

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Boston Public Schools

BSEA # 1308609

DECISION

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

A hearing was held on June 10, 2013 at One Congress Street, Boston, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Heather Fortuna	In-Home Behavior Therapist, Toward Independent Living and Learning, Inc.
Ronald Samuels ¹	Pediatrician, Boston Children's Hospital
Patrice Glancy	Special Education Teacher, Boston Public Schools
Colleen McNamara	Special Education Services Coordinator, Boston Public Schools
Natalie Ake	Boston Public Schools
Jennifer Sweeney	Boston Public Schools
Rajan Sonik	Attorney for Parent and Student
Jeffrey Becker	Attorney for Boston Public Schools
Andrea Alves Thomas	Attorney for Boston Public Schools

The official record of the hearing consists of documents submitted by the Parent and marked as exhibits P-A through P-Z and P-AA; documents submitted by the Boston Public Schools (Boston) and marked as exhibits S-1 through S-9; and approximately one half-day of recorded oral testimony and argument. As agreed by the parties, oral closing arguments were made at the end of the evidentiary hearing on June 10, 2013, and the record closed on that date.

INTRODUCTION

On May 24, 2013, Parent filed her Hearing Request, seeking expedited status because of alleged threats to Student's health and safety. The Hearing Request stated that at school

¹ This witness testified by telephone.

Student was being allowed to eat food off of the floor and from the garbage. In addition, the Hearing Request generally challenged the appropriateness of the current IEP, taking the position that Student needs a small, highly-specialized program with a low student-to-teacher ratio that is designed to meet Student's unique educational needs. The Hearing Request also sought compensatory relief.

The BSEA granted expedited status. The Hearing Officer bifurcated the case, allowing one part of the dispute to proceed on an expedited status, with all other aspects of the dispute to proceed on a non-expedited status. The expedited issue was framed in the Hearing Officer's June 4, 2013 order as follows: "whether Student's health and safety is [sic] being compromised in her current program, and, if so, what measures must Boston take at this time to assure Student's health and safety." The case was reassigned for administrative reasons to the present Hearing Officer on June 6, 2013. A hearing was held on June 10, 2013 to address the expedited issue, with all remaining issues to be addressed at a separate hearing scheduled to begin on August 26, 2013.

Parent takes the position that as a result of Boston's failure to address Student's uncontrolled behavior, including eating food off the floor and from the garbage, her health and safety are at risk. The only relief sought by Parent is immediate placement in an out-of-district, private day program that would appropriately meet Student's educational (including behavioral) needs.

Boston takes the position that it is taking all reasonable steps to address Student's behavior deficits, including the relatively recent assignment of a dedicated 1:1 aide and a recent Applied Behavior Analysis (ABA) consultation assessment that will be soon reviewed by Student's IEP Team. Boston urges continuing this incremental approach, which it believes is gradually and successfully addressing Student's behavior difficulties, including eating food off of the floor and from the garbage.

For reasons explained below, I am persuaded by the evidence that Student's health and safety are currently at risk, but I am not persuaded, at this juncture of the proceedings, that Student is entitled to an out-of-district, private placement to address those health and safety risks. As detailed below, Boston is directed to take immediate steps to address the risk to Student's health and safety.

ISSUES

The issues to be decided in this expedited part of the dispute are the following:

1. Are Student's health and safety being compromised in her current program?
2. If so, what measures must Boston take to assure Student's health and safety?

FACTUAL BACKGROUND

Student is a ten-year-old girl who lives with her Mother in Boston. As Parent explained in her testimony, Student is a “sweet” girl who has a variety of challenges. These challenges include diagnoses of Autism spectrum disorder, global developmental delays (including a moderate intellectual deficit) and Rett Syndrome. These deficits substantially limit Student in a variety of ways, including her ability to learn basic academic and daily living skills (such as dressing and bathing). Student also has substantial behavioral difficulties that have precluded her from accessing the curriculum. Testimony of Mother, Samuels, Glancy.

During the current school year, Student has been placed in a substantially-separate classroom at Boston’s Jackson Mann School. Currently, there are six children in Student’s classroom, including Student. It is staffed by a lead teacher (Ms. Glancy), two classroom aides and two aides dedicated to working with specific children.

Of most immediate concern to Parent and Boston and central to this expedited portion of the dispute are Student’s behaviors, particularly those reported at school. Student’s behavior takes on added meaning when one considers that she weighs approximately 200 pounds and is approximately five feet tall. Testimony of Mother.

There is evidence of behavioral difficulties (and consequent safety concerns) from the fall of the current school year. In a report dated October 11, 2012, Student’s occupational therapy consultation report noted “[s]afety concerns secondary to student’s significantly decreased behavioral/impulse control despite 2:1 adult support during specific portions of school day.” Exhibit P-s (page 1).

Student’s in-home behavior therapist (Ms. Fortuna) observed Student at school on December 6, 2012 for approximately two hours. During this observation, Student had six instances of food stealing, seven instances of food stealing attempts, 14 instances of noncompliance, 11 instances of touching objects or others inappropriately, and six instances of property destruction. During the observation, a 1:1 aide was available to try to contain Student’s behaviors. Testimony of Fortuna; exhibit P-X.

In a progress report dated March 15, 2013, Student’s special education teacher (Ms. Glancy) detailed the severity of Student’s behavioral difficulties, the challenges Boston faces in addressing them, Student’s lack of progress in this area, and the implications for Student’s learning. In the report, Ms. Glancy wrote as follows:

[Student] has not demonstrated progress in the area of self-regulation. She continues to engage in various negative behaviors through all parts of her day; behaviors vary greatly in topography and function at this time. These behaviors continue to interfere with her ability to participate in all activities across her day including academics, specialty classes, and therapies. Inappropriate behaviors include, but are not limited to the following: food stealing, bolting, flopping, hitting, out of seat, hair pulling, mouthing inedible objects, touching objects in the environment or grabbing other

students things, touching other students, inappropriate eating, property destruction, and non-compliance. Access to items, access to teacher attention, escape, and automatic reinforcement have all been observed to be functions of [Student's] various behaviors. Data over the past measured sessions indicated that [Student] is currently demonstrating inappropriate behavior at an average rate of .79 occurrences per minute. This rate is with receiving as much as one to one supervision throughout all parts of the day that we can possibly provide and would be significantly higher if we did not staff her with this level of supervision to block/redirect many of these behaviors. If left unattended for longer than three seconds, [Student] will immediately engage in one of the above behaviors, mostly [sic] likely going directly to food whether it's in the classroom, hallways, or somewhere else where she knows there is food. Data indicated that [Student] cannot be left unsupervised at any time of the day including in the cafeteria, transitions, in the classroom, specialty classes, therapies, or in the bathroom. She will leave any area at any time (bolting) in order to obtain food. Despite one to one supervision, [Student] stole 22 times in a 215 minute period (data taken over 5 sessions), which is 3.7 steal per hour. Additionally, it should be noted that [Student] steals food off the floor at least one time per day, out of the trash at least one time every two days, and takes other students [sic] meals (including studies in other classrooms) at least one time per day. [Exhibit P-Z (page 2).]

The record reflects that Ms. Glancy has been teaching at the Horace Mann School since October 2002, she has a master's degree in education (severe disabilities) and she has been a Board Certified Behavioral Analyst (BCBA) since October 2012. In other words, she is a highly experienced teacher with substantial expertise regarding behavior difficulties of special needs students. Testimony of Glancy; exhibit S-8.

More recently (as of approximately April 1, 2013), Boston added, a dedicated 1:1 aide for Student. Also, Boston has revised Student's behavior plan on several occasions (most recently on May 1, 2013), and medication changes occurred in early May 2013. These changes have coincided with (and perhaps have resulted in) an improvement in Student's behaviors overall, as explained below. Testimony of Glancy.

Boston's most recent data is broken down into three time periods—first, from April 1, 2013 through April 11, 2013 (this is the time period before April vacation); second, from April 23, 2013 to May 12, 2013 (this is the time period after April vacation and after a medication change); and third, from May 13, 2013 to May 24, 2013 (this is the time after implementation of the most recent changes to Student's behavior plan). During these three time periods, Student's overall percentage of compliance started at 27%, increased to 57% and further increased to 73%. Similarly, Student's rate of inappropriate behaviors per minute started at .94, dropped to .55 and further dropped to .39. These inappropriate behaviors include touching objects, touching people, aggression towards staff, aggression towards other students, out of seat, mouthing non-edible objects and "flopping" onto the floor. Similarly, the data shows that the number of tantrums per day has decreased substantially, as has the

number of aggressions per day, over the course of these three time periods. Testimony of Glancy; exhibits S-4, P-X (page 9).

At the same time, it may be noted that these decreases in behavior happened concurrently with Boston's decision to reduce demands on Student by no longer trying to take food away from her once she had grabbed it. Boston found that it was quite difficult to take food away from Student and that it typically resulted in additional behavior problems, including tantrums and flopping to the floor which can be dangerous to Student and others. Testimony of Glancy.

Even with the reductions in aberrant behaviors, it is not disputed that Student's behavior difficulties, as reported by Boston's data and by Ms. Glancy, remain substantial. For example, as noted above, the most recent data reflects that although her rate of inappropriate behavior has been reduced substantially, Student continues to demonstrate an inappropriate behavior on average once every two or three minutes throughout the day. Testimony of Glancy; exhibit S-4.

Student eats lunch in a cafeteria with approximately 200 other students. It is not unusual for there to be food left on the floor in the cafeteria and in the hallways, there is food in the trash, and other students have food. In other words, Student has many opportunities throughout the school day to try to steal food. Testimony of Glancy.

Boston's data indicates that food steals either from others, from the floor or from the garbage have decreased only marginally and remain at approximately seven per day. As mentioned above, once Student has grabbed inappropriate food, staff now allow her to eat it. Typically once or twice per day, Student grabs food from the floor or from the garbage, with the result that currently Student is daily eating food from the floor or garbage. Testimony of Glancy.

DISCUSSION

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."² "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."³ An IEP must be "tailored" to address the student's "unique" needs that result from his or her disability.⁴ The IEP must be "reasonably calculated to confer a meaningful educational benefit."⁵

² 20 U.S.C. § 1400 (d)(1)(A).

³ *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

⁴ See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be "tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)"); *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1st Cir. 2007) (FAPE includes "specially designed instruction ... [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. § 300.39(b)(3)).

⁵ *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *I.M. ex rel. C.C. v. Northampton Public Schools*, 869 F.Supp.2d 174, 177 (D.Mass. 2012).

The IDEA also reflects a preference for mainstreaming disabled students.⁶ This entails ensuring, “[t]o the maximum extent appropriate,” that disabled children are taught with nondisabled children.⁷ “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”⁸

Safety concerns may be considered by a BSEA Hearing Officer in a special education dispute since these kinds of concerns, if substantiated, may preclude a student from receiving FAPE.⁹

Parent has the burden of persuasion on all issues.¹⁰

As quoted above in the Factual Background section, Ms. Glancy’s March 15, 2013 progress describes in graphic and alarming detail the behaviors that Boston has found impossible to extinguish even with near constant supervision. To Boston’s credit, progress has been demonstrated more recently, but Student’s behaviors nevertheless remain both dangerous and on-going, particularly in the area of stealing food, and Student continues to have very high levels of inappropriate behavior throughout the day.

As discussed earlier, the most recent data indicate that Student continues to steal food approximately seven times per day. Ms. Glancy estimates that approximately one or two of these daily food steals is from the floor or from the garbage. Once Student has grabbed inappropriate food, she is allowed to eat it because of the difficulties in trying to take away her food. Thus, it is undisputed that notwithstanding the addition of a 1:1 dedicated aide and adjustments to her behavior plan, Student continues eating food from the floor and from the garbage on a daily basis. Testimony of Glancy; exhibits P-Z (page 2), S-4.

Also, as discussed above, Student has other potentially-dangerous behaviors that continue, including flopping to the floor, and aggression towards staff and other students. “Flops” can

⁶ 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

⁷ 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i).

⁸ *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1st Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1st Cir. 2002) (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990).

⁹ See *Lillbask v. Connecticut Department of Education*, 397 F.3d 77, 93 (2nd Cir., 2005) (IDEA’s “broad language suggests that Congress did not intend to exclude from consideration any subject matter - including safety concerns - that could interfere with a disabled child’s right to receive a free appropriate public education”); *A.S. and W.S. v. Trumbull Board of Education*, 414 F.Supp.2d 152, 178 (D.Conn. 2006) (if the proposed placement . . . threatened [students’] health in a manner undermining their ability to learn, such a placement would deny the children the benefits that the IDEA guarantees”). See also cases discussing claims of school-related harassment or hostile learning environment, including *Stringer v. St. James R-1 School District*, 446 F.3d 799 (8th Cir. 2006); *Guckenberger v. Boston University*, 957 F.Supp. 306, 313 (D.Mass. 1997); *In Re: Peabody Public Schools*, BSEA # 01-3945, 8 MSER 108, 128 (SEA MA 2002).

¹⁰ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

last up to 45 minutes and can be dangerous to Student and others, particularly when Student flails her arms and legs. Testimony of Glancy; exhibit S-4.

The most recent data reflects that Student continues to demonstrate an inappropriate behavior on average once every two or three minutes throughout the day. The educational implications of these on-going and frequent inappropriate behaviors are undisputed. Ms. Glancy wrote in her March 15, 2013 report (quoted above in the Factual Background section): “These behaviors continue to interfere with her ability to participate in all activities across her day including academics, specialty classes, and therapies.” Ms. Glancy testified that Student’s behavioral difficulties have continued to preclude her from being able to access the curriculum, even with the recent reduction in Student’s overall rate of number of inappropriate behaviors. Testimony of Glancy; exhibits S-4, P-Z (page 2).

To their credit, Boston’s staff and teachers have recognized the problem. Boston has made incremental improvements of adding a 1:1 staff and adjusting Student’s behavior plan, and Boston will review the results of the recent ABA therapy consultation evaluation. Boston takes the position that it is appropriate and sufficient for it to continue this incremental approach with the expectation that these steps may further reduce Student’s behavior.

I disagree. Student’s behaviors are becoming (or have become) more entrenched and therefore more difficult to ameliorate, she is getting older and stronger, and she is losing valuable time needed to remediate her behaviors and learn academic and daily living skills. For a substantial period of time, her behaviors have completely eclipsed any opportunity to make meaningful educational progress and they continue to subject Student to unhealthy and dangerous eating habits; yet, there is no realistic expectation that Boston’s incremental approach will remedy this any time soon. In sum, the undisputed evidence demonstrates that despite many months of knowing about and working with Student and her behavioral difficulties, she is left with daily, dangerous behaviors and with no ability to access the curriculum. I find it to be completely unacceptable to allow this situation to continue.

I now turn to the question of what additional measures must Boston take to assure Student’s health and safety.

Parent argues that, in light of the evidence regarding Student’s history of behavior and educational difficulties within Boston’s educational programs, I should immediately order Boston to place Student in an out-of-district therapeutic placement with a low student-to-teacher ratio that is tailored to meet Student’s unique constellation of needs. Parent has supported this position with the testimony of Ms. Fortuna. But, Ms. Fortuna is an in-home behaviorist with no demonstrated expertise or experience outside of this area of work. I find that she is not able to provide credible expert testimony on this part of the dispute.

Parent also has produced a supportive letter from Walter Kaufman, MD, who is Director of the Rett Syndrome Program at Boston Children’s Hospital. Exhibit P-Y. But, there is no evidence regarding Dr. Kaufman’s expertise or experience educating students with Student’s

constellation of difficulties, and he did not testify. I therefore find that the letter has no probative value.

Finally, Parent points to her testimony that she followed up with one or more alternative in-district placements suggested by Boston and found that even the staff at these programs agreed that the programs would be inappropriate for Student. Testimony of Parent. But, this is hardly a demonstration that Boston does not have or cannot develop an appropriate educational program within the School District so as to justify a more restrictive, private school to resolve Student's health and safety issues. Moreover, neither Parent nor any other witness testified as to how such a private program would likely address and resolve Student's current unsafe behaviors.

Thus, I find that Parent has provided no credible evidence that in order to address Student's needs for a safe environment, the only viable solution is placement in an out-of-district school. Parent has neither offered nor proposed any other relief. I now turn to Boston's evidence and argument as to what may be done prospectively.

Ms. Glancy testified that she did not know how it might be possible to further limit Student's stealing food. For example, she did not know whether additional staffing would resolve the problem. She explained that Student moves very quickly and is able to grab food at times even before her 1:1 staff can stop her. Testimony of Glancy. I find it telling that Ms. Glancy, with her substantial expertise and experience, including working directly with Student for nearly an entire school year, appears to have run out of ideas for addressing Student's unsafe food stealing or otherwise resolving Student's overall behavioral problems.

Boston's only proposal for further addressing Student's current difficulties is an ABA therapy consultation that was recently completed, but the content and recommendations of this consultation are yet unknown. It would be speculative to assume that this consultation alone will make any appreciable difference regarding Student's behavior. Therefore, I cannot rely upon it for purposes of my resolving the instant dispute.

I conclude that Boston has not yet identified anything that may be expected to eliminate Student's eating unsafe food or to otherwise assure her health and safety.

For these reasons, I find that there is an urgent need for Boston to find and implement new ways of making Student safe.

Ultimately, it is likely that the only way that Student can be safe at school and make educational progress is to find a way to resolve Student's need to engage in her many aberrant behaviors. Therefore, I find that there is also an urgent need for Boston to better understand Student, to consider different options, and ultimately to propose an individualized education program that is reasonably calculated to successfully address Student's underlying behavior difficulties so that she will be safe and have an opportunity to make meaningful educational progress.

ORDER

Student's health and safety are at risk in her current program.

Parent has not met her burden of establishing that Student is entitled to an out-of-district, private placement in order to address the risk to Student's health and safety.¹¹

Immediately, Boston shall take steps to locate or create and then implement additional or different services, interventions, structures or settings so that Student's health and safety are no longer at risk.

Boston shall also immediately begin the process of identifying and implementing whatever steps are needed in order to develop an individualized education program that is reasonably calculated to successfully address Student's underlying behavior difficulties.

For these purposes, Boston shall file three weekly status report, the first by June 21, 2013, the second by June 28, 2013 and the third by July 5, 2013, setting forth what steps it has taken and expects to take and by what date those steps will be taken. This will be reviewed by me with the parties during a conference call at 9:30 AM on July 8, 2013, and further orders may issue at that time regarding any subsequent status reports or other actions by Boston.

Because of both the urgency and the complexity of these concerns, I cannot emphasize strongly enough the importance of Boston's immediately bringing to bear whatever expert consultants, staff and program resources it may have available to assist with these processes, and for this to occur as quickly as possible.

By the Hearing Officer,

William Crane
Dated: June 13, 2013

¹¹ Parent's requested relief of an out-of-district placement may be further considered during the hearing scheduled to begin on August 26, 2013, which will address all remaining substantive issues, including the appropriateness of Boston's proposed services and placement for Student and Parent's claim for compensatory services.