

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

**In Re: Student v. Andover &  
Quincy Public Schools**

**BSEA No. 1602494**

**DECISION**

**INTRODUCTION**

This decision is issued pursuant to the Individuals with Disabilities Education Act or IDEA (20 USC Sec. 1400 et seq.); Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) the Massachusetts Administrative Procedures Act (MGL c. 30A) and the regulations promulgated under these statutes. At issue in this case is whether the Andover Public Schools (Andover or APS) is liable for compensatory services to Student for certain time periods during the 2014-2015 school year when Student was not attending any school program. The Quincy Public Schools (Quincy or QPS) is a party in this matter because Quincy was fiscally responsible for Student’s special education services under the “move-in law” during a portion of the time period at issue; thus, a corollary issue is whether QPS would have any responsibility to fund compensatory services to Student in the event that Andover has any such liability.

**SUMMARY OF BACKGROUND AND PROCEDURAL HISTORY**

This case involves a now 15-year-old child with a complex profile including Autism Spectrum Disorder (ASD) and an intellectual disability that significantly compromises all areas of functioning. During the time periods at issue in this case, Student and his family were residents of Andover. Andover placed Student in three successive state-approved residential schools designed for students with ASD pursuant to accepted IEPs.<sup>1</sup> Student left each of the three residential programs relatively shortly after placement, and before expiration of the corresponding IEP. Several months elapsed between the termination of each placement and Andover’s securing a successor placement that was available, appropriate, and acceptable to Parents. The parties do not dispute that during those time periods Student was not receiving educational services. The parties sharply disagree, however, as to which party—Andover or Parents—is responsible for these gaps in Student’s educational programming, and each party blames the other for this loss of services.

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<sup>1</sup> Student’s initial IEP calling for residential placement was issued by Quincy, where the family was then living. Shortly thereafter, the family relocated to Andover, which issued all subsequent IEPs for residential placement. QPS remained fiscally responsible through June 30, 2014 pursuant to the “move-in law.”

In August 2015, Andover filed a hearing request (BSEA No. 1601301) seeking a determination that the district's IEP calling for a residential educational placement was reasonably calculated to provide Student with a free, appropriate public education (FAPE). Parents countered on September 18, 2015 with the instant hearing request in which they sought an immediate day placement as well as interim and compensatory services for times that the Student had been out of school. Attempts at resolution failed. On or about October 1, 2015 Parents relocated from Andover to another community, withdrawing Student from APS and enrolling him in the new school district of residence. Shortly thereafter, Andover withdrew its hearing request and Parents withdrew their prospective claims and filed an amended hearing request a few months later. The hearing was postponed numerous times at the request of the parties for purposes of discovery, prehearing motions, and the like. A hearing on the merits of Parents' hearing request was held on April 4, 5, 6 and 28, 2017 at the office of the BSEA, One Congress Street, Boston, MA. Those present for all or part of the proceeding were the following:

Student's Mother	
Student's Father	
Ellen Kallman	Andover Public School (APS)
Amy Reese	Former Special Education Director (APS)
Sara Stetson	Special Education Director, APS
Nancy Koch	APS
Dr. James Luiselli	Consultant for APS
Erin Perkins	Special Education Director, QPS
Alanna Gold, Ph.D. <sup>2</sup>	Lurie Center, Mass. General Hospital
Rafael Castro, Psy.D. <sup>3</sup>	Integrated Center for Child Development (ICCD)
John Green, M.D. <sup>4</sup>	Physician, Oregon
Mark Silberman	Hopeful Journeys Educational Center
Tim Piskura <sup>5</sup>	Hopeful Journeys Educational Center
Elizabeth Kirby <sup>6</sup>	Hopeful Journeys Educational Center
Rita Gardner	Melmark, Inc.
Candace Colon-Kwedor, Ph.D.	May Institute, Randolph, MA
Robert Murphy, Esq.	Attorney for May Institute
Amy Oster	Advocate for Parents
Catherine Lyons, Esq.	Attorney for APS
Kristin Wesolaski, Esq.	Attorney for APS
Alisia St. Florian, Esq.	Attorney for Quincy Public Schools
Felicia Vasudevan, Esq.	Attorney for Quincy Public Schools
Anne H. Bohan	Registered Diplomate Reporter
Alexander K. Loos	Registered Diplomate Reporter
Sara Berman	BSEA Hearing Officer

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<sup>2</sup>Testified telephonically

<sup>3</sup> Testified telephonically

<sup>4</sup> Testified telephonically

<sup>5</sup>Testified telephonically

<sup>6</sup> Testified telephonically

The record in this matter consists of Parents' Exhibits P-1 through P-77 and P-80 through P-83; School's Exhibits S-1 through S-80, and S-A through S-N. The record also consists of electronically and stenographically-recorded oral testimony, argument and oral rulings on motions elicited over the four days of hearing, as well as written rulings on motions presented during the hearing and the parties' written closing arguments. The parties requested and were granted successive postponements for completion of testimony; at the close of the testimony the parties requested and were granted a postponement until June 16, 2017 for submission of written closing arguments. All written arguments were received by that date, on which the record closed.

### **ISSUES PRESENTED**

Pursuant to a previously-issued Ruling on APS' *Motion for Partial Summary Judgment*, Student's "stay put" placement was determined to be an approved residential education program designed for children with ASD; thus whether or not residential placement was appropriate for Student during that time period, or whether a different type of program might have been equally or more appropriate, was not an issue for the hearing. Rather, the sole issues to be determined were the following:

1. Whether Student was deprived of a FAPE due to gaps in services from approximately February 12, 2014 to approximately June 10, 2014 and from mid-November 2014 to early October 2015;
2. If so, whether Andover was responsible for such deprivation;
3. If so, whether Parents and Student are entitled to compensatory services as a result.

### **POSITION OF PARENTS**

Student suffered significant physical injuries in each of the three residential school programs in which APS placed him. Parents' attempts to address their legitimate and reasonable concerns about Student's safety in a collaborative manner with APS and the private schools were met with resistance or even hostility by the private schools, and inflexibility by Andover. Two of the three residential schools at issue discharged Student after Parents attempted to address safety issues. Parents removed Student from the third placement because of serious unexplained injuries to Student. That program terminated Student's enrollment shortly thereafter. After each placement ended, Parents fully cooperated with Andover's efforts to locate a successor placement. APS never told Parents that their advocacy efforts (*i.e.*, use of social media) were hampering placement efforts for Student. Had Andover so informed Parents, they would have ceased such activities immediately.

Understanding that locating a suitable residential program for a child with Student's complex profile could not happen instantly, Parents requested that APS provide Student with interim services such as home-based instruction and/or placement in a

public or private day school program. Andover failed and refused to provide such interim services to Student because of its rigid insistence on residential placement to the exclusion of any other educational programming, despite the absence of evaluations showing that Student could not receive FAPE in the less restrictive environment of a day school and the determinations by several private day schools that Student was an appropriate candidate for their programs.

When Andover finally did make offers of interim services, these offers contained so many contingencies that Parents—who were not represented by counsel—could not accept them. Student and Parents are entitled to compensatory services corresponding to periods when Student was denied educational programming.

### **POSITION OF ANDOVER PUBLIC SCHOOLS**

Any gaps in Student’s services are the responsibility of Parents and a consequence of their unreasonable behavior, including unilateral removal from appropriate placements and unreasonable and inflammatory conduct during and between placements, all of which hampered Andover’s efforts to find successor placements. At all relevant times, Student’s accepted IEPs called for residential educational placements designed for children with ASD and intellectual disabilities. Parents unilaterally removed Student from the initial and third placements. Student was discharged from the second residential school because of Parents’ violation of program policies, but was explicitly available under “stay put” principles pending location of a new placement. Regardless of whether Student’s departure from the programs at issue was instigated by Parents or by the program, each remained available as Student’s “stay put” placement while Student awaited a new residential school. That Student did not take advantage of “stay put” programming is not the fault of Andover. Further, Parents’ claims that the three private schools at issue were, in effect, not available for Student because they placed Student in danger are not supported by credible evidence that Student’s reported injuries were the fault of the private schools.

Not only did Andover fulfill its responsibility to obtain successive appropriate residential educational placements for Student pursuant to his accepted “stay put” IEPs despite obstacles posed by Parents, Andover also made several proposals for interim services, including referrals to several day school programs as requested by Parents. Parents were, in fact, represented by counsel or had access to counsel when at least some of these offers were made. Parents cannot blame Andover for the gaps in Student’s programming when they neither availed themselves of available “stay put” placements nor accepted reasonable offers of interim services.

### **SUMMARY OF EVIDENCE**

1. Student is a now fifteen-year-old boy who was a resident of Andover during the periods at issue in this case. Student is a happy, affectionate boy who is a valued member of his family, and participates in many family activities. (P- 66) Student enjoys swimming, playgrounds, using his iPad, watching movies, and listening to music. At all relevant times, Student had some foundational skills necessary for learning, including eye

contact with Parents, parallel play with siblings, and the ability to be redirected from problematic behavior as well as emerging communication and daily living skills. ( S-1, P-4, P-66, Piskura)

2. Student has severe, pervasive developmental disabilities including Autism Spectrum Disorder (ASD), and an intellectual disability. Student also has health impairments including a seizure disorder (controlled at the time of the hearing) and ADHD. (P-66) There is no dispute that as a result of his disabilities, Student is eligible for special education and related services pursuant to federal and state law and that, at all relevant times, the Andover Public Schools has been the Local Education Authority (LEA) that was programmatically responsible for providing such services to Student.<sup>7</sup>

3. Student's disabilities significantly affect most areas of his functioning including communication, academics, fine and gross motor skills, socialization, and adaptive behavior. (S-1) Standardized test scores revealed skills falling many years below his chronological age and ranging from less than one year to approximately 3.5 years (at age 13). During the periods at issue in this case, Student was essentially non-verbal and while he had some emerging communication skills, did not have a well-developed, functional alternative communication system such as sign, PECS<sup>8</sup> or assistive technology for expressing his wants and needs. Among the most significant impediments to Student's learning has been a constellation of disability-related behaviors including severe self-injurious behavior (SIB), primarily consisting of hitting his own head and body, flopping (defined as falling on the floor on his buttocks), aggression (scratching, pinching, biting, hair-pulling), and indiscriminate pica.<sup>9</sup> There is no dispute that depending on circumstances, Student's interfering behaviors can occur with great frequency and intensity. Student's pica has been particularly problematic because Student has ingested or has been at risk of ingesting, dangerous non-food items that are present in normal environments (such as batteries, for example). (S-1, P-3, P-4, Mother)

4. The parties agree that Student has needed and continues to need a special education program based on principles of Applied Behavior Analysis (ABA) in order to make effective progress, and that during the relevant time periods, he needed close and careful 1:1 supervision during all waking hours because of his pica and other safety concerns. (Mother, Gardner, Reese)

5. Student began his educational career in a different state. In approximately May 2013, Student and Parents moved to Quincy MA and, shortly thereafter, enrolled Student in the Quincy Public Schools. In June 2013, Quincy issued an IEP which covered the period from June 25, 2013 to June 24, 2014. This IEP, which Parents accepted in full, provided for Student's residential placement in Melmark-New England (MNE or

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<sup>7</sup> Quincy was fiscally responsible for Student's out-of-district placements from August 2013 through June 30, 2014 pursuant to the Move-In Law, MGL c. 76§5. During approximately the first week of October 2015, Student's family relocated from Andover to a different school district. Andover's responsibility for Student terminated at that time.

<sup>8</sup> Picture Exchange Communication System

<sup>9</sup> Pica is ingestion of non-food substances.

Melmark). MNE is a DESE-approved private school located in Andover, MA that provides special education services to students with ASD and developmental disabilities. MNE serves both residential and day students. Student began attending MNE in late June 2013. (P-2)

6. On or about August 1, 2013, Student and Parents relocated from Quincy to Andover, MA in order to be closer to Student at MNE. Parents enrolled Student in the Andover Public Schools, which thereafter became programmatically responsible for Student's special education placement. On August 12, 2013, APS convened a Team meeting attended by Parents, Amy Reese, who at that time was the Out of District Placement Coordinator for APS, and several MNE supervisory staff to discuss behavioral and safety concerns. The outcome of the Team's discussions was a proposed IEP amendment that added 1:1 paraprofessional supervision for virtually all of Student's waking hours, consisting of 4 hours per day in the educational setting, 8 hours in the residential setting on school days, and 16 hours per day on weekends. The amendment would be reviewed in September 2013 after MNE had conducted further assessments. Parents accepted the proposed amendment in full on August 13, 2013. (P-3)

7. The Team convened again as planned on September 26, 2013 to review assessments conducted by MNE and develop a new IEP for Student's MNE placement. Parents attended the Team meeting together with staff from MNE and administrators from APS and Quincy. APS issued an IEP covering the period from September 26, 2013 to September 24, 2014 which provided for residential placement at MNE. This IEP contained the following goals: behavior (*i.e.*, reducing maladaptive behaviors such as SIB, pica, and toileting accidents), adaptive behavior (*i.e.*, functional communication), communication (PECS), "respond to name," following directions, activities of daily living (ADLs), "name stamping," hygiene, "visual performance: matching," leisure, gross motor imitation, and physical therapy (to address gait, posture, navigation skills, and safety awareness). Most goals were to be addressed in both the classroom and residential setting. In addition to academics, Student's service delivery grid listed speech, occupational and physical therapy. All instruction was based on ABA principles and methodologies, and Student's 1:1 supervision was to be continued. The IEP provided for a 241-day school year. Parents accepted this IEP and placement in full on October 2, 2013 (P-4)

8. Parents began expressing concern about Student's well-being within the MNE placement beginning in approximately July 2013, shortly after he entered the placement. On or about July 2013, Parents received a report that Student had ingested part of a mushroom that he had found on the MNE grounds. Parents were concerned that staff did not follow instructions of Poison Control to take Student to the emergency room if they could not identify the mushroom. Instead, the nursing staff instructed residential staff to "push fluids" and observe Student for behavior changes.<sup>10</sup> (Mother, Gardner, P-6)

9. Additional concerns arose relative to the use of wrist weights on Student. MNE proposed a trial of wrist weights to determine if the weights would reduce Student's self-

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<sup>10</sup> Student apparently suffered no adverse effects from ingesting the mushroom.

hitting. Parents agreed to this trial. Mother testified that contrary to MNE representation that the weights would be soft, they were made of a hard material that was then attached too tightly with an improperly-sanitized compression sleeve. In November 2013, Student developed an infection in on his wrist which turned out to be colonized by MRSA bacteria. Parents attributed the infection to pressure from hard-surfaced, improperly-attached and poorly-sanitized wrist weights. Student saw his primary care physician twice for the wrist infection and was successfully treated with antibiotics (Mother, Gardner, P-6, 7) The record does not reflect that Student missed educational programming as a result of the wrist infection.

10. Beginning in June 2013, when Student entered MNE, staff conducted daily “well-body” checks and documented any changes to Student’s skin (such as scratches, redness, etc.) and monitored such changes through the MNE nursing department. Documentation of the body checks shows that over the course of any one month, Student would have some “red marks,” scratches, or bruises, mainly on his arms and legs but also on his face. Student had more marks during some months than others. MNE staff attributed any marks on Student’s skin to SIB and such behaviors as mouthing objects. Parents felt that MNE was minimizing the seriousness of Student’s injuries as well as not effectively blocking or preventing SIB injuries. (Mother, Gardner, P-6)

11. At some point between mid-November 2013 and late January 2014, Parent told Amy Reese of APS that Student’s primary care physician had expressed concerns about Student’s safety at MNE. Ms. Reese conveyed this concern to MNE, which had its nurse follow up with the physician. The physician stated that Parent’s report was incorrect, and that she (the physician) had no such concerns. (S-9, S-C)

12. The record contains no documents or testimony from Student’s primary care physician or other providers or evaluators concluding that Student was unsafe at MNE.

13. Parents and various MNE staff engaged in conversations and email exchanges on health-related issues beginning in approximately June 2013. Parent concerns increased over time. In an email from Mother addressed to Rita Gardener and APS administrators dated January 29, 2014, Mother expressed that she wanted to discuss Student’s programming, including “the many recent injuries that are out of the norm for [Student], (black eye, bleeding scraped chin and leg, welt on the side of his head...) and the recent incident with staff using wrist weights...to the point that his hands turned purple, developed a knot in this area which became infected and then tested positive for MRSA...” The email raised additional concerns about responsiveness of MNE nursing staff, issues with medication and concluded with the following sentence: “I have serious concerns for the safety and well-being of [Student]. Please email me back with an IEP date.” Ms. Gardner responded as follows: “I will have folks start putting together a copy of his student record.” (Gardner, P-6)

14. Approximately one hour after receiving this email, Amy Reese sent an email to Rita Gardner and MNE executive staff stating: “Rita, Can someone at Melmark call me ASAP regarding [Student]? I have not received any phone calls regarding any issues

with [Student]. The first I am hearing of what seems to be a major issue is through this series of emails which started with the parent. The district needs some clarification.” (P-6, Reese)

15. As a condition of admission and continued enrollment, MNE required blanket medical releases from parents and guardians of all MNE students. (S-1, Gardner) Parents duly executed such releases when Student entered MNE. (S-1, Gardner, Mother) In or about January 2014, Parents came to have objections to MNE having unrestricted access to Student’s medical information and told nursing staff that they were revoking consent to staff communication with medical providers. (P-8 audio, Gardner, Mother)

16. On February 11, 2014, MNE and Andover convened a meeting to discuss the issues of Parents’ revocation of medical releases and their concerns about Student’s safety in the MNE program, Parents and MNE senior staff, and Amy Reese from APS attended the meeting. (Mother, Gardner, Reese, P-8 audio)

17. At the meeting, Parents stated that they were revoking all non-emergency medical releases and would only allow communication between MNE and providers if they (Parents) were part of the discussion.<sup>11</sup> Parents also stated their concern about Student’s physical welfare in the program, citing in particular to the MRSA infection but also mentioning that staff “manhandled” Student when removing his jacket. (Mother, P-8 audio)

18. MNE, in particular Director Rita Gardner, disagreed with Parents’ characterization of MNE’s care for Student, and stated that revocation or limitation on medical releases were contrary to the program parameters to which Parents had agreed on several occasions. Dr. Gardner stated that MNE would be “moving for emergency discharge” of Student from the program both because MNE could not serve Student without medical releases and because MNE was not “comfortable” serving Student if Parents felt he was not safe in the program. (P-8 audio recording, Mother, Reese, Gardner)

19. Parents stated that they did not feel assured of Student’s safety in the residential component of the program, although they were pleased with the day school portion. Parents also stated that they felt that Student would be better served in an ABA-based day school program with extended day and home-based supports than in a residential setting, which Parents felt was too crowded and noisy for Student and contributed to SIB. (P-8 audio)

20. The remainder of the meeting was spent discussing the logistics of Student’s departure from MNE and referral to a new program. Amy Reese emphasized that given the complexity and intensity of Student’s needs, the limited number of appropriate residential schools in the Commonwealth, and the competition for open slots in those

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<sup>11</sup> Parents justified this action on various grounds, including a desire to protect Student’s privacy. Parents also raised complaints about MNE’s staff psychiatrist and MNE’s administration of psychotropic medications to Student. (P-8, Gardner)



schools, finding a new placement for Student could be a lengthy process. MNE and Parents discussed the possibility of Student attending MNE as a day school student for a brief interim period, but neither Parents nor MNE committed themselves to that option; rather, they decided to take a few days to think over that possibility and then contact Amy Reese with their decisions. Meanwhile, Parents, MNE and APS ultimately agreed that Parents would take Student home after the meeting, and either pick up his belongings the following day or have MNE deliver them to the home.<sup>12</sup> (P-8 audio, Mother, Gardner, Reese)

21. MNE executive personnel stated that because Parents refused to sign medical releases and felt that Student was unsafe in the facility, MNE deemed the “emergency discharge” of Student to be the only option. Parents were interested in day placement at MNE on an interim basis, but did not, at the meeting, agree to sign the required medical releases (other than for emergencies) or retract their position that they were not comfortable with Student’s care in the residential portion of the program. (Mother, Reese, P-8 audio)

22. Immediately after the meeting adjourned, Parents met privately with Amy Reese to discuss referrals to a successor program. Ms. Reese reiterated the challenges involved in finding a new placement, stating that in some cases waiting lists at residential schools were two to three years long. (P-8, Reese, Mother)

23. In a 21-page letter to Amy Reese dated February 27, 2014, MNE’s Executive Director, Rita Gardner responded to each of Parent’s allegations regarding injuries to Student as well as other complaints made regarding the program at the meeting of February 11, 2014. With respect to the injuries reported by Parent, the letter disputed numerous allegations by Parents. For example, Ms. Gardner stated that Student demonstrated an extraordinary amount of SIB which staff attempted to block and redirect but not always successfully and that Parents had formally acknowledged in writing when Student was admitted that this might be the case. Additionally, beginning in January 2014 staff instituted (in addition to daily routine skin checks referred to above) an enhanced skin monitoring system calling for skin integrity and injury intensity checks 4 times daily with digital images and communication of any skin problems to Parents. Ms. Gardner stated that the wrist infection and other injuries complained of by Parent were far less severe than reported; the wrist weights were, in fact soft and unlikely to have caused injury and, in any event, the wrist injury had appeared on a day following a day on which the weights were not used. (S-12, Gardner)

24. Attached to the letter was a chronological log of contact between staff and Parents when various concerns were discussed. MNE stated that during Student’s tenure in the program, there had been approximately 86 contacts with Parents exclusive of regularly scheduled meetings, and that Parents had frequent and regular contact with Student

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<sup>12</sup> Both Frank Bird from MNE and Amy Reese mentioned that hospitalization at a facility such as Hampstead Hospital might be an option for Student while he was awaiting a new placement. Parents responded that they had managed Student safely at home before and could continue to do so but would seek hospitalization if an emergency arose. (P-8)

including 55 daytime visits (both on and off-grounds), twice-weekly lunch dates on the premises, and 15 home overnight visits between June 2013 and February 2014. (Gardner, S-12)

25. Ms. Gardner's letter concluded as follows: "We wish that the opportunity to serve [Student] would have continued but understand given the [Parents'] perceptions of the quality of our services that was not realistic. On February 11, 2014, in the IEP Team meeting, the [Parents] opted to withdraw [Student] from Melmark New England's residential program." (S-12) On March 17, 2014, MNE sent Amy Reese copies of Student's final progress reports, behavior support plan and behavior graphs for the period ending February 11, 2014. In a cover letter, MNE's Senior Director of School Services, Helena Maguire, stated "[w]e understand the family desires a different placement...at this time..." (S-13)

26. Parents and MNE had no further communication regarding Student's return as a day student or in any other capacity. At some point after February 11, 2014, Parents filed a complaint with the Andover Police Department alleging that MNE staff had abused and/or neglected Student. The Police Department concluded that no crime had been committed, and filed a 51A report with the Department of Children and Families (DCF) regarding the alleged abuse or neglect. After investigation, DCF found the report to be unsubstantiated. Amy Reese had contacted Ms. Gardner several times to ask about potential day placement at MNE. Ms. Gardner reported back that based on Parents' allegations to police, DCF and social media<sup>13</sup> that Melmark had abused or neglected Student, MNE did not believe Parents intended to return Student to his "stay put" placement. (Gardner)

27. Parents have maintained that Student was discharged from MNE effective February 11, 2014, that they actually were open to his return on an interim basis, but that MNE had foreclosed this possibility. MNE asserted that Student was not formally discharged or terminated but had been withdrawn by Parents. At the hearing, Rita Gardner testified that MNE was Student's "stay put" placement, and that Student could have returned there while awaiting a new placement. (Gardner) There are no documents in the record to this effect. MNE never initiated "emergency" or "planned" termination procedures pursuant to 603 CMR 18.05(7)(c) or (d) and 603 CMR 28.09(12)(b). Parents never rejected Student's IEP or placement or wrote a letter formally withdrawing Student from MNE. QPS continued paying for Melmark for a period of time after Student's departure. (Reese)

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<sup>13</sup> Andover introduced testimony from various witnesses to the effect that Parents had used social media (Facebook) to make allegations about Student being abused and/or neglected in residential placements, either by posting the allegations directly or having knowledge of such postings by other persons. Andover argues that this social media campaign impeded Andover's efforts to place Student. Parents denied that they were responsible for many of the postings and also argued Andover never directed them to stop or to instruct friends and families to do so. None of the actual postings was put into evidence, however, and no testimony or documents were admitted that stated definitively whether or not the social media activity prevented APS from securing placements for Student.

28. Meanwhile, Andover began the process of referring Student to new programs immediately after the meeting of February 11, 2014, with Parents' cooperation. In an email to Amy Reese on the afternoon of the meeting, Parent stated "Hello Amy, Just to follow up on our meeting today. Please forward the release as soon as possible to expedite the search for a new ABA school." (P-10, S-10, Mother, Reese)

29. Amy Reese responded approximately one hour later, forwarding to Parents, via email, releases authorizing referrals to four residential programs: Parents electronically signed and returned the releases on the same day. (P-10, S-10, Mother, Reese)

30. The following day, February 12, 2014 Mother sent Amy Reese an email in which she stated, "Thank you so much Amy. We are not interested in residential placement for [Student] at this time. We will need to coordinate with you on a year round ABA program with extended day, and in home services." On February 13, 2014 Father sent an email to Ms. Reese requesting referrals to day programs with an extended day component and also requesting in-home services. (P-10) In an email dated February 21, 2014, Amy Reese replied as follows:

While I appreciate that you are interested in day programs, the District maintains that [Student] requires a residential program at this time in order to meaningfully benefit from the educational services he requires. I would suggest that we continue the referral process to the previously identified programs, which may (depending on the school) allow [Student] to attend as a day student if that is something we ultimately agree to do. Given [Student's] unique needs and challenges, and your recent removal of him from Melmark, it is really important to explore all potentially appropriate placement options, even if you do not feel all of those options are appropriate for [Student] at this time. Unless you withdraw your consent to the proposed referrals, I would strongly suggest we continue the referral process...I will mail out the referral packets to the schools indicate [sic] on the signed releases on Monday unless I hear otherwise from you..." (S-10, P-10)

31. Despite Parents' expressed wishes either not to pursue residential placement, or to pursue day placements either in addition to or instead of residential programs, Parents did not revoke consent for the residential referrals, and did not reject the previously – accepted IEP calling for residential placement. Mother testified that Parents wanted to cast the broadest possible net to secure services for Student. On February 24, 2014, Ms. Reese forwarded referral packets to the four residential schools referred to above. None of these programs accepted Student. (S-11, Reese)

32. On March 20, 2014, Ms. Reese sent a referral packet to the May Institute in Randolph. On March 27, an experienced special education attorney whom Parents had retained sent APS counsel a letter requesting a referral to Crotched Mountain School in

Greenfield, NH. Ms. Reese sent a referral to Crotched Mountain the following day, March 28, 2014. (S-15)

33. Crotched Mountain School accepted Student for residential placement by letter dated April 8, 2014. Student's anticipated start date was April 28, 2014. On or about April 18, 2014 Parents and Andover learned that Crotched Mountain was not able to provide strict ABA-based programming, no longer had a full-time BCBA on staff, and requested removal of language from Student's IEP that stipulated ABA methodology. This development contradicted what Parents had seen on the program website. Parents no longer wanted Student to attend Crotched Mountain for this reason. In an email dated April 18, 2014 Amy Reese advised Quincy Public Schools (which was still fiscally responsible for Student's placement) that Andover would "push" for the May Institute despite Parents' misgivings (due to the distance from their home) because APS was "running out of options." (S-16)

34. Ms. Reese further stated that "Parents' attorney asked if we'd agree to temporary [day] placement at Futures in Beverly<sup>14</sup> until placement could be secured. We will have to agree since he's had no programming. I'm letting you know because of being fiscally responsible." Andover contacted Futures by telephone but did not pursue a referral because Futures stated that they did not provide temporary or interim services.

35. Counsel for Parents and for Andover negotiated a proposed agreement for interim services but Parents rejected the proposal. (Mother, Reese, S-16)

36. Andover had referred Student to the May Institute in Randolph, MA (hereafter, "May") during the spring of 2014. The May Institute accepted Student in early May 2014, with a projected start date of early June 2014. (S-17) On May 20, 2014 Andover issued an IEP amendment and placement page for Student's residential placement at May. The amendment indicated that the Team would meet to develop a new IEP in approximately 10 weeks after placement. Parent accepted the proposed amendment and placement on May 29, 2014. (P-17)

37. Student entered the May Institute residential program on June 10, 2014 pursuant to the accepted IEP, which included 1:1 aide supervision. Parents were generally pleased with the daytime educational portion of the May Institute placement. (Mother) They became dissatisfied with May's care for Student in the residential portion beginning in approximately August 2014, however. In particular, Parents believed that residential staff was failing to take adequate safety precautions relative to Student's pica. Mother testified that she found hazardous items such as battery operated devices with missing battery covers and batteries (for example, remote controls, window alarms, and toys), as well as pills and other dangerous items on the floors of the residence, and that staff members did not correct the conditions upon Parents' requests. Parents also were concerned that Student regularly refused to take required medications and so missed multiple doses.

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<sup>14</sup> Futures is an approved private day school in Beverly, MA for children on the autism spectrum. The current name for the program is Hopeful Journeys Educational Center (HJEC), but at the time period at issue in this case the school was still using the name "Futures." (Silberman, Piskura)

Parents believed that staff had not developed a behavioral program to address Student's medication refusal. Parents and May Institute staff were in frequent and regular phone, email, and personal contact to discuss these and other issues. (Mother, Colon-Kwedor, P-22)

38. On or about August 18, 2014, Student was taken to the hospital from the May residence because Parents had discovered a window alarm with missing batteries and Parents suspected Student may have swallowed them. Examination at the hospital revealed that Student had not swallowed batteries, but that there was needle-like object inside Student's abdomen. Parents believed Student had found and swallowed this object on May Center premises. The hospital discharged Student with recommendations for monitoring Student's condition. (Mother, P-22)

39. While Student was in the hospital for this incident, the May Institute and hospital nursing staff communicated about Student's condition without Parents' knowledge. Parents objected to this communication, stating that it kept them out of the loop on Student's care. On August 20, 2014, Father sent an email to May staff stating "I didn't give consent for ongoing communications between the school and medical providers. [We] feel that it is very important for us to be the hub for medical communications because unless this is the case we end up being out of the loop, which makes it hard to manage [Student's] medical care. Going forward please go through us regarding all communications with medical providers." (P-22)

40. In or about August 2014, May developed a protocol for "sweeps" of the school, residence, and vehicles to remove any objects that Student might ingest. (Mother, Kweder-Colon, P-24)

41. On or about September 10, 2014 Student was hospitalized for surgical removal of the metal object from his abdomen. (Mother, Reese) Parents returned him to the May shortly thereafter, but took him home after discovering a TV remote with the back removed in the residence and encountering what they felt to be unconcerned responses from staff. (P-24, Mother)

42. Pursuant to a Team meeting held on September 10, 2014, APS issued a comprehensive IEP covering the period from September 10, 2014 to September 9, 2014. (Since Student was hospitalized at the time for surgery, Mother participated by telephone.) A behavior plan was attached to the IEP. Parents rejected some of the wording and benchmarks within the IEP but partially accepted the IEP and consented to the May Institute placement on October 3, 2014. (P-18, S-24)

43. On September 23, 2014, APS and the May Institute convened another Team meeting to discuss several issues, including communication by May with Student's medical providers. At the meeting, Parent reiterated that she gave full consent for such communication, and May Institute staff agreed to communicate with Mother when obtaining information from providers. Parents and May also discussed additional strategies to address pica. (S-22)

44. On October 10, 2014 another Team meeting was held at the request of the May Institute to discuss an ongoing dispute between Parents and May over whether Student's stuffed bear was safe in light of his pica.<sup>15</sup>

45. In an email dated October 14, 2014 Parents explicitly revoked any and all medical releases allowing communication between May Institute and Student's health care providers, stating that they would execute new releases on October 21, 2014 (the date of the next scheduled Team meeting) provided that "Parents are to be present and active participants in any verbal discussion of our child..." (P-27, Mother, Colon, Reese)

46. In a letter dated October 17, 2014 to Cheryl Crumb, who was then the Out of District Coordinator for APS, the Executive Director of the May Center School stated the following: "[p]lease consider this letter as notice of emergency discharge of [Student]. In accordance with 603 CMR 28.09(12), [Student] will be discharged from the May Center School on October 31, 2014. We request our meeting scheduled for October 21, 2014 serve as a formal discharge meeting." At the Team meeting held on that date, the May staff stated that the program was going to discharge Student for "health and safety reasons." The Team decided to treat the discharge as a "planned termination" rather than an emergency discharge, and agreed that Student would stay at the May until APS had secured a successor placement. (P-28) Parents were represented by an advocate at this time, who attended the meeting. (Mother, P-28)

47. On October 22, 2014, Parent signed releases authorizing APS to send referrals to Amego, Evergreen, NECC, Easter Seals, Groden Center, and Crotched Mountain. (P-29)

48. On October 29, 2014, APS issued an N-1 form stating that "[t]he staff at May stated they could no longer meet [Student's] educational needs, due to his parents' failure to permit communication with [Student's] private medical providers regarding his safety needs and medical protocols... May remains [Student's] "stay put" program and placement while the District takes the necessary steps to seek another residential placement for him. During this period, the District agrees that a bi-weekly phone conference with May and the parents is appropriate to facilitate [Student's] transition to another residential program." (P-28)

49. Student continued to attend the May Institute residential placement after his discharge, with no change to his programming. (Colon-Kwedor) As agreed, Parents, May staff and APS had bi-weekly telephone conferences to discuss the referral process as well as Student's functioning in the program. (S-29)

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<sup>15</sup> Parents and May staff disagreed on whether the stuffing in the bear posed a pica risk, with Parents arguing that Student had had the bear for most of his life with no problems and May asserting that they could not allow Student to have the bear without medical clearance. Student's gastroenterologist would not write a blanket approval for the bear and urged Parents and May to negotiate a mutually acceptable resolution. (Mother, Colon-Kwedor, Reese, S-26, S-G, H)

50. On or about November 14, 2014, Mother took Student for a medical appointment with his gastroenterologist and, when she took Student to the bathroom before the visit, noticed multiple bruises on his buttocks as well as on his arms. Mother was shocked, felt that these were not typical for Student, had not been reported to her by May staff, and suspected abuse. Student's primary care physician examined Student on that day. This doctor's written record of the visit states that the doctor observed a small number of bruises that did not appear to be in the shape of a hand. (Mother, S-M)

51. Student continued to attend his stay-put placement at the May Institute after the doctor visit referred to above. During this period, APS' referral to the Easter Seals program in New Hampshire was progressing. APS understood that Parents would likely accept placement at Easter Seals if the program were to accept Student for enrollment. (Reese, S-32, 33, 34)

52. Parents took Student home for the Thanksgiving holiday on or about November 25, 2014. They noticed a bruise on Student's foot (of which May staff had informed them) which turned out to be a healing stress fracture. Parents did not return Student to the May Institute after the Thanksgiving break. (P-34, Mother, Colon-Kwedor, Reese)

53. On or about November 25, 2014, the date that Parents removed Student from the May Institute, Parents registered a complaint of abuse and/or neglect of Student with the Andover Police Department, which, in turn relayed the complaint to the Randolph Police Department (RPD). RPD investigators spoke to May Institute staff, Parents, and others, and closed the police investigation with no charges being filed. (S-35, P-35)

54. On November 26, 2014, as part of its investigation, the RPD detective filed a 51A report against the May Institute with DCF Special Investigations Unit. Parents also filed a 51A report. The reports alleged two counts of abuse of Student (bruises on Student's buttocks and bruise on foot) and two of neglect. After investigation, which concluded on December 16, 2014, DCF deemed the reports of abuse to be unsubstantiated, in that there was no evidence that the bruises had been inflicted by a caregiver; rather, the bruising was consistent with documented severe SIB. One report of neglect was unsupported. A second neglect report (arising from the swallowed needle-like object) was supported based on lack of sufficient supervision; the DCF investigator stated that given Student's sometimes relentless pica, he must have eyes on him at all times. The neglect was attributed to an "unknown perpetrator" since, according to Student's surgeon, Student likely ate the object at least one month before it was discovered in August 2014, and there was no way to determine where Student had been or who had been with him when he swallowed the object. (P-35, S-40)

55. On November 29, 2014 Andover proposed mediation with the BSEA to resolve Student's placement issue. Andover was prepared to make Parents an offer that Amy Reese felt they would accept. The parties did participate in mediation, but did not reach agreement. (Reese, S-36, P-39)

56. On December 11, 2014, the Easter Seals program in New Hampshire accepted Student for residential placement and was prepared to admit him during the month of December. Andover offered Easter Seals on multiple occasions throughout that month. Parents and APS exchanged repeated emails consisting of Parents' objections to residential placement and requests for referrals to day programs, countered with Andover's statements that Student required residential placement, which also constituted "stay put." Eventually, on December 19, 2014 Parents sent Andover an email stating "if the district will not educate my son...UNLESS he is in a residential placement, we will accept the only schooling option for him which happens to be at Easter Seals. We do not agree that this is FAPE or LRE. (P-40).

57. On December 15 and 16, 2014, Parents asked APS to participate in the SPEDEX process to resolve the parties' placement dispute. In an email dated December 17, 2014 APS declined to participate in SPEDEX because "the District has offered an appropriate placement." (P-41) Amy Reese testified that in addition, Andover declined SPEDEX because it anticipated that the parties would be unable to agree on the required neutral third party. (Reese)

58. On December 31, 2014 in response to a request for paperwork from Parents in support of the Easter Seals placement, Parent sent an email to Amy Reese stating "we were informed that DCF has an ongoing investigation at Easter Seals for a child recently enrolled...with pica so severe it required surgery. In addition, many reports of children leaving the campus. Parents were not notified until police made contact with them. This does not sound like a secure facility for a child with [Student's] needs. He needs to be SAFE. (P-40)

59. In a responsive email dated January 1, 2015 Amy Reese stated that "Easter Seals remains approved by the Massachusetts Department of Education, and I am unaware of the incidents you referenced. Please provide me with the name of the person(s) who informed you of this information...[G]iven the severity of [Student's] needs and the fact that you are unwilling to return him to his "stay put" placement at the May Center, your placement option...is Easter Seals. Your failure to comply with the admissions process is obstructing the District's efforts to provide [Student with appropriate and much needed services and support, and represents a clear and disturbing pattern on your part...[P]lease sign [a required] form and return it to my office immediately. Regardless of your decision, [Student] is required by law to be in school next week." (P-40)

60. On December 19, 2014, at Parents request, APS referred Student to the Higashi School. Higashi declined to accept Student because they deemed him in need of intensive, individual instruction which did not conform to Higashi's group-based teaching model. (P-41, S-42)

61. On January 5, 2015, Student was accepted by the Evergreen residential program located in Upton, MA. On January 23, 2015, Parents accepted an IEP amendment and placement page reflecting the placement at Evergreen. Student began attending the program on January 29, 2015. (S-55, Reese, Mother)



62. On January 15, 2015, shortly before Student's beginning Evergreen, Parent signed forms from Evergreen including a "Consent for Emergency Restraint." This form stated "I have reviewed the Evergreen Center's Physical Restraint Policy and consent to emergency Physical Restraint being instituted, only in an emergency when all other interventions have been unsuccessful, to protect [Student] if he/she is engaging in physically abusive behaviors to self or others. I understand that such restraint will be done in the least restrictive manner possible and have as its goal reintegration of the student into regular programming as soon as possible. The Evergreen Center defines an emergency as an extreme situation that is unpredictable and not reoccurring." A handwritten note on the form stated "communicate with parents with emergency restraint usage." (P-46)

63. On February 2, 2015, Evergreen staff restrained Student three times. The precipitating causes were, for two incidents, "nonredirectable SIB" and, for the third incident, "nonredirectable SIB and aggression." Two of the restraints entailed one-person seated basket holds lasting 6 minutes for one and 7 minutes for the other. One restraint was a two-person prone restraint lasting 15 minutes. (P-47) On February 4, 2015, Student received two one-person basket hold restraints due to "nonredirectable SIB," lasting just over 3 minutes for one and 4 minutes 50 seconds for the other. On February 9, 2014 Student received a 15-minute 2-person prone restraint for the same reason. All restraints were administered in the residence, and preceded by cueing, reduced demands, and, for two of the incidents, "differential reinforcement of alternative behavior." (P-47)

64. On February 9, 2014, Parents sent an email to Evergreen staff notifying them that they had noticed bruises on Student's arms and legs that "looked like grab marks." Parent's email stated that Parents did not want Student pulled by arms because he could be easily directed with a gentle hand on his back and also stated that Parents' intent was not to make accusations but to encourage gentle handling of Student. (P-50) Evergreen responded with an email to Parents acknowledging concerns, and made internal inquiries among staff. (P-50) Evergreen's body-check forms for the corresponding time period noted marks on Student's arms attributed to restraints as well as other marks said to be caused by self-stimulation. (P-50)

65. On February 12, 2015, Parents took Student to a previously-scheduled visit to Ann Neumeyer, M.D., Student's neurologist at the Lurie Center. Upon examining Student, Dr. Neumeyer observed multiple small bruises on Student's upper arms and legs. In her report of her examination of Student, Dr. Neumeyer stated the following:

What is most remarkable and concerning today however is that [Student] has multiple bruises over the extremities upper and lower, and that [Student's] parents cannot explain why he has these bruises nor has his school adequately explain [sic] them. I am highly concerned that he is handled too roughly at school. I therefore will initiate child protective services and...file a 51A. I have explained this to [Student's] family. His parents feel confident that the school

is investigating and trying to understand and determine the etiology of the bruising. They are most concerned that the bruising may be happening after school in a residential component of the program. (P-51)

66. Dr. Neumeyer's office filed 51A reports with DCF alleging physical abuse of Student. On February 27, 2015, after investigation, DCF found the allegations to be "unsupported," and that the bruising was the result of "constant hands on" with Student. (P-52) An internal review by Evergreen dated March 3, 2015 concluded that Student's bruises were consistent with restraints used as a result of intensive SIB and pica as well as some pinching by another child. (P-53) The bruising issue also was investigated by the Department of Early Education and Care (EEC), which interviewed Evergreen's Chief Operating Officer and the DCF investigator, and reviewed Evergreen's internal investigation report and other documentation. In a report dated June 4, 2015, EEC determined that there was no abuse or neglect of Student, and that Parents had consented to emergency restraints. EEC also found, however, that Evergreen had used incorrect incident reporting forms for documenting restraints,<sup>16</sup> and recommended that Evergreen attempt to contact Parents when restraints were imposed and document when it could not do so. (P-52)

67. On February 12, 2015 Mother reported to Evergreen's Behavior Education Team Supervisor, Shawn Bryant, and Director of Family Services, Kate Morrison, that Dr. Neumeyer had been concerned about "severe bruising" on Student's body. Mr. Bryant and Ms. Morrison responded that the bruises were not severe and were consistent with "intervention procedures, blocking incidences of ingestion, and normal bruising for a 12-year-old." Mother disagreed with this view. Evergreen and Parents agreed to have a meeting the next day. (P-53) On the evening of February 12, 2015, Parents took Student home from the Evergreen Center. On February 17, 2015 Father arrived at Evergreen with local police and retrieved Student's belongings. According to an Evergreen progress note dated February 13, 2015, Parents withdrew Student from the school and requested no further contact from the school. (P-54)

68. In a letter to Amy Reese dated February 17, 2015 Evergreen's Chief Operating Officer stated the following:

It has come to our attention that [Student's] parents may want significant changes in [Student's] IEP, including a different placement. Given [Student's] intensive special needs, it will not be

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<sup>16</sup> Evergreen had mistakenly used forms designated for so-called "Level III Interventions" to document Student's emergency restraints. Level III Interventions are non-emergency behavioral interventions that are considered highly restrictive. For a state-approved program to use them, the interventions must be part of a behavior plan, explicitly consented to by parents or guardians, and subject to multi-level administrative review. 603 CMR 18.05(5) and regulations cited therein. Evergreen had planned to implement Level III Interventions with Student to address SIB and pica, and had scheduled a meeting with Parents to discuss the plan, but the meeting had not yet taken place when the restraints occurred. Evergreen's view was that Father had indicated approval over the phone to use Level III; therefore, documentation of emergency restraints on Level III forms was not inappropriate. (P-52)

possible to provide him with the special education that he needs, without his parents' full cooperation. We wish to work with the [Parents] towards providing [Student] with an IEP that meets his parents' goals, and that is in [Student's] best interest. Therefore, pursuant to 34 CFR 300.325(b)(1), we ask that [Student's] IEP Team be re-convened as soon as possible, to discuss a revised IEP for [Student]. (P-54)

67. In an email dated March 2, 2015, Evergreen's Chief Executive Officer stated the following:

...[T]he parents of [Student] have permanently withdrawn [Student] from the Evergreen Center, Inc., and have therefore terminated [Student's] placement at Evergreen. Given the unequivocal nature of the [Parents'] intentions, no formal termination procedures by Evergreen are necessary. Specifically, [Student's] parents took [Student] from Evergreen on the evening of February 12, 2015 with no prior notice to Evergreen. The only communication from the [Parents] since February 12 came on February 17, 2015. At that time [Father] arrived at...Evergreen Center School, accompanied by local police officers, and removed all of [Student's] belongings. As [Student] was at Evergreen Center for only two weeks, and given the parents' decision to pull him from the program, Evergreen Center will not be sending a representative to any IEP Team meeting, regarding [Student's] next special education program. (S-59)

68. Notwithstanding the foregoing, APS sent wrote emails to Parents on February 28, March 6, and March 9, 2015 stating that Evergreen was Student's last agreed, "stay put" placement and urging Parents to return Student to Evergreen in order to comply with mandatory school attendance laws. (P-57) Amy Reese testified that there was no dispute between Andover and Evergreen that Evergreen was Student's "stay put" placement. If Parents had been willing to return Student to Evergreen, "they would not have been happy," but would have admitted Student. (Reese)

69. Beginning on March 6, 2015, an attorney from the Disability Law Center (DLC) began representing Student.<sup>17</sup> In an initial letter to counsel for APS, the DLC attorney agreed to Andover's suggestion that Parents consent to referrals to NECC, Groden Center, Crotched Mountain and Easter Seals. The attorney also requested "some educational services" for Student while he was out of school, stating that Parents would "shortly provide medical support to request home tutoring, pursuant to 603 CMR 28.03(3)(c). (S-62)

70. On March 6, 2015, Andover sent Parents releases to allow referrals to NECC, Groden Center, Crotched Mountain, and Easter Seals. Parents signed the releases, and

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<sup>17</sup> As the Protection and Advocacy agency for Massachusetts, DLC represents disabled individuals; therefore, Student was the DLC client. (Mother, P

Andover sent referral packets to the listed schools on March 9, 2015. (P-58)

71. On March 23, 2015, the DLC attorney wrote a letter to APS counsel requesting home tutoring for Student, as well as referrals to day programs. The DLC attorney enclosed a letter from Dr. Neumeyer dated March 11, 2015 which stated, in part, “I strongly recommend that any child not attend a school where there is unexplained bruising. While [Student] is known to have self-injurious behaviors, it is concerning that there may have been either inadequate supervision nor documentation of self-injurious behaviors, or that the bruising may have been inflicted by another person. I do not believe it is emotionally health for any child to be placed in an environment where he acquires bruises. Therefore, I do not recommend that he return to the Evergreen School...It is...recommended that an educational program is started in the home setting until an appropriate school program is found.” (P- 57)

72. In an email to the DLC attorney dated April 6, 2015, APS counsel stated that because Student was neither medically confined to the home nor without an available placement, the District had no obligation to provide tutoring; moreover, APS was hesitant to send personnel into the home because of the history of abuse allegations made by Parents in prior residential placements. (S-66)

73. Between approximately April 6 and April 16, 2015, counsel for Student and for Andover negotiated a draft agreement in order to resolve the placement dispute. The draft agreement offered a one-year placement in the Futures program (or other day program if Futures did not accept Student). The draft also contained standard waivers, disclaimers and acknowledgments typically found in settlement agreements, including a detailed confidentiality/mutual non-disparagement clause. The Agreement provided that Futures would be the “stay put” placement at the expiration of the one-year term. (S-66) Additionally, on May 11, 2015, the parties negotiated an Interim Services Agreement providing, in sum, for Andover to fund a “bank” of home based services to be delivered by a vendor of Parents’ choosing. (S-66)

74. Parents did not accept either agreement. Mother testified that they would not agree to the waivers contained in the proposed agreements. (Mother) On May 13, 2015, the DLC attorney withdrew from representing Student.<sup>18</sup> (P-66)

75. Meanwhile, on or about April 29, 2015 Parents retained a New Hampshire law firm to represent them with respect to Student. Other than a copy of a letter notifying Andover of its involvement and requesting Student’s records, there is no further evidence in the record regarding the New Hampshire firm’s involvement in this matter. (S-66)

76. On March 30, 2015, Student received a comprehensive neuropsychological

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<sup>18</sup> On May 18, 2015, after DLC’s withdrawal of representation, Parents indicated that they would accept the Interim Services Agreement contingent on removal of a clause calling for waiver of attorney fees. The record contains no response to the specific request other than correspondence indicating that the agreement had been negotiated by the parties’ attorneys, but that APS did not owe Student interim services. In the end, the only relevant fact is that the parties never executed an agreement.

evaluation by Alanna Gold, Ph.D., from the Lurie Center. In a report dated May 13, 2015, Dr. Gold made multiple, detailed findings and recommendations regarding Student's functioning and needs in all domains. In sum, Dr. Gold recommended "an intensive level of support in an intensive, full day placement that focuses on skill development and generalization [without which] [Student] will almost certainly fail to make adequate progress..." The report further stated that Student "requires consistent, intensive, full-day, year-round services based on the principles of Applied Behavior Analysis (ABA)..." Finally, the report stated that Student "did not require residential placement at this time." (P-66) Parents forwarded this report to APS and requested a Team meeting to review it.<sup>19</sup>

77. Andover convened a Team meeting on May 21, 2015 to discuss Dr. Gold's report. The record contains no proposed IEP amendment and no N-1 form proposing action or refusal to act on the part of APS.

78. On May 21, 2015, APS received signed consents from Parents to send referrals to NECC, Crotched Mountain, Groden Center, Devereux, and Amego, although subsequent correspondence is unclear as to whether Parents withdrew such consent. (P-70)

79. The record indicates that from the date of the May 21, 2015 Team meeting through the remainder of May and into June 2015, the parties exchanged multiple letters and emails in which Parents, in essence, requested interim services, changes to Student's IEP, and referrals to day placements and Andover stated that Student had a "stay put" placement available, that Student needed residential placement, and that Parents' conduct was preventing Student from receiving an education. On May 28, 2015, Andover offered to participate in mediation, and on June 16, 2015 Andover offered to participate in a facilitated IEP meeting. Parents declined both offers. At another point, Andover offered to observe Student at home; Parents responded by offering to share a private ABA assessment that they had obtained. (P-70 through P-75, S-70, 71)

80. On August 7, 2015, Andover filed the hearing request referred to in "Procedural History," above (BSEA No. 1601301). On September 17, 2015, during a pre-hearing conference with BSEA Hearing Officer Amy Reichbach, the parties reached an agreement in principle, subject to review by Parents' then-attorney.<sup>20</sup> The Agreement proposed placement for the 2015-2016 school year, including summer services, at an approved private day school (Futures, Nashoba Learning Group, or Realizing Children's Strengths) plus up to 20 hours per week of interim home-based services during the referral process and 50 hours of compensatory services. Parents did not sign the proposed agreement. (Reese)

81. On September 28, 2015, Andover made blind referrals to Hillcrest, Amego, Crotched Mountain, Groden Center, NECC and Easter Seals. (S-74)

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<sup>19</sup> Unlike the report dated May 13, 2015, Dr. Gold's original report, dated April 27, 2015 had not specified whether Student needed day or residential placement. (Gold) Since the appropriateness of day or residential placement for Student is not at issue in this hearing, the difference in the recommendations is not relevant.

<sup>20</sup> The attorney did not enter an appearance in this matter.

82. On October 1, 2015, the parties participated in a resolution meeting pursuant to the Parents' hearing request in the instant matter. For purposes of resolution, APS issued an N-1 form proposing an extended evaluation in a public or private day program plus a bank of 20 hours per week of home-based services from a provider of Parents' choosing. Parents did not accept this proposal. (S-75)

83. On or about October 5, 2015, Parents and Student moved out of the district and relocated to another community. As of that date, the only IEP in effect was the IEP issued in September 2014, as amended in January 2015 to reflect the Evergreen placement. The parties did not reach an agreement for any services or placement other than those listed in that IEP at any time from January 2015 until the family left Andover in October 2015.

## **DISCUSSION**

### **Legal Framework**

#### **1. Definitions of FAPE and Stay Put**

There is no dispute that Student is a school-aged child with a disability who is eligible for special education and related services pursuant to the IDEA, 20 USC Section 1400, *et seq.*, and the Massachusetts special education statute, M.G.L. c. 71B ("Chapter 766"). Student is entitled, therefore, to a free appropriate public education (FAPE), that is, to a program and services that are tailored to his unique needs and potential, and designed to provide 'effective results' and 'demonstrable improvement' in the educational and personal skills identified as special needs." 34 C.F.R. 300.300(3)(ii); *North Reading School Committee v. BSEA*, 480 F. Supp. 2d 489 (D. Mass. 2007); citing *Lenn v. Portland School Committee*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993). While Student is not entitled to an educational program that maximizes his potential, he is entitled to one which is capable of providing not merely trivial benefit, but "meaningful" educational benefit. See *Andrew F. v. Douglas County School District RE-1*, 69 IDELR 174 (March 22, 2017), *Bd. of Education of the Hendrick Hudson Central School District v. Rowley*, 458 US 176, 201 (1982), *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 789 (1<sup>st</sup> Cir. 1984); *D.B. v. Esposito*, 675 F.3d 26, 34 (1<sup>st</sup> Cir. 2012).

Student is not only entitled to the substantive components of FAPE as outlined above, he and Parents, also are entitled to procedural protections designed to support the parent-school collaboration envisioned by federal and state special education statutes. Parents are full members of the Team that develops IEPs, which are the blueprints for providing services for eligible students, 20 USC §1414(d)(1)(b)(i). Parental participation in the planning, developing, delivery, and monitoring of special education services is embedded throughout the IDEA, MGL c. 71B, and corresponding regulations. Courts have consistently emphasized the centrality of parental participation to the IDEA scheme. In *Rowley*, 458 U.S. 405-406 (1982), the Supreme Court stated "...Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process...as it did upon

the measurement of the resulting IEP against a substantive standard.” See also: *In Re Framingham Public Schools and Quin*, 22 MSER 137 at 142 (Reichbach, 2016), and cases cited therein.

Notwithstanding the above, it is well settled that although parents are Team members, entitled to fully participate in the IEP development process and to have their views considered, they are not entitled to dictate the terms of an IEP. On the contrary, a school is not required to negotiate with parents to reach a result with which parents agree if by doing so they propose an IEP that the school believes is not appropriate for the child. Rather, schools are obligated to propose what they believe to be FAPE in the LRE, whether or not the parents are in agreement. *In Re Natick Public Schools*, 17 MSER 55, 66 (Crane, 2011).

If parents disagree with the district on what constitutes an appropriate IEP and/or placement for a child, the IDEA and Massachusetts law provide detailed mechanisms for dispute resolution, *i.e.*, mediation with a trained mediator who assists the parties in negotiating a legally-binding agreement, and due process hearings, where both parties submit evidence to an impartial hearing officer who adjudicates the dispute and issues a written decision. Both of these processes enable parents and school districts to resolve disputes in a structured manner with the assistance of a neutral third party. 20 USC §1415; 34 CFR §300; MGL c. 71B§2A; 603 CMR 28.08.

During the time that parent and school district are engaged in the IDEA dispute resolution process, “unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child...” 20 U.S.C. Sec 1415(j); 34 CFR Sec. 300.514; *Honig v. Doe*, 484 U.S. 305 (1988); *Verhoven v. Brunswick School Committee*, 207 F.3d 1, 10 (1<sup>st</sup> Cir. 1999); *M.R. and J.R. v. Ridley School District*, 744 F.3d 112 (3d Cir. 2014); M.G.L. c. 71B; 603 CMR 28.08(7). Indeed, even if there is no formal mediation or due process hearing pending, the “stay put” principle precludes schools (with certain exceptions not relevant here) from unilaterally changing a child’s placement during the term of an accepted IEP. Any such change is a violation of “stay put” unless the parties “otherwise agree” via the IEP process or other valid agreement. See *Honig v. Doe*, and *In Re Framingham Public Schools & Quin*, *supra*. By the same token, “stay put” defines the metes and bounds of a school district’s responsibility when parties have disagreements about an IEP or placement. In such cases a school district is bound to provide the services and placement in the last accepted IEP unless and until a new IEP and/or placement is developed by the parties through the Team process, a negotiated agreement, or as a result of due process. *Id.*

In the instant matter, Student’s “stay put” placement was determined via the previous *Ruling on Andover’s Motion for Partial Summary Judgment* to be an approved residential educational program designed for children with ASD. This means that unless or until another type of placement was agreed upon by the parties or ordered by a hearing officer, Student was entitled to an approved residential educational placement and Andover’s obligation was to make such a placement available.

## **2. Remedies—Compensatory Services**

An award of compensatory services is one remedy available to a hearing officer to make a student whole if a school district commits procedural violations that result in a denial of FAPE to an eligible student or precludes parents from meaningful participation in the Team process. *Pihl v. Mass. Department of Education*, 9 F.3d 184 (1<sup>st</sup> Cir. 1993). An award of compensatory services is in the nature of an equitable remedy. *Diaz-Fonseca v. Comm. of Puerto Rico*, 451 F.3d 13 (1<sup>st</sup> Cir. 2006). As such, a hearing officer may consider the conduct of parents in determining whether compensatory services are warranted, and may deny such if parents unreasonably obstruct the IEP process or otherwise interfere with the ability of the school district to fulfill its obligations. See *C.G. and B.S. v. Five Town Community School District, et al.*, 513 F. 3d 279 (1<sup>st</sup> Cir. 2008), citing *Roland M. v. Concord School Committee*, 910 F.2d 983 at 987 (1<sup>st</sup> Cir. 1993); *Murphy*, 22 F.3d at 1197.

## **3. Burden of Proof**

In a due process proceeding to determine whether a school district has offered or provided FAPE to an eligible child or whether the school district has deprived a child of FAPE because of procedural missteps, the burden of proof is on the moving party. In the instant case, as the moving party, Parents bear this burden. That is, in order to prevail in their claim for compensatory service, Parents must prove, by a preponderance of the evidence, that that Andover committed procedural violations or excluded Parents from the Team process, and that as a result, Student was deprived of a FAPE. *Schaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).

## **FINDINGS AND CONCLUSIONS**

In the instant case, Parents argue that they and Student are entitled to compensatory services corresponding to three discrete time periods. Parents assert that each of Student's three successive residential placements had, in effect, become unavailable during the term of Student's IEPs, and that APS had failed and/or refused to provide FAPE in the form of interim services during the inevitable intervals between placements. Andover counters that the residential placements remained available to Student, and that it had no obligation to provide Student with anything else; nonetheless, it made several offers of interim services to Parents, who refused all of them.

I will examine each of the time periods in question in light of the foregoing Summary of the Evidence and legal framework discussed above to determine, first, whether the last-agreed placement was available to Parents; if not, whether Andover acted diligently and reasonably to secure a successor placement, and whether Parents' conduct during the relevant intervals was reasonable or whether such conduct impeded the ability of Andover to secure a new placement for Student.



## **1. February 12, 2014 to June 10, 2014**

Parents became concerned about Student's well-being in the residential component of MNE almost immediately after he was placed there. MNE administration became leery of Parents' apparent mistrust of the program's ability to keep Student safe as well as their withdrawal of the medical consents that were a condition of enrollment in the program. The mutual concerns led to the meeting on February 11, 2014 described in the Summary of Evidence above. Based on the audio recording of the meeting, as well as testimony of Parents, Amy Reese, and Rita Gardner, Parents' belief that Student could not return to MNE was understandable. Rita Gardner used the term "emergency discharge." Parents and staff discussed retrieving Student's belongings. Parents had made very clear that they were not comfortable either with MNE having unmediated access to Student's medical providers, which access was a pre-requisite for Student's continued enrollment, they also had major concerns about Student's safety in the residential portion of the program. There was some discussion about Student's temporary return for the school day portion of his program, but this possibility never came to fruition. Amy Reese immediately began discussing the process of securing a new placement. All of the foregoing could reasonably cast doubt in Parents' minds on the continuing availability of MNE as a placement.

On the other hand, MNE never formally terminated Student's enrollment via either the emergency or "planned" termination process set forth in 603 CMR 18.05(7)(c) or (d) and 603 CMR 28.09(12)(b). No new IEP or other written agreement was issued; the only IEP in existence was the fully-accepted IEP providing for the MNE placement. Had Parents sought to "enforce" that IEP by returning Student to MNE, there is no dispute that MNE would have been required to admit him, and go through the regulatory termination procedures if they believed that they could not serve him. Finally, Andover, which was programmatically responsible for Student's placement, never notified Parents that they could not return Student to MNE; in fact, on more than one occasion, Amy Reese communicated to Parents that MNE was available should they wish to return Student there. Ultimately, Parents' and Student's rights in this situation do not depend on the state of mind of Parents, MNE, or Andover. By virtue of a still-valid IEP and by operation of law, MNE was Student's "stay put" placement. Without imputing any wrongdoing to MNE, Parents certainly were entitled to decide that they were not comfortable with Student's residential placement there. Such a decision does not make the existing placement unavailable, however, and nor does the ambiguity about Student's status arising from the meeting of February 11, 2014<sup>21</sup>.

Still, Student had no educational services for four months between February and June 2014. In determining whether Andover owes him compensatory services corresponding to that period, I must determine whether Andover made reasonable and timely efforts to secure a new placement, and acted reasonably in the face of unavoidable delays. The evidence presented at hearing demonstrates that it did so. The parties do not

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<sup>21</sup> I note also that Parents' filing of police and 51A reports against MNE after Student's departure gives credence to MNE's and Andover's position that Parents had no intention of returning Student to MNE.

dispute that Amy Reese conferred with Parents immediately after the meeting of February 11, 2014 about a successor placement and had sent out four referral packets by February 24, 2014. While none of these placements accepted Student, he was accepted by Crotched Mountain by early April 2014 (which would have required alteration of Student's accepted IEP and which Parents rejected for that reason) and by the May Institute in May 2014. While Parents expressed misgivings about residential placement generally, they signed all required releases and participated fully with Ms. Reese in the process. The gaps in services here were not the fault of either party.

Finally and importantly, Parents were represented by counsel during some or much of this period. Through counsel, Andover made an offer for interim services which Parents rejected. Other than assertions that this offer of services had contingencies to which Parents could not agree, Parents have not provided any evidence that the proposed interim services were inappropriate. Under the totality of circumstances outlined here, including the potential continuing availability of MNE, diligence on Andover's part in locating a new placement, and an offer of interim services which Parents rejected, I find that Andover is not liable for compensatory services corresponding to the period from February to June 2014.

## **2. November 26, 2014 to January 29, 2015**

In late October 2014, the May Institute terminated Student's placement; however, there is no dispute that the May was Student's "stay put" placement, and that Student continued to attend both the day and residential portions for the remainder of October and most of November 2014. Parents removed Student from the May Institute effective November 25 or 26, 2014, but the May Institute clearly remained available to Student. Once again, Andover made multiple referrals starting even before Student's discharge date at the end of October, and Parents cooperated with the referral process. The Easter Seals program, in which Parents had initially been interested, accepted Student in early December, but Parents ultimately rejected that placement. Evergreen accepted Student in early January 2015 and Student began attending on January 29, 2015. Given the clear, continuing availability of the May Institute during the time from late November to late January (approximately two months long, minus a one-week holiday break) coupled with timely referrals by Andover, Student is not entitled to compensatory services corresponding to that period.

## **3. February 12, 2015 to October 1, 2015**

Parents removed Student from Evergreen on February 12, 2015 after they and Student's physician observed numerous bruises later found to be consistent with multiple restraints. The physician wrote a letter in which she stated that she would not recommend returning Student to a school where he experienced bruising, and also requested home-based instruction until a new placement could be located. While Evergreen may have remained available, theoretically, as a "stay put" placement, I find that Parents did not act unreasonably in declining to return him there in light of the physician's recommendations. I also find that although Andover continued to act

diligently in seeking a new placement for Student, it would also be reasonable for Andover to offer interim services, given the length of time that it would take to locate a new placement and the medical recommendation against returning Student to the “stay put” placement at Evergreen. And, in fact, Andover did offer not only interim services, but virtually everything that Parents had been requesting since Student left MNE. Specifically, In April and May 2015, Andover offered Parent, who were represented by DLC counsel at the time, a full-year day school placement as well as a package of interim services. Parents rejected this offer. In August 2015, Andover offered a full-year day school placement, interim services pending a start date at a day school, and compensatory services. Parents had an attorney review the proposal, and then rejected it. Similarly, in October 2015, Parents rejected a proposal, which was made at a resolution meeting, for an extended evaluation at a day program together with interim services.

Parents testified that they felt they could not accept Andover’s offers because they were contingent on certain waivers and contingencies (e.g., waivers of attorney fees). Parents are certainly entitled to make that choice. As stated above, however, an award of compensatory services are is in the nature of an equitable remedy. In balancing the equities here, I find that Parents’ actions in rejecting offers for virtually everything they had been asking of Andover--interim services, a private day placement, and, in the case of one offer, for a bank of compensatory service hours-- precludes them from now recovering compensatory services from Andover.

### **CONCLUSION AND ORDER**

Based on the foregoing, the Parents did not meet the requisite burden of proof on any of their claims for compensatory services. Because Andover is not liable for compensatory services during the period when the Quincy Public Schools had fiscal responsibility for Student’s residential placement, Quincy clearly has no such liability, and I need not revisit the issue of Quincy’s involvement in this matter.

This case is very unfortunate because a vulnerable child with intense needs lost several months of educational services through no fault of his own. I decline to lay blame on either party’s doorstep. Rather, if there is any lesson to be learned from this situation it is that both parents and school districts might benefit from recognizing early when they are at impasse, and rather than continuing futile attempts to convince each other of their positions, take advantage of the due process mechanisms available to them.

By the Hearing Officer,<sup>22</sup>

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Sara Berman  
Dated: July 10, 2017

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<sup>22</sup> The hearing officer gratefully acknowledges the assistance of BSEA Intern Paul Hart in the research for this Decision.