

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

**In Re: Agawam Public Schools**

**BSEA # 1403554**

**DECISION**

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

A hearing was held on December 19 and 23, 2013 in Springfield, MA before William Crane, Hearing Officer. Those present for all or part of the proceedings were:

Student's Mother	
Student's Father	
Jessica Batchelder <sup>1</sup>	Applied Behavior Analyst, Hampstead Hospital
Frank Robbins	Educational and Behavioral Consultant, Quabbin Valley Educational Consultants
Ricardo Cruz	Intensive Care Coordinator, Carson Center
Yvette Stoddard	Behaviorist, Lower Pioneer Valley Educational Collaborative
Marc D'Amore	Special Education Administrator, May Center School
Erica Kearney	Program and Clinical Director, May Center School
Lauren Guilmette	Home Consultant, May Center for School and Family Consultation
Gail Loughlin-Rogers <sup>2</sup>	School Psychologist, River Street School
John Kaplan <sup>3</sup>	Program Manager for Extended Day Program, River Street School
Michelle Pratt	Director, May Center for School and Family Consultation
John Hampel	Private Educational Consultant
Amber Kendall	Speech-Language Pathologist, Agawam Public Schools
Jessie-Fern Sanders	Special Education Teacher, Agawam Public Schools
Kimberly Cass	Supervisor of Special Services, Agawam Public Schools
April Rist	Director of Special Services, Agawam Public Schools
Matthew Engel	Attorney for Parents
Nena Totten	Assistant to Matthew Engel

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<sup>1</sup> Ms. Batchelder testified by telephone.

<sup>2</sup> Ms. Loughlin-Rogers testified by telephone.

<sup>3</sup> Mr. Kaplan testified by telephone.

Peter Smith  
Debbie Lovejoy

Attorney for Agawam Public Schools  
Court Reporter, Catuogno Court Reporting

The official record of the hearing consists of documents submitted by Parents and marked as exhibits P-1 through P-66; documents submitted by the Agawam Public Schools (hereinafter, “Agawam”) and marked as exhibits S-1 through S-30; and approximately two and one-half days of recorded oral testimony and argument. Oral closing arguments were made on December 24, 2013 and the record closed on that date.

In order to apprise the parties in a timely manner of my conclusions in this case, a Summary Decision was issued on December 31, 2013, in advance of the full text of this Decision. See Appendix A. The instant Decision sets forth the reasoning underlying the Summary Decision.

### **ISSUES**

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Agawam (exhibit S-1, as amended by exhibits S-2 and S-28) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would a residential educational placement satisfy this standard? If so, is a particular residential placement appropriate and should it be ordered?

### **POSITIONS OF THE PARTIES**

See the Summary Decision (Attachment A) for a discussion of the positions of the parties.

### **PROCEDURAL HISTORY**

On November 12, 2013, Parents filed their hearing request against Agawam and the Massachusetts Department of Children and Families (DCF) in this dispute. DCF then filed a motion to dismiss it as a party and, by ruling of December 3, 2013. There is neither a court custody order nor a voluntary placement agreement between Parents and DCF and, as a result, Student is not within the care or custody of DCF. Accordingly, I allowed DCF’s motion because Student has no legal relationship with DCF.

On November 27, 2013, Parents filed a *Motion for Emergency Placement*. Through this motion, Parents sought an order from the BSEA requiring Agawam to immediately make a referral to a Melmark residential program in Pennsylvania and to pay the full cost of this program “once [Student’s] application has been accepted.” Agawam filed an opposition and a telephonic motion hearing was held on December 4, 2013.

On December 5, 2013, I denied Parents' *Motion for Emergency Placement* but nevertheless explained that Parents had persuaded me of the importance of quickly resolving this dispute on the merits. I noted that Student continued to be at Hampstead Hospital, with the possibility of being discharged before a resolution of the instant dispute. Parents had made credible allegations regarding the severity and dangerousness of Student's behavior if he were to return to live at home and attend his May Center day placement. I found that there was an urgent need to determine Agawam's responsibilities to Student under state and federal special education laws and ordered that an evidentiary hearing be scheduled for December 19 and 23, 2013, with oral closing arguments on December 24, 2013.

On December 2, 2013, Agawam filed a motion to join the Massachusetts Department of Developmental Services (DDS). Agawam subsequently withdrew this motion before I ruled on it.

As explained above, I issued a Summary Decision on December 31, 2013 in order to advise the parties of my conclusions in a timely manner. See Appendix A.

### **FACTUAL BACKGROUND**

Student is an eleven-year-old boy with a dual diagnosis of Autistic Disorder and X-linked Opitz G/BBB Syndrome with confirmed MID1 mutation. He is considered severely autistic, he has a very substantial intellectual impairment (that may be caused, in part, by the X-linked Opitz G/BBB Syndrome), and he is non-verbal. Testimony of Robbins; exhibits P-1, S-18.

Pursuant to a mostly-accepted IEP, Student has been placed at the May Center School (a private day school) in West Springfield, MA, by Agawam for more than seven years and during this time has also been receiving extended day services and home consultation services. However, since October 28, 2013, none of these services has been provided because Student has been hospitalized on a locked psychiatric unit at the Hampstead Hospital in New Hampshire. Except during this and a previous psychiatric hospitalization in September 2013, Student lives with his Parents and two siblings in Agawam. Testimony of Father; exhibit S-1.

Student enjoys human interaction and he likes being touched by others. He also likes playing with others. He makes clear his enjoyment through excitement or a happy appearance. Parents have taken Student on family vacations. Testimony of Father.

Student's disabilities severely impact him with respect to all areas of functioning and learning. He has extremely limited ability to communicate his wants and needs, his independent living skills are so limited that he is unable to perform a single task (such as washing or putting on a piece of clothing) independently, and he has no ability to independently entertain himself. As a result of his disabilities, Student also has aberrant behaviors at school and at home and, at times, these behaviors have been both extreme and dangerous. Testimony of Father, Robbins; exhibits P-1, S-18.

At 21 months, Student was diagnosed with autism and received early intervention services. When he turned three years old, Agawam began providing special education services of verbal behavioral therapy in its childhood center. During the first year of services from Agawam (ages three to four), Student lost certain communication and learning skills which he has never regained. Testimony of Father.

At age three and one-half, Frank Robbins, PhD, evaluated Student at Parents' request and expense. Dr. Robbins is an educational and behavioral consultant who consults to school districts and parents, principally regarding autistic students and often with respect to their behavioral difficulties. He conducts 30 to 40 evaluations each year and over the course of his career, he has conducted more than 50 evaluations of children who generally have Student's educational profile and are in his age range. Often his evaluations are used to help school districts and parents keep students in day placements so that a residential placement is not needed. Dr. Robbins found Student to be severely impaired with respect to communication and daily living skills. Importantly, Dr. Robbins found that Student had no self-injurious behaviors at that time. Testimony of Robbins; exhibit P- 65.

At age four through the present (i.e., for more than seven years), Agawam has placed Student at the May Center School in West Springfield which all agree has been an excellent day program for Student. In addition, Agawam has paid for home tutors for 480 hours per year (most recently provided through four home tutors who are hired by Parents). Also, Agawam has contracted with the May Center for School and Family Consultation for approximately one hour per week of home consultation services for Parents. The May Center School and the May Center for School and Family Consultation are separate divisions of the May Institute. In addition, the family has obtained 20 hours per week of personal care assistance services funded partly through the Massachusetts Department of Developmental Service and partly through Mass. Health. Testimony of Father,

Father testified that there is coordination between school and home-based services through the one hour per week of consultation, and that at home, the tutors work on the same goals that are being addressed at school. He further testified that Parents conduct discrete trial training at home with their son. For example, they work on their son complying with requests to "come here" or "stop" which are particularly useful on community outings; they work on the Picture Exchange Communication System (PECS) communication program; and they work on the potty training program even when traveling with their son. Father testified that as goals are mastered at school, they are worked on at home so that Student can generalize them. Testimony of Father.

In November 2012, Parents became concerned that Student may require a residential placement. Father testified that in a January 30, 2013 Team meeting, Parents raised with Agawam for the first time, this concern. Parents have always believed the May School to be an excellent day program, and they have been satisfied with their home-services, but they became concerned that Student required more intensive and more highly structured services in order to have an opportunity to make appropriate educational progress. Father testified that within a month after the January 2013 Team meeting, Agawam began expressing

concerns to Parents about what it believed may be insufficient coordination between school and home-based services. Testimony of Father.

The most recently-accepted IEP was issued as a result of a January 30, 2013 Team meeting. Agawam proposed an IEP that continued to place Student in the May Center School, with ABA instruction throughout the day. In addition, home tutoring would be provided for “9.23 hours per week on average” and home services would include home consultation by ABA staff for 45 minutes per week and home program consultation by ABA staff for “approximately 1 hour per week”.<sup>4</sup> The proposed IEP also included changes to goal # 9 (this goal addresses home/community issues) by including specific benchmarks for home tutors and Parents. On February 18, 2013, Parents accepted the placement in its entirety and accepted the remainder of the IEP except for their rejection of five benchmarks under goal # 9. On April 5, 2013, Parents rejected goal # 9 in its entirety. Testimony of Father; exhibit S-1.

Agawam engaged Yvette Stoddard of the Lower Pioneer Valley Education Collaborative to review the home-based services and make a recommendation to Agawam. She reviewed the data that was available to her from the home-based services and concluded that the data did not allow one to know whether the home-based and school programs were functioning in a consistent manner, and that complete consistency between home and school educational services was essential to their success. She made a number of recommendations intended to ensure that such consistency would occur in the future, and she reported on these recommendations at the October 16, 2013 IEP Team meeting, discussed below. Testimony of Stoddard; exhibits P-25, S-20.

On September 5, 2013, Student was admitted to a psychiatric unit of Hampstead Hospital due to a precipitous increase in his self-injurious and aggressive behaviors. Student’s behavior came under better control in the hospital setting, as he responded well to the behavioral support plan, the structure and the consistency of the inpatient unit. On September 18, 2013, Student was discharged from Hampstead Hospital. The discharge report indicated that Student would likely require a residential placement, but Student was discharged to his home and he continued to live with his Parents. Testimony of Father; exhibits P-1, P-3, S-18.

On October 16, 2013, the IEP Team met to propose that goal # 9, which Parents had by then fully rejected, be agreed to by Parents and fully implemented. Father testified that a reason that Parents have not consented to this amendment is that they were concerned that the increased reporting requirements included within the goal would require their home consultant to spend approximately 15 minutes (of her one hour per week consultation to Parents) on reporting, thereby reducing the actual time consulting to Parents to 45 minutes per week. Father further explained that Parents believed that a number of benchmarks under goal # 9 improperly referenced Parents as having service delivery responsibilities under the IEP. Testimony of Father; exhibit S-2.

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<sup>4</sup> Although the IEP appears to call for approximately one and three-quarters hours of home consultation, the testimony was that Parents receive one hour of home consultation each week. Testimony of Father, Guilmette.

As a result of the October 16, 2013 Team meeting, Agawam proposed that ABA staff provide home support for an hour each week and that a BCBA consultant provide home support for a half hour each week, thereby upgrading the qualifications of the home support to a consultant who is a BCBA for a half hour period of time each week. The IEP amendment also proposed to provide home tutoring for three times 120 minutes per week. Exhibit S-2.

By this time, Parents had become more concerned about Student's safety and the safety of others who come into contact with him. Student had learned how to unlock and open all doors in the family home and run across a busy street, putting himself at risk of severe injury or death. Testimony of Father.

On October 21, 2013, Dr. Robbins evaluated Student at Parents' request. As noted above, Dr. Robbins had previously evaluated Student in the spring of 2006. Dr. Robbins concluded that Student requires a residential educational placement. Testimony of Robbins; exhibit P-1.

On October 25, 2013, Student scratched himself 122 times and slapped or punched his head 115 times in the course of a six-hour school day. The severe self-injurious behaviors continued at home that evening and Parents called the local crisis team. The crisis team began to immediately look for an appropriate vacancy at a psychiatric unit in a hospital. Testimony of Father; exhibits P-27, S-19.

Student's self-injurious behaviors continued unabated until he was re-admitted to Hampstead Hospital during the evening of October 28, 2013. Student has remained hospitalized because he continues to require hospital-level of services to address his behavioral difficulties. Testimony of Batchelder, Father.

On December 10, 2013, the IEP Team met to consider Dr. Robbins' evaluation (described above) and propose any amendments to the IEP. As a result of this meeting, Agawam proposed changing Student's placement to the River Street School in Connecticut (about a half hour from Agawam). This placement would include a school program and extended day services until 7:00 PM on Monday through Thursday and until 5:00 PM on Fridays. The placement would also include more school days than Student's placement at the May School. Testimony of Loughlin, Kaplan; exhibits S-27, S-28.

The principal advantage of this proposed River Street School placement, as compared to the combination of May School and home tutoring on the previously-proposed IEP, is that the River Street School and extended day services are closely integrated, essentially guaranteeing consistence of instruction throughout the day, afternoon and early evenings. This amendment would eliminate the home tutoring from the previously-proposed IEP but would not change the home consultation services to Parents, discussed above (River Street School does not provide home consultation services but is willing to coordinate its services with home services). Testimony of Hampel, Loughlin, Kaplan; exhibits S-27, S-28.

## LEGAL FRAMEWORK

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE].”<sup>5</sup> “The primary vehicle for delivery of a FAPE is an IEP [individualized education program].”<sup>6</sup> An IEP must be “tailored” to address the student’s “unique” needs that result from his or her disability.<sup>7</sup> A student is not entitled to the maximum educational benefit possible or “even the best choice”.<sup>8</sup> Rather, the IEP must be “reasonably calculated to confer a meaningful educational benefit.”<sup>9</sup>

In the application of the meaningful benefit standard, “levels of progress must be judged with respect to the potential of the particular child”<sup>10</sup> unless the potential is “unknowable”<sup>11</sup> because “benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between”.<sup>12</sup>

Massachusetts FAPE standards (which are found within Massachusetts statute and regulations<sup>13</sup> and which may exceed the federal floor<sup>14</sup>) seek “to ensure that eligible

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<sup>5</sup> 20 U.S.C. § 1400 (d)(1)(A).

<sup>6</sup> *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012) (internal quotations omitted).

<sup>7</sup> See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 181(1982) (FAPE must be “tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP)”; *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1<sup>st</sup> Cir. 2012) (“IEP must be custom-tailored to suit a particular child”); *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4 -5, 20 (1<sup>st</sup> Cir. 2007) (FAPE includes “specially designed instruction ... [t]o address the unique needs of the child that result from the child’s disability”) (quoting 34 C.F.R. § 300.39(b)(3)).

<sup>8</sup> See *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197, n. 21 (1982) (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993) (“Appropriateness and adequacy are terms of moderation. It follows that ... the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.”); *GD v. Westmoreland School District*, 930 F.2d 942, 948 (1<sup>st</sup> Cir. 1991) (“FAPE may not be the only appropriate choice, or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice”).

<sup>9</sup> *Sebastian M.*, 685 F.3d at 84; *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012); *Andover School Committee v. Bureau of Special Educ. Appeals of Div. of Administrative Law Appeals*, WL 6147139, \*1 (D.Mass. 2013); *I.M. ex rel. C.C. v. Northampton Public Schools*, 869 F.Supp.2d 174, 177 (D.Mass. 2012). See also *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984) “Congress sought primarily to make public education available to handicapped children and to make such access meaningful” (internal quotations omitted), quoting *Rowley*, 458 U.S. at 192.

<sup>10</sup> *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d 18, 29 (1<sup>st</sup> Cir. 2008). See *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP.”); *Shore Reg’l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (“The IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.”)

<sup>11</sup> See *D.B. v. Esposito*, 675 F.3d at 36.

<sup>12</sup> *Rowley*, 458 U.S. at 202.

<sup>13</sup> See MGL c. 71B, s.3 (defining FAPE to mean special education and related services that meet the “education standards established by statute or established by regulation promulgated by the board of education”).

<sup>14</sup> See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 524 (2007) (“education must ... meet the standards of the State educational agency”); *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 11 (1<sup>st</sup> Cir. 2007)

Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment.”<sup>15</sup>

Thus, the IEP must be tailored to the student’s unique special education needs so as to confer a meaningful educational benefit (gauged in relation to the potential of the student at issue) within the least restrictive educational environment and must be designed to develop Student’s educational potential.

The First Circuit has made clear that, as a general rule, the IEP must address the full range of a student’s special education needs, including behavior that impacts on learning. As the First Circuit has explained:

[An IEP] must target "all of a child's special needs," Burlington, 736 F.2d at 788 (emphasis supplied), whether they be academic, physical, emotional, or social. See Roland M., 910 F.2d at 992 (explaining that "purely academic progress . . . is not the only indic[um] of educational benefit"); Timothy W. v. Rochester, N. H. Sch. Dist., 875 F.2d 954, 970 (1st Cir.) (observing that "education" under the Act is broadly defined), cert. denied, 493 U.S. 983, 110 S.Ct. 519, 107 L.Ed.2d 520 (1989); U.S. Dep't of Educ., Notice of Policy Guidance, 57 Fed. Reg. 49,274 at 49,275 (1992) (stating that an IEP must address "the full range of the child's needs"). . . . In the last analysis, what matters is not whether the district judge makes a series of segregable findings, but whether the judge is cognizant of all the child's special needs and considers the IEP's offerings as a unitary whole, taking those special needs into proper account.<sup>16</sup>

At the same time, special education and related services need not address "problems truly 'distinct' from learning problems."<sup>17</sup> Consequently, for example, the need to address

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(state may “calibrate its own educational standards, provided it does not set them below the minimum level prescribed by the [IDEA]”).

<sup>15</sup> 603 CMR 28.01(3) (“purpose of 603 CMR 28.00 is to ensure that eligible Massachusetts students receive special education services designed to develop the student's individual educational potential in the least restrictive environment in accordance with applicable state and federal laws”). See also MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential”); MGL c. 71B, s. 1 (term “special education” defined to mean “educational programs and assignments including, special classes and programs or services designed to develop the educational potential of children with disabilities”).

<sup>16</sup> *Lenn v. Portland School Committee*, 998 F.2d 1083, 1089-1090 (1st Cir. 1993). See also *Mr. I. v. Maine School Administrative District No. 55*, 480 F.3d 1, 12 (1<sup>st</sup> Cir. 2007) (IDEA entitles eligible students to services that target all of their special needs, whether they be academic, physical, emotional, or social); *Zayas v. Commonwealth of Puerto Rico*, 163 Fed.Appx. 4, 5 (1<sup>st</sup> Cir. 2005) (student may have the right, under the IDEA, to “receive an education that is tailored to her social, psychological, and educational needs”); 603 CMR 28.02(18) (“Progress effectively in the general education program shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development . . .”).

<sup>17</sup> *Gonzalez v. P.R. Dep't of Educ.*, 254 F.3d 350, 352 (1<sup>st</sup> Cir. 2001).



behavior deficits depends on whether these deficits can appropriately be considered separable from the learning process.<sup>18</sup>

The IDEA<sup>19</sup> and Massachusetts law<sup>20</sup> reflect a preference for mainstreaming disabled students. This entails ensuring, “[t]o the maximum extent appropriate,” that disabled children are taught with nondisabled children.<sup>21</sup> “The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs.”<sup>22</sup> A residential placement is properly considered more restrictive than a day program, even when the day program (for example, the May Center School or River Street School) places Student in a substantially separate special education program.<sup>23</sup>

The appropriate standard, as reflected within several First Circuit Court of Appeals 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>24</sup>

It is not disputed that Student is an individual with a disability, falling within the purview of the IDEA and the Massachusetts special education statute.<sup>25</sup>

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<sup>18</sup> 20 U.S.C. 1414(d)(3)(B)(i) (“The IEP Team shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior”); *Indep. Sch. Dist. No. 284, Wayzata Area School v. AC*, 258 F.3d 769 (8th Cir. 2001) (student's behavior problems are not separable from the student's learning process, and behavioral and emotional problems must be addressed through residential services if the student is to succeed academically); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n.3 (1<sup>st</sup> Cir. 2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, “[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn”); *Board of Education of Montgomery County v. Brett Y.*, 155 F.3d 557 (4th Cir. 1998) (“residential placement that is necessary for ‘medical, social, or emotional problems that are segregable from the learning process’ need not be funded by the local education agency.”); *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1122 (2nd Cir. 1997) (“fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated”).

<sup>19</sup> 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

<sup>20</sup> MGL c. 71B, s.1.

<sup>21</sup> 20 U.S.C. § 1412(a)(5)(A); MGL c. 71B, s. 1. See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c).

<sup>22</sup> *C.G. ex rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 285 (1<sup>st</sup> Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1<sup>st</sup> Cir. 2002) (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1<sup>st</sup> Cir. 1990).

<sup>23</sup> *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2nd Cir. 1998).

<sup>24</sup> See *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1<sup>st</sup> Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1<sup>st</sup> Cir. 1983).

<sup>25</sup> MGL c. 71B.

The initial issue presented is whether the programming and specialized services embodied in Agawam's most-recently proposed IEP (including its two proposed amendments) are consistent with these legal standards.

Parents have the burden of persuading me that the IEP does not meet the above-described standards, that the IEP cannot be modified or amended to meet these standards, and that Student requires a residential educational placement in order to receive FAPE in the least restrictive environment.<sup>26</sup>

## DISCUSSION

I begin with a consideration of what progress Student has been making in his current array of services that include a day placement (at the May Center School), extended day services at home (through home tutors) and additional home-based consultation to Parents (through a separate division of the May Institute) and whether this progress may be improved through Agawam's proposed IEP amendments that would place Student at the River Street School for his day placement and extended day services.

With respect to educational progress, there are essentially two components—first is educating Student regarding certain rudimentary communication skills and certain basic functional or daily living (including leisure) skills, and the second is remediating Student's behavior difficulties. I will begin by exploring Student's past and expected progress with respect to communication and functional (or daily living) skills. This progress will be considered within the context of Student's learning potential.

It is not disputed that in all areas, Student's skills are extraordinarily compromised. In particular, his self-care skills (including toilet training), his communication skills, his leisure skills and his other daily living skills present constant challenges. Testimony of Robbins; exhibit P-1, S-18.

Because Student has been attending for seven years (and would continue to attend) an applied behavior analysis (ABA) program, significant data has been taken regarding Student's skill levels over time in those areas where he has been receiving instruction. With respect to the dispute regarding Student's progress, each party engaged an experienced and sophisticated expert who reviewed some or all of the data. The experts came to different conclusions regarding whether the data demonstrated sufficient progress, but there was no dispute that the data provides the most comprehensive and reliable measure of Student's progress to date.

Each party is also proposing that Student continue in an ABA program—Agawam proposing a somewhat more structured and intensive day and extended day program, and Parents proposing a residential program that would provide the maximum amount of structure and

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<sup>26</sup> See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief).

intensity. It is not disputed that Student's past progress provides relevant evidence of what Student's progress may be in each of the programs now being proposed by the parties.

Parents and their expert (Dr. Robbins) relied primarily on the data collected and presented through the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R), an assessment that consists of 544 items that encompass 25 domains to measure Student's functioning, over time, in language and pre-academic skills. Dr. Robbins had evaluated Student in 2006, and he reviewed Student's progress from 2006 to his recent evaluation on October 21, 2013. He looked in particular at Student's progress over the last four years when ABLLS and ABLLS-R data were available for review, with the most recent ABLLS-R assessment occurring on November 26, 2012.

Dr. Robbins testified that comparing the ABLLS from October 2009 to December 2010 indicated that over this period of time, Student had mastered six new skills; comparing the ABLLS from December 2010 to January 2012 indicated that over this period of time, Student had mastered five new skills; and comparing the ABLLS from January 2012 to November 2012 indicated that over this period of time, Student had mastered seven new skills but regressed in five other areas, including two in the toileting domain. Each skill is focused narrowly. This can be illustrated by taking a single domain (for example, cooperation and reinforce effectiveness), and then looking at the following examples of skills from among the 17 skill being addressed within this single domain: "looks at instructor for instruction", "waits without touching materials", "works for multiple instructors", "work for reinforce from teacher", and "take a common object". Testimony of Robbins; exhibits P-1, S-18, S-11, S-18.

As part of his October 21, 2013 assessment, Dr. Robbins administered (and relied upon the results of) the Vineland Adaptive Behavior Scales-II Parent/Caregiver Interview with Student's Mother, which provided detailed information regarding Student's functioning in the home and community. At this point in the analysis, I add Father's undisputed testimony which was that his son has made progress over the years with respect to daily living skills at home, but the progress has been extremely small. For example, Student has progressed with respect to dressing so that now if an adult puts his underwear or pants on him around his ankles, Student will pull up his underwear or pants. Student cannot feed himself. Student has no independent leisure skills—for example, he is not able to watch television unsupervised. Student has extremely limited ability to communicate his wants and needs spontaneously—for example, he expresses not wanting something by crying or biting or engaging in some other aberrant behavior. As a result, Student has no ability to do even the simplest tasks independently, he requires constant monitoring and supervision, and his communication skills remain at a very rudimentary level. Testimony of Father.

Dr. Robbins also relied upon interviews with the program staff working with Student at the May Center School. These staff advised Dr. Robbins that they need to continue to work on Student's basic foundational skills, that Student has difficulty retaining skills that have been taught, and that he has had significant regression in skills.

The extent of Student's progress can also be seen in a comparison of speech-language evaluations from 2009 to 2012. The evaluations were conducted by Agawam's speech-language pathologist (Amber Kendall) who testified at the hearing. As reflected in these evaluations and Ms. Kendall's testimony, Student has made progress over this three-year time period in that by 2012 Student could often be redirected back to a task, as compared to 2009 when this did not occur. Nevertheless, in 2012 Student remained distractible with inconsistent attentiveness. Also, by 2012 Student seemed to be understanding non-verbal aspects of communication such as gestures, voice affect and intonation changes, but could not do this in 2009. Nevertheless, his understanding of basic concepts and object function remained very limited. Written progress reports reflect similar kinds of incremental progress. Testimony of Kendall; exhibits S-2, S-4, S-5, S-6, S-7, S-8, S-9, S-15, P-4, P-17, P-52, P-53, P-54, P-55, P-56, P-57, P-64.

Dr. Robbins testified (and his report reflects) that on the basis of his record review, observations of Student at school and at home, interviews with May staff and Parents and administration of the Vineland (referenced above), he believes Student has made "painstakingly slow" progress from 2006 through the present. He noted that Student is working on the same kinds of basic building blocks that were being worked on when Dr. Robbins first evaluated Student in 2006—for example, trying to develop Student's imitating and matching skills. Dr. Robbins found Student's overall skill profile to be similar to his profile in 2006, with the only notable exception being that Student has developed a greater ability (although it remains extremely limited) to communicate his basic wants and needs through a Picture Exchange Communication Program (PECS) that Student uses at school and home, but Student is only able to utilize PECS during discrete trial training rather than being able to use it to spontaneously communicate. He noted that Student has not developed a single daily living skill (such as putting on his pants, washing his hands or going to the bathroom) to the point that he can do it independently. Dr. Robbins concluded that Student has "virtually stagnated over the last year."

Agawam's principal expert (Dr. Hampel) who is an experienced and sophisticated BCBA did not assess or observe Student but, instead, reviewed Student's records, including the same data that Dr. Robbins relied upon. Dr. Hampel agreed with Dr. Robbins' overall assessment regarding Student's failure to master any daily living skill, but he nevertheless found that the ABLLS-R assessments demonstrated that Student had increased abilities within certain skill domains, and that this showed progress. Dr. Hampel also considered the results of a March 2013 Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) that Dr. Robbins did not review. Dr. Hampel testified that this relatively recent assessment demonstrated that Student has a relative strength in listening, and that because he cannot ask "w" questions (such as when, where, who questions), a principal focus of Student's school and extended day should be focused on manding—that is, learning how to make requests. Dr. Hampel was encouraged by September 2013 data showing an increased ability to make requests. He also noted that without the ability to communicate appropriately or effectively, Student is likely using his aberrant behaviors to communicate. Dr. Hampel testified that in order for Student to make greater progress, Student's ABA program should be adjusted with respect to the programming details (for example, increased emphasis on manding) and

Student should be exposed to as much instruction as possible. Testimony of Hampel, Sanders; exhibits S-13, S-17, P-16.

Thus, Dr. Robbins and Dr. Hampel did not necessarily disagree on what progress Student had made, but they disagreed as to whether this progress could be increased sufficiently without a residential placement. When considering Agawam's proposed placement of Student at River Street School, Dr. Robbins saw no reason to believe that Student would gain any substantial benefit even though the program would admittedly allow for more consistent programming during the extended day and therefore would be an improved educational program. On the other hand, Dr. Hampel viewed Student's past progress more positively and opined that with some adjustments to the details of Student's current ABA programming and with the River Street extended day program that would ensure consistency through the extended day services, Student's progress would likely increase. Dr. Robbins testified that it was only through a residential programming offering around-the-clock instruction and support that Student would have the opportunity to make meaningful educational progress, while Dr. Hampel stated his belief that residential services were unnecessary and may be detrimental to Student because he would be removed from his home and community and exposed to aggressive behavior by other students. Testimony of Robbins, Hampel.

I find that to date, Student has made miniscule progress as discussed above. Although there has been some incremental improvement in certain areas, even this progress has sometimes been lost through regression and even when it has not been lost, the progress has not allowed Student to be independent with even a single daily living skill. Testimony of Kearney, Robbins, Hampel. Yet, even with this extremely little progress to date, I do not find that Student would be entitled to residential educational placement on the basis of his need to make greater progress in these functional skill areas. I reach this conclusion for several reasons.

First, it is nearly impossible to judge Student's learning potential, and for purposes of a FAPE determination, learning potential is normally a critical part of the consideration since progress needs to be considered within the context of this potential. This was discussed above, briefly, under Legal Standards, but I note here that the Supreme Court has explained: "It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully ... while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."<sup>27</sup> Similarly, the First Circuit has noted that "children of different abilities are capable of different achievements, and only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement."<sup>28</sup>

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<sup>27</sup> *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).

<sup>28</sup> *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 36 -37 (1<sup>st</sup> Cir. 2012) (internal quotations and citations omitted).

Student has been diagnosed with a combination of two disabilities—autism and X syndrome. The latter is extremely rare, with the result that little is known about it, but what is known is that it has the potential to cause substantial limits in cognitive ability. Parents' own expert (Dr. Robbins) testified that it was simply impossible to know what Student's learning potential is or might be. Thus, Dr. Robbins could not predict what additional progress Student would likely make in a residential setting. Agawam's expert (Dr. Hampel) found reason for possible optimism in the variability of Student's assessment results, but was not persuasive that one could determine, with anything more than speculation, Student's learning potential. Testimony of Robbins, Hampel.

Without knowing Student's learning potential while, at the same time, knowing that Student is severely disabled through autism and intellectual impairment, it becomes difficult to gauge whether Student's past very limited progress and expected marginally improved future progress at the River Street School fail to satisfy state and federal FAPE standards and, of course, Parents have the burden of persuasion on this and other parts of the dispute.

Second, the Massachusetts federal district court has noted the substantial negative implications from unnecessarily placing children in residential placements,<sup>29</sup> and BSEA decisions have echoed this concern.<sup>30</sup> At the same time, of course, there are disputes where the only possible placement that can appropriately educate a student is a residential school, and such a placement must be ordered in those cases.<sup>31</sup>

In the present dispute, Student is relatively young (11 years old), and it is not disputed that residential placement would remove Student from his family except for occasional visits. Also, it is not disputed that because of Student's severity of need and likely slow rate of progress under the best of circumstances, once placed within a residential living situation, he may never live at home again. Also, any residential program to which Student might be placed will likely include other students with substantial behavioral difficulties, adding some measure of risk to Student. None of these reasons makes residential placement inappropriate for Student; rather they simply emphasize the need, as the Second Circuit has cautioned, to "proceed cautiously" before ordering a residential educational placement.<sup>32</sup> Testimony of Hampel, Robbins.

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<sup>29</sup> *Rosie D. v. Romney*, 410 F.Supp.2d 18, 23-24 (D.Mass. 2006) ("While such a removal is a heartbreaking consequence in and of itself, it is equally clear that the unnecessary isolation of [a seriously emotionally disabled] child in an expensive residential facility has well-documented, objective clinical sequelae. These are reflected in exacerbated symptoms including: failure at school, inability to relate positively to others, isolating depression, and assaultive or other anti-social behavior.").

<sup>30</sup> See, e.g., *In Re: Worcester Public Schools*, BSEA # 09-3109, 15 MSER 40 (Crane 2/24/09) (finding that a residential placement would likely harm the student in multiple and significant ways over the long term).

<sup>31</sup> See *Abrahamson v. Hershman*, 701 F.2d 223 (1<sup>st</sup> Cir. 1983); 603 CMR §300.104 ("Residential placement. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.").

<sup>32</sup> *Walczak v. Florida Union Free School Dist.*, 142 F.3d 119 (2<sup>nd</sup> Cir. 1998).

Third, in light of the legal and educational mandates to keep Student in a day program if possible, consideration of Agawam's proposed placement at the River Street School bears careful consideration. It is not disputed that in order to make an appropriate level of progress, not only do all of Student's educational services need to be comprehensive and highly structured, but they must also be delivered in an entirely consistent manner, so that what he is learning in one context reinforces what he is learning in all other contexts. It is also not disputed that although the extended day services that have been provided for the past seven years (through home tutors) have likely provided excellent instruction and have worked on skills being worked on at school, there has been insufficient data collected (as well as insufficient communication and supervision) to have the consistency required to ensure effective educational progress.<sup>33</sup>

The principal advantage of the River Street School is that its structure essentially guarantees consistency of instruction between the day school and the extended day program and the extended day program continues until 7:00 PM Monday through Thursday and until 5:00 PM on Friday. Although Parents' expert (Dr. Robbins) minimized the likely difference this change in programs may make, there is little, if any, dispute that there is a substantial likelihood that this would improve Student's educational program, and his educational progress would likely increase in at least an incremental way. Testimony of Robbins, Stoddard, Hampel, Kaplan, Loughlin; exhibit S-27.

On the basis of these three reasons, I conclude that if one were only to consider Student's communication and functional (or daily living) skills deficits and how they should be addressed, I would find that Agawam's proposed placement at the River Street School is reasonably likely to increase Student's educational progress, at least in an incremental manner, and that given the difficulty of gauging Student's educational potential, even a small improvement would be sufficient to preclude Parents from meeting their burden of persuasion that the Agawam proposed IEP and amendments fail to satisfy FAPE standards.

Therefore, I would conclude that this placement should be tried before resorting to a residential educational placement if the focus were only on Student's learning communication and functional (or daily living) skills. However, as noted above, there is a second consideration that is particularly pressing—that is, addressing Student's aberrant behavior at school, at home and in the community.

It cannot be disputed that Student's behaviors at home and in the community have become extreme and unsafe—not all the time (for example, Student has, at times, been able to

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<sup>33</sup> It should also be noted, however, that the home-based services that Agawam has sought to criticize as being ineffective (because there is no way to ensure consistency) are essentially the same services that Agawam has funded and provided for the past seven years without raising concerns or seeking changes. Moreover, it appears that it was only when Parents raised concerns about Student's needing to be in a residential placement that Agawam began raising questions about the appropriateness of the home-based services that it had been funding. Agawam took the position that it had no previous reason to question the appropriateness of these services. See testimony of Rist. However, this may simply reflect Agawam's failure to appropriately monitor these services rather than any indication that the services were satisfactory.

continue to make outings in the community with his family while he was living at home) but enough of the time to require constant supervision. And, importantly, even with this supervision, Student presents as a substantial risk of seriously harming himself or possibly others. Of equal concern is that these behaviors in the home have been escalating, particularly over the past year or so. Testimony of Father, Robbins.

Parents' expert (Dr. Robbins) compared Student's behavior from his first evaluation of Student in 2006 to his 2013 evaluation: "as compared to the baseline that I had with [Student], which is 2006, really has been significant behavioral deterioration both in terms of his self-injurious behavior, aggressive behavior, destructive behavior, pica, eating inedible objects, bolting, smearing of feces. You know, [types] of behavior that are really significantly challenging." Transcript, vol. II, pp. 361-362.

Parents mark the point of the more recent escalation of home behaviors as January 2013, but even before then, Student's behaviors were, at times, extreme and unsafe. Prior to January 2013, his maladaptive behaviors included scratching himself to the point of causing bleeding, putting feces in his mouth and smearing feces on other objects, biting others (one of his ways of expressing frustration), and bolting from his Parents and from the home (Parents use a harness in the community). He is attracted to any place where there is water, including the toilet (he tries to step in the toilet) and ponds. Because he has no understanding of danger and has no safety skills, his behaviors are extremely dangerous, even life-threatening, to him. Testimony of Father.

Since January 2013, Student's maladaptive behaviors have worsened. The bolting behavior has continued but become more dangerous as Student has learned how to unlock doors. He has left the house on his own several times, crossing streets and, once, getting into a 55 gallon drum with water—any of these incidents could have resulted in his death. He has also broken windows to exit the house. Parents have tried to secure the house by taking off door knobs, putting in an alarm system and installing Plexiglas windows, but they reasonably believe that none of this will prevent all of Student's bolting behavior (for example, they or one of their other children may leave a door open or unlocked by mistake) and therefore do not assure his safety. Testimony of Father.

In addition, since January 2013, Student's biting behavior has worsened. He now bites harder and does not release upon biting. He appears to bite out of frustration, but it is impossible to predict when or why he will be frustrated, and therefore this dangerous behavior is unpredictable. During 2013, Student has bitten his brother and the May School Director, and there have been many near misses. Testimony of Father.

Also, since August 2013, Student has been banging his head with his fist and banging his head on the wall. In 2013, Student has also been squeezing his genitals to the point of causing them to swell. Parents have found it difficult to catch this behavior before he injures himself. In general, his ability to tolerate unwanted situations has been decreasing, with the result that his frustration and resulting aberrant behaviors (such as biting or crying) have been increasing. Testimony of Father.



In sum, Parents provided credible and persuasive testimony that Student's behaviors at home and in the community have become extremely dangerous to Student and others, with Parents unable to safeguard Student at home.

As will be discussed below, Student's behavior at home and at school are interrelated. And, similarly but to a lesser degree, Student's aberrant behaviors have increased in frequency and severity at school over the past year or so. Although there is no consistent pattern to Student's behaviors, the overall trend over the past year has been a worsening of his behaviors at school. And, as at home, it has not been possible to determine what causes Student's behavior difficulties or to predict when they may occur. In summary, Dr. Robbins' report explained that Student "presents very significant behavior challenges both at home and school. These include aggression, self-injurious behaviors, pica, fecal smearing, bolting and other destructive and potentially dangerous behaviors (e.g., climbing, throwing)." (Emphasis in original.) Testimony of Robbins; exhibits P-1, S-1, S-18.

As described in the Factual Background section above, Student's behaviors at home and at school have led directly to two psychiatric hospitalizations. On September 5, 2013, Student was admitted to Hampstead Hospital due to a precipitous increase in his self-injurious and aggressive behaviors. These behaviors included head-banging, hitting himself with closed fist, hitting back and buttocks on corner edges of furniture, and biting others (including Father, his brother and the Director of the May Center School). Testimony of Father; exhibits P-1, P-3, S-18.

On September 18, 2013, Student was discharged from Hampstead Hospital after Student's behavior had come under better control in the hospital setting, responding well to the behavioral support plan and the structure and consistency of the inpatient unit. Testimony of Father; exhibits P-1, P-3, S-18.

Although Student was discharged back to living with his Parents, the Hospital's discharge report, written by Student's physician at the Hospital, indicated that Student would likely require a residential placement. Specifically, the discharge report explained that Student's prognosis was "guarded" and that "Patient will likely require residential placement as evidenced by his significant improvement over the brief course of his hospitalization in a behaviorally oriented unit and minimum psychopharm." Exhibit P-3.

While at school on October 25, 2013, Student scratched himself 122 times and slapped or punched his head 115 times in the course of a six-hour school day. The severe self-injurious behaviors continued at home that evening, and Parents called the local crisis team. The crisis team began to immediately look for an appropriate vacancy at a psychiatric hospital. Testimony of Father; exhibits P-27, S-19.

Student's self-injurious behaviors continued unabated until he was re-admitted to Hampstead Hospital during the evening of October 28, 2013. Student remains hospitalized because he

continues to require hospital-level of services to address his behavioral difficulties.  
Testimony of Batchelder, Father.

Jessica Batchelder, the Applied Behavior Analyst at Hampstead Hospital, has daily contact with Student and consults to his clinical team. She is familiar with Student's behavior and learning difficulties and is knowledgeable about the clinical team's understanding of Student's needs and how they should be met. She testified regarding Student's current psychiatric hospitalization, explaining that his maladaptive behavior and aggressiveness have been variable. For example, he has had as few as no self-injurious behaviors on a given day, and on other days these behaviors have occurred 30 times. She noted that there continues to be pica behavior on a daily basis—for example, he has tried to eat paper towels, Styrofoam cups, Legos, and wrappers. She testified that the pica behavior would be of particular concern as a safety risk if Student were living in the community. She noted that his face scratching, head-banging and bolting behavior have continued at the hospital. She testified that Student's lack of safety awareness is also a substantial concern. Testimony of Batchelder.

Ms. Batchelder testified that it was concerning that Student had required a re-hospitalization after a relatively short return to the community. She indicated that if home-based services were sufficient to address Student's behavior needs, she would have hoped that he would not have needed to be re-hospitalized. Testimony of Batchelder.

None of the evidence presented at hearing indicated that there is any likelihood that Parents would be able to safely and effectively address Student's behavioral difficulties at home and in the community and avoid the likelihood of further hospitalizations that disrupt Student's educational services. Agawam's proposed placement at the River Street School (including the extended day program) provides for Student's education until 7:00 PM Monday through Thursday and until 5:00 PM on Friday. River Street School does not provide home-based programming.

To address Student's difficulties at home, Agawam has proposed only to increase its current one hour per week of ABA consultation by adding a half-hour per week of home consultation by a BCBA. Importantly, Agawam's proposed services would, at the same time that it marginally added to home consultation, eliminate home tutors who, most recently were proposed by Agawam to be in the home "9.23 hours per week on average". Agawam correctly viewed the home tutors as providing extended day services that, under its most recently proposed amendment, would be provided in a more consistent and integrated manner at the River Street School, but the result would leave Parents without a valuable home resource. Exhibits S-1, S-2, S-28.

Agawam witnesses (Ms. Stoddard, Ms. Kearney and Dr. Hampel) sought to address the question of how Student's behavior in the home and community might be appropriately addressed. Ms. Stoddard was engaged by Agawam to review the home-based services and make a recommendation to Agawam. She testified that in order to address the safety concerns at home, the home-based services should be a mirror image of the school program.

Parents would need to be trained to respond to Student's behavior in the ways that the day program is responding to those behaviors. Ms. Stoddard emphasized the importance of "errorless" teaching across all settings in order for Student to make meaningful progress. Testimony of Stoddard, exhibit S-2.

Ms. Kearney testified that she believed that there were strategies that Parents could have implemented in the home to reduce Student's aberrant behaviors, but that Mother advised Ms. Kearney during a Team meeting that she would not implement these strategies. It is clear from this testimony that Ms. Kearney had no direct knowledge of what was occurring in the home, nor did she have responsibility for proposing home-based strategies or working with Parents to implement these strategies. For these reasons, I find that her testimony has little probative value.

Dr. Hampel testified that Parents could be trained to respond to Student's behavior in an appropriate manner. He had viewed exhibit P-61, which is a video taken of Student by his Father, both at home and at Hampstead Hospital during a family visit. Dr. Hampel criticized what he saw as Parents giving their son attention when he had a behavioral difficulty, since Dr. Hampel believed that this may be reinforcing the behavioral difficulty. Testimony of Hampel.

However, on further questioning, Dr. Hampel agreed as to the extreme difficulty of a loving parent (and there is no doubt that Parents are loving and committed to their son) simply ignoring the kinds of extreme behaviors that Student manifests and, of course, he agreed that no responsible parent would simply ignore behavior to the point that it may injure Student or anyone else. Testimony of Hampel.

Dr. Hampel also testified that a review of the data at school indicates that there is not sufficient consistency of behavior data to know how to respond differently to Student's aberrant behavior. His testimony supports the conclusion that there is no way of predicting what, if any, improvement in Student's behavior would occur at home regardless of whether Agawam's most recently proposed IEP were implemented and he were to attend the River Street School and extended day program. On cross-examination, Dr. Hampel also agreed that pica (which is one of Student's more dangerous behaviors) is extremely difficult to extinguish under any circumstances. I also note that Dr. Hampel has never talked with Parents about these issues. Testimony of Hampel.

Dr. Robbins' testimony further revealed the difficulty of knowing how to safely and effectively address Student's aberrant behavior. He testified persuasively that even under the most intensive and structured placement—that is, a residential placement—one cannot precisely predict the course of Student's behavior, in part because so little is currently known regarding its causes. Testimony of Robbins.

During closing arguments when asked how Agawam's proposed educational program would allow Student to live safely at home, its attorney took the position that Hampstead Hospital

could provide the family with behavioral protocols for this purpose. But, there is nothing in the record that would support my finding that this would (or even could) occur.

On the basis of a review of the record, I find that there is virtually no probative evidence or credible argument that would support a finding that Agawam's proposed services and placement would allow Student's behavior at home and in the community to be safely, effectively or appropriately addressed. Nor was there any evidence that any other services or placement, short of residential services, would provide sufficient structure, supervision and intensity of services to address Student's unsafe behaviors.

Thus, it was virtually uncontested that Student cannot return home and live there safely under the present circumstances. If he were to return home under the present circumstances, it seems likely that, given his history of increasingly dangerous behaviors, these behaviors would again spin out of control and escalate to the point that he would manifest highly dangerous behaviors that may result in serious harm to himself or others and that may require re-hospitalization for another indeterminate stay.

Agawam's only possibility for avoiding responsibility for a residential educational placement under these circumstances is to take the position that Student's behavior in the home and community are not its responsibility because this behavior is separate from and unrelated to Student's education, and that Student's increasingly problematic behaviors at school are not, by themselves, sufficient to justify residential placement.

In a roughly comparable situation, the First Circuit upheld a hearing officer's determination that the school district bore no responsibility to address a student's dangerous behavior at home through the residential placement sought by the parents. The student in that case, Gabriel, had "a history of throwing tantrums at home (although the frequency and controllability of those tantrums is disputed by the parties); and his parents ... expressed considerable concern for their safety and that of their daughter if Gabriel return[ed] home pursuant to the proposed IEP." The lower court found that the student's severe and potentially unsafe behavior was the parents', rather than the school district's, responsibility to address because the behavior was "separable from Gabriel's educational problems".<sup>34</sup>

The First Circuit upheld the district court decision because there was "conflicting testimony from credible experts as to whether Gabriel could be appropriately educated outside a residential program; owing a degree of deference to the hearing officer's determination" and because the First Circuit agreed that "[a]s a conceptual matter, the district court's recitation of the relevant legal standard was correct as to problems truly 'distinct' from learning problems."<sup>35</sup>

However, the First Circuit then provided this caution: "Nonetheless, as a practical matter, in cases such as this one, where all agree that the student's activities need to be highly

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<sup>34</sup> *Gonzalez v. Puerto Rico Dept. of Educ.*, 254 F.3d 350, 352 -353 (1<sup>st</sup> Cir. 2001).

<sup>35</sup> *Id.*

structured both during and after school in order for him to receive an appropriate education, clear lines can rarely be drawn between the student's educational needs and his social problems at home.”<sup>36</sup>

The First Circuit also, by way of illustrating when a school district would not normally be responsible to provide a residential setting because of dangerous behaviors at home, explained that the IDEA “does not require a local school committee to support a handicapped child in a residential program simply to remedy a poor home setting or to make up for some other deficit not covered by the Act. It is not the responsibility of local officials under the Act to finance foster care as such: other resources must be looked to.”<sup>37</sup>

With this guidance in mind, I consider whether Student’s behavioral difficulties at home may be considered separable and distinct from Student’s education. I also consider whether Student’s increasingly problematic behaviors at school may be appropriately addressed by Agawam without a residential placement.

*First*, I dispense with the specific kinds of circumstances, noted by the First Circuit above, when a school district would not bear responsibility for addressing difficult behaviors at home and therefore would not be responsible for providing residential services.

It is not disputed that, in the present dispute, a residential placement for Student is not sought “simply to remedy a poor home setting.” It is undisputed that Parents are incredibly devoted to Student and there have been no allegations or argument that Parents have a “poor” home. Testimony of Robbins, Hampel.

Similarly, this is not a situation where Parents are seeking the equivalent of “foster care” that would be the responsibility of another public agency. Agawam had sought to keep DCF as a party to these proceedings, with the hope that DCF would voluntarily provide (or be ordered to provide) the residential portion of a residential educational placement.

However, as explained in my Ruling of December 3, 2013 allowing DCF’s motion to be dismissed as a party, a DCF residential placement would require that Student first be within the care or custody of DCF either through a court custody order, or through an agreement between Parents and DCF for a voluntary placement. Parents had sought DCF voluntary services, and DCF denied this request after determining that Student did not qualify for services. In my ruling allowing DCF’s motion to dismiss, I therefore concluded: “Currently, DCF has no formal relationship with Parents or Student. Apparently, Parents and DCF have had further informal discussions and it may nevertheless be possible that DCF would be willing to assist with services, perhaps through a voluntary placement agreement, but neither Parents nor DCF has taken the position that there is any likelihood of this in the future; and there is no reason to believe that DCF will seek a court custody order.” As a result, there is

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

no basis to believe that DCF (or any other public agency) bears responsibility to provide residential services to Student.

*Second*, I explain why Student's behavior difficulties, including those at school, at home and in the community, are not separate or distinct from (but rather are inextricably intertwined with) his learning.

To its credit, Agawam for many years (and continuing through the present) has proposed and implemented IEPs that sought to address Student's behavior difficulties in the home and community—for example, through weekly home consultation by ABA staff and, recently, by a BCBA, as reflected in its IEPs and IEP amendments. The first IEP goal on the most recently proposed IEP describes Student's behaviors as including biting of others, self-scratching, pulling his skin and crying. This IEP goal includes benchmarks for reducing these behaviors. The most recently proposed IEP also includes a home/community goal that describes Student's behavior at home and in the community as including biting himself and others, scratching himself and others, pulling his skin and crying. This IEP goal includes benchmarks for reducing these behaviors. Exhibits S-1, S-2, S-28. This evidences that Agawam does not dispute its responsibility to address Student's behaviors at school, in the home and in the community, and that these behaviors must be addressed as part of Student's special education program.

The testimony below of Dr. Hampel (Agawam's principal expert) reveals how Student's problematic behaviors essentially serve as Student's language. As discussed above, learning to communicate appropriately and effectively is an essential component of Student's educational program. Exhibit S-1. Dr. Hampel testified as follows:

This is a young man who has -- at age eleven, has the ability to request that's on par with a typical twelve-month-old child. It should come as no surprise, then, that we have the potential for serious problem behavior. In fact, problem behavior is -- I'm going to say it's, very likely, his original language and remains very strongly his repertoire. As someone mentioned earlier, it doesn't take much frustration to push him into that direction. [Transcript, vol. II, p. 521.]

Dr. Robbins testified persuasively that within Student's educational program at the May School, staff reduced educational demands as Student's behaviors increased, and that it was appropriate for them to do so. This is because Student's increased behavioral difficulties are likely caused by frustration (such as being in an unwanted learning situation), and the educational demands placed on Student needed to be substantially reduced in order to diminish his frustrations at school. When Dr. Robbins observed Student at the May Center School, he noted that, as a likely consequence, only 22 minutes of his four-hour observation involved teaching Student. Testimony of Robbins. This is another example of how Student's increased behavior difficulties at home and school, and his learning opportunities are inextricably intertwined.

As discussed above, Student's behavioral problems at school and in the home resulted in two hospitalizations, causing him to be removed from the special education services that have been designed to meet his individual needs during the school day and during tutoring sessions at home.

Ms. Batchelder testified that at Hampstead Hospital, a tutorial service provides three or four hours per day of special education to Student. She noted that this is not a full-day academic program. Agawam's Director of Special Services (Ms. Rist) testified that there has been no communication between Agawam and Hampstead Hospital and thus there is no indication of any coordination between Agawam and Hampstead Hospital regarding how Student's special education needs should be met. It appears that Hampstead Hospital is simply relying on Student's most recent IEP as a guide. Testimony of Batchelder, Rist.

Thus, I find that his hospitalizations (resulting from his home and school behaviors) have caused him to lose substantial educational opportunities. If Student's extreme and unsafe behaviors at school and in the home and community are not appropriately addressed, it seems inevitable that he will eventually be re-hospitalized and thus lose additional educational opportunities.

*Third*, I explain why a residential educational placement is the only educational program that can appropriately address Student's behaviors at home, in the community and at school.

As discussed above, there is no dispute by Agawam that a highly structured program is required for Student in which all educational services are provided in a consistent manner—and, in this regard, Agawam's witnesses opined that the services must be "error free"—in order for Student to make progress. Agawam's closing argument also emphasized the essential importance of consistency between home and school. Agawam witnesses have emphasized the importance of these principles when criticizing the lack of close coordination between school and extended school services, but it is undisputed that these same principles apply equally to all aspects of Student's educational program, whether it is communication skills, daily living skills or aberrant behaviors that are being addressed. Testimony of Stoddard, Hampel, Guilmette.

Similarly, Dr. Robbins explained in his report that in order for Student's behaviors to be appropriately addressed, he must be in a "program where his behaviors can be consistently addressed in all settings in a coordinated and systematic fashion." (Emphasis in original.) He testified that in order to address Student's maladaptive behavior, the behaviors at home and at school must be both addressed at the same time and must be addressed consistently. I find Dr. Robbins' opinions in this regard to be persuasive and un rebutted. Testimony of Robbins; exhibits P-1, S-18.

The discussion above regarding Student's escalating behaviors at home and in the community makes clear the virtual impossibility of Parents, even with ample home consultation and support, being able to keep their son safe at home, protect others from harm,

and implement comprehensive behavior strategies in a manner that would be consistent with the behavior strategies used during the school day and extended school day.

Dr. Robbins explained why, in his opinion, Student's behavior difficulties have reached a critical juncture regarding the need for residential placement:

when I look at [Student's] overall profile and I look at the students that I work with as a whole, the absence of the ability to meaningfully engage himself and entertain himself may be kind of that breaking point in terms of what I feel is the need for residential placement. [Student] simply does not have the ability to appropriately engage himself and thus needs -- in the words of his parents, needs to be supervised every single second. And that if that doesn't happen, you know, there can be intervening challenging behavior. [Transcript, vol. II, pp. 362-363.]

Dr. Robbins' report and testimony concluded that Student's only hope of avoiding continued unsafe behaviors at home and in the community and his only hope of avoiding intermittent hospitalizations as a result of his extreme and unsafe behaviors is placement in a residential school. He recommended residential services because there is no other option that has any likelihood of being able to address Student's behavioral difficulties and allow him the opportunity to make meaningful educational progress. I find this conclusion and recommendation to be persuasive. Testimony of Robbins; exhibits P-1, S-18.<sup>38</sup>

I also find that Dr. Robbins' conclusion and recommendation are essentially un rebutted because there is no probative evidence in support of a finding that Student's home and community behaviors may be addressed effectively and safely through something less than residential services and placement.<sup>39</sup>

For these reasons, I find that Student's behavioral deficits, as manifested at school, in the community and at home, are not separate and distinct from but rather are inextricably intertwined with his learning needs—in fact, his behavioral needs are presently his most critical educational needs. I find that it is only through services that can allow Student to be safe and that reduce his aberrant behaviors that he will have the opportunity to engage in meaningful learning. And, the only way that Student's behavior needs can be appropriately and safely addressed is through an around-the-clock residential educational placement.<sup>40</sup>

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<sup>38</sup> I find this opinion to be particularly credible and persuasive in light of Dr. Robbins' depth and breadth of experience evaluating students on behalf of school districts as well as parents, and his history of seeking to avoid residential services for Student. Also, no other expert witness had first-hand knowledge of Student, his school program and his family. Testimony of Robbins.

<sup>39</sup> Also, Ms. Batchelder (the Hampstead BCBA who is working with Student) testified that when Student is discharged from Hampstead Hospital, her recommendation (as well as the recommendation of Student's clinical team at the Hospital) is that Student be placed at a residential placement. She explained that this recommendation is based on safety concerns because of Student's bolting, pica, other self-injurious behaviors, as well as his aggression towards others. She stated that a residential placement, as compared to an educational day placement, would likely better address these behavioral concerns as well as his skill deficits. Testimony of Batchelder.

<sup>40</sup> Dr. Hampel also testified as to the importance of engaging Student in a meaningful way as much of the time as possible because of his aberrant behaviors. Dr. Hampel was not suggesting that Student should be in a residential



Accordingly, I conclude that in order to appropriately address his special education needs, Student requires residential educational services and that no less restrictive program would satisfy Agawam's responsibilities to Student under state and federal special education law.

### **ORDER<sup>41</sup>**

The IEP most recently proposed by Agawam (exhibit S-1, as amended by S-2 and S-28) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment and cannot be modified to meet this standard. It is only through a residential educational placement in an applied behavior analysis educational program that Agawam can satisfy its responsibilities to Student under state and federal special education laws.

As explained in my December 31, 2013 Summary Decision, New England Center for Children (hereinafter "NECC") and Melmark New England (hereinafter "Melmark NE") are appropriate residential educational placements for Student. However, there was also evidence that neither placement may have an immediate opening for Student.

Accordingly, I order Agawam to do the following:

1. Agawam shall immediately send packets to and make application for Student's admission to both NECC and Melmark NE. If Student is admitted to one or both schools, Agawam shall place Student there as soon as there is an opening available for him, subject to the provisos contained within paragraphs 2 and 3 below.
2. In light of the possibility that Student will not be admitted to either NECC or Melmark NE or that he will be admitted but there will be undue delay in an opening becoming available for him, Agawam shall convene a placement Team meeting within the first five school days of 2014. This meeting shall be for the purpose of identifying additional residential schools that may be appropriate for Student. Agawam shall then immediately send packets to and make application to the identified additional residential schools that may be appropriate.<sup>42</sup>

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placement, but his testimony nevertheless supports the proposition that Student's behaviors would benefit from more intensive teaching and intervention than can be provided within a day program, extended day program, and the home. He testified as follows:

Well, this is a boy who needs as much engagement in a productive, meaningful teaching, individualized, intensive teaching as possible. Some of the best medicine, long-term, for a child who engages in a lot of self-stimulatory behavior and problem behavior, and with weak motivation otherwise, is engagement. Just a lot of -- so an extended day, of any kind, or doing instruction throughout the day, and as much as possible, makes a lot of sense. [Transcript, vol. II, p. 527.]

<sup>41</sup> The substance of this Order was included in my December 31, 2013 Summary Decision (attachment A).

<sup>42</sup> Parents and their expert are entitled to participate and have input into all placement decisions. Parents have taken the position, with which I agree, that after the Team determines that one or more additional residential schools may be appropriate, Parents and their expert may need to visit one or more of these proposed schools (presumably, this would occur subsequent to or simultaneously with packets being sent and application being made by Agawam) so

3. Agawam shall place Student at one of these identified additional residential schools in the event that all of the following occurs: (1) one or more of the identified additional residential schools accepts Student, has an opening available for Student, and is determined to be appropriate by the Team,<sup>43</sup> and (2) there is no available opening for Student at NECC or Melmark NE, and waiting for an available opening at NECC or Melmark NE (as compared to placing Student at one of the identified additional residential schools) would unreasonably delay Student's residential placement.<sup>44</sup>

By the Hearing Officer,

William Crane

Dated: January 16, 2014

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that Parents and their expert may provide informed input into the process prior to any decision being made that Student would actually attend a particular school.

<sup>43</sup> In its determination of whether a particular residential school is appropriate for Student, the Team shall be guided by the recommendations contained both within the last paragraph on page 13 and within pages 14 and 15 of Frank Robbins' Evaluation Report of 10/21/13 (exhibits P-1, S-18). Agawam's principal expert (Dr. Hampel) testified that he agreed with Dr. Robbins' detailed recommendations regarding the characteristics of an appropriate program for Student, as described within pages 14 and 15 of Dr. Robbins' report, except that Dr. Hampel did not concur with the need for a residential placement and Dr. Hampel did not have an opinion regarding Student's need for a sensory diet (one of Dr. Robbins' specific recommendations on page 14 of his report).

<sup>44</sup> Parents and their expert are entitled to participate and have input into any determination that waiting for an available place at NECC or Melmark NE, as compared to placing Student at one of the additional residential schools, would unreasonably delay Student's residential placement.

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

**In Re: Agawam Public Schools**

**BSEA # 1403554**

**SUMMARY DECISION**

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

A hearing was held on December 19 and 23, 2013 in Springfield, MA before William Crane, Hearing Officer.

The official record of the hearing consists of documents submitted by Parents and marked as exhibits P-1 through P-66; documents submitted by the Agawam Public Schools (hereinafter “Agawam”) and marked as exhibits S-1 through S-30; and approximately two and one-half days of recorded oral testimony and argument. Oral closing arguments were made on December 24, 2013 and the record closed on that date.

In order to apprise the parties in a timely manner of my conclusions in this case, this summary decision is being issued in advance of the full decision.

The issues to be decided in this case are the following:

1. Is the IEP most recently proposed by Agawam (exhibit S-1, as amended by exhibits S-2 and S-28) reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment?
2. If not, can additions or other modifications be made to the IEP in order to satisfy this standard?
3. If not, would a residential educational placement satisfy this standard? If so, is a particular residential placement appropriate and should it be ordered?

Parents take the position that Student’s educational needs can be appropriately addressed only through a residential placement. They point out that Student has been hospitalized twice since September 2013 (and currently remains hospitalized) in a psychiatric hospital because of extreme and unsafe behaviors at home and at school. Student’s clinical team at

the psychiatric hospital believes that Student continues to require hospital level of care to address his behavioral needs and that when ready to be discharged from the hospital, he should be placed in a residential school.

Parents take the position that Student has made virtually no educational gains over the past seven years, with the result that he is unable to do anything independently. In addition, Parents point out that over the past year, Student's behaviors both at home and at school have become markedly worse, with the result that injuries have occurred and educational demands on him have been reduced.

Parents argue that it is no longer safe for Student to live at home. They point out that his bolting and pica behaviors, combined with other self-injurious behaviors and a complete lack of self-help skills, make it necessary that he be monitored constantly. They are afraid that he will seriously injure himself (or possibly others) if he returns home. Parents believe that Agawam has proposed nothing that has any substantial likelihood of changing Student's extreme and unsafe behaviors at home, and note that the Massachusetts Department of Children and Families has determined that Student is not eligible for its services. Parents conclude that only a residential educational placement provided by Agawam can safely and effectively address Student's behavior difficulties and allow him the opportunity to make meaningful educational progress.

While Parents' expert acknowledged that there may be a benefit to Agawam's proposed placement at the River Street School, he opined that even this more comprehensive placement is insufficient to allow Student the opportunity to make meaningful educational progress. Parents also point out that there are negative implications to Student's extended day program at the River Street School—for example, Student would no longer be provided tutors at home (most recently proposed at 9.23 hours per week on average) and Parents' personal care services at home may be substantially reduced. Parents therefore believe that no net benefit is likely as a result of Agawam's proposed change in placement.

Agawam took the position that Student's educational needs can be met appropriately without a residential placement and therefore a residential placement is not legally required. Agawam further argued that a residential placement would not be in Student's educational interests. Agawam pointed to evidence that Student has made slow but demonstrable progress while receiving his current array of school and home-based services over the past seven years and that this progress can be improved with a number of proposed changes in services, together with increased coordination and accountability, as reflected in proposed amendments to the IEP.

Agawam agrees that Student requires an intensive, comprehensive and consistent applied behavior analysis (ABA) educational program in order to make meaningful progress. However, Agawam believes that Student's home-based services have not been well-coordinated with his school-based program, there has been insufficient data collected in the home-based program to know what has occurred there, there has been inadequate supervision of the home services and training of the home tutors, and there has been insufficient

communication between the home and school programs. Agawam has concluded that, as a result, the consistency essential to Student's educational services has been missing.

Through a recently-proposed IEP amendment, Agawam would remedy this shortcoming by placing Student at the River Street School in Connecticut (about a half hour drive from Agawam) where Student would attend a school program designed for students on the autism spectrum, together with an integrated extended day program. The extended day program would provide a consistent continuation of what is taught during the day and would extend Student's school day until 7:00 PM Monday through Thursday and until 5:00 PM on Friday. Agawam argues that every possible less restrictive alternative to a residential placement should be considered and, if appropriate, implemented, and the River Street School presents such an alternative that would likely allow Student to make greater educational progress within the context of a day school and extended day program.

Agawam acknowledges that Student has had substantial behavioral difficulties at home but takes the position that his behavior has been markedly better in school, with the exception of occasional spikes in behavior that do not merit a change in programming. Agawam argues that Student's home behavior can be appropriately addressed through Parents' consistent implementation of strategies used successfully at school and through Agawam's proposed upgrade of home-based consultation services. Agawam would add a half hour per week consultation by a Board Certified Behavior Analyst (BCBA) to the current one hour per week of consultation by an ABA staff person.

Finally, Agawam points out that there may be significant negative implications to a residential placement for Student. For example, he would inevitably be spending substantially less time with his family and it may be that once started, residential services would continue indefinitely for Student rather than allowing him to gain skills and reduce behavior difficulties so that he would be able to return to living with his family.

In sum, this was a closely contested dispute, with each side making reasonable arguments supported by credible testimony and documentary evidence. There was no doubt that each party believed strongly in the merits of its case. On short notice and within a compressed hearing schedule, both attorneys did an excellent job of presenting substantial and credible evidence and argument in support of their respective positions.

After careful consideration of the entire record, including the testimony, documents and arguments by both parties, I find that Student requires a residential educational placement in order to receive a free appropriate public education in the least restrictive environment.

More specifically, I find that the IEP most recently proposed by Agawam (exhibit S-1, as amended by S-2 and S-28) is not reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment and cannot be modified to meet this standard. I find that it is only through a residential educational placement in an applied behavior analysis educational program that Agawam can satisfy its responsibilities to Student under state and federal special education laws.

I further find on the basis of unopposed evidence that both New England Center for Children (hereinafter “NECC”) and Melmark New England (hereinafter “Melmark NE”) are appropriate residential educational placements for Student.<sup>45</sup> There was also evidence, however, that neither placement may have an immediate opening for Student.

Accordingly, I order Agawam to do the following:

1. Agawam shall immediately send packets to and make application for Student’s admission to both NECC and Melmark NE. If Student is admitted to one or both schools, Agawam shall place Student there as soon as there is an opening available for him, subject to the provisos contained within paragraphs 2 and 3 below.
2. In light of the possibility that Student will not be admitted to either NECC or Melmark NE or that he will be admitted but there will be undue delay in an opening becoming available for him, Agawam shall convene a placement Team meeting within the first five school days of 2014. This meeting shall be for the purpose of identifying additional residential schools that may be appropriate for Student. Agawam shall then immediately send packets to and make application to the identified additional residential schools that may be appropriate.<sup>46</sup>
3. Agawam shall place Student at one of these identified additional residential schools in the event that all of the following occurs: (1) one or more of the identified additional residential schools accepts Student, has an opening available for Student, and is determined to be appropriate by the Team,<sup>47</sup> and (2) there is no available opening for Student at NECC or Melmark NE, and waiting for an available opening at NECC or Melmark NE (as compared to placing Student at one of the identified additional residential schools) would unreasonably delay Student’s residential placement.<sup>48</sup>

A full decision will be issued on or before January 17, 2014 and will explain the reasons for the above findings and orders.

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<sup>45</sup> The unopposed testimony at hearing was that if Student requires a residential educational placement, NECC and Melmark NE would be appropriate for that purpose. During closing arguments, Agawam agreed that if I determined that Agawam was required to provide Student with a residential educational placement, NECC and Melmark NE would be appropriate placements for him.

<sup>46</sup> Parents and their expert are entitled to participate and have input into all placement decisions. Parents have taken the position, with which I agree, that after the Team determines that one or more additional residential schools may be appropriate, Parents and their expert may need to visit one or more of these proposed schools (presumably, this would occur subsequent to or simultaneously with packets being sent and application being made by Agawam) so that Parents and their expert may provide informed input into the process prior to any decision being made that Student would actually attend a particular school.

<sup>47</sup> In its determination of whether a particular residential school is appropriate for Student, the Team shall be guided by the recommendations contained both within the last paragraph on page 13 and within pages 14 and 15 of Frank Robbins’ Evaluation Report of 10/21/13 (exhibits P-1, S-18).

<sup>48</sup> Parents and their expert are entitled to participate and have input into any determination that waiting for an available place at NECC or Melmark NE, as compared to placing Student at one of the additional residential schools, would unreasonably delay Student’s residential placement.

By the Hearing Officer,

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William Crane

Date: December 31, 2013

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

**THE BUREAU'S DECISION, INCLUDING RIGHTS OF APPEAL**

**Effect of the Decision**

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party's appeal.

Under the provisions of 20 U.S.C. s. 1415(j), "unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case "with the consent of the parents, the child shall be placed in the public school program". Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington, v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

**Compliance**

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).



### **Rights of Appeal**

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

### **Confidentiality**

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove School District v. Pulitzer Publishing Company*, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

### **Record of the Hearing**

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.