

# **THE COMMONWEALTH OF MASSACHUSETTS**

## **DIVISION OF ADMINISTRATIVE LAW APPEALS**

### **Bureau of Special Education Appeals**

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In RE: Clyde<sup>1</sup>

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BSEA #1304032

Martha's Vineyard Public Schools

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#### **DECISION**

This decision is issued pursuant to M.G.L. chs.71B and 30A, 20 U.S.C. §1400 *et seq.*, 29 U.S.C. § 794 and the regulations promulgated under those statutes. A hearing was held in the above-entitled matter on May 30, 2013 at the Offices of Murphy, Lamere and Murphy in Braintree, MA. Those present for all or parts of the proceedings were:

Ms. C.	Parent
Will Verbits	Director of Special Education, Martha's Vineyard Public Schools
Donna Lowell-Bettencourt	Director of Student Support Services, Martha's Vineyard Public Schools
Mary Joan Reedy	Attorney for Martha's Vineyard Public Schools
Jane Williamson	Court Reporter
Lindsay Byrne	Hearing Officer, BSEA

The official record of the Hearing consists of exhibits submitted by the Parent marked P-1 and P-2; exhibits submitted by the School marked S-1 through S-16; and approximately six hours of recorded oral testimony and argument. The Parent appeared pro se. The School was represented by a counsel. Written closing arguments were due on June 21, 2013. The School submitted a timely closing argument. The Hearing Officer sua sponte extended the deadline for receipt of the Parent's closing argument to July 1, 2013. Nothing was submitted by the Parent and the record closed on that date.

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<sup>1</sup> "Clyde" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

## ISSUES

As set out in the Prehearing Scheduling Order dated April 26, 2013 the issue presented for resolution by the Parent is:

Whether the Martha's Vineyard Public Schools appropriately implemented the Student's last accepted IEP by timely offering a comparable residential educational program?

## SUMMARY OF THE EVIDENCE

The following operative facts are not in dispute:

1. The last accepted IEP for purposes of the instant dispute is the one developed by the Dover-Sherborn Public Schools in November 2010 which determined that Clyde needed a therapeutic residential education program and identified the appropriate placement as the Academy at Swift River. (S-15)
2. Ms. C. accepted the IEP proposed by Dover-Sherborn on June 13, 2011. (S-15)
3. Clyde attended the Academy at Swift River from November 2, 2011 until June 5, 2012 when he left school without permission and did not return. (S-12)
4. The Parent has not accepted any subsequent IEP developed by Martha's Vineyard Public Schools. The Parent has not accepted any educational placement proposal since Academy at Swift River.
5. Clyde has been entitled to a therapeutic residential educational placement at all times during the pendency of this dispute.
6. The Parent has not taken any unilateral "self-help" action and is not seeking reimbursement of any expenses incurred on Clyde's behalf between June 2012 and the date of the Hearing.

The following facts are found based on the preponderance of credible evidence in the Hearing Record:

7. At the time this dispute arose Clyde was a 17 year old tenth grade student. Clyde has above-average cognitive potential and recent standardized academic achievement testing reveals acquisition of academic skills consistent with that potential. (S-11) He has been diagnosed with Depression, OCD, Substance Abuse Disorder and Conduct Disorder. (S-10; S-12; S-13; S-9) He is eligible for special education services on the basis of an emotional disability. (S-15; S-1; S-2; S-6)

8. Beginning in 2009, after a period of declining performance and inadequate attendance in public school programs operated by his former town of residence, Dover-Sherborn, Clyde attended a series of therapeutic residential schools and programs in Massachusetts and out-of-state. (S-15; S-10; S-11). In November 2010 Dover-Sherborn developed an IEP calling for Clyde to attend the Academy at Swift River, an approved residential special education school in Cummington, MA. (S-15) The proposed placement was developed in the context of referrals to at least 13 therapeutic programs within Massachusetts. (P-2) The Parent accepted the proposed IEP on June 13, 2011. Clyde began attending the Academy at Swift River on November 2, 2011. (S-12)
9. The Family moved to Martha's Vineyard in the fall of 2011. On June 5, 2012 Clyde left the Academy at Swift River without permission. Although he returned to the Family home in Martha's Vineyard sometime later that month, he elected to live and work independently for the remainder of the summer. (S-12; Ms. C.)
10. Mr. Verbits, Director of Special Education, and Ms. Lowell-Bettencourt, Director of Student Support Services, for Martha's Vineyard Public Schools, were both new to their positions on August 1, 2012. Ms. Lowell-Bettencourt testified that she learned of Clyde on her first work day. She met with Ms. C. on August 10, 2013. Ms. C. requested that Martha's Vineyard place Clyde at either Catalyst Residential Treatment Center or Vista Residential Treatment Center, both in Utah. Ms. Lowell-Bettencourt asked Mr. Verbits to investigate both placements which he did. The School invited Catalyst to participate in the Team meeting scheduled for August 22, 2012. At the meeting Catalyst indicated that its boys-only program could meet Clyde's learning needs and currently had an opening. On September 4, 2012 the School proposed an IEP for Clyde calling for a therapeutic residential placement and indicating on Page 1 that Catalyst was the "assigned school" and on Page 18 that the location of service provision was "TBD" (to be determined). (S-6; Lowell-Bettencourt, Verbits)
11. Ms. Lowell-Bettencourt testified that while preparing for Clyde's placement at Catalyst she reviewed Clyde's school records. She found that there was no indication that Martha's Vineyard, Clyde's current residence, or Dover-Sherborn, Clyde's previous residence, had conducted a search for an appropriate therapeutic school in Massachusetts. In order to secure State approval for the Catalyst placement Martha's Vineyard would be required to demonstrate that no appropriate in-district or in-state program was available for Clyde. On September 7, 2012 she called Swift River and Dover-Sherborn to request their records. She was unable to secure parental consent to release the records to Martha's Vineyard until September 14, 2012. When the records from Dover-Sherborn arrived on September 19, 2012, there was no evidence of the required search. Ms. Lowell-Bettencourt called the Parent on September 20, 2012 to determine if the Parent had any relevant records. They met on September 27, 2012 to review a long list of Massachusetts options. The Parent agreed to look at the Wedeiko and Eagleton programs. Later she withdrew consent for a referral to Eagleton. The Parent, Clyde and Mr. Verbits visited Wedeiko on October 5, 2012. The Parent declined to pursue placement at Wedeiko citing its single gender program and inappropriate age range. The age range at Wedeiko is 9-21. There are no recommendations in Clyde's educational

record concerning the appropriate gender composition of potential educational placements. (Lowell-Bettencourt; S-6; S-9; S-10; S-12; S13; S-15. See also: Verbits)

12. At that point Catalyst and Vista notified Martha's Vineyard that there were no current openings in their programs. Ms. C. requested placement at the John Dewey Academy, a regular education boarding school in Massachusetts. Ms. Lowell-Bettencourt contacted John Dewey immediately but learned that Clyde would not be admitted because a relative was already in attendance. Ms. Lowell-Bettencourt continued to investigate appropriate alternatives to Catalyst, both in-state and out-of-state, including Montcalm Academy, Summit Academy, Grove School, and Hyde School, none of which accepted Clyde, as well as Stone Mountain, Deck House, and Cooper Canyon Academy, none of which were appropriate for him. Ms. Lowell-Bettencourt believed Wedeiko remained appropriate for and available to Clyde. Ms. C. told Ms. Lowell-Bettencourt, however, that she would not accept any placement in Massachusetts. Since Ms. Lowell-Bettencourt believed that Provo Canyon Residential Treatment Center in Utah also offered an excellent program suited to Clyde's needs and comparable to the Academy of Swift River Martha's Vineyard Public Schools offered that placement to Clyde, initially on October 14, 2012, and continually throughout the fall and winter 2012-2013. (Ms. C.; Ms. Lowell-Bettencourt; P-1, S-14)
13. Ms. C. testified that she understood that Martha's Vineyard had offered Clyde a placement at the Catalyst Residential Treatment Center at her request, and consistent with the recommendation of the Academy at Swift River, through an IEP issued on September 4, 2012. She understood that the placement has been continually available to Clyde since then. Ms. C. stated that she did not accept the IEP because it did not seem like a timely or good faith effort on the part of the School to identify an appropriate school for Clyde. (Ms. C.; See also Verbits, Lowell-Bettencourt)
14. Will Verbits, Special Education Director for Martha's Vineyard, testified that he learned of Clyde as soon as he started his new job in August, 2012. Mr. Verbits met with Clyde shortly thereafter. Clyde told Mr. Verbits that he wanted to attend Martha's Vineyard High School and play sports. Mr. Verbits advised both Clyde and Ms. C. that Clyde could receive academic and therapeutic services through the High School's substantially separate therapeutic program or through discrete add-on services while placed at the High School on an interim, temporary or permanent basis pending attendance at a residential school. He offered to arrange a tour of the School and the therapeutic program for Ms. C. in September and October, 2012 and in January 2013. She declined to visit. Martha's Vineyard arranged for 1:1 out of school/home academic tutoring for ten hours per week as well as weekly individual counseling. These services began in early October, 2012. By December Clyde's attendance and performance were inconsistent. (Verbits; Ms. C.)
15. Clyde attained the age of 18 on January 18, 2013. A Team meeting to discuss age of majority and transitional issues had been scheduled for January 3, 2013 but at the family's request was not held. (S-4) On January 26, 2013 Ms. C. signed a consent form permitting Martha's Vineyard to send referral packets to 22 out-of-state private therapeutic residential programs. (S-8). On January 28, 2013 Clyde signed an "Age of Consent Decision Form" electing to share special education decisions with his parent.

(S-5). Also on January 28, 2013 Martha's Vineyard proposed, consistent with Clyde's request, an interim placement at Martha's Vineyard High School. Clyde and Ms. C. accepted the interim placement pending identification of an appropriate residential option. (S-3; Ms. C; Lowell-Bettencourt)

16. Of the 22 out-of-district placements that reviewed Clyde's school records, nine responded that their programs might be appropriate. Of those Ms. C. and Ms. Lowell-Bettencourt identified 4 as potentially appropriate: Montcalm, Sorenson Ranch, Turning Winds and Mountain Lake Academy. In February 2013 Clyde had telephone interviews with the four potential placements. He insisted he was not interested in residential placements but "if forced", would choose Montcalm. Ms. C. insisted that only Turning Winds would be appropriate for Clyde. Ms. Lowell-Bettencourt visited Turning Winds in Utah on March 27, 2013 and approved the program. Martha's Vineyard offered an immediate placement in advance of a positive response from the DESE of the "sole source" application approval process. (S-1; Lowell-Bettencourt) Ms. C. accepted the Turning Winds placement. Clyde rejected the proposed placement at Turning Winds on April 24, 2013. (S-1)
17. Clyde attended a partial day program at Martha's Vineyard High School for a few months. His attendance was progressively inconsistent and by April 2013 he was not accessing any school based services. Clyde maintained that he was not interested in any residential options.<sup>2</sup> (Ms. C.; Verbits; Lowell-Bettencourt)

## FINDINGS AND CONCLUSIONS

There is no dispute that Clyde is a student with special learning needs as defined by 20 U.S.C. § 1401 *et seq* and M.G.L. c. 71 B. The only issue is whether Martha's Vineyard took all reasonable and appropriate measures to ensure continuous implementation of Clyde's accepted IEP after the placement that had been delivering the services to him became unavailable. After careful consideration of all the evidence presented at the Hearing, and of the arguments of both parties, it is my determination that the Parent has failed to prove by a preponderance of the evidence that Martha's Vineyard neglected its duty to offer Clyde an immediate educational placement comparable to that outlined and delivered under his last agreed upon Individualized Education Program. *Schaffer v. Weast*, 546 U.S. 49 (2009).

This matter involves one of the fundamental procedural protections available to students with disabilities under the IDEA and M.G.L. c. 71B, colloquially known as "stay put".<sup>3</sup> "Stay put" comes into play whenever a Student/Parent and the responsible local school district disagree about provision of special education services. It also applies to situations where, as here, the agreed upon special education services can no longer, for any number of reasons, be delivered to the student in the manner, location, setting, hours, methodology or by the personnel contemplated under the last accepted IEP. Where the precise terms previously agreed to cannot be implemented, a school district's obligation to "maintain the status quo" may be fulfilled by

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<sup>2</sup> At the time of the Hearing on May 30, 2013 Clyde had indicated his consent to residential placement at Turning Winds and was scheduled to leave for the program a few days later.

<sup>3</sup> 20 U.S.C. §1415 (j); 34 CFR §300.518; 603 CMR 28.08 (7).

identifying and providing a “comparable” program. A “comparable” special education program is one which matches as closely as possible the setting, the type and level of service delivery, the degree of mainstream contact, the methodology and teaching approach, the staff-student ratio, the instructional and therapeutic expertise, and the duration of direct and incidental teaching the student received in the placement in which the student was enrolled at the time the dispute or placement interruption occurred.<sup>4</sup>

Here the Parties agree that a therapeutic residential education program or a residential treatment center with a strong educational component is “comparable” to the one no longer available to Clyde through the Academy at Swift River.

The Parent asserts that Martha’s Vineyard Public Schools intentionally delayed locating a placement comparable to the Academy at Swift River for the purpose of avoiding its obligation to implement a therapeutic residential education program for Clyde. She argues that Martha’s Vineyard Public Schools personnel were aware that Clyde did not agree that residential programming was appropriate for him, that he wished to remain in Martha’s Vineyard which has no residential educational programs, and that he would attain the age of 18 in January 2013. By waiting until Clyde had independent legal authority to approve or disapprove his IEP, Ms. C. argues, Martha’s Vineyard could and did take advantage of Clyde’s lack of insight into his own educational needs to offer him less expensive programming.

To be sure, the delay of almost ten months in the actual delivery of an educational program comparable to that outlined in the last agreed upon IEP is deeply troubling. Furthermore, the record demonstrates that the results of Martha’s Vineyard’s efforts to locate alternative placements, to communicate with the Parent and to ensure timely delivery of appropriate special education services to Clyde were less than ideal. While the School has a continuing obligation to maintain a Student in his last agreed upon placement, or if that placement is unavailable for any reason to provide a comparable program, there are extenuating circumstances in this matter that explain the difficulty the School had in fulfilling its statutory duty.

First, it is unclear when the School was notified or otherwise learned of Clyde’s absence from the Academy at Swift River. The testimony established only that the new Directors of Special Education and Student Support Services learned of the need to secure an alternate education program for Clyde when they started their jobs at the beginning of August 2012. The record shows that they immediately met with the Parent, investigated the placements she suggested, selected one, Catalyst, arranged for Catalyst to participate in a Team meeting within two weeks, and ten days later proposed an IEP indicating residential placement at Catalyst.

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<sup>4</sup> See e.g. *Knight by Knight v. District of Columbia*, 877 F.2d 1025 (DC Cir. 1989), (“if a child’s then-current educational placement is not available, the school system must provide the student with placement in a similar program during the pendency of administrative and judicial proceedings); *R.B. ex rel Parent v. Mastery Charter School*, 762 F.Supp. 2d 745 (E.D. Pa 2012) (“where a child’s then-current placement is simply no longer available, the LEA retains responsibility for providing the student with placement in a similar program.); *Spilsburg v. District of Columbia*, 307 F. Supp. 2d 22, 26 (D.D.C. 2004) (current educational placement encompasses the whole range of services a child needs not only the physical school building the child attends).

After that reasonable response by the School, things began to go awry. The Parent declined to accept the proposed IEP and placement at Catalyst. The reason she gave, that she did not believe Martha's Vineyard would actually place Clyde at Catalyst, did not alter or advance Martha's Vineyard's understanding of Clyde's needs nor facilitate his placement in a residential program comparable to the Academy at Swift River. Meanwhile Martha's Vineyard began to conduct the search for an appropriate, approved in-state special education program for Clyde as required by the DESE's "sole source" approval process. The Parent indicated that she would not accept any placement in Massachusetts. She later met with Ms. Lowell-Bettencourt and Mr. Verbits to review potential programs in Massachusetts, but declined permission to send referral packets to all but one, Wedeiko. After visiting Wedeiko, Ms. C. and Clyde declined Martha's Vineyard's offer to place Clyde there. Ms. C. then requested a placement at the John Dewey Academy, an unapproved non-special education private boarding school in Massachusetts. Ms. Lowell-Bettencourt investigated that option but learned that Clyde would not be accepted. In mid-October, with the proposed placement at Catalyst still outstanding, but unaccepted, and resources within Massachusetts exhausted, Ms. Lowell-Bettencourt reasonably determined that the sole source criteria had been met and widened the search for an appropriate placement for Clyde. On October 14, 2012 Martha's Vineyard offered an immediate placement at Provo Canyon, a residential treatment center similar to Catalyst. Ms. C. declined. Thereafter in November, 2012 Martha's Vineyard contacted 7 out-of-state programs for which Ms. C. gave contact permission; none was acceptable to Ms. C. All the school district's actions were reasonable and timely under the difficult circumstances presented.

Meanwhile, Martha's Vineyard had ongoing contact with Clyde through his tutor, evaluators and Mr. Verbits. Martha's Vineyard was aware that Clyde and his mother had substantial disagreements about both his then current and his future educational programming. Ms. Lowell-Bettencourt pointed out that most residential programs require the cooperation of a late adolescent and would not accept a student who plainly indicated an unwillingness to participate in a particular program, as Clyde had. The conflict between the Parent and the Student clearly hampered Martha's Vineyard's ongoing efforts to locate appropriate educational programming acceptable to both the Student and the Parent. There was little the school district could do to resolve that conflict. Martha's Vineyard met its obligation to educate Clyde by continuing to offer a program comparable to Swift River through the unaccepted September 4, 2012 IEP, through making a continuum of placements at the local High School immediately available to Clyde, and by ensuring the delivery of interim tutoring and therapy services to him. That none of those options were acceptable to both Clyde and his mother does not negate the appropriateness of the school district's actions.

Later, when Clyde turned 18 and elected shared decision making with his mother the conflict in perspectives did not abate. Martha's Vineyard continued to offer placements comparable to Swift River, continued to offer a continuum of services at the High School, and continued to search for a program all parties could agree upon. When Ms. C. identified Turning Winds as an acceptable program the school district visited the site, approved the placement, and produced an IEP offering Turning Winds within one week. These actions were careful, timely and consistent with the school district's previous responses to Clyde's difficult circumstances and Ms. C's requests. That Clyde later rejected the proposed IEP and refused residential placement does not negate the fact that the school district fulfilled its ongoing duty to offer a

placement both comparable to the Academy at Swift River and appropriate for Clyde's identified learning needs.

The preponderance of the evidence demonstrates that Martha's Vineyard acted in a timely manner by identifying and proposing a therapeutic residential program at Catalyst that was "comparable" to the Academy at Swift River when it learned in August 2012 that Clyde was in need of a new placement. That program and placement was never accepted by the Parent.

The preponderance of the credible evidence also establishes that Martha's Vineyard continued to make significant efforts to locate "comparable" programs acceptable to the Parent throughout fall 2012 and winter 2013; that Martha's Vineyard actually offered immediate placement to Clyde in at least three programs it believed were comparable and appropriate; and that it discharged its responsibility to evaluate and educate Clyde while these efforts were undertaken.

The Parent did not argue, nor is there any evidence in this record, that the placements offered by Martha's Vineyard were not "comparable" to the Academy at Swift River. There is little support, other than her own suspicions and the passage of time, for the Parent's contention that the school district dragged out the process of identifying and proposing a placement comparable to Swift River until Clyde could reject it on his own. In fact the Parent did that for him by not responding to the September 4, 2012 IEP when it was developed or anytime thereafter.

#### ORDER

Martha's Vineyard met its procedural obligations under 20 U.S.C. § 1415 (j) and 603 CMR 28.09 (7) to timely and continuously offer a comparable therapeutic residential educational program to Clyde when his last agreed upon placement at the Academy at Swift River became unavailable to him.

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Lindsay Byrne, Hearing Officer

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Dated: July 16, 2013

