

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

**Student v. Tewksbury Public Schools**

**BSEA #1402344**

**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.

**PROCEDURAL HISTORY**

Parents requested a hearing on September 17, 2013 which was scheduled for October 22, 2013. There was a telephone conference call on October 9, 2013 during which the Parties agreed to postpone the hearing until October 30 and October 31. On October 24, 2013, the Parties made a joint request to postpone the hearing. An Order issued allowing the postponement and requiring the submission of a status update by November 22, 2013. On December 5, 2013 an Order to Show Cause was issued. On January 2, 2014, Parents submitted a request to continue the case for sixty days. On February 4, 2014, Parents submitted a request to continue the case for thirty days, to which Tewksbury assented. There was a conference call on March 4, 2014. The Parties submitted a joint request to take the matter off calendar for ninety days, which was allowed. On May 23, 2014, the Parties submitted a joint request for a conference call. On June 4, 2014 a Notice of Reassignment was issued by the BSEA because the hearing officer original assigned to the case (William Crane) was retiring. On August 18, 2014 the Parents requested that the hearing be scheduled after November 12, 2014. There as a telephone conference call on September 17, 2014. On October 31 an Order issued scheduling the hearing for December 9, 10, and 11, 2014 and requiring the submission of witness lists and hearing exhibits by December 2, 2014. On November 28, 2014, Tewksbury filed a motion to Compel Parents' Discovery Responses. On December 5, 2014, the BSEA issued a Notice of Reassignment of the hearing officer (Ann Scannell) for administrative reasons. Also on December 5, 2014, the BSEA issued an Order for a telephone conference call with the newly assigned hearing officer on December 8, 2014. During the conference call, Parents' counsel requested a postponement of the hearing until January due to the assignment of a new hearing officer, to which Tewksbury's counsel strenuously objected. The request to postpone the hearing until January was denied due to insufficient grounds. On December 5, 2014, Tewksbury filed a Motion to Prohibit the Introduction of Any Evidence not disclosed in compliance with BSEA Rule IX (the five day rule). On December 9, 2014 upon the commencement of the hearing, Parents filed a Motion in Limine to Strike and Exclude Trial Documents and Trial Witnesses for Tewksbury School District<sup>1</sup>. This motion was denied when Tewksbury's counsel presented evidence that she had

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<sup>1</sup> Parents' counsel did not raise this issue during the hearing officer initiated telephone conference call on December 8, 2014.

submitted the exhibits and witness lists via e-mail to Parents' counsel who had only a post office box and not a mailing address<sup>2</sup>. Parents' counsel's argument that he was not in his office and thus did not review the exhibits or witness lists until a day or two later did not persuade the hearing officer that Tewksbury had not complied with the five day rule. Parents also submitted a Motion in Limine to Introduce late trial exhibits including a letter dated November 18, 2014 and addressed "To Whom it May Concern" from a psychiatrist and another letter dated December 5, 2014 also addressed "To Whom it May Concern" from a medical doctor<sup>3</sup>. Parents' Motion to Introduce late trial exhibits was denied due to the failure to disclose the exhibits in compliance with federal law and BSEA rules, coupled with Parents' failure to provide any responses to Tewksbury's discovery requests which sought information about Student's medical providers. The hearing proceeded on December 9 and December 10. For reasons more fully described in the record, Tewksbury's witnesses from the Devereux School were not available on December 10 and the newly assigned hearing officer was not available for the entire day on December 11, 2014. Thus, over Parents' objection, because the hearing officer required the testimony of the Devereux witnesses to resolve the hearing issues, the hearing officer allowed Tewksbury's request to schedule an additional day for the Devereux witnesses to testify. The additional day was scheduled on the earliest date offered by the hearing officer on which the Parents were available and the hearing was held at 3:00 p.m. in the Parents' home town to accommodate their work schedules and day care needs. At the commencement of the final day of hearing, January 22, 2015, Parents' counsel presented the hearing officer with a motion, entitled Parents' Renewed Motion to Strike and Exclude Trial Documents and Trial Witnesses for Tewksbury Public Schools. The hearing officer told the Parties she would take the motion under advisement and address it in the decision. The first part of the motion is a renewed request to exclude Tewksbury's exhibits. The motion is the same motion filed and denied on the first day of hearing. It contains no additional information or legal argument. Tewksbury's counsel provided documentation that she had e-mailed Parents' counsel the exhibits prior to the expiration of the deadline. Parents' counsel argued that he had not received them because he was not in his office when the documents were e-mailed. I denied the Motion then and deny it again now. Parents have also renewed their request to exclude the testimony of the Devereux witnesses because they were not available on December 10 when they were originally scheduled to testify. Parents have not provided any additional facts or legal argument that was not available to me when I initially denied their motion. As I informed the Parties the first time this motion was made, the testimony of the Devereux witnesses was necessary to provide me with sufficient information to render a meaningful decision. This motion is again DENIED. Parents argue that Tewksbury was given an unfair advantage in this matter because the third day of hearing was scheduled approximately six weeks after the initial hearing dates. However, Parents were offered dates as early as four, five and six days after the initial hearing date, but chose to proceed six weeks later. Additionally, the hearing officer held the final day of hearing in Tewksbury after Father's work hours had concluded to avoid further inconvenience to Parents. There is no basis on which to allow Parents' request for costs and attorneys fees and such request is hereby DENIED.

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<sup>2</sup> See Administrative exhibit #1.

<sup>3</sup> During the December 8, 2014 telephone conference call when questioned by the hearing officer about whether he intended to submit any exhibits, Parents' counsel indicated he intended to introduce a letter from a DDS employee and some photographs. He did not mention either of the exhibits he sought to introduce the following day at the commencement of the hearing.

The hearing proceeded and concluded on January 22, 2015. The Parties made oral closing arguments and the record closed at that time.

Those present for all or part of the hearing were:

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|---------------------------|---|
| Mother                    |   |
| Father                    |   |
| Jim Sperry                | BCBA, Clinical Solutions/Needs Center, Inc./Amego, Inc. |
| Tim Sobezenski            | Service provider, Clinical Solutions/Needs Center       |
| Chaz Fisher               | Attorney for the Parents                                |
| Debra McManus             | Coordinator of Home Services, Tewksbury Public Schools  |
| Renee Czyzewski           | Out of District Coordinator, Tewksbury Public Schools   |
| Rick Pelletier            | Director of Special Education, Tewksbury Public Schools |
| Sherry Lynn MacNeil       | Education Director, Devereux School                     |
| Steve Yerdon              | Executive Director, Devereux School                     |
| Vicky Sheerin             | Group Home Director, Devereux School                    |
| Bonnie Byer               | Admissions Director, Devereux School                    |
| Amy Rogers                | Attorney for Tewksbury Public Schools                   |
| Jane Williamson           | Court Reporter  |
| Linda Walsh               | Court Reporter  |
| Catherine Putney-Yaceshyn | Hearing Officer   |

The official record of this hearing consists of Parents' exhibits marked P-1 through P-2<sup>4</sup>, and Tewksbury Public Schools' exhibits marked S-1 through S-30 and approximately twelve hours of recorded oral testimony.

## **ISSUES**

1. Whether the residential placement at Devereux proposed by the Tewksbury Public Schools is reasonably calculated to provide the student with a free appropriate public education in the least restrictive environment.
2. If not, whether a residential placement in a group home run by the NEEDS Center in Methuen or Tewksbury, in addition to the LABBB day placement in Arlington will provide the student with a free, appropriate public education in the least restrictive environment.

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<sup>4</sup> Initially, Parents' exhibits marked P-1 and P-2 were excluded because Parents did not comply with the requirement that hearing exhibits be submitted five business days prior to the hearing and Tewksbury objected to the admission of said exhibits. At the end of the second day of hearing, December 10, 2014, the hearing officer allowed Parents' request that their exhibits be admitted over Tewksbury's objection after denying Parents' request to end the hearing without the testimony of Tewksbury's witnesses from the Devereux School. Parents did not seek the formal admission of their exhibits during the final day of hearing, January 22, 2015. The hearing officer administratively marked the exhibits as P-1(letter from Dr. Friedman) and P-2 (letter from Dr. Hart) and included them in the record.

## **SUMMARY OF THE EVIDENCE**

1. The student (hereinafter, “Student”) is nineteen years old<sup>5</sup> and resides in Tewksbury, within the Tewksbury Public School district (hereinafter, “Tewksbury”). He has been diagnosed with Pervasive Developmental Disorder, intellectual impairment, and Type 1 diabetes. (S-8) Additionally, he has a significant history for neonatal meningitis, hydrocephalus, and seizures. (S-5) He is sociable and friendly and has strong relationships with his parents and sibling. He has a strong interest in and knowledge of music. (S-26)
2. Student’s last accepted IEP was for the period from January 16, 2013 through January 15, 2014 and included placement at the LABBB Collaborative Program located at Lexington High School. The LABBB program is an eleven month program that runs from September through July. The IEP contained goals in the areas of English/Language Arts; mathematics; vocational; behavior: self-regulation/self-control; daily living skills; and language and communication. The A grid contained consultation services in the area of behavior with a counselor 2 x 30 minutes per month and consultation in the area of home services by a behaviorist 1 x 60 minutes per week. There were no services in the B grid. The C grid contained services as follows: functional academics with the special education teacher 16 x 40 minutes per week; community awareness with the special education staff 3 x 40 minutes per week; vocational services with the vocational specialist 1 x 450 minutes per week; daily living with the occupational therapist 2 x 30 minutes per week integrated; communication with the speech therapist 2 x 30 minutes per week integrated; and home services with a home service provider 5 x 120 minutes per week. Additionally, there was a provision extended school year services (between July 29 2013 and August 16, 2013) of up to fifteen days total with the LABBB staff. Mother accepted the IEP in full and the placement on February 7, 2013. (S-8)
3. Until May 2013 Student attended the LABBB program located in Lexington High School. In a report dated July 23, 2013, Jim Sperry, BCBA, Clinical Solutions and NEEDS Center, described his review of the LABBB programs located at Lexington High School and Arlington High School, which he undertook in order to recommend an appropriate placement for Student. He noted that Student had been attending the Lexington program for approximately two years, but that his behavior during the past several months had worsened to the point that staff did not feel it provided sufficient structure to keep him safe and provide an appropriate therapeutic setting. He noted that during the past few months Student had engaged in self-injurious behavior and property destruction and had not been able to fully participate in the educational program. During the past several weeks Student had spent most of time in the “Planning Room” away from the other students. The Lexington staff indicated that their site is relatively unstructured and requires a level of independence that Student was not currently showing and thus, it was no longer able to meet his needs. Staff noted that interventions that had previously been effective with Student were no longer working.

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<sup>5</sup> Father has been appointed as Student’s legal guardian. (Father)

Mr. Sperry also visited the Arlington High program which provides a more structured and behaviorally based education program. The Arlington program has a BCBA on staff and students have behavior support plans to address challenging behaviors. He noted that the staffing ratios were higher and the number of students per classroom were lower than the Lexington program. Based upon his review of the two programs, Mr. Sperry recommended that Student attend the Arlington LABBB site as it appeared better able to meet his educational and behavioral needs. (S-25)

4. Tewksbury sent Parents an N1 form dated July 24, 2013. The narrative description indicated that Tewksbury was recommending that Student attend the LABBB-Arlington High School Extended School year program. It indicated that LABBB Lexington had been providing Student with therapeutic educational services during the prior two years and that Student's behavioral challenges including self-injurious behavior and property destruction had recently increased. Staff at the Lexington program believed that they were unable to continue to meet his needs. Parents agreed to the change in placement for extended school year services. Mother signed a consent to the change in placement from September 3, 2013 through January 15, 2014 on August 29, 2013. (S-9)
5. Tewksbury sought and received consent to send a referral to Devereux in early November 2013. Mother and Student visited Devereux in February 2014. On March 3, 2014 Devereux informed Tewksbury of their determination that Student was not an appropriate candidate based upon its inability to meet his medical needs in their present population. (S-18)

Tewksbury sought and received consent to send a referral packet to Boston Higashi School in March 2014. On April 4, 2014 Boston Higashi School informed Tewksbury that they did not believe the school would be an appropriate placement for Student based upon his age and behavioral issues. (S-19)

Tewksbury sought and received consent to send a referral packet to Amego, Inc., in November 2013. Amego, Inc. responded on January 6, 2014 and indicated that Student seemed like a good fit for their school, but they would not have an opening until late spring. (S-20)

Evergreen responded to Tewksbury's referral packet on or about March 20, 2014 by stating that they believed their model of decentralized community group homes would not be able to provide adequate services required by Student. They did not believe Student would be a good candidate for Evergreen. (S-21)

The Guild for Human Services informed Tewksbury on or about December 12, 2013 that after discussing Student's medical history and details for managing Student's diabetes, it determined that Student's medical needs were beyond what could be managed in their community-based setting. Therefore, they determined they could not meet Student's needs. (S-22)

6. Richard Pelletier, Tewksbury's Director of Student Services, sent a letter to Parents dated February 4, 2014, indicating that Student's IEP had expired on January 15, 2014. He noted that the district had attempted to schedule a mutually agreeable time to convene an IEP team meeting since December 10, 2013. He noted that the district continued to work with the family to schedule a meeting and referred to an agreement between the parties that the "expired IEP is extended by default." He enclosed a timeline of attempts by the parties to schedule the annual review meeting and indicated that Tewksbury would continue to work with the parents to schedule the meeting. (S-10)
7. The Team convened on March 5, 2014 for its annual review. (S-11) The N1 shows that Team members recommended that Student continue in his current placement until an alternative residential placement could be found. The district proposed an IEP based on Student's complex behavioral, medical, and academic needs and stated that the parents and district are working collaboratively to find an appropriate placement for Student. (S-12)
8. The Team proposed an IEP for the period from March 5, 2014 through March 4, 2015. The IEP states that Student benefits from having an individualized behavior support plan that provides consistent consequences to both his pro and anti-social behaviors. It states that since starting in the Arlington LABBB program Student has averaged body control (no aggression, no property destruction) 98% of time, voice control 98% of the time, and following directions an average of 97% of the time. The IEP contains goals in the areas of behavior, communication, functional academics, daily living, vocational, APE (adapted physical education), and home services. The A grid contains consultation services in the areas of occupational therapy (1 x 30 minutes per month); behavior with a BCBA (1 x 30 minutes per month) and home service with a behaviorist (1 x 60 minutes per month) There are no services in the B grid. The C grid contains services as follows: behavior and classroom management with LABBB staff (across the day); summer programming with the LABBB staff (from 7/1/2014 through 8/15/14 5 x 5 hours per week); communication with the speech therapist (2 x 30 minutes per week); functional academics with LABBB staff (5 x 1.3 hours per week); daily living skills with the LABBB staff (5 x 3.6 hours per week); vocational services with LABBB staff (5x 3.6 hours per week; adaptive physical education with LABBB staff (5 x 30 minutes per week); and home services with the home service provider (5 x 120 minutes per week). The IEP notes that Student requires an extended year program for consistent development in behavior management, learning and overall quality of life. The Additional Information section of the IEP states that Student has an individualized behavior support plan as well as a health management plan. It also states that Student's parents will continue to work on finding an appropriate residential program for him. Parents neither accepted nor rejected the IEP (S-12) The record contains no indication of what, if anything, the parents found inappropriate in the proposed IEP.
9. Tewksbury sought and received Mother's consent to send a referral packet to Crystal Springs School in April 2014. The record does not contain a response from Crystal Springs. Parents did not follow through with its referral process. (Czyzewski) Tewksbury also sought to send a referral to Easter Seals in Manchester, New Hampshire to which Parents did not consent. (S-13, Czyzewski)

10. Jim Sperry, M.S., BCBA, NEEDS Center, Clinical Solutions, wrote an Annual Summary of Student's progress dated March 1, 2014. He noted that Student presents with challenging behaviors including aggression toward others, property destruction, verbal outbursts, and self-injurious behavior. He further noted that Student's most pressing current concern relates to his ability to control his behavior. Student's functional behavioral assessments indicate that his behaviors serve a primary function of escape/avoidance from unwanted activities or tasks and a secondary function of gaining attention. He noted that Student does quite well working with his behavior specialist during home-based service time. His behaviors are better under control in his school setting as well. However, he had shown an increase in aggressive behaviors, property destruction, and verbal outbursts when he is at home without any staff. His behaviors have made it difficult for his parents to ensure his safety as well as theirs and his sibling's. (S-26)
11. Mother testified that Student had recently lost some of his independent showering skills, but he is able to do some washing independently. She shampoos his hair and shaves him and he is able to towel dry and put on deodorant and cologne "as best he can." Student can get dressed independently, but mother helps him choose matching outfits. He has difficulty with belts, tying shoes and zippers. Student has difficulty cleaning himself after toileting and will wait until Mother is home to request assistance even if it means waiting for many hours. Student is not able to prepare his own breakfast because his behaviors interfere with his completing tasks. Student generally is unable to help to set the table at dinner because of his behaviors. When he is asked to complete a task, he defies his parents. Sometimes during dinner he is very disruptive and goes to his room and bangs, kicks and screams, which causes his family distress. Student also has difficulty eating with his family if he has not followed his routine precisely before the meal. He will sit and stare at his dinner if he forgot to check his blood sugar or if a door is left open. After dinner he watches television until bed time. He then checks his sugar and Parents give him his long-acting insulin before he goes to bed. Once he goes to bed he stays in his room until morning. He lies down on his bed and does not move until morning. On weekends there is less structure to the days than during the school week. Student wakes up early and wants all of his electronic devices and tends to be very busy. Staff provided by Mother's insurance come to the home for five hours each day. (Mother)

Mother further testified that it is difficult for the family to go out together in public because of Student's behaviors. She described a recent outing in which the family went out to dinner and Student's behavior turned very aggressive. Student became agitated when he could not decide between two drink choices. He began banging his fists on the table and Mother tried to get him to go outside with her. He refused to get up initially and then stood abruptly and his chair went flying. As he and Mother left the restaurant Student raised his fists to people at tables and threatened to hit them. As soon as they were outside he began kicking Mother. She got him into the back seat of the car and he began punching her arm. Father came to the car and opened the back door and Student began punching him in the face. He continued to punch his parents as they tried to calm him down. He seemed to calm down, but when Father drove to the highway, Student began punching him

in the back of the head. When they got home they called Jim Sperry to get assistance from him and his staff and gave Student Ativan. Student was calm by the time Jim and his staff arrived. He was no longer hitting his parents, but was still kicking things and punching the walls and table. (Mother)

Mother described an incident prior to that during which Student had awakened in a good mood but then something happened to his phone. When he was in the shower he began banging the walls and trying to punch Mother through the curtain. Student engaged in a great deal of property destruction that day. Parents called Jim Sperry who sent staff to their house to assist them. Student's aggressive behaviors have been increasingly worse at home over the past two years. Mother has been very pleased with Student's program at the Arlington LABBB program. Her concern is that he is not thriving at home and not having his needs met in the home and the community. (Mother) Father described incidents during which Student has become very aggressive. During one incident Father was injured while trying to move Student toward the middle of the kitchen because he was kicking the cabinets extremely hard. Another incident occurred on interstate 93 when Father was driving Student to get a haircut and had to make an unscheduled stop. Student started kicking the dashboard and windshield and kicked Father. Father had to pull over on the side of the highway and restrain Student because he had begun to bang his head against the window. Student does not have such physical outbursts at school according to the reports Mother receives from LABBB. (Mother)

12. Mother wants Student to live in a home-like environment. She wants Student to be near her so that she can have access to him any time. She expects that once he turns twenty-two he will live in a DDS group home near her home. (Mother) Father does not want Student to move out of his home, but Student's aggression has become difficult to endure. He wants to be in Student's life and to be able to go see him at the group home quickly and take him out for pizza or family activities. He does not want his family to be separated from one another. (Father)
13. Rene Czyzewski is Tewksbury's Out of District Coordinator and Student's case manager. She initially referred Student to Devereux's program which included the off-campus group homes. Devereux did not feel that it could adequately meet Student's medical needs in the group home setting. However, Devereux reconsidered Student's admission in the spring of 2014. In May 2014 Tammy Gregoire, an admissions assistant at Devereux, sent an e-mail to Ms. Czyzewski summarizing a conversation she had had with Mother. The e-mail stated that Devereux's population had changed a bit over the past couple of months and they wanted to see if Student would be a good match for their on campus unit. Ms. Gregoire's e-mail also stated that Mother had stated that Devereux was too far away and she did not like the campus setting (dormitory unit).
14. Jim Sperry holds a bachelor's degree in psychology, a Master's degree in counseling psychology and is board certified behavioral analyst (BCBA). He has been working in the field of developmental disabilities for adults and children for almost twenty five years. He spent most of his career working at The May Institute in various positions including Executive Vice President of Adult Services. He has worked in group homes and provided



home-based services. Mr. Sperry worked for the Massachusetts Department of Developmental Services (DDS, then DMR), overseeing all of their state-operated residential programs. He has also worked with Amego and recently formed a consulting company, Clinical Solutions. He co-founded a nonprofit organization called the NEEDS Center which provides residential and day services to adults twenty two years of age and older in the Methuen/Tewksbury area.

The NEEDS Center has three group residences, two are in Methuen and one is in Tewksbury. There is staff at each residence when residents are home. The group home in Tewksbury has four residents between the ages of 22 and 23. The Methuen house on Vincent Avenue has residents between the ages of 23 and 24 with similar diagnoses to Student. A third home in Methuen houses mostly residents in their 30s and one resident is 22. Some of those residents are similar to Student and some present differently. In each home each resident has his or her own bedroom and each home has at least two bathrooms. The homes have the layout of a typical family home. Currently there is an opening in the Methuen home which houses the residents in their 30s. Residents engage in community activities such as going to the local YMCAs. Residents have ISPs (individual service plans) with objectives that are worked on in the residence. (Sperry)

Generally, people become residents of the NEEDS Center homes via DDS or when a parent of a student about to turn 22 approaches them about procuring their services. Mr. Sperry testified that Student is the type of person his group homes serve. He stated that because he is under 22 it is a “little bit of a different circumstance.” He would need to be referred by Tewksbury for residential services and then the NEEDS Center would look at him. (Sperry)

The NEEDS Center group homes are not educational settings. They are not approved by the Department of Elementary and Secondary Education (DESE) for the provision of special education services. They are not connected to any educational day program that is approved by DESE. There have never been any residents under the age of 22 (since the inception of the NEEDS Center in April 2014). There is not a nurse in each home, although Mr. Sperry stated that his organization would be able to hire to the needs of the people they serve and would have a nurse available if Student were there. He stated that in the past they have hired VNA when they had residents who were insulin-dependent, but have “had nursing on as well.” Mr. Sperry stated that the NEEDS Center had not yet made any inquiry with any nursing agency with respect to how it would meet Student’s needs. (Sperry)

Mr. Sperry did not know what process the NEEDS Center would have to go through to admit a student under the age of 22 to its group home. He stated that Student’s presentation is similar to other residents and they have vacancies, so they would probably accept him if he were referred. (Sperry)

Mr. Sperry’s company, Clinical Solutions, provides Student’s home-based direct and BCBA services. His staff goes into Student’s home and analyzes his behavior, develops plans, works on teaching techniques with the family and meets with the family to

determine best approaches to deescalating Student. His staff has done some crisis intervention with the family when significant problems have arisen. Tim Sobezenski provides most of Student's direct services and Mr. Sperry is the supervising clinician. Mr. Sperry has witnessed Student's antecedent-type behavior when he bangs objects and gets loud, but he has not witnessed him getting aggressive toward anyone.

15. Debra McManus holds a Master's degree in applied behavior analysis and has completed all of the course requirements for a Ph.D in behavioral neuroscience, specializing in developmental disabilities. She has worked with students with developmental disabilities including autism for over thirty five years. She is the home services coordinator for Tewksbury. She has spoken to Jim Sperry with regard to Student six to eight times over the last fifteen months. She has reviewed and is familiar with Student's school records, including his IEPs. She was familiar with his progress reports and noted that he has made incremental progress in all areas. She noted that his reading and math skills have improved. Behaviorally, in school, behaviors such as aggression, property destruction, verbal outbursts, bolting and self-injurious behavior have all decreased to nearly zero levels. (McManus)
16. Ms. McManus visited Devereux twice in connection to Student's case. During her first visit on November 6, 2014, she met with one of the nurses; Tammy Gregory, the admissions coordinator; Vicky Sheerin, a member of the day program staff who was previously a case manager; and a program director for the residential program. She took a tour of the campus and observed programming. In addition to observing the South Wing program she was able to speak at length with the program manager about the residential program. She also did a forty-five minute classroom observation. There were seven students and four adults in the classroom. She observed the vocational program which includes a woodworking shop, pet care center, automotive repair area, housekeeping program, kitchen skills area and clerical skills.
17. On December 3, 2014, Ms. McManus returned to observe the residential program. She observed 13 students along with six staff members. There was also a counselor there some of the time. Each student receives counseling. She observed students participating in a community meeting, which happens every day when students return from school. The meeting lasted about thirty minutes and then the students broke up into small groups. The small group activities were staffed with one staff person per three students. Some of the group activities included working on room care skills, and one group went downstairs to listen to music and dance. Ms. McManus observed a lot of social interaction, some was coached. She also observed some coaching with language skills. After their small group activities, students went to dinner at the cafeteria with a staff person. Dinner was served cafeteria style and staff encouraged conversation and social interaction. (McManus)

The program manager for the South Wing program told Ms. McManus that the residential program manager is part of the clinical team and meets weekly to discuss students and plan generalization across settings. Staff work on skills in the residential program that students are working on in the school setting. There is also coordination between the

vocational programs and the day and residential programs. Additionally, is an occupational therapist who works across settings. (McManus)

Based upon her review of Student's current performance on his IEPs, her conversations with Jim Sperry about the kinds of skills Student was working on at home and her observations at Devereux, Ms. McManus believes that the peer group at Devereux (for both the day program and the residential programs) would be appropriate for Student. She also believes that Devereux has all of the services that are required by Student's currently accepted IEP and his proposed IEP. Devereux has occupational therapy, speech and language therapy and provides vocational training. It provides instruction in functional academic skills, social skills groups, and teaches activities of daily living.

Ms. McManus and Ms. Czyzewski spoke to Devereux staff about the available nursing services within the South Wing program. There is nursing coverage on campus from 7:00 a.m. until 10:00 p.m. There are on-call nurses from 10:00 p.m. until 7:00 a.m. The on-call nurses live about ten minutes away. The nearest hospital is in Worcester and is about fifteen to twenty minutes away from Devereux. Nurses come to the residential unit to administer nursing services, students are not required to report to the nurse's office. Additionally, the staff had previously trained with another student with Type 1 diabetes, so they could check sugar levels and knew the protocol for when to call for a nurse or any other emergency services. (McManus, Czyzewski)

Ms. McManus observed an adult group home run by Jim Sperry in Tewksbury on December 1, 2014. There was one male resident and one staff person present. The resident was waiting for dinner and the staff person was preparing dinner. The other two adult residents were out at the YMCA with another staff person. She met with Jim Sperry during her visit and he told her that there were four adult residents who all attended an adult day program. The emphasis in the residential program was recreational in nature. The residential home was not an educational program and it did not carry over academic skills from a school component. There was no occupational therapist or speech and language therapist in the group home and there were no current openings. There was no nursing staff, and they would have to rely on visiting nurses. Ms. McManus does not believe that the group home setting would provide Student with a free appropriate public education, because it is not an educational placement and does not have the nursing staff he requires. Even if Student were to continue to attend the LABBB program he currently attends during the day, the adult group home setting would not be appropriate because it is not an educational program.<sup>6</sup>

Ms. Czyzewski explained the importance of having continuity of services between the school and residential portions of Student's day. She explained that all of the staff at Devereux has the same or similar training whether they are part of the day program or the residential program. Staff carry over the ABA services throughout the day and night

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<sup>6</sup> Ms. McManus explained that it is important for Student to remain in an educational setting because he will only be eligible for special education services for another two years and nine months. She noted that he has made incremental educational progress in a very structured behavioral program and stated that he deserves the opportunity to continue his education for as long as he is eligible.

time. Residential and day staff members consistently communicate and consult with one another regarding a student's needs and services. Additionally, the residential staff works on generalizing skills learned in the day program. (Czyzewski)

18. Bonnie Byer is the Admissions Director at Devereux. She is familiar with Student through his referral packet, which she shared with her admissions team. After reviewing Student's packet, she helped to make a decision about which of Devereux's programs would be most appropriate for him. She and the admissions team determined that the Devon House or South Wing programs may be appropriate for Student. She assigned a clinician familiar with both programs to review the file and meet with the family along with staff from each program. Devon House is a community home with 1:2 staffing. South Wing is a residential treatment program which is staffed on a 1:3 basis and is in a dormitory setting. Initially the admissions team thought Student would have an appropriate peer group at Devon House, but there was not a nurse on staff there and staff is not able to administer insulin. Rebecca Nichols, nurse manager at Devereux, sought to obtain the services of a visiting nurse to administer insulin at set times, but was not able to schedule definite times and Ms. Nichols was also concerned that there would not be a nurse available for any other issues that may arise. (S-18) She suggested looking at placement at South Wing because of the availability of nursing staff from 7:00 a.m. and 10:00 p.m. South Wing also works with students who are similar to Student (there had been changes in the clientele at the unit and there were now students more like Student). He would have a peer group, access to nursing, and they could keep a closer eye on his medical needs if he were on the campus.

It was determined that Devereux could meet Student's educational and medical needs and admission was offered. Devereux is approved by DESE to provide special education services. Currently, there is one student on the waitlist, but Student could probably be placed within a month.<sup>7</sup>

19. Sherry Lynn MacNeil is the Education Director at Devereux. She has a Master's degree in special education, is a BCBA, is licensed as a special education teacher (K-12), a science teacher (8-12), and holds other licenses. Ms. MacNeil described the educational component of the South Wing program at Devereux as follows. Students are in school from 9:00 a.m. until 3:00 p.m. each day. They have four core subjects, specials (including woodworking, culinary, job skills, animal care, and art), and job skills classes. They have lunch for thirty minutes in the cafeteria. They participate in a school to work program which includes programs in automotive, housekeeping and food services. There are vocational opportunities and the program has a vocational coordinator and educational specialist. The teachers are all certified. Some hold special education certification, some hold content area certification and some hold both. The program runs for 216 days per year.

Based upon her review of Student's IEP, Ms. MacNeil determined Student would be placed in a self-contained class for older students on the autism spectrum or with mental

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<sup>7</sup> Ms. Byer testified on January 22, 2015. Thus, a placement will be available for Student at Devereux one month from that date. (Byer)

retardation. Her determination was based on Student's disability and his level of functioning. The general model followed in the classroom is an applied behavior analysis model. The program also utilizes therapeutic behavior change guidelines which is an outline of how to address problematic and maladaptive behaviors. The staffing ratio within the classroom is generally three students per one adult.

20. Ms. MacNeil reviewed the IEP proposed for the period from March 2014 through March 2015 (S-12) and testified that Devereux could implement most of the goals within the day program. She provided detailed testimony as to how Devereux would address each goal. She also noted that daily living skills would be worked on during both the school program and the residential program. She was not sure how home service goals would be addressed at Devereux. She was familiar with the peers in Student's proposed peer group and believed it would be an appropriate peer group for him. She is aware of other students at Devereux who have nursing as a related service on their IEPs because of a diabetes diagnosis. She noted that the school program is approved by DESE for the provision of special education services. (MacNeil)
21. Vicky Sheerin is the Program Director of a group home at Devereux and was previously a case manager for residential units. She described the South Wing unit as populated primarily by students on the autism spectrum and using an applied behavior analysis approach. The residential school is approved by DESE. She described how students follow a schedule from awakening until bed time (students can access a picture schedule). Students wake up between 7:00 and 7:30, participate in hygiene routines and chores, have breakfast, and transition to school where they remain from 9:00 until 3:00. Students then return to the residence, have a snack and attend a community meeting. Students again have a picture schedule for the remainder of their day. Students then participate in clinical groups such as social skills and coping skills. Students also participate in fitness activities on and off campus. They transition to dinner in the cafeteria and sometimes prepare meals. After dinner students participate in preferred activities as incentives. Each student has a set bed time and a routine he or she follows at bed time. Students settle in at their assigned time and medications are administered. The South Wing has a staff to student ratio of 1:3 and a shift supervisor or higher level staff is always present. Case managers and clinical staff are always on site as well. Direct care providers have bachelor's degrees or significant relevant experience as well as training in crisis intervention, safety, CPR, medication administration. Training specific to working with a population on the autism spectrum is provided three to four times per year. Nursing services are available on campus until 10:00 p.m. After 10:00 there is an on call nurse. Students have individual medical plans and Student's would indicate how staff should respond to needs arising from his diabetes.

Devereux can provide transportation and a case manager as necessary to transport students to their medical appointments. Additionally, Devereux provides many ways to facilitate visitation between family and students. They provide family therapy and can schedule sessions to coincide with visits. They provide clinical support, and case management with a main focus of communicating all information with families. They have an open door

policy regarding family visits. Devereux can provide transportation for Student to visit home and students are permitted to visit home for overnights when appropriate.

Each unit has a “greenbook” for each student that all staff read and review, which contains students’ IEPs and treatment plans for carry over between the day and residential programs.

22. On September 16, 2014, Tewksbury’s counsel sent a letter to Parents’ counsel proposing residential placement of Student at Devereux in Rutland, Massachusetts. (S-1)

## **FINDINGS AND CONCLUSIONS:**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)<sup>8</sup> and the state special education statute.<sup>9</sup> As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor her entitlement is in dispute.

Under the Individuals with Disabilities Education Act (IDEA) and Massachusetts law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); (M.G.L. ch. 71B.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

A FAPE is provided when the school district implements an IEP that is “‘reasonably calculated’ to insure that the child receives meaningful ‘educational benefits’ consistent with the child’s learning potential.” *Hunt v. BSEA & City of Newton*, No. 08-10790-RGS, 2009 U.S. Dist. LEXIS 79775, at \*4 n.8 (D. Mass. Sept. 4, 2009) (quoting *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. 16*.)

While an IEP must conform to the procedural and substantive requirements of the IDEA, “the obligation to devise a custom tailored IEP does not imply that a disabled child is entitled to the maximum education benefit possible.” *Lessard, v. Wilton-Lyndenborough Cooperative School District et.al.*, 518 F.3d 18 at 23. Additionally, the IDEA does not require school officials to in effect finance alternative care as a means of remedying issues in a child’s life that are unrelated to education. *Abrahamson v. Hershman*, 701 F.3d 223, 227-228 (1st Cir. 1983).

There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the hearing officer must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the hearing officer must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the

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<sup>8</sup> 20 USC 1400 *et seq.*

<sup>9</sup> MGL c. 71B.

information available at the time it was promulgated. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990)

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, Parents are the party seeking relief, and thus have the burden of persuading the hearing officer of their position.

There is no dispute that Student requires a residential placement. The Team agreed that Student required residential placement as early as March 2014 and the parties have sought to identify an appropriate placement for Student. (S-12) Tewksbury has offered placement at Devereux (S-1) and Student has been accepted into their South Wing residential placement after being rejected as a student in their community home, Devon House. (MacNeil)

Tewksbury and the Team determined that Student's educational needs could only be met in an educational residential facility. Pursuant to that determination, Tewksbury sent out referrals to several educational residential facilities. Student was only accepted at Devereux<sup>10</sup>.

A placement is not deemed appropriate simply because it is the only placement that accepted a student. However, a careful review of the credible testimony provided by Sherry MacNeil, Vicky Sheerin, Bonnie Byer, Debra McManus and Renee Czyzewski demonstrates that the South Wing program at Devereux is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Sherry MacNeil provided credible testimony that the school day portion of the South Wing program could appropriately meet Student's needs. She described his peers as having similar profiles to Student and deemed Student as an appropriate match to the peers based upon information contained in his IEP.<sup>11</sup> She testified that the program model is an applied behavior analysis model, which is the same model that Student's current day program utilizes (as evidenced by the data collection sheets contained in the record, S-28) and that Jim Sperry's staff utilizes in working with Student at home. (Sperry) Ms. MacNeil was able to describe how Devereux would provide services in the areas of functional academics, behavior, daily living skills, and vocational services/experiences, all areas of need identified in both Student's last accepted and proposed IEPs. The day program is approved as a provider of special educational services by DESE. Parents did not provide any expert testimony or any other evidence to show that the Devereux day component was not appropriate for Student.

Ms. MacNeil noted that Devereux could use Student's current IEP if it was "workable" in their setting. They could also evaluate Student and reconvene to draft a new IEP after approximately six weeks. In the case at hand, given that Student's three-year-evaluation is due, and that Parents have neither accepted nor rejected the proposed IEP, it would be appropriate for Devereux to

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<sup>10</sup> Student was not rejected at Amego, but there were no available placements at the time that the referral was made. (S-20)

<sup>11</sup> Although Ms. MacNeil reviewed an IEP that was not in evidence initially and then reviewed a proposed IEP that had not been acted upon by Parents, the information contained in the IEPs about Student's profile had not changed since prior IEPs that had been accepted by the Parents. (S-12)

conduct his three-year evaluation and for the Team to reconvene to review the results and draft a new IEP.

Ms. Sheerin provided credible testimony about the residential portion of the South Wing program. She noted that residential students' time is scheduled from the moment they return from school until they go to bed at night. This appears to be particularly appropriate for Student given the testimony of Mother and Father that Student has behavioral difficulty during unstructured time or when changes to his routine occur. The residential unit communicates with the day staff about students via electronic mailbox to share pertinent information. Additionally, Ms. Sheerin explained that all residential staff has access to students' IEPs and treatment plans to provide continuity of services between the day and residential portions of the day. The residential program utilizes the same ABA program model as the day program. It provides opportunities for students to practice social skills, which is an area of need noted on Student's IEPs. It also provides opportunities to receive instruction in completing hygiene routines and chores, which were identified by Mother as areas of continuing need for Student. The residence is staffed at a ratio of one staff person per three residents. There are both case managers and clinical staff on site at all times. The direct care providers have bachelor's degrees or significant relevant experience and all staff receive training in CPR, crisis intervention, safety, and making connections with students. Staff receive training specific to working with students on the autism spectrum three to four times per year. The South Wing residential program is also approved by DESE as a provider of special education services.

Parents have argued that the distance between their home and Devereux makes Devereux an inappropriate placement for Student. While I am sympathetic to Parents' desire to have Student as close to them as possible, there is insufficient basis in the record for finding that the distance from Parents' home to Devereux makes Devereux an inappropriate placement. There was conflicting testimony regarding the amount of time it takes to drive from Parents' home in Tewksbury to Devereux in Rutland. I take administrative notice that according to MapQuest, the distance from Parents' home to Devereux is 53 miles and it takes approximately one hour and seven minutes to travel that distance. There is no credible evidence that Student would not receive a free appropriate public education in the least restrictive environment due to the distance of his home from Rutland. In fact, Ms. Sheerin testified about the many services Devereux provides in order to promote visitation between students and families. Parents' goal is to maintain Student as an integral part of their family unit, and the evidence shows Devereux strives to support this goal. Devereux has an open door visitation policy for parents and provides transportation to and from Devereux when necessary to facilitate visitation. It also permits students to go home for overnight visits when it is appropriate. Although Parents would ideally want Student to be located closer to them, the Devereux placement will allow and encourage Parents to continue to have access to Student.

I turn next to a consideration of Student's medical needs as they interface with an appropriate educational placement. Devereux provides residents of its main campus (including South Wing residents) with full time nursing services from 7:00 a.m. until 10:00 p.m. After 10:00 p.m. there are on call nurses available who are physically located from ten to thirty minutes from campus. Although Parents suggest that the nursing services provided are inadequate, they did not present any expert medical testimony or evidence of any kind to prove the nursing services were



inadequate. The credible testimony of Vicky Sheerin shows that Student would have an individual medical plan with a protocol for how to respond to issues pertaining to Student's diabetes<sup>12</sup>. It is further noted that Student does not require twenty four hour nursing care within his home. Parents did not provide any evidence that Student requires on-site nursing services after 10:00 p.m.<sup>13</sup> Parents did not present any evidence to show that Student requires nursing services in addition to those available at Devereux.

Parents have raised concerns about Student's ability to continue to treat with his current medical providers while attending Devereux. Ms. Sheerin explained that the majority of their students continue to treat with their own medical providers throughout Massachusetts and in other states. She explained that Devereux can provide both transportation and a case worker to accompany students on medical appointments as needed. Parents submitted two exhibits, addressing the issue of Devereux's location. Exhibit P-1 is a November 18, 2014 letter from Nora Friedman, M.D., who treated Student on two occasions. (Mother) Dr. Friedman's letter recommends that Student's placement be "located close to the family home." She does not define what she means by close. She also did not testify at the hearing. I gave her letter little weight for these reasons. Parents additionally submitted a letter (P-2) from Edward Hart, M.D, dated December 5, 2014. He notes that he is writing at the request of Parents in support of their wish that Student's group home and school program be as close to their home as possible. He also advises that Student's placement be at most, one hour from his hospital. Dr. Hart did not testify at hearing. I am unable to assess his credibility or determine whether he has a medical opinion regarding Student's specific proposed placement at Devereux. Therefore, Dr. Hart's letter does not persuade me that placement at Devereux is inappropriate for Student.

Having found the Devereux placement appropriate, it is not necessary to address the appropriateness of the placement requested by the Parents. However, in order to assist the Parties in moving forward, I will provide some guidance with respect to the NEEDS Center group home.

Parents are seeking an Order that Tewksbury fund a residential placement for Student, who is nineteen years old, in an adult group home run by the NEEDS Center in Methuen or Tewksbury. They have not cited to any legal authority that would permit the BSEA to order a school district to fund a residential placement for a student in an adult group home. The evidence shows that the NEEDS Center adult group homes are not *educational placements*. Student however requires an educational placement. Tewksbury is only obligated to provide residential services when they are required for educational reasons. The standard, as reflected within several First Circuit decisions, for determining whether a day placement would satisfactorily address Student's educational needs, or, conversely, whether a school district is required to provide a student with a more restrictive, residential placement, is whether the educational benefits to which the student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.<sup>14</sup> Therefore, if I were to be

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<sup>12</sup> Ms. Sheerin further noted that staff could call 911 if a medical issue arose and U-Mass Medical Center is approximately twenty minutes away from campus. (Sheerin)

<sup>13</sup> Mother testified that she gives Student his long acting insulin before he goes to bed at around 8:00 p.m. and that Student sleeps until morning, when she usually has to wake him for school. (Mother)

<sup>14</sup> See *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983).

persuaded by Parents' argument that Student's educational needs can be adequately addressed by continuing his day placement at LABBB Arlington, Tewksbury would not be obligated to provide residential services at all. Thus, if Student did not require the kinds of educational services that are available in the residential South Wing program at Devereux to receive a free appropriate public education, Tewksbury would not be obligated to provide a residential placement. The evidence shows that Student does in fact require a residential placement for educational reasons as Tewksbury has already determined. His educational progress has been slow and incremental over the years. (Mother, McManus) He continues to require instruction and reinforcement in activities of daily living including completing hygiene tasks, cooking, and household chores. (Mother) He is still not able to carry over the progress he has made in school with controlling behavioral outbursts into other settings such as the home and the community. (Mother, Father)

Jim Sperry testified that if Student were placed in one of the NEEDS Center's group homes he would provide all of the supports necessary for Student. Although I found Mr. Sperry to be well-meaning and knowledgeable and skilled in providing home services and supervision to staff working with Student, I am not persuaded that the NEEDS Center's group home could be modified in such a way as to be an appropriate educational setting for Student. First, it is not approved by DESE as an educational placement<sup>15</sup>. Further, there is no dispute that the NEEDS Center group home is not an educational setting.<sup>16</sup> Thus, given Student's acceptance at an approved residential school which I have found to be appropriate, Tewksbury would not be permitted to use public funds to place Student residentially in a non-educational residential placement. Parents argue that the NEEDS Center group home would be the least restrictive setting for Student because it would allow him to reside near their home. However, the least restrictive environment mandate does not trump the FAPE mandate and I have deemed the NEEDS Center to be inappropriate for Student.

## **ORDER**

Based upon the foregoing, I find that the residential placement at Devereux proposed by Tewksbury Public Schools is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment. I further find that a residential placement in a group home run by the NEEDS Center in Methuen or Tewksbury, in addition to the LABBB day placement in Arlington will not provide Student with a free, appropriate public education in the least restrictive environment.

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<sup>15</sup> The school district shall, in all circumstances, first seek to place a student in a program approved by the Department pursuant to the requirements of 603 CMR 28.09. ... When an approved program is available to provide the services on the IEP, the district shall make such placement in the approved program in preference to any program not approved by the Department.

<sup>16</sup> Mr. Sperry made a vague reference to being aware of a student under the age of 22 being placed in a group home while he was employed at the May Center, but was not able to provide any details regarding that circumstance. Mr. Sperry was not aware of what kind of procedure would have to be followed to permit a nineteen year old student to reside in an adult group home setting in any event (Sperry)

Additionally, Student is due for his three-year evaluation. This evaluation shall be completed as soon as possible at Devereux, if feasible, and the Team shall convene to review the results.

By the Hearing Officer,

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Catherine M. Putney-Yaceshyn

Dated: February 11, 2015