COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

SPECIAL EDUCATION APPEALS

**Middleborough Public Schools v. Student BSEA # 2309287**

**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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

**PROCEDURAL HISTORY**

Middleborough Public Schools requested an accelerated hearing on March 28, 2023[[1]](#footnote-1). The BSEA issued a Notice of Hearing scheduling the Hearing for April 27, 2023. The Parties jointly agreed to advance the date to April 11, 2023. On April 7, 2023 Middleborough filed a joint request to remove the case from the accelerated track to allow Parent additional time to engage with referral schools and potentially resolve the dispute. On April 10, 2023 the Hearing was scheduled to proceed on April 28, 2023 and May 1, 2023, as requested by the Parties. On April 28, 2023, the Parties filed a joint request to postpone the Hearing to schedule a Pre-Hearing Conference and for Parent to file their exhibits and witness lists in hard-copy form. On April 28, 2023, the postponement was allowed, and the Hearing was re-scheduled to May 5, and 9, 2023, as requested by the Parties. A Pre-Hearing Conference was held on May 1, 2023, via Zoom. On May 4, 2023 Parent filed a Motion to Allow Respondent [Student] to File a Response and Counterclaims Late and to Allow [Mother] to Testify. The Motion was heard on May 5, 2023. The Motion to allow Respondent to File a Response and Counterclaims late was denied and the Motion to Allow Mother to Testify was allowed. The hearing proceeded on May 5 and 9, 2023 via Zoom. The Parties made oral closing arguments and the record closed on May 9, 2023.

Those present for all or part of the hearing were:

Mother

Charles Reid, III Attorney, Parent

Kimberly Crowell-Oravec Special Education Coordinator, Middleborough Public Schools

Paige Blanchard Registered Behavior Therapist, Middleborough Public Schools

Elizabeth Hill Board Certified Behavior Analyst, Middleborough Public Schools

Katherine Graham Speech language pathologist, Middleborough Public Schools

Gina Muse Special education teacher, Middleborough Public Schools

Colleen Shea Attorney, Middleborough Public Schools

Jane Werner Court Reporter

Arlene Boyer Court Reporter

Catherine Putney-Yaceshyn Hearing Officer

The official record of this hearing consists of: Parents’ exhibits marked P-A through P-E; Middleborough Public Schools’ exhibits marked S-1 throughS-36; and approximately 9 hours of recorded oral testimony.

# ISSUES

1. Whether Middleborough’s IEP for the period from March 7, 2023 through March 6 2024 is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

**SUMMARY OF THE EVIDENCE**

1. The student (hereinafter, “Student”) is a nearly 18-year-old student within the Middleborough Public School district, (hereinafter, “Middleborough”). Student presents with a global communication disorder secondary to his diagnosis of Autism. He has difficulty expressing his ideas, thoughts and feelings. He has difficulty processing lengthy auditory information and can be overwhelmed by the complexity of language. Difficulty with articulation impacts his ability to clearly express information verbally and he has a “nonverbal disability.” Student is incontinent and has also been diagnosed with a seizure disorder. (S-8) (Mother)
2. Student’s most recent psychoeducational evaluation report was written by Kylie Bowen, School Psychologist, and dated October 26, 2021. It assessed his cognitive performance using the Wechsler Nonverbal Ability Scale. His full scale IQ was found to be 30 and classified in the extremely low category. His academic skills were noted to be below average for his age and grade. His adaptive functioning was assessed at home and in school using the ABAS-3. His General Adaptive Composite, Conceptual Composite, Social Composite, and Practical Composite all fell in the extremely low range across settings. His Social Composite was noted as a comparative strength. Ms. Bowen recommended continued close home school communication. She further suggested using praise and encouragement with Student whenever possible. She recommended continued use of Student’s 1:1 communication device and reward system. To address Student’s deficits in perceptual reasoning, she recommended providing opportunities to sort, classify, and categorize. She suggested use of cooperative groups and reciprocal teaching to help with perspective taking and exposure to different problem-solving methods. To address deficits in working memory, she recommended use of multimodal presentation of information and delivering information in small units. Due to deficits in Student’s adaptive behavior, Ms. Bowen recommended continuing community involvement when appropriate; social groups; community use teaching strategies; and transition planning strategies. (S-3)
3. Student’s most recent speech and language evaluation was completed by Katherine Graham, M.S., CCC-SLP, on November 4, 2021. She noted that Student continued to present with a global communication disorder secondary to his diagnosis of Autism. She reported that his communication impairment impacts his ability to understand and use language across domains. Receptively, she noted that Student understands words, phrases, sentences, simple conversations, and some sign language. She indicated that he is able to follow simple commands by request and physical prompt. Student understands basic concepts such as object function, emotions, body parts, colors, money, same/different, time, shapes and quantity. Student is able to respond to attention commands. He uses a total communication approach, utilizing modified American Sign Language, an AAC device (Touch Chat), PECS, vocalizations, and word approximations. He also communicates using gestures, actions, pointing, and showing objects, and uses vocalizations and facial expressions to express his pleasure or discomfort. (S-4)
4. Kate Cooney, MS OTR/L conducted an Occupational Therapy Evaluation of Student in October 2021. Her October 28, 2021 report noted that Student continues to benefit from having sensory regulating activities built into his day. She reported he is often dysregulated and requires sensory supports to participate in his classroom activities. She found that bouncing on a therapy ball and climbing flights of stairs were effective strategies for Student and that he was usually able to participate in his individualized curriculum. She recommended that Student have access to sensory regulating activities throughout his school day. (S-5)
5. Lauren Scott, B.S. Ed., completed a home assessment in October 2021, and wrote a report dated October 14, 2021. The report focused on Student’s communication, behaviors, activities of daily living/self-care, gross motor skills, and community participation skills. Ms. Scott made a number of recommendations including: home-based services; the development/implementation of a behavior plan; increased independence in daily living skills including a toileting program across home and school settings; the expansion of Student’s communication skills within the home including coordination between home and school in supporting the use of Student’s AAC device; the use of visual supports within the home; and ongoing evaluation and monitoring of the home program and consistent communication between home and school. (S-7)
6. Student’s last fully accepted IEP was for the period from November 10, 2021 through November 9, 2022. It included goals in the following areas language arts, functional communication, mathematics, daily living skills, and transition. The service delivery grid included consultation in the following areas: speech, home supervision, occupational therapy, adaptive physical education, and behavior support. The B grid included services in unified arts 3 x 87 minutes per week with “SPED, Reg/ESP” staff. The C grid included services in language arts (3x 87/6 days); communication with the SLP (0[[2]](#footnote-2) x 30 min/6 days); home services with a home service provider (0 x 180 min/monthly); mathematics with “SPED/ESP” (3 x 87 min/6 days); life skills with “SPED/ESP” 3 x 87 min/6 days; transition skills with “SPED/ESP” 3 x 87 min/6 days; and extended school year services with “SPED/Reg/ESP 4 x 240 min/week from July 5, 2022 through August 11, 2022. Parent accepted the IEP services and placement in full.[[3]](#footnote-3) (S-8)
7. Gina Muse has a Master’s degree in severe special needs and is a special education teacher in the AIMS program (Academic Individualized Multi-Sensory) at Middleborough Public Schools. The AIMs program is a substantially separate program for students on IEPs with significant needs. She taught Student last year in the program and was his contact teacher. She has taught him math, biology, and fundamental skills (ADLs). In addition to Ms. Muse, last year’s AIMS program was staffed by Student’s 1:1 aide and two other staff. Last year Student ate his lunch in the cafeteria and began attending a unified physical education class. He was able to transition off his bus and come to the classroom and unpack his belongings. He could review his visual schedule and find his seat with his peers. He participated in lessons, daily routines and activities, with support. With prompting and scheduled breaks he was able to participate for the duration of activities and complete his work. He had staff supported interactions with peers and could wait his turn appropriately. He made progress in the AIMS program. He had minimal struggles with transitions. If he was having a hard time he might whine or use non-functional communication. His behaviors were mild and easily re-directed. Any aggressive behavior would be limited to a pinch to the arm or leg of staff. (Muse)
8. Katherine Graham, is the speech language pathologist who has worked with Student since he entered high school in 2021. Last year Student’s direct speech language services were provided in a small group model. Ms. Graham pushed into the substantially separate classroom and provided speech language services to the whole group, which included conversational turn taking and language building. In the fall of last year Student was a very active participant. He used his AAC device or gestures to engage in language building activities. He could attend for 20-30 minutes. He was motivated by rewards earned by completing tasks. He was able to use Touch Chat, his AAC device, to request objects or actions. He used signs and vocal approximations. He used vocal intonation to express pleasure or dislike for things. Ms. Graham found that Student made effective progress in speech language therapy last year. He was able to appropriately engage with peers and effectively communicate his wants and needs. He was able to improve on using his AAC device to identify and communicate feelings. Ms. Graham did not recall any specific behavior difficulties that Student had last year. He had a 1:1 aide who would address any behavioral issues during group sessions. (Graham)
9. Paige Blanchard is a registered behavior technician who consults with Student’s special education teachers and educational support professionals (ESPs) and practices behavioral interventions with them.[[4]](#footnote-4) Ms. Blanchard has worked with Student since November 2021. Last year she was able to take walks around the building with Student. Student was able to sit for whole academic blocks. Last year Ms. Blanchard witnessed Student giving staff “little pinches” at times seeking sensory input. (Blanchard)

1. Jennifer Healy has been the Director of Special Education at Middleborough since July 2022, and had been employed by Middleborough for thirteen years as a classroom teacher in a substantially separate classroom, and a special education coordinator at the middle and high schools. She has known Student since his third grade when she was his summer school teacher, and was familiar with him last year in her role as Special Education Coordinator. Ms. Healy became involved in his case during the past summer and became more involved when the current Special Education Coordinator contacted her last fall with concerns regarding Student’s performance. She is aware that Student has complex needs and has had some behavioral issues in the past. In her opinion, Middleborough was able to meet his needs in the past and he had always shown progress.

Ms. Healy provided oversight to the 2022 Extended School Year program and became aware that Student was showing escalated behavior during the summer program. He did not de-escalate with prompts as quickly as he previously had. Staff reported that Student could not maintain regulated behavior and his behavior would ramp up again after he was able to comply and complete a task. Ms. Healy observed his class and consulted with staff. She and the staff hypothesized that his behavior issues could be caused by the different and less structured program provided during the summer. (Healy)

1. Ms. Muse did not work at the summer program, but received communication from Student’s program over the summer because she was his contact teacher. Staff reported concerns about Student’s behavior. (Muse) Ms. Graham worked in the same building where his program was located, and observed Student in the calm down space having some difficulty with regulating his behavior. (Graham)
2. Kimberly Crowell-Oravec has been the Special Education Coordinator at Middleborough High School since September 2022, although she began orientation during the summer 2022. She first became aware of Student when she was copied on an email from the ESY staff regarding concern over injuries that had been sustained by staff working with Student. She met with the program directors who recounted challenges that staff had had in working with Student during the summer. (Crowell-Oravec)
3. Ms. Healy was aware that transitions are difficult for Student and therefore, staff anticipated a challenging transition in the fall of 2022. Thus, Ms. Healy prepared by ensuring that supports were in place for Student. She made sure his communication devices were being used effectively and trained staff in safety care approaches for any needed de-escalation. Staff created a space for Student to cool down and implemented strategies suggested by Ms. Crowell-Oravec. Staff incorporated more sensory strategies and opportunities for breaks. The speech language pathologist set up his communication device. (Healy)
4. In September Ms. Crowell-Oravec consulted with the AIMs program and made some recommendations for interventions to try with Student. The interventions lead to limited success. Some would work for a week or a few days, but the same behaviors would re-emerge. Ms. Crowell-Oravec has observed Student’s classroom behaviors and has seen aggressions toward staff. (Crowell-Oravec)
5. By the end of September Ms. Healy was contacted by administrators including the building principal and Ms. Crowell-Oravec, and was told that staff had not seen a downward trend in Student’s interfering behaviors yet. Staff had been hoping to see Student settle into the program, but were instead seeing more escalation in behavior. (Healy)
6. Ms. Muse is currently Student’s teacher within the AIMS program for three of four daily blocks. There are six students (including Student) and three staff in the AIMS program this year. When Student returned to school in September, he was much more dysregulated than he had previously been. He could not sit at a table and complete work for long. Student’s transition from the bus is also much more difficult this year. He often has aggressive behaviors during that time, and sometimes requires assistance from 2-3 staff to get him into the building safely. Some mornings he starts the day in the calm-down room getting regulated. When he is calm he unpacks his belongings and then immediately goes to his individual work space where he works 1:1 with staff. He completes his daily routine and has his snack and lunch in the 1:1 setting with staff. Student continues to attend unified gym class. Although it is a preferred activity that he usually wants to attend, he has had difficulty attending in that setting this year. He often gets there late or has to be removed from class and escorted back to his calm-down space due to unsafe behavior or aggression in the gym setting. (Muse)

Ms. Muse and other staff have seen behaviors including scratching, pinching, grabbing, and pinching staff this year. (Muse, Graham, Blanchard, Crowell-Oravec) Ms. Muse has seen Student throw objects at staff and he has thrown them at her. She has seen staff punched with a closed fist in the chest, groin, and face. Student has hit her in the face. There is often no antecedent to the behaviors. There are upticks in his behavior at around 10:00 AM and then later in the day prior to his transition home. (Muse)

In addition to providing Student with a 1:1 environment for most of his day, staff have lowered academic demands on Student this year. Middleborough has modified his behavior plan, reward system, and sensory diet as well as his daily schedule and routine. Despite the interventions, staff have not been able to attain a decrease in Student’s aggressive behaviors. They have not seen a significant increase in his time spent on academic instruction. Even in a 1:1 setting, his dysregulation and behaviors prevent him from sitting at a desk and competing work. Student often gets out of his seat and tries to leave the room. He has bolted from the AIMS suite and gotten down the hall. Ms. Muse has seen a lot of regression in Student’s academic and daily skills including in his functional math skills. He can no longer demonstrate the skills he could last year. Further, for safety reasons, Student has been separated from his peers and no longer has many opportunities to interact with them. He is the only student in the program that requires the use of the calm-down room. He is the only student in the program that does not go to lunch in the cafeteria. Ms. Muse does not know of any other measures staff could put in place to assist Student. (Muse, Blanchard, Graham)

1. Ms. Graham continues to provide Student’s speech language services during the current school year, as well as consultation to his classroom and team, and she programs his iPad/communication device. At the beginning of this year, Student continued to receive his speech services in the classroom with the entire group because that model had previously been successful. Due to an increase in behavioral difficulties, he was often not in the room or not able to access the services. Ms. Graham has observed Student bolting out of the classroom. She has observed him engaging in aggressive behaviors toward staff. She noted a significant increase in behaviors from the prior school year. He has had difficulty self-regulating. Last year Student could be re-directed using behavior charts to earn rewards such as breaks. This year, the same techniques were not effective in re-directing his behavior. Ms. Graham tried to get Student to use his device to request what he wanted and tell staff how he was feeling. She recommended that language used with Student be concise, direct, consistent, and easy for him to understand. She worked with behavioral staff to come up with verbiage for staff to use with him. She has sought to determine if there is a communication frustration causing Student’s dysregulation. She has used pictures and visual representations of Student’s schedule and reduced verbal stimuli when working with him. She worked with other teachers and the behavioral team and has used the behavioral system recommended by the behavior team. (Graham)

Ms. Graham noted that Student has not been able to use his communication device (an iPad which is in a case with a handle) in recent months. Student has used the handle and swung the device at staff. He was provided with pictures of highly requested items or feelings to use in place of the iPad. Ms. Graham noted that it has been increasingly difficult for Student to communicate this year. (Graham)

1. Ms. Blanchard, the RBT, currently spends about 2-2.5 hours per week in Student’s program, primarily focusing on Student. She consults with the teacher or staff, observes Student and helps to support staff, offering ideas and strategies. She creates the data sheets that staff use to collect data. The data sheets define the behaviors that staff track. She has also worked with the occupational therapist to create sensory interventions for Student. (Blanchard)

Student had a behavior plan last year which had been updated in April 2022. (S-10) It was updated on October 28, 2022 because it was not working effectively. To update the plan, Ms. Blanchard and Ms. Hill (the BCBA) reviewed data and talked to staff. The plan was re-structured to provide a calm-down procedure. Staff noticed the compliance tasks required by the previous plan were not helping Student to calm down and regulate himself, so it was removed from the plan. (S-12, Blanchard)

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This year, Ms. Blanchard has modified the seating arrangement used for Student’s academic instruction. Previously he sat at a round table beside a staff member. He now uses a longer table to give him more space and staff sits across from him. (Blanchard, Crowell-Oravec) Ms. Blanchard has not been able to find interventions that work consistently. Last year she accompanied Student on walks around the building. Student is not able to do that this year due to concerns for the safety of staff and Student. This year he can only sit for a few minutes at a time. He now spends a great deal of time in the calm-down room. (Blanchard)

Ms. Blanchard has not witnessed Student aggressing toward peers, but has seen him scratch and kick staff, and has observed him posture, or move toward staff without making contact. She described Student’s behaviors this year as more intense than last year. He sometimes requires the support of more than one staff person. He also requires more staff prompting this year to complete tasks. Ms. Blanchard noted that the overall numbers of Student’s day-to-day aggressions, as reflected by the raw data shown at S-20, is significant. She noted that on some days the number of aggressions are low and some days they are very high. She concluded that the impact of his behaviors on his day is significant. His behavior plan requires that he go to the calm down room to regulate whenever there is an aggression which impacts his access to services. She noted that although Student does not frequently engage in throwing and bolting, the main behaviors staff are targeting, pinching, hitting, and posturing, have increased and are occurring at a high frequency. (Blanchard)

1. Student’s language arts progress report dated November 15, 2022, states, “Due to an increase in unsafe behaviors at school, data collected to determine Student’s progress on this goal is limited at this time, therefore, progress cannot be reported this quarter. It is the hope of the Team that [Student] makes progress in the immediate areas of need such as safety, communication, behavior and sensory regulation so that he can address other areas of need within this IEP.” In the area of functional communication, it is noted that Student was not able to attend group sessions due to behaviors. It explained that Student had been reluctant to use his ACC device to initiate or request items and was using more vocalizations and signs to request and initiate. Student was reportedly able to use his device with prompting to express feelings on 3 of 4 opportunities. His math progress report contained the same language as his language arts progress report regarding an increase in unsafe behaviors at school. It noted changes in Student’s environment from a small group to a 1:1 or 2:1 setting, adjustments in his behavior plan and systems of reinforcement, and modifications to his daily schedule. It stated that when regulated Student can complete a variety of academic and functional based skills, but his success varies widely due to dysregulation and an increase in unsafe behaviors. The daily living progress report included the language cited above regarding an increase in unsafe behaviors at school. It noted that during that quarter, Student required full physical support during nearly all transitions. When Student was regulated he required one staff member holding his hand or arm to transition, as his self-awareness and proximity to others is challenging and the potential of unpredictable aggressive behavior toward peers and staffing has increased. When Student is dysregulated and unsafe, he can require two staff utilizing “Safety Care physical management” to transition to the de-escalation area. (S-18)
2. Student’s January 26, 2023 progress reports are largely the same as the prior quarter’s with respect to behaviors. His language arts report is the same as his progress report dated November 15, 2023. His January 26, 2023 functional communication progress report states that Student is unable to attend group sessions and has been accessing individual sessions. It noted that he was using his AAC device to initiate or request items with 2 verbal cues and using more vocalizations and signs to communicate needs. Student’s mathematics report states that Student was able to use visual supports and his Touch Chat app to identify and match the correct coin with 50% independence and 60% accuracy. It stated that Student has many relative strengths in his mathematics skill. However, data and opportunity to practice those skills had been limited due to frequency of behaviors during academic time. His daily living progress report dated January 26, 2023, states that Student continues to require moderate to full physical support from 1-2 staff during transitions to nearby locations within his classroom suite. He requires reminders to maintain personal space, walk slowly, stay near staff, and maintain safe hands during most transitions. Student could recall and answer questions about recent events such as what he ate for lunch with minimal to moderate prompting and use of his total communication approach. He was not able to participate in his classroom’s weekly cooking lessons due to safety concerns, but did participate in helping to prepare his snack and lunch and cleaning up with moderate to full support. (S-18)
3. Student’s transition progress report dated January 26, 2023, states Student rarely requests the bathroom, so staff attempt to toilet on a regular schedule to avoid accidents. He required moderate to full physical support to transition safely and appropriately to his classroom and locker. He was able to engage in some leisure tasks such as lounging on a comfy chair, completing a simple puzzle, looking at a book, but his success with doing those activities safely and for increasing amounts of time was inconsistent. Student was able to receptively identify almost 10 familiar staff members using his total communication approach. (S-18)
4. The Team convened on December 6, 2022 for an annual IEP meeting.[[5]](#footnote-5) Middleborough proposed a 45-day extended evaluation to determine if the high school AIMS substantially separate educational program continued to be an appropriate educational placement for Student. (S-13) Ms. Healy explained that the goal of the extended evaluation was to get a better understanding of what was causing Student’s behaviors. After the meeting Middleborough issued releases for different collaboratives and did not receive consent. (Healy)

The district believed that Student may benefit from a more restrictive placement with staffing and supports not available in his current placement. Mother agreed to consider placement options but was not sure whether a change in placement would be Student’s best interest. Middleborough staff noted opined that Student’s placement was not the most appropriate for him given his current presentation in the classroom, even with multiple modifications to content and methodology of instruction that have been employed during the school year. (S-13)

The proposed IEP provided the same goals and grid services as the previous IEP with updated measurable annual goals and benchmark/objectives. On January 6, 2023 Mother partially rejected the proposed IEP, writing “review aggression since meeting and academics” and “will take additional time to look into schools due to [Student]’s latest seizure.” (S-13)

During the meeting, Student’s attorney requested that the additional accommodation of medication be added to Student’s IEP. Middleborough had previously received an order from Dr. Benjamin Caplan, MD for the administration of 2.5 mg of Tetrahydrocannabinol gummies at 10:00 a.m. daily. Middleborough staff stated that medication administration is never outlined in the accommodations section of the IEP as it is not for the educational Team to determine what type, when or how medication is administered as an accommodation to access the curriculum. (S-13)

1. The Team re-convened on March 7, 2023. (S-15) Several months had passed and Middleborough did not believe that Student was receiving appropriate services and did not believe that it could provide Student with a free appropriate public education. Student was not making gains. (Healy) Ms. Crowell-Oravec noted Student’s progress reports showed two consecutive terms in which he was not making progress. (Crowell-Oravec)

The IEP contained similar goals to the previously proposed IEP with some modified wording in some of the benchmarks/objectives. The Service Delivery Grid was the same as the previously proposed IEP except that the B Grid service of Unified Arts was removed. The IEP proposed an out-of-district placement. Mother noted her opinion that the data collected by Middleborough did not provide an accurate depiction of Student. She verbally rejected the proposal at the meeting. Since that time Mother has signed some releases and packets have been sent to several potential placements. (S-15, Healy)

1. Middleborough staff are of the opinion that Student is not currently receiving a free appropriate public education in the least restrictive environment and that placement in an out-of-district special education school would provide him with same. Ms. Muse opined that an out of district placement would provide Student with more specialized instruction in a environment where he would benefit from more highly trained staff. (Muse)
2. Ms. Graham concluded that Student has not been able to make progress on his communication goals this year. In her opinion, Student would benefit from a structured educational placement that would help him increase his communication skills alongside other students who have similar complex communication needs and use similar devices. She finds that he requires more intensive services than he is currently receiving, delivered in a placement that would provide communication skills embedded throughout his day. Additionally, staff and other students would be working with similar devices throughout the day. (Graham)
3. Ms. Blanchard has raised her concern that Middleborough is not meeting Student’s needs to her supervisor. Because of the levels of aggression Student is showing, he is spending more time with just staff and not peers. She thinks he requires a smaller group, a smaller number of people in the program, a better staff to student ratio, more consistent staff, and more resources. (Blanchard)
4. Ms. Crowell-Oravec, who has previously worked at an out-of-district placement with students whose needs were similar to Student’s, believes he would benefit from being in a smaller school environment. He would have greater access to a typical school environment than he has at Middleborough and would be able to participate more with his peers. Student is not able to access the curriculum in his current classroom. She finds that he requires more discrete trial techniques that are best implemented in a 1:1 setting. (Crowell-Oravec)
5. Ms. Healy supports the recommendation that Student attend an out-of-district placement because she hopes such a placement could better support Student with respect to his communication and behavioral needs. She believes that an out-of-district placement will have staff with more experience working with students with profiles such as Student’s than Middleborough. She added that such placement would be able to implement different, more beneficial communication strategies, an extremely important factor given her opinion that Student’s behavior is caused by communication difficulties. Additionally, she believes that an out-of-district program would be able to carry out strategies used in one classroom throughout the day, including behavioral and communication techniques. She noted that Student has the most complex needs of any Student in the AIMS program. There are other students with autism who use communication devices in the classroom, but Student’s level of needed support is different than the other students. Ms. Healy would be concerned if Student remained at Middleborough because she has not seen him make progress this year. She is concerned that Student is not accessing his education in his current placement. She his concerned about his inability to complete a task and is concerned for his safety and that of others. Student has a cycle where he escalates and eventually de-escalates only to escalate again, and that pattern continues all day. She does not believe that adding staff to the existing AIMs program would make the program appropriate for Student. He already has a 1:1 aide and the program has multiple staff. In Ms. Healy’s opinion, Student requires different interventions and a staff more experienced in his complex constellation of needs. Given that he is almost 18 years old and will only be eligible for special education services for a few more years, Ms. Healy wants him to be able to become independent in as many skills as possible (Healy)
6. Mother testified that Middleborough did not mention Student’s escalating behavior to her until she requested an accommodation on or around October 26, 2022, namely that the school administer cannabis to Student.[[6]](#footnote-6) She testified that the first time the school mentioned Student’s increase in aggressive behavior was November15, 2022, although she stated that she had heard about his aggression once or twice in the fall of 2022. Mother testified that she is experienced with creating charts and graphs as she does data analysis in her job. She asserted that the behavioral graphs created by Middleborough do not show an upward trend in aggressive behaviors, and that they indeed disprove Middleborough staff’s testimony regarding such upward trend. She stated that Student’s daily communication logs refute Middleborough’s claim that Student was “violent” every day. Mother reported that she was called to the school due to Student’s aggressive behavior on April 11 and May 8. She further noted that the first day of the Hearing was the first time she had heard about Student spending most of his day in a room separate from other students[[7]](#footnote-7). (Mother)
7. Ms. Crowell-Oravec is responsible for signing staff injury incident reports and sending them to the central office. She initially kept such reports relating to Student in a file, and then began documenting the injuries on a spreadsheet. (S-19, Crowell-Oravec) The documented staff injuries occurred between September 26, 2022 and April 12, 2023. There are sixty-eight incidents reported. Many of the incidents involved staff being scratched and/or pinched or hit and resulting in bruising, bleeding, and swelling. Other reports are of staff being grabbed and squeezed. There are reports of sore backs and muscle soreness due to Student’s aggressions. There’s one report of staff having hair pulled out. There are reports of staff being hit in the face, resulting in bleeding. There are multiple reports of staff receiving bloody noses. There are reports of a bloody lip and fingers. There is a report of eye trauma. There are reports of thumbs and fingers being bent back. There is a report of a staff being struck in the jaw with a closed fist. There are reports of staff being kicked in the groin and chest. There are reports of a staff being hit in the head and having had her glasses knocked off. (S-19)

**FINDINGS AND CONCLUSION:**

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

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”[[10]](#footnote-10) FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”[[11]](#footnote-11)

Student’s right to a FAPE is assured through the development and implementation of an individualized education program (“IEP”).[[12]](#footnote-12) An IEP must be custom-tailored to address a student’s “unique” educational needs in a way reasonably calculated to enable him to receive educational benefits.[[13]](#footnote-13) For an IEP to provide a FAPE, it must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”[[14]](#footnote-14) A student is not entitled to the maximum educational benefit possible.[[15]](#footnote-15) Similarly, the educational services need 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.”[[16]](#footnote-16) The IDEA further requires that special education and related services be designed to result in progress that is “effective.”[[17]](#footnote-17) Further, a student’s level of progress must be judged with respect to the educational potential of the child.[[18]](#footnote-18)

Massachusetts special education regulations provide that specially designed instruction and related services described within the IEP must be sufficient to “enable the student to progress effectively in the content areas of the general curriculum.”[[19]](#footnote-19) Massachusetts also requires that the special education services be designed to develop a student’s educational potential.[[20]](#footnote-20)

The IDEA requires that “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 20 USC 1412(a)(5); 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast, 546 U.S. 49,* 126 S. Ct. 528, 534, 537 (2005) In this case, Middleborough is the party seeking relief, and as such has the burden of persuading the Hearing Officer of its position.

In the context of the foregoing legal framework, I turn to the issue before me. In the instant case Middleborough seeks to change Student’s placement from its substantially separate AIMS program to an out of district placement. The proposed IEP contains services similar to those that were contained in prior accepted IEPs, but calls for placement in a separate day school. [[21]](#footnote-21)

Middleborough witnesses credibly testified that Student’s aggressive behavior and dysregulation have increased significantly during the 2022-2023 school year. They described the negative educational consequences which have resulted from Student’s increased behaviors, including his missing out on academic instruction and being separated from his peers. They further attested to the multiple instances of staff injury that resulted from said behaviors. They described the modifications and strategies that they have implemented to assist Student in accessing the curriculum this year and the lack of success yielded by such interventions.

Ms. Blanchard credibly described modifications made to Student’s reward system, Behavior Plan, and data collection forms. She described consulting with the staff in the AIMS program and recommending new interventions. She discussed working with the occupational therapist to create sensory interventions for Student. She credibly testified that despite the changes made, she was not able to identify interventions that worked consistently with Student.

Similarly, Ms. Graham testified that she consulted with the AIMS staff to suggest using simplified, concise and consistent language with Student to assist in his comprehension. She consulted with behavior staff and sought to determine whether the increase in behaviors was due to communication frustration. She attempted to implement the reward system which was effective in working with Student the prior year.

Ms. Muse reported that Student’s aggressive and dysregulated behavior increased so much that AIMS staff have had to modify his schedule and routine. She noted that his academic instruction was being provided in a 1:1 setting due to the increase in his aggression and his inability to attend for long. She noted that Student’s academic time is limited by the amount of time that he has spent in the calm-down room due to aggressive behavior and dysregulation.

Student’s progress reports for the first and second term, along with the uncontested testimony of Middleborough’s witnesses, demonstrate that Student was not making effective progress in any of his goal areas. (S-18) The data collected by Middleborough supports its contention that Student continues to have a high number of aggressions per day. (S-20) The credible testimony of Student’s teacher’s and administrators further supports Middleborough’s position that Student’s episodes of aggression have increased, negatively impacting his ability to access his education, and staff have not been able to identify effective interventions to enable Student to access his education.

Middleborough has demonstrated that it has made multiple attempts to modify Student’s current program to enable Student to access his education. None has been successful. Middleborough proposed an extended evaluation to determine whether there were additional interventions that it could implement. Parent did not consent to the evaluation. Parent has not provided any evidence as to additional supports that Middleborough could implement to make Student’s current program appropriate for him.

I find that Middleborough’s proposal to place Student in an out-of-district placement is appropriate, and that his needs cannot be appropriately met in the less restrictive AIMS program. Middleborough has demonstrated that it is not able to meet Student’s needs and he requires more intensive services than it can provide within its setting. Therefore, Middleborough’s proposal to place Student in an out-of-district placement, albeit a more restrictive placement than his current placement, is reasonably calculated to provide Student with a free appropriate education in the least restrictive environment.

Although Parent’s attorney asked each of the Middleborough’s witnesses if they were lying (and accused them of lying), Parent did not present any evidence that would suggest that the witnesses were untruthful. Parent did not refute the testimony that Student was no longer able to access his educational program. Parent stated that the people who knew Student best at Middleborough did not testify at the hearing, but she did not call any Middleborough witnesses, relying instead only upon her own testimony. Although Parent disagreed that Middleborough’s data showed an increase in aggressive behavior by Student, the record also contained credible and unrefuted testimony and documentary evidence regarding such increase.

**ORDER**

For the foregoing reasons, I find that the IEP and placement proposed by Middleborough Public Schools for the period from March 7, 2023 through March 6, 2024 is reasonably calculated to provide Student with a free appropriate public education in the least restrictive environment.

Although Middleborough has met its burden of showing that its proposed IEP and placement will provide Student with a free appropriate public education in the least restrictive environment, the evidence showed that Student has not yet been accepted into a school.  Therefore, the Parties are urged to work cooperatively to complete all outstanding admissions requirements and identify an appropriate placement



Dated: June 2, 2023

1. Middleborough had previously filed an expedited Hearing Request regarding Student on March 13, 2023. It withdrew that request and filed the Hearing Request in this matter subsequently. (See BSEA #2308487) [↑](#footnote-ref-1)
2. The Additional Information section of the IEP indicates that Student’s “communication services and speech/language consult services are written as ‘minutes/cycle’ to allow flexibility in the provision of services based on Student’s needs. It also facilitates the generalization of communication strategies across environments.” (S-8) [↑](#footnote-ref-2)
3. Parent’s acceptance is not dated. The Response section has a date stamp indicating that it was received by Middleborough on January 24, 2022. [↑](#footnote-ref-3)
4. Ms. Blanchard is supervised by board certified behavior analyst (BCBA), Elizabeth Hill. Ms. Hill analyzes behavioral data and graphing, and Ms. Blanchard and Ms. Hill collaborate to write behavioral support plans, data sheets, and suggest new interventions. (Blanchard) [↑](#footnote-ref-4)
5. The Team meeting was originally scheduled for November 7, 2022, but Mother requested that the meeting be postponed in order for her to obtain legal representation. The Team convened on the next date on which all Team members, including Parent and her attorney, were available. (S-13) [↑](#footnote-ref-5)
6. Although Parent testified that Middleborough did not inform her of Student’s increased behavioral issues until after she requested the use of cannabis as an accommodation, this issue was not raised as a Hearing issue, and thus is not addressed in this Decision. [↑](#footnote-ref-6)
7. The IEP proposed after the December 6, 2022 meeting and the IEP proposed after the March 7, 2023 both describe that Student had been receiving 1:1 instruction in a separate classroom since mid-October 2023. (S-13, S-18) [↑](#footnote-ref-7)
8. 20 USC 1400 *et seq*. [↑](#footnote-ref-8)
9. MGL c. 71B. [↑](#footnote-ref-9)
10. 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007) [↑](#footnote-ref-10)
11. 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c) [↑](#footnote-ref-11)
12. 20 USC 1414(d)(1)(A)(i)(l)-(lll); *Honig v. Doe*, 484 U.S. 305 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) [↑](#footnote-ref-12)
13. *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir.1993) [↑](#footnote-ref-13)
14. *Endrew F. v. Douglas County. Sch. Dist.*, 580 U.S. \_\_ (2017) [↑](#footnote-ref-14)
15. *Rowley*, 458 U.S. at 197 [↑](#footnote-ref-15)
16. *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991) [↑](#footnote-ref-16)
17. 20 USC 1400(d)(4); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F. Supp.2d 479 (D. Mass. 2007)(the educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as "special needs”) [↑](#footnote-ref-17)
18. *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008) [↑](#footnote-ref-18)
19. 603 CMR 28.05(4)(b) [↑](#footnote-ref-19)
20. MGL c.71B; 603 CMR 28.01(3) [↑](#footnote-ref-20)
21. The Placement Consent Form specifies a public day school, but Ms. Healy testified that Middleborough has sent packets to both public and private schools. (Healy, S-15) [↑](#footnote-ref-21)