

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
Bureau of Special Education Appeals

In Re: Elijah¹ and the Ashland Public Schools

BSEA# 14-02087

DECISION

This Decision is issued pursuant to M.G.L. c. 71 B 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 on October 17, 2013 at the Administrative Offices of the Ashland Public Schools in Ashland, Ma. Those present for all or part of the proceeding were:

Ms. "E."	Parent
Mr. "E1" and Mr. "E2"	Relatives
Kathryn Silva	Director of Student Services, Ashland P.S.
Mary Ellen Sowyrda	Attorney for Ashland Public Schools
Lindsay Byrne	Hearing Officer

The official record of the Hearing consists of exhibits submitted by the School marked S-1 through S-14 and approximately 6 hours of recorded oral testimony and argument. The Parent did not offer any documents for submission in the record. The Parent proceeded pro se at all times during the Hearing process. The school was represented by an attorney. The Parties submitted written closing arguments on October 30, 2013 and the record closed on that date.

ISSUE

The issue for resolution at hearing is limited: Whether Ashland has met its obligation pursuant to M.G.L. c. 71B § 5 and 20 U.S.C. § 1415 to provide Elijah with the services outlined in his last accepted Individualized Education Program?

FINDINGS OF FACT

The pertinent facts are few and may briefly summarized:

¹ "Elijah" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

1. Elijah is a nine year old who has a diagnosis of Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder. According to comprehensive evaluations conducted by the May Center in February 2011 and July 2012, and by the Evergreen Center in February 2012, Elijah requires year round placement in a substantially separate highly structured specialized therapeutic setting in order to make educational progress commensurate with his potential. As he demonstrates significant behavioral difficulties across settings a comprehensive, consistent ABA approach, a low staff-student ratio, and access to in-home therapy and psychiatric services are necessary to address his substantial learning needs. (S-14; S-12; S-4-8; S-9; see also testimony of Silva) There are no contrary recommendations in this record.
2. During the 2012-2013 school year Elijah lived in Northbridge. Northbridge developed an IEP for Elijah calling for special education services to be delivered in a specialized private day school. (S-1) Elijah attended the Evergreen Center pursuant to that IEP from October 22, 2012 until February 2013. On February 4, 2013 the Parent fully accepted the Northbridge IEP and Elijah began attending the Institute of Professional Practice Durham Educational Center (hereinafter “Durham”). (S-1; Parent; Silva) There are no subsequent IEPs in this record.
3. At the conclusion of the 2012-2013 school year the Parent removed Elijah from the Durham Center. In July or August 2013 Elijah moved with his Parent to Ashland. Elijah did not participate in any special education programming during the summer of 2013 at the Parent’s election. (Parent)
4. During the first week of August 2013 the Parent visited the Administrative Offices of the Ashland Public Schools. She delivered Elijah’s last accepted IEP to the Special Education Office. She picked up the enrollment documents. (Silva, Parent) It is not clear when the enrollment documents were completed and returned to Ashland. Ms. Silva testified that Ashland offered to implement the last accepted IEP at the Durham Center but the Parent declined that placement. Ashland scheduled a Team meeting for September 6, 2013. (Silva)
5. At the Team meeting on September 6, 2013, Ashland again offered to immediately place Elijah at the Durham Center. Ashland also requested parental consent to send referral packets to Crossroads, the Darnell School and RCS. Ms. Silva testified that all three schools offered excellent year round special education programming and related services comparable to the Durham Center. (Silva) There is no contrary information in the record.
6. At the Team meeting the Parent requested placement in an in-district special education program. The Parent asserted that Elijah was capable of attending school in Ashland and that she would not enroll him in an out of district setting. Ms. Silva testified that Ashland did not have an in-district program immediately available to Elijah that would be “comparable” to that outlined in Elijah’s last accepted IEP. (Parent; Silva)
7. At the Team meeting Ashland offered to provide up to six hours per week of out-of-school/ out of home tutoring to Elijah while he remained home at Parent direction. There is no physician order for home services. Ms. Silva testified that she did not believe home services would be appropriate for Elijah nor did she believe that tutoring was in any way comparable

to the special education he was entitled to receive in accordance with his last accepted IEP. (Parent; Silva)

8. On September 11, 2013 Ashland requested an expedited hearing to determine whether it had met its obligations under “stay put” to provide the placement to which the Parent had most recently agreed- the Durham Center- or one substantially similar. The School noted that at the Parent’s election Elijah was not receiving any special education services. (Administrative Record)
9. At the end of September 2013 the Parent consented to release of the referral packets to RCS, Crossroads and the Darnell School. She also requested that referral packets be sent to the Walker School and the League School. Ashland agreed that these two programs could provide the setting and services necessary to implement the last accepted IEP and were comparable to the Durham Center. Ashland therefore sent the referrals to the schools requested by the Parent. (Silva; Parent)
10. The Parent visited Darnell, Crossroads and the League School. She did not visit RCS. The Walker School had no openings. (Parent; Silva)
11. The Parent testified that she was aware that Elijah was entitled to return to the Durham Center according to the IEP she had last accepted for him. She acknowledged that Ashland had offered to transport Elijah to the Durham Center at any time. (Parent)
12. The Parent testified that she asked for an “Emergency Amendment” to Elijah’s IEP at the September 6, 2013 Team meeting so that he could attend in-district special education programs. She stated that she had no reports or evaluations that recommended a setting, approach, or program different than that outlined in Elijah’s last accepted IEP. (Parent)
13. Elijah has been out of school and without any special education or related services since June 2013. (Parent, Silva)
14. At all times since Elijah moved into Ashland, the district has been prepared to implement his last accepted IEP by continuing his placement at the Durham Center or by arranging his enrollment in a comparable private day program. (Silva)
15. None of the in-district special education programs in Ashland is comparable to that offered by the Durham Center. (Silva)

FINDINGS AND CONCLUSIONS

There is no dispute that Elijah is a student with special learning needs and thus entitled to receive a free appropriate public education. Similarly there is no dispute that since at least mid-summer 2013 Ashland has been responsible for ensuring that appropriate special education services are offered to Elijah. The only question presented for decision here is whether Ashland has taken all reasonable steps to meet its obligation to offer Elijah a free appropriate public education. After careful consideration of all the evidence presented at the hearing and of the applicable law it is my determination that it has. My reasoning follows:

Ashland's obligations to Elijah are governed by both Massachusetts and federal special education laws. As a student who moved into Ashland with an accepted IEP calling for placement in a private special education day school, Elijah is entitled to remain in that placement until a new IEP is developed and accepted. 20 U.S. C. §1415 (j); 34 CFR § 300.518; M.G. L. c. 71B § 5; 603 CMR 28.08 (7). Generally the precise terms of the last accepted IEP are implemented as the student's "stay put" placement. *Verhoeven v. Brunswick School Committee*, 207 F.3d 1 (1st Cir. 1999); *Doe v. Brookline School Committee*, 722 F. 2d 910 (1st Cir. 1983). In this matter strict enforcement of Elijah's IEP obligated Ashland to continue his placement at the Durham Center. The uncontroverted evidence establishes that Ashland was, at all relevant times, ready, willing and able to continue Elijah's placement at the Durham Center as called for in his last accepted IEP .

The Parent, however, did not agree to continue the Durham Center placement for Elijah. In that instance Ashland was justified in searching for and offering to the Parent placements with a setting, services, staff-student ratio, degree of mainstream contact, expertise and teaching methodologies substantially similar to those offered by the Durham Center. When the placement contemplated in the last accepted IEP is not available, the school's obligation to maintain the status quo may be met by identifying and providing a "comparable" program. *Henry v. Administrative School District #29*, 70 F. Supp. 2d 52 (D.N.H. 1999); *Knight by Knight v. District of Columbia*, 877 f.2d 1025 (D.C. Cir. 1989).

The Parent argues that Ashland violated her son's special education rights by not immediately acceding to her wish to place him in an in-district program. That argument is misplaced. By operation of the special education regulations designed to protect the Student's rights to an individually tailored education, Ashland was required to continue those services which the Parent and school evaluators and teachers had most recently agreed were appropriate for him. That it did.

The Parent argues that Ashland failed to timely identify appropriate alternatives to the Durham Center after she informed Ms. Silva that she would not permit Elijah to return to Durham. The evidence shows otherwise. Ashland responded rapidly by convening a team meeting, proposing evaluations and requesting consent to send referral packets to programs with features comparable to Durham. Any delay in securing a response is attributable to the Parent's actions.

The Parent argues that Ashland failed to provide the amount and type of home services Elijah needed while he was not attending a school based program. This argument is also misplaced. Home-based education services are provided at the direction of a physician when a student may not attend school for medical reasons. 603 CMR 28.03(3)(c). Here, Elijah was kept home by the Parent due to her displeasure at the private school options available to her. There is no evidence that a physician certified that a medical condition required Elijah to remain "confined to home" between August 2013 and the date of the hearing. The fact that Ashland offered to provide some tutoring to Elijah during this time does not establish his eligibility for such services or expose Ashland to challenges to the appropriateness of these services.

In sum, I find based on the clear preponderance of the evidence that Ashland appropriately and timely discharged its obligation to Elijah by offering to continue the program and placement at the Durham Center as set out in his last accepted IEP, and by timely offering several comparable programs as alternatives when the Parent declined the Durham Center placement.

ORDER

Ashland Public Schools appropriately met its obligations to Elijah pursuant to M.G. L. c. 71 B §5 and 20 U.S.C. §1415 (j).

By the Hearing Officer

Dated: November 21, 2013

Lindsay Byrne

