent behavioral plan with clear consequences. He requires many opportunities for breaks and one-on-one support for virtually the entire day either to support his academics or to keep him on track behaviorally. His social interactions with peers were generally positive in unstructured settings, but he could be highly distracting to his peers during academic times. Ms. Messer noted that although Student made a great deal of progress during the 2010-2011 school year, reading and writing were areas of significant disability for him. At the time of the evaluation Student was reading at the DRA level 4 (emergent level) while his grade level peers were reading at a level 15. In the area of written language Student was “able to orally generate sentences for written language and can copy what has been scribed.” His grade level peers were independently writing five sentence paragraphs. Student was working independently on math activities, although Ms. Messer noted that the language of math would likely be increasingly difficult for him as the concepts become more abstract. Ms. Messer also noted that Student’s academic performance is largely dependent on his mood at any given time. He requires strong behavioral limits, but generally responds to the limits well.
2. Ms. Messer made a number of recommendations for Student. She recommended a behavioral plan that includes opportunities for breaks that include drawing or walking; consistent expectations; a reward system for “listening times”; preferred seating; and one-on-one support as often as possible. She also made a number of recommendations in the academic realm. She recommended a consistent, structured approach to instruction. She noted that those working with Student must understand that when he perceives tasks as too difficult, he will shut down and may become unruly. Ms. Messer recommended that his materials be presented at his independent level with small amounts of instructional materials presented at a time to avoid overwhelming him. Additionally she recommended visual supports, a scribe as needed, systematic phonics instruction, and again, one-on-one support as often as possible. (S-4)
3. Amy Chase, MS, CCC-SLP, conducted a speech language evaluation of Student on April 12, 13, 14, 25, and 28, 2011. Ms. Chase’s results supported the previous finding that Student presents with a moderate language delay in expressive and receptive modalities. He demonstrated weaknesses in efficient and effective identification of semantic relationships between words. Student’s receptive vocabulary skills were in the average range and expressive vocabulary skills were variable across measures, ranging from below average to average. His pragmatic language and social communication skills were considered a strength. He demonstrated inaudible blocks in his speech that are not indicative of developmental dysfluency. (S-4)
4. The Team met to consider the above summarized evaluations on May 3, 2011. Mother did not attend the meeting, but did give the Team permission to proceed with the meeting in her absence. (Butler) The IEP resulting from the meeting indicates that Student’s communication delay impacts his ability to effectively access the curriculum. Additionally, it states that Student’s academic delay, especially in English language arts areas, affects his ability to access all written areas of the curriculum. The IEP also notes that Student’s emotional status can adversely affect his ability to access the curriculum. The IEP proposes a number of accommodations to assist Student in the classroom. The service delivery grid contains consultation in the area of communication with the speech and language pathologist and in the social/emotional realm with the adjustment counselor. The “B Grid” includes communication services with the speech language pathologist 1 x 30 minutes per week; English language arts with the general education/special education/T.A. 5 x 60 minutes per week; mathematics with the general education/special education/T.A. 5 x 40 minutes per week; and social/emotional services with the general education/special education/T.A. 1 x 20 minutes per week. The “C Grid” contains pull-out services in the area of communication with the speech and language pathologist 1 x 30 minutes per week; social/emotional services with the adjustment counselor 1 x 20 minutes per week; and extended school year services 3 x 180 minutes per week from July 5, 2011 through August 12, 2011. The IEP provided for regular bus transportation with the addition of a bus aide. The IEP was written for the period from May 3, 2011 through November 12, 2011. Mother accepted the IEP in full, including the placement, but not until October 6, 2011. (S-8)
5. Student was placed in the Integrated second grade classroom for the 2011-2012 school year. Integrated programs in Falmouth are general education classrooms with special education support for most of the day. Support services are woven into the program and the special education teacher and regular education teachers work as a team along with specialists. (Shea) Ann McDonald, who has credentials in both elementary education and moderate special needs ,in addition to a Master’s degree, was the general education teacher in the Integrated classroom. She co-taught with Cathleen Edwards, a Master’s level special education teacher and there was a classroom aide present all day. Ms. McDonald noted that Student’s behavior had been a problem all year. At the beginning of the year Student had difficulty with transition. His behavior seemed to function to avoid work and it increased throughout the year as work demands increased. Student was below grade level in all academic areas, especially reading. Ms. McDonald assigned Student kindergarten level homework and instructed him at the first grade level. Math was an area of strength for him, but he was at the low first grade level and struggled a great deal with word problems. Student also struggled a great deal with writing. Ms. McDonald stated that he was often unavailable to learn, was hyperactive, and spent a lot of time off task. According to his witness, Student has a communication disability, difficulty processing and expressing himself and struggles to get his point across. He is also creative and artistic, but sometimes off topic. (McDonald)
6. The Team met again in November 2011. Mother attended the meeting and discussed her concern that Student learn to read. The Falmouth members of the Team discussed their need to do a functional behavioral assessment (FBA) to determine what was causing Student’s escalating behaviors. (Butler)
7. The Team proposed conducting an FBA and sent Mother an Evaluation Consent Form on or about November 16, 2011. Mother rejected the proposed evaluation in full. In her response, dated December 12, 2011, Mother wrote, the “IEP should be based on academics only.” Additionally, she wrote, “I think you have done enough evaluation of my son. Let’s get cracking and get him to read. No more assessments. Let’s get the work done.” (S-9)
8. Jennifer Butler, Falmouth’s K-4 Special Education Department Head, met with Mother on December 22, 2011 to review the evaluations and clarify Mother’s concerns. The IEP for the time period from November 8, 2011 through November 9, 2012, dated February 10, 2012 was sent to Parent for review. The IEP proposed a partial inclusion program. It identified Student’s disabilities as emotional and communication. It stated that Student continued to read at an emergent level. It also stated that Student’s overall academic performance was dependent upon his availability to learn, and was inconsistent as he often exhibited non-compliance in the form of growing anger, verbal refusals and negative statements. It noted that Student requires strong behavioral limits, positive reinforcement and attention for following directions and completing tasks. The IEP noted Student’s cooperation and progress in his pull-out sessions addressing his social/emotional goals, but stated that he continues to need to work on his frustration tolerance and overall compliance with academic and non-desired tasks. The IEP noted that Student’s social emotional and communication disability impacts his access to and participation in the curriculum.

The November 2011 IEP included goals in English language arts and social/emotional skills as did the prior IEP. Additional goals were written in the areas of math and specialized reading. The service delivery grid contained the same social/emotional consultation as did the previous IEP. Additionally, it contained a consultation in the area of English language arts and academics for 1 x 10 minutes per week. The “B Grid” contained English language arts with the general education/special education/T.A. 5 x 20 minutes per week; mathematics with the general education/special education/T.A. 5 x 40 minutes per week; and social/emotional with the general education/special education/T.A. 5 x 60 minutes per week. The “C Grid” included English language arts with the speech language pathologist 2 x 30 minutes per week; social/emotional with the adjustment counselor 4 x 30 minutes per week; English language arts with the special education teacher 3 x 40 minutes per week; and extended school year services 3 x 180 minutes per week from July 2, 2012 through August 9, 2012. The Placement page called for a partial inclusion program. (S-10)

1. Mother returned the IEP, rejected in full, on February 17, 2012. She also refused the placement. Additionally, on virtually every page of the IEP, Mother wrote “Reading Only” beside her initials and the date. On the Service Delivery Grid, Mother drew a line through most of the grid and wrote, “[Student] will be taken away from his classroom to read and to read only. None of the above.” She then initialed and dated the page. On page 18 of 20 Mother indicated her opinion that Falmouth had wasted five years of her son’s life and her concern that he would never catch up with his peers. On the response page Mother wrote, “[Student] will only leave his classroom for reading. That is it. Nothing Else.”
2. On or about March 27, 2012, Falmouth sent Mother another evaluation consent form. In the narrative description of the district’s proposal Falmouth stated that the staff was deeply concerned about the disagreement regarding the IEP. Falmouth stated that in light of the rejected IEP and placement, the information gained from the proposed evaluation (an FBA) was necessary to make appropriate educational decisions. The narrative explained that due to the rejected IEP Student would remain in the integrated second grade program and continue with the services outlined in the last accepted IEP. The exception to that would be that the district would no longer provide pull-out services as outlined in the “C Grid” in any area other than reading as requested by Mother. On March 27, 2012 Mother rejected the proposed evaluation in full and wrote, “No more behavior evaluations.” (S-12)
3. On March 30, 2012, Karen Karson, Principal of North Falmouth Elementary School, sent a letter to Mother. The letter stated that on that date Student was sent to her office for “purposeful and deliberate unsafe behavior to another student.” Ms. Karson stated that due to repeated unsafe behaviors and referrals to her office Student would be suspended from school on Monday April 2 and Tuesday April 3. She informed Mother she would be required to attend a meeting at the school on April 4. (S-13)
4. Falmouth sent Mother an “N1” letter dated April 11, 2012. It stated that Mother had refused to meet with staff again on April 9, 2012 when the Team attempted to meet for a manifestation determination. Falmouth believed it was imperative to meet due to “the urgency in coming to a resolution regarding the rejected IEPs and evaluations.” Falmouth indicated its continued concern about the disagreement regarding the rejected IEP. In light of Student’s recent suspension and escalating behaviors the Team proposed a new IEP and change in placement. The new IEP contained additional services in reading and speech language and a new placement in the Structured Learning Center. The Team felt the proposed placement was appropriate due to increases in Student’s negative behavior and limited academic progress. The Team believed Student required a smaller classroom environment. The N1 stated that Falmouth staff has tried to meet with and work with Mother. However, Mother has repeatedly asked for reading services and refused all other services. Student’s non-compliant and disruptive behaviors and office referrals have increased in frequency over the past few months and are impacting his academic performance. Falmouth asserted the importance of conducting the FBA to help make educational decisions. (S-14)
5. The IEP written for the Structured Learning Center runs from April 9, 2012 through April 8, 2013. The vision statement indicates that the Team would like to see Student make progress in all academic and social areas. It would like for him to decrease his frustration when challenged with academic tasks that are too difficult for him. The Team would like Student to develop appropriate coping skills and be able to apply the skills when he becomes upset or frustrated. The service deliver grid contains consultation with the speech and language pathologist in communication 1 x 10 minutes per month; consultation with a Board Certified Behavior Analyst (BCBA) 1 x 30 minutes per month in the area of behavior/social skills; consultation with the special education teacher in academic 1 x 15 minutes per week and consultation with the psychologist in the social/emotional area 1 x 10 minutes per week. The “B grid” includes services in communication with the speech and language pathologist 2 x 30 minutes per week; mathematics with the general education/special education/t.a. 5 x 40 minutes per week, and social/emotional with the general education/special education/t.a. 5x 390 minutes per week. The “C Grid” includes communication with the speech and languge pathologist 2 x 30 minutes per week; social skills with the special education teacher 5x 60 minutes per week; specialized reading with the special education teacher 5 x 60 minutes per week, and extended year services. (S-14)

The Nonparticipation Justification section states that Student’s social/emotional and communication disability affects his performance within the general education setting, therefore specially designed instruction in a quiet setting free of distractions is required for Student to make effective progress. Additionally, Student will be provided with a specially designed reading program that could not be provided in the general education setting. In order to service Student’s social/emotional needs and teach him adaptive coping skills, Student requires a setting outside the general education environment. (S-14)

The placement page indicates that Student will participate in a substantially separate program, the Structured Learning Center, at the East Falmouth Elementary School. (S-14)

1. The Structured Learning Center (SLC) is described by Falmouth as a program for students with emotional and behavioral issues who may need some time outside of the mainstream setting. All students in the SLC program may be included in general education classes in an inclusion model. Students receive the support and redirection they require in the inclusion setting or the SLC setting depending on their individual needs at any given time. Students may remain in the special education classroom for the entire day or be included in general education classes for the majority of the day depending on their needs. The program offers significant behavioral support. Students participate in social skills groups and receive counseling as needed. A school psychologist or adjustment counselor consults to the program. The classroom is staffed with a certified special education teacher who is specifically trained to work with students with significant behavioral, social and emotional issues. A BCBA consults to the program. (S-19, Shea) Teacher assistants are in the classroom as well. Ms. Butler explained that the teaching assistants’ home base is the Structured Learning Center where they have the support of the BCBA and teacher. The teaching assistants can then support the child in all settings throughout the day. The teaching assistants can also identify Student’s triggers and help to extinguish behaviors before they become problematic. (Butler) Students receive related services according to their IEPs. (S-19, Shea) Student would be able to work with a speech language therapist on communication strategies and participate in a social skills group daily. He could be provided with specialized reading daily by a LIPS trained provider. (Butler)
2. Student’s disciplinary log from the time period from October 16 through May 2, 2012 includes approximately seventeen entries. The reported offences include Student being disruptive and interrupting a teacher, pushing another student, using inappropriate language with other students and staff, “slamming” other students hands on the floor, refusing work and being non-compliant. There are three notations regarding suspensions including an incident in which Student pushed another student, an incident in which he choked another student, and an incident in which Student screamed “at the top of his lungs” directly into another student’s ear. The log also shows many instances during which Student was sent to the office. (S-15)
3. Ms. McDonald testified emotionally, becoming visibly upset as she recounted how difficult it was to assist Student in the classroom. She explained that Student requires a great deal more services than Falmouth was allowed to implement due to the rejected IEP. Ms. McDonald noted her concerns about Student being able to meet the academic demands of third grade. She noted that the demands of third grade are much higher than those of second grade and Student is still learning how to work. (McDonald)
4. Ms. Edwards, Student’s special education teacher, echoed many of Ms. McDonald’s concerns. She noted that Student is significantly below grade level academically and that the gap between him and his peers has widened during the past school year. She had wanted to provide one to one pull out services to Student in reading, but was not able to do so until March because that is when the IEP was partially accepted. She has not seen many gains since March even with specialized services. Student gets frustrated and refuses to do work. She uses the behavior plan even in the one to one setting and Student still ends up getting sent to the office. In a large group environment Student gets distracted and can escalate very quickly. Ms. Edwards tried to make him part of small group in math, but he was too disruptive. (Edwards)
5. Student’s second grade teachers and Team members believe that the Structured Learning Center is the most appropriate program for Student. The staff in the integrated second grade classroom have tried everything available within their program to meet Student’s needs and he was not successful. Student requires more services to address his internal emotional struggles. The Structured Learning Center can provide Student with access to the curriculum along with the ability to go to a small setting as needed. Student has the potential to be successful if the appropriate supports are available to him. Ms. Shea opined that it was appropriate for Mother to be concerned about Student learning to read. However, he struggles to attend and be available for learning, and those needs must be met by his program as well. (Shea) Ms. Clark agreed that there is an emotional component to Student’s profile that requires services. She believed that the Structured Learning Center could help Student learn to emotionally regulate himself. (Clark) Ms. McDonald explained that one of Student’s strengths is that even after a difficult incident, he is able to take a break, calm down, and work again. She thought the Structured Learning Center would be a good fit for Student as it would allow him to take a break from the general education setting, continue to receive support and instruction in the Structured Learning Center, and rejoin the general education setting when he is ready. (McDonald) The Structured Learning Center would provide Student an opportunity to access services in a therapeutic and non-punitive way and help him to learn strategies to deal with his frustration. (Butler)

**FINDINGS AND CONCLUSIONS:**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[[2]](#footnote-2) and the state special education statute.[[3]](#footnote-3) As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute. Under the FAPE standard, the IEP proposed by the school district must offer the student a free appropriate public education that meets state educational standards. This education must be offered in the least restrictive environment appropriate to meet the student’s individual needs[[4]](#footnote-4). Federal law also requires that the student be able to fully participate in the general curriculum to the maximum extent possible. 20 USC § 1415(d)(1)(A)(iii); 34 CFR 300.347(a)(2)(I) and (a)(3)(ii); 64 Fed. Reg. No. 48, page 12595, column 1; See also, In Re: Worcester Public Schools, BSEA # 00-1912, 6 MSER 194 (2000).

As stated by the federal courts, the LEA is responsible to offer students meaningful access to an education through an IEP that provides "significant learning" and confers "meaningful benefit" to the student[[5]](#footnote-5), through “personalized instruction with sufficient support services …” [[6]](#footnote-6). The requirements of the law assure the student access to a public education rather than an education that maximizes the student’s individual potential. *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993); *GD v. Westmoreland School District*, 930 F.2d 942 (1st Cir. 1991).

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief.  *Schaffer v. Weast*, *546* U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In this case, Falmouth is the party seeking relief, namely a finding that its IEP is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment and that it is appropriate to override Parent’s lack of consent to the functional behavior assessment, and thus Falmouth has the burden of persuading the hearing officer of its position.

**Issue 1. Whether the BSEA should override Parent’s lack of consent and allow Falmouth to conduct a functional behavioral assessment of Student.**

Federal regulation provides that

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311—

1. if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) if the child’s parent or teacher requests a reevaluation. See 34 CFR 300.303.

In the instant case, Falmouth has demonstrated that it needs to reevaluate Student in order to determine what behavioral and/or emotional supports Student requires to enable him to be successful in the classroom. The testimony showed that even with the use of a behavior plan and even when Student was working with staff one-on-one he was not able to maintain his behavior and was often sent to the principal’s office. Therefore, Falmouth has met its burden of showing that it requires additional information to appropriately provide for Student’s needs.

Federal law requires that

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child’s parent has failed to respond. 20 U.S.C. § 1414(c)(3).

Similarly, the Massachusetts regulation pertaining to parental consent for a reevaluation states that, “Written parental consent shall be obtained before conducting a reevaluation and before placing a student in a special education placement subsequent to the initial placement in special education.” 603 C.M.R. 28.07(1)(a). The regulations require that the school district make and document efforts to contact the parent when their consent is required and the parent fails or refuses to participate in the process. 603 CMR 28.07 (1)(c). In the instant case, Falmouth sent Parent multiple requests to conduct an FBA. Additionally, Falmouth requested mediation to attempt to explain to Parent the reasons it required an FBA. Finally, Falmouth requested a hearing, but attempted to engage the Parent in a telephone conference with the hearing officer to resolve the issues prior to the hearing. Parent refused to mediate, refused to meet with Falmouth, and refused to participate in a telephone conference call with the hearing officer. When none of Falmouth’s efforts to engage the Parent were successful, Falmouth proceeded to hearing. Parent did not participate in the hearing.

Additionally, the Massachusetts regulations provide

If subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation …the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent’s failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08. Participation by the parent in such consideration shall be voluntary and the failure or refusal of the parent to participate shall not preclude the school district from taking appropriate action pursuant to 603 CMR 28.08 to resolve the dispute. 603 CMR 28.07(1)(b)

Falmouth has met its burden of showing that it has attempted to resolve this matter with Parent prior to proceeding to hearing. Additionally, Falmouth has demonstrated that it requires the additional information that can be gleaned from an FBA in order to provide Student sufficient supports to enable him to regulate his behavior and be available for learing, and thus to afford him FAPE.

**Issue 2. Whether Falmouth’s proposed IEP and placement in the Structured Learning Center for the period from April 9, 2012 until April 8, 2013 is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.**

There is no dispute regarding Student’s eligibility for special education services. There is, however, a dispute as to the nature of the services Student requires. Unfortunately, the parties have been unable to resolve their dispute regarding appropriate services and Student has struggled in school, especially during the most recent academic year. Although Mother has ceased to communicate with Falmouth Public Schools, she has made her position clear. She does not wish for Student to receive any special education services other than those related to reading.

The overwhelming evidence shows that Student requires services in addition to those directed at improving his reading skills. His classroom teachers testified credibly that Student is often unavailable for learning. (See testimony of Edwards and McDonald.) He has a difficult time controlling his behavior within the classroom and during pull-out sessions, which often results in his being sent to the principal’s office. Student is falling further and further behind academically and is understandably frustrated. He is unable to properly deal with his frustration and often behaves inappropriately. This results in his being sent to the principal’s office where he misses more instruction and falls further behind.

The evaluations completed in 2011 support Falmouth’s position that Student requires services in the communication and social emotional realm. The proposed IEP for the Structured Learning Center provides services to address those needs as well as his reading needs. There is a consult with a BCBA to assist staff in meeting Student’s behavioral and emotional needs. There are extensive services with a speech language pathologist to address his communication issues, and daily opportunities to focus on social skills. The IEP provides Student with a specialized reading program daily.

Although it appears that Mother did not wish for Student to be pulled out of the classroom for any services other than reading, the credible testimony of Student’s service providers and Team members, along with the evidence of Student’s lack of progress during the second grade, demonstrate that he requires intensive services that can only be provided by way of specialized instruction and services. However, the Structured Learning Center is designed to provide Student with as much inclusion in the general education setting as he is able to tolerate. This satisfies Falmouth’s mandate to provide Student appropriate services in the least restrictive setting. Student’s past performance has demonstrated that he is not successful in a solely inclusion setting. He also was not successful in a partial inclusion setting when he was not provided with appropriate emotional, behavioral and communication-related supports. The Structured Learning Center is an appropriate placement for Student because it provides services for all of his identified needs while allowing him to be included as appropriate.

It is unfortunate that the Parties have not been able to communicate effectively and work together to determine appropriate services for Student. The Parties should consider engaging in a mediation to assist them in re-establishing a means to communicate regarding Student’s future educational needs.

ORDER

Based upon the foregoing, I find that it is appropriate for the BSEA to override Mother’s refusal to consent to the conduct of an FBA and hereby authorize Falmouth to conduct its propose FBA.

Additionally, I find that the IEP proposed for the period from April 9, 2012 until April 8, 2013 is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. Falmouth is authorized to implement the IEP.

By the Hearing Officer,

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Catherine M. Putney-Yaceshyn

Dated: July 26, 2012

1. The BSEA granted Falmouth’s request to submit its closing argument on July 3, 2012. [↑](#footnote-ref-1)
2. 20 USC 1400 *et seq*. [↑](#footnote-ref-2)
3. MGL c. 71B. [↑](#footnote-ref-3)
4. 20 USC 1412(5)(A) [↑](#footnote-ref-4)
5. For a discussion of FAPE see *Hendrick Hudson Bd. Of Education v. Rowley*, 458 U.S. 176, 188-189 (1992); *Cedar Rapids Community School District v. Garret F.,* 526 U.S. 66 (1999); Burlington v. Department of Educatio*n*, 736 F. 2d 773 (1st Cir. 1984). *Houston Independent School District v. Bobby R*., 200 F.3d 341 (5th Cir. 2000); *Stockton by Stockton v. Barbour County Bd. of Educ.,* 25 IDELR 1076 (4th Cir. 1997); *MC v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996), *cert. denied* 519 US 866 (1966); *Ridgewood Board of Education v. NE*, 30 IDELR 41 (3rd Cir. 1999). See also *GD v. Westmoreland School District*, 930 F.3d 942 (1st Cir. 1991). [↑](#footnote-ref-5)
6. *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 203, 102 S.Ct. 3034, 3049 (1982). [↑](#footnote-ref-6)