

**COMMONWEALTH OF MASSACHUSETTS
SPECIAL EDUCATION APPEALS**

In Re: Andover Public Schools

BSEA #1402762

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes.

At issue in this case is whether the Andover Public Schools is obligated to reimburse the Parents for the costs associated with their unilateral placement of the Student in a private, non-special education religious school.

The background information is as follows. On September 11, 2012, after a three-day evidentiary hearing, the BSEA issued a decision (*In Re: Andover Public Schools*, BSEA No. 12-7315, hereafter *Decision No. 1*) that ordered the Andover Public Schools (Andover or School) to “locate or create” an educational placement for the Student that met specified criteria. Shortly thereafter, Andover sought the consent of Parents to forward referral packets to twelve substantially separate day school placements. Parents withheld consent for referrals to all but one of the listed placements, allowing the School to refer Student to a private school that ultimately did not accept Student.

Meanwhile, approximately one week before the BSEA issued *Decision No. 1* Parents placed Student at their own expense in a private, regular education religious school that does not provide special education services. In December 2012, Parents filed a motion alleging that Andover had not complied with *Decision No. 1*, and requesting an order directing the School to fund the private placement chosen by the Parents. The School opposed the Parents’ motion. That same month, both Parents and the School appealed *Decision No. 1* to the U.S. District Court for the District of Massachusetts. The District Court consolidated the two appeals.¹

On October 1, 2013, the Parents filed the hearing request in the instant case, requesting an order directing the School to reimburse them for the expenses already incurred for the private school as well as for costs of the private school up to the date of the District Court’s decision on the appeal.

On November 21, 2013, after the Parents had filed their hearing request but before the hearing took place, the U.S. District Court (Judge Woodlock) issued a

¹ The School’s appeal was filed as Andover Public Schools v. BSEA, et al., No. 12-12288-DPW, and the Parents’ case was entitled John Smith [a pseudonym] v. BSEA, et al., No. 13-10184-DPW.

dispositive ruling on the Parents' and School's cross-motions for summary judgment in the consolidated appeal referred to above, fully upholding *Decision No. 1*.

The BSEA hearing in the current case was postponed for good cause at the request of the parties, and ultimately took place on December 11 and 12, 2013 at the office of the Division of Administrative Law Appeals-BSEA at 1 Congress Street, Boston, Massachusetts.

The School was represented by counsel, and the Parents represented themselves and the Student pro se. Each party presented documentary evidence and examined and cross-examined witnesses. The parties waived written closing arguments, and the record closed on December 12, 2013.

The record in this case consists of the Parents' exhibits P-1 through P-11 and P-13 through P-24, School's exhibits S-1 through S-24, and approximately 7.5 hours of tape-recorded testimony.

Those present for all or part of the proceeding were:

Parents

Amy Reese

John Norton

Jeff Bostic, M.D., Ed.D.

Joyce Laundre

Catherine Lyons, Esq.

Out of District Coordinator, Andover Public Schools

Special Education Program Head, Andover High School

Consulting Psychiatrist, Andover Public Schools (testified by speaker phone)

Director of Student Services, Andover Public Schools

Attorney for Andover Public Schools

ISSUES PRESENTED

The issues for hearing are the following:

1. Whether the Andover Public Schools has offered the Student an IEP and placement which are reasonably calculated to provide him with a free, appropriate public education (FAPE) as such is defined in the decision in BSEA No. 12-7315 (*Decision No. 1*) for the period from September 2012 to and including the date of the District Court decision in this case, November 21, 2013.
2. If not, whether the private school in which the Parents placed the Student in September 2012 is appropriate, such that the Parents are entitled to reimbursement for the costs of this placement.

POSITION OF PARENTS

The School failed to comply with the requirements of *Decision No. 1* in that it failed to offer a placement that was designed to meet the needs of highly intelligent students with Asperger's syndrome and similar disabilities as required by that decision, and further, failed to offer the Student a placement that would provide him with FAPE.

All but one of the schools suggested by Andover either were inappropriate for Student or had rejected applications made for him in previous years. The one placement that was potentially appropriate rejected Student's application. Since *Decision No. 1* did not issue until a few days after the first day of school in September 2012, Student had no place to start school at the beginning of the 2012-2013 school year, leaving the Parents with no choice but to place him in his current private school.

Further, the placement selected by the Parent is appropriate. Student has excelled academically and socially in the private school, is happy there, and requires no special education interventions or accommodations in that placement. Parents now believe that Student's difficulties in the public middle school were the result of Andover's poor treatment of him. Because Andover failed to comply with *Decision No. 1* and failed to offer the Student a placement that would provide him with FAPE, and because Student's current private school clearly is meeting his needs, Andover should reimburse Parents for the costs of this private placement.

POSITION OF ANDOVER PUBLIC SCHOOLS

At all relevant times, the Andover Public Schools has fulfilled its obligations to Student. Upon receipt of *Decision No. 1*, the District offered to refer Student to twelve (12) approved private and public day programs that potentially could meet the requirements of the *Decision*, and, additionally, invited the Parents to suggest additional potential placements for consideration. Parents' refusal to consent to have referral packets sent to any but one (1) of the listed programs (which rejected Student's application), as well as their refusal to reconsider other potentially appropriate programs, prevented the School from securing a placement for Student. Because the School's inability to completely fulfill the mandates of *Decision No. 1* or otherwise offer a placement to Student for 2012-2013 was caused solely by the Parents' actions, the School has no responsibility to reimburse Parents for their expenses for the private school.

Moreover, even if Andover did fail to comply with *Decision No. 1* or otherwise failed to offer an appropriate program to the Student, the placement secured by the Parents is inappropriate. The private school that the Parents have chosen explicitly and undisputedly provides no services or accommodations to address the Student's special needs. Andover has no obligation to reimburse Parents for the costs of this placement.

FINDINGS OF FACT

1. The entire Decision in BSEA No. 12-7315 (*Decision No. 1*), as issued on September 11, 2012 is incorporated by reference.
2. Student is a now sixteen-year-old boy who is a resident of Andover. His eligibility for special education services from Andover is not in dispute. Student attended the Andover Public schools from third grade (2006-2007) through eighth grade (2011-2012).

3. Student's disability profile is discussed in detail in *Decision No. 1*. For purposes of the current Decision, it is sufficient to reiterate that Student is very intelligent, academically capable, and artistically talented. He has been diagnosed with Asperger's Syndrome, which historically has affected his social and behavioral functioning. (*Decision No. 1*, at pp. 3-6).
4. *Decision No. 1* contained the following Findings, Conclusion and Order, which are repeated verbatim (minus footnotes in the original) below:

After reviewing the testimony and documents on the record, I conclude that the School has amply demonstrated [footnote omitted] that despite his high intelligence and artistic gifts, Student would likely have tremendous difficulty receiving FAPE at Andover High School. As a result of his disability, Student tends to be extremely rigid, oppositional and sometimes disruptive when asked to do tasks that he does not want to do. Although I credit the Parents' testimony that Student has friends and participates in activities outside of school, I also must credit the unanimous testimony of the School's witnesses to the effect that Student has been consistently isolated from interactions with peers and adults in a school setting, has tremendous difficulty when another person, such as a teacher, requires him to operate outside of his own sphere of thinking, and does not appear to have made much progress in this arena. Student is now fourteen years old; it will be very difficult for him to move towards self-sufficiency if he does not develop more functional social and emotional skills in the near future.

The uncontroverted evidence on the record is that Student requires a small, structured setting capable of explicitly and consistently teaching him these skills, during the course of the school day. John Norton, AHS' Program Advisor for Special Education testified without contradiction that AHS could not adequately serve Student at this time, despite the wide range of services available at AHS. Although Dr. Doyle testified that Student could probably be educated within a public high school, he also testified that he is not familiar with AHS, and, further, that Student would benefit from a level of in-the-moment intervention that Andover acknowledges that AHS cannot provide. While the IDEA requires schools to remove students from public school settings only when they cannot be provided FAPE with appropriate supports and services, I am persuaded that AHS is not currently able to provide such services.

I further conclude, however, that the School has not met its burden of persuasion that Gifford is an appropriate setting for the Student. Based on the testimony of Mr. Jankauskas, [footnote omitted] who clearly is familiar with Student, Gifford serves students with a wide variety

of challenges. There is no evidence on the record about the experience of the school or the staff in dealing with students with Asperger's Syndrome and similar issues, and no evidence as to the appropriateness of the proposed peer group for Student. Student has a unique profile, and requires a setting where staff have expertise in addressing needs similar to his, using not only appropriate therapeutic interventions as recommended by Dr. Bostic, but also by implementing a behavioral intervention plan informed by a data-driven FBA as recommended by Dr. Doyle.

Finally, I must note that the record does not reveal that Student was ever provided with interventions designed for students on the autism spectrum, including functional behavioral assessments and behavior intervention plans created from objective data about Student's behavior and responses to intervention.

ORDER

Within thirty calendar days from the date of this Decision, the Andover Public Schools shall locate or create a placement designed for highly intelligent students with Asperger's Syndrome and similar disorders, and shall fund Student's placement in such program.

Decision No. 1 at pp. 9 – 10.

5. Between the conclusion of the 2012 hearing and issuance of *Decision No. 1* on September 11, 2012, the parties attempted to resolve this matter informally, but were not successful. (Parent, Laundre, P-16 at p. 48) Andover was aware that Parents had located a private, sectarian, non-special education school in which they wished to enroll Student on the first day of school, September 5, 2012. Andover had not agreed to fund this private placement. (Laundre, P-16 at p. 48) Andover had notified Parents that the following placements were available to Student for the first day of school, pending issuance of *Decision No. 1*: Andover High School (with certain stipulations that Parents found unacceptable), The Gifford School, and the North Shore Consortium. Parents did not find any of these options to be acceptable. (Laundre, Parent) Student began attending the private sectarian school on or about September 6, 2013, at Parents' expense.
6. On September 21, 2012, ten calendar days after issuance of *Decision No. 1*, Andover's Director of Student Services, Joyce Laundre, sought Parents' written authorization for Andover to refer Student to twelve out of district placements: Northshore Academy, Merrimac Special Education Collaborative (MSEC), Corwin-Russell School at Broccoli Hall (Corwin-Russell), Doctor Franklin Perkins School, Granite Academy, JRI-The Victor School, Manville School, Milestones, New England Academy, Reed Academy, St. Ann's Home, and Willow Hill School. (Laundre, Reese, Parent, S-2)

7. Parents consented to a referral to Willow Hill School, but refused to allow any of the other eleven referrals. Willow Hill did not deem Student to be an appropriate candidate for admission. (Parent, Laundre, Reese, P-5 at p. 21, S-4)
8. In a letter dated October 9, 2012, Andover's out-of-district coordinator, Amy Reese, stated that in light of Willow Hill's declining Student's referral and the Parents' refusal to allow Andover to pursue the other eleven potential placements, "the program and placement previously offered to you at Gifford School as well as a placement at the North Shore Consortium remains available to you if you choose to avail yourselves of either of these placements..." (Parent, Laundre, Reese, P-5 at p. 21, S-4)
9. On October 16, 2012 Parents wrote a letter in response to the foregoing letter from Ms. Reese, stating that during the previous year, they themselves had, in fact, applied to New England Academy (twice), Corwin Russell, and Gifford, but that only Gifford had accepted Student. Parents' letter further stated that *Decision No. 1* had concluded that Gifford was inappropriate. Finally, Parents' letter stated that according to their own research, none of the schools proposed by Andover was appropriate or consistent with *Decision No. 1*, and requested Andover to create a program for Student within Andover High School. (Parent, Laundre, Reese, P-5 at p. 22, S-5)
10. On October 18, 2012, Andover responded to the Parents' letter of October 16, stating that "[y]our unwillingness to cooperate in the referral process has made it impossible to identify another appropriate program for [Student]. While the Hearing Officer found that the district did not meet its burden of persuasion regarding Gifford, she did not, in fact, find that....Gifford failed to afford [Student] a...FAPE." The letter went on to state that it was not possible to create an appropriate program within Andover High School, continued to offer the Gifford placement as the only state-approved program that had accepted Student, repeated its offer of the North Shore Consortium (where Student had successfully completed an extended evaluation and which was likely to accept Student), and invited Parents to contact Andover's special education office if they wished to reconsider their refusal to consent to the other eleven referrals or if they knew of additional approved special education programs that they wanted the School to consider. (Laundre, P-5 at p. 23, S-6)
11. Parents responded on October 31, 2012, reiterating that they were not failing to cooperate; rather, the programs proffered by Andover "ma[d]e no sense" for the Parents to consider. Parents further reported that Student was doing extremely well in his private school, where "he does not need special education at all." (Parents, P-5 at p. 24)
12. The parties continued to recite their respective positions in emails and correspondence during November 2012. Meanwhile, Student continued to attend the private school, and Parents did not consent to any further referrals. During this period, Andover sent "blind" referrals to schools on its list, i.e., referral packets

cleansed of identifying information about the Student, but did not get any positive responses. (Reese)

13. On January 28, 2013, Andover issued an invitation to a Team meeting to review Student's IEP (which would be expiring in February 2013). Andover also sent Parents a release which, if signed, would authorize Andover to contact the Student's private school. (Laundre, Norton, Reese, S-11). On February 5, 2013, Parents responded with a letter refusing to grant permission for direct contact between Andover and the private school, asking Andover why a Team meeting was needed, and stating that Student's experience with special education in middle school had been damaging to him. (S-12)
14. On February 7, 2013 the School responded that it was obligated to propose an IEP for Student every year despite his attendance at private school, and informed Parents that the District would develop an IEP in Parents' absence if Parents elected not to participate in the Team process. (Laundre, Reese, S-14)
15. Parents and Andover exchanged further correspondence and emails in which Parents indicated that they were willing to meet with the District to discuss Student's possible return to Andover High School without an IEP, but that they did not wish to participate in a Team meeting because Student did not require an IEP. Parents further offered to provide Andover with information about Student's performance at the private school, but continued to refuse to allow Andover to contact the private school directly. (S-15, S-16)
16. In an e-mail to the Parents dated February 20, 2013, Andover's out of district coordinator stated that "[i]t is clear from your letter that you are waiving your participation [in the Team process] at this time. Additionally, you continue to refuse to allow Andover to communicate with [Student's] private school, which makes it impossible to accurately ascertain his present level of educational performance... The district is nevertheless required to propose an IEP and placement for [Student] on an annual basis, even without your participation... Accordingly, the Team will meet to develop an IEP for him next week, and I will send it to you by mail for your review and response. If you reconsider your decision, please contact me immediately." (Reese, S-16)
17. Andover convened the Team meeting on March 1, 2013. Parents did not attend. Andover issued an IEP on March 15, 2013, covering the period from March 1, 2013 through February 28, 2014. This IEP proposed placement for Student at the Gifford School. (Norton, S-17) In November 2012 and October 2013, Andover proposed a re-evaluation of Student, to which Parents have not consented. Parents also have declined repeated requests by Andover to contact Student's private school directly. (S-21)

18. Both Andover and the Parents presented testimony in support of their positions regarding the appropriateness of the School's proposed placements as well as the private school the Student has been attending since September 2012.
19. Joyce Laundre, Andover's Director of Student Services, testified that she and out-of-district coordinator Amy Reese were primarily responsible for implementing *Decision No. 1* by searching for potentially appropriate placements for Student, i.e., programs which were capable of serving intelligent students and providing "in the moment" processing of social/emotional issues, counseling and therapeutic supports, and social skills instruction. (Laundre) Ms. Laundre testified that relying on the MAAPS directory and her and Ms. Reese's experience and understanding of the Decision and Student's profile, Andover compiled its list of twelve potential placements by searching for programs designed for students with average to above-average intelligence carrying diagnoses of Asperger's Disorder, non-verbal learning disorders, and similar issues. Andover eliminated from consideration programs serving students with cognitive impairments or those who are medically fragile. Ms. (Laundre)
20. Andover's out of district coordinator, Amy Reese, testified that to develop she had a significant role in developing the list of 12 potential placements for Student. Ms. Reese stated that she relied on her past experience with various placements,² as well as on program descriptions contained in the MAAPS manual to develop this list. Ms. Reese testified that all of the schools on the list serve students with Asperger's Disorder and similar disabilities. In her experience, North Shore Academy (part of North Shore Consortium), Doctor Franklin Perkins, The Victor School, Manville, Milestones, St. Ann's, New England Academy, and Willow Hill all have students within their populations who have high intelligence. (Reese).
21. With respect to Gifford, Ms. Reese testified that she is responsible for monitoring some other Andover students who have been placed there. She has observed grades 9, 10 and 11 at Gifford on two occasions, during the late spring of 2013 and December 2013. Ms. Reese testified that her observations consisted of conversations with the admissions director and head teacher, as well as observations of classes (including language arts and math). Ms. Reese testified that among the students served at Gifford are students with high intellectual ability. Students are grouped for academics according to their abilities, instruction is differentiated, and high level coursework is available. (Reese)
22. The Gifford high school program is attended by about 50 students, many of whom have Asperger's disorder or similar social/emotional challenges. Classes comprise 18 to 25 students and are staffed by a dually certified teacher (i.e., certified in both special education and a content area) and a teaching assistant. Students experiencing emotional challenges can take a break or continue their work in a quiet area and

² As of the hearing date, Ms. Reese had served as Andover's out of district coordinator for approximately 1.5 years, and had served the same function in another district for about 2 years. In that role, she has monitored and observed students who have been placed in private special education schools.

process their concerns with staff. Social skills instruction is embedded in the curriculum and also is provided explicitly. Students have access to counseling, and transition planning services. Staff meet daily to discuss student progress, and are supported by a Ph.D.- level consultant. Approximately 70 % of graduates from the high school program attend college, and Gifford reports a 100% MCAS pass rate. Based on her observations of Gifford and knowledge of Student, Ms. Reese believes that Gifford would be a very appropriate placement for Student. (Reese)

23. When asked why Andover referred Student to programs where he previously had been rejected, both Ms. Laundre and Ms. Reese stated that private schools often reconsider and/or accept students whom they had rejected in prior years because of changes in circumstances. For example, a school might reject a student at a particular year because the school cannot provide a cohort of appropriate peers, and then accept the student at a later time if an appropriate grouping becomes available. (Laundre, Reese)
24. John Norton, the Special Education Program Head at Andover High School also observed Gifford's high school-level program in December 2013. Mr. Norton's testimony was similar to that of Ms. Reese. In addition, Mr. Norton testified that he observed that students at Gifford appeared to be engaged in learning, and noted many examples of highly skilled teaching. He testified that there were multiple avenues for teaching social skills and processing social or emotional issues, including direct and embedded instruction and a school-wide point system. Mr. Norton testified that he did not observe behavior problems among the students; students appeared respectful during his observation, did not act out, did not make disparaging remarks, and did not engage in "atypical" behavior. (Norton)
25. Parent testified that they were knowledgeable about the programs on Andover's list either because Student had already applied and been rejected (Willow Hill, New England Academy, Corwin-Russell)³; because the Student had applied and been accepted but Parents found the program academically deficient or otherwise inappropriate (Gifford, North Shore Consortium); or because the Parents' research, consisting of review of school websites and drives around school campuses, indicated that the programs would not meet Student's needs. Parents felt that it made no sense to consent to referrals to programs that either had rejected Student or were, in Parents' view, clearly inappropriate. (Parent)

PROGRAM SOUGHT BY PARENTS

26. In September 2012, Parents placed Student in a private, college-preparatory, non-special education religious high school. The private school Handbook indicates that the school's purposes include providing "an environment for students to reach their potential through fostering positive self-image, promoting self-discipline, developing

³ At one time, Parents had considered Corwin-Russell as potentially appropriate, and had visited the school with Student; however, Corwin-Russell rejected Student because he indicated that he was not interested in attending. (Parent,

critical thinking skills, and enhancing each one's unique talents;" as well as "offering advanced placement, honors, college preparatory and elective courses that present students the opportunity for intellectual, spiritual, and emotional growth." (S-23)

27. The Handbook explicitly states the private school's position with respect to students with disabilities as follows: (S-23)

[Private School] is a [religious], private school and as such is free to accept or not accept any student at its discretion. [Private School] does not provide special education services; therefore, the school does not accept any service described in any Individual Education Plan (IEP) or 504 Plan, unless reviewed and authorized by the Head of School. No accommodation will occur unless granted in writing by the Head of School through the student's School Counselor.

28. Since enrolling in the private school, Student has carried a full academic course load. For the 2012-2013 school year, Student's courses included Algebra, French, Literature, Physical Science, Scripture, World History, and Fine Arts, and Physical Education. All academic courses were designated as at the "college prep" or "honors" level. Student's quarterly and final grades were all in the 90's and the brief teacher comments were highly positive (e.g., "excellent!", "fabulous"). The literature teacher commented that Student should participate more in class; however, Student earned a 94 in that class. Student won three academic award pins and an award certificate in June 2013. (P-3, pp. 6 – 10) Student has continued to excel academically during the 2013 – 2014 school year. (Parent)
29. Parents have received no complaints of any kind from the private school about Student's behavior, social interactions, or emotional status. Their only visits to the private school have been for special events or award ceremonies. The Parents feel that Student's self-esteem and emotional state have improved dramatically since he began attending the private school. They report that Student feels respected at the private school. They have concluded that Student does not need special education services or a therapeutic environment. (Parent, P-9, pp. 24, 26, 28) Student likes the private school, but would like the option of returning to Andover High School. Parents would support his return, as a regular education student. (Parent, P-17, 20, 21)
30. Parents have not allowed Andover to contact the private school because they are concerned that such contact might jeopardize Student's current placement there. Parents have not shared Student's special education history with the private school. (Parent, Laundre, Norton, Reese)
31. School witnesses testified that they are concerned about the ability of Student's private placement to meet Student's documented special needs because the private school provides none of the supports and interventions that previous evaluations have recommended. They feel that Student's good grades alone do not necessarily indicate Student's emotional or social functioning, especially given that Student's historic

difficulties were not academic in nature. (Laundre, Norton, Bostic) Dr. Jeffrey Bostic testified that individuals with profiles similar to Student do not generally “get over” their diagnosed disabilities in a different environment, without services. (Bostic) Andover was generally concerned that without the ability to contact the private school, they did not have an accurate picture of Student’s functioning. (Laundre, Norton, Reese)

FINDINGS AND CONCLUSIONS

There is no dispute that for purposes of this hearing, the definition of “free, appropriate public education” (FAPE) for the Student is defined in *Decision No. 1*. This definition was set forth on pages 4 and 5 of the instant Decision, and will not be repeated here.

Given this definition of FAPE for Student, the issue of whether or not the Parents are entitled to the relief requested, i.e., reimbursement for the costs of Student’s private school placement, can be analyzed both in terms of compliance with *Decision No. 1* and within the framework of “self-help, i.e., a claim for reimbursement for a unilateral parental placement. Regardless of which framework is used, the Parents have not met their burden of persuasion.

1. Compliance Analysis

Rule XV of the BSEA *Hearing Rules* provides the following:

A party contending that the Hearing Officer’s decision is not being implemented may file a motion requesting the BSEA to order compliance with the decision. The motion shall set out the specific areas of alleged non-compliance. The Hearing Officer may convene a hearing on the motion at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and/or refer the matter to the Legal Office of the...Department of Elementary and Secondary Education for enforcement.

As stated above, *Decision No. 1* ordered Andover to “locate or create a placement designed for highly intelligent students with Asperger’s Syndrome and similar disorders, and shall fund Student’s placement in such program.” Parents argue that Andover failed to comply with *Decision No. 1* because the placements to which Andover sought to refer Student either were not appropriate for him, primarily because in the Parents’ view, they were not suitable for “highly intelligent students,” or because they were unavailable (e.g., Willow Hill, Corwin Russell, and New England Academy). While it is conceivable, theoretically that none of the programs suggested by Andover would have been appropriate for Student, Parents’ conduct effectively prevented that inquiry from getting off the ground.

The School presented credible, uncontroverted testimony as to the basis for selecting the twelve facilities listed for referral. School staff relied on their own experience together with published information to assemble an array of schools that serve children with average to above-average intelligence who present with Asperger's Disorder, non-verbal learning disorders, and related social and emotional challenges. The starting point for the School's inquiry was obviously reasonable.

Neither the School nor the Parents had any way of determining which, if any, of these programs ultimately might be appropriate for Student without proceeding to the second step, namely, completing the referral process so that the proposed placement could review the Student's IEP and evaluations, identify whether the private school might possibly be a good fit for the Student, and, if so, meet with the Student and family one or more times before making a final admissions decision. By refusing to consent to referrals to all but one of the listed programs, Parents stopped the process in its tracks, and made it impossible for Andover—or themselves—to determine whether any of the listed programs might be appropriate.

Parents argue that their own internet research led them to conclude that most of the listed placements would not meet the requirements of *Decision No. 1* or otherwise be appropriate for the Student. While Parents certainly acted reasonably and diligently in conducting independent research, they presented no evidence based on that research that merely listing the proposed schools as potential placements constituted non-compliance by the School.

Parents further argued that for certain schools (Corwin Russell, for example), the referral process would be futile, because Student already had applied and been rejected. This argument is also unpersuasive. The School presented unrefuted, credible testimony from Joyce Laundre and Amy Reese that changed circumstances frequently lead schools to reconsider and possibly accept students whose applications previously had been rejected.

In sum, the uncontroverted evidence is that Andover complied with *Decision No. 1* to the extent possible, and any non-compliance is the result of the Parents' failure to cooperate with the referral process. Within approximately ten days from the date of that *Decision*, Andover had generated a list of twelve potential placements, one or more of which might have proven appropriate for Student. The next step—consenting to the referrals—was the Parents' responsibility. Additionally, Andover continued to offer placement at the North Shore Consortium, as well as at Gifford.⁴ Andover's inability to move forward in the placement process was solely the result of Parents' refusal to allow Andover to do so. Finally, it is important to note that Parents refused to allow any direct contact between Andover and the private school. While Parents' concern about

⁴ Contrary to the Parents' assertions, *Decision No. 1* did not find that Gifford was inappropriate for Student; rather, the Decision stated that the School had not met its burden of demonstrating its appropriateness. The School cannot be faulted for presenting Gifford as an option in the face of Parents' refusing to allow referrals to other programs.

jeopardizing Student's current placement are understandable, their refusal to allow direct contact with the private school impeded the process of information-gathering and undercut their claim for public funding of that placement. Andover cannot reasonably be expected to fund a non-approved private placement without making its own assessment of whether that placement addresses Student's special needs.

Based on the foregoing, Parents are not entitled to their requested relief on the basis of alleged non-compliance by Andover.

2. Self-Help Analysis

A school may be required to reimburse parents for the cost of unilaterally placing a child in a private school, if the parents can demonstrate that (1) the school failed to offer the child an appropriate program and (2) that the placement provided by the parent is appropriate. Florence County School District Four v. Carter, 510 US 7, 13 (1993). Parents are not required to meet state education standards in making a unilateral placement, as long as the school chosen is capable of providing the student with FAPE; that is, the placement is "appropriately responsive to [a student's] special needs," so that the student can receive educational benefit. Matthew J. v. Mass. Dept. of Education, 989 F. Supp. at 387, 27 IDELR 339 at 343-344 (D. Mass. 1998), citing Florence County, *supra*.

Finally, reimbursement is in the nature of an equitable remedy. Diaz-Fonseca v. Comm. of Puerto Rico, 451 F.3d 13 (1st Cir. 2006). As such, a hearing officer may consider the conduct of parents in determining whether reimbursement is warranted, and may deny reimbursement if parents unreasonably obstruct the IEP process. See C.G. and B.S. v. Five Town Community School District, et al., 513 F. 3d 279 (1st Cir. 2008), citing Roland M. v. Concord School Committee, 910 F.2d 983 at 987 (1st Cir. 1993).

In the instant case, Parents, as the parties challenging the placement offered by the School, must demonstrate by a preponderance of the evidence that Andover failed to offer or provide the Student with an appropriate program in September 2012. If Parents meet that threshold, they must establish that the program they selected was appropriate for the Student. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005), Florence County, *supra*.

As has been discussed extensively earlier in this Decision, Andover fulfilled its responsibility by generating a number of potentially appropriate placements as well as keeping the potential placement at Gifford "alive" when there appeared to be no alternatives as a result of the Parents' conduct. The process was halted solely by Parents' refusal to consent to referrals. As in the Five Town case cited above, Parents' obstruction of the IEP and placement process precludes their recovery.

Finally, because the Parents have not met their burden of showing that Andover failed to offer the Student a FAPE, the appropriateness of Student's current placement need not be addressed at length. I note, however, that the private school explicitly

declines to implement IEPs or accommodations under Section 504, and provides Student with no special education or related services. In fact, Parents now take the position that Student does not need special education services. Even if Parents had prevailed on the first prong of their reimbursement claim, there is little or no evidence on the record that would support their position on the second prong.

CONCLUSION

For the reasons discussed above, Parents are not entitled to the relief requested.

By the Hearing Officer:

Sara Berman

Date

