COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

SPECIAL EDUCATION APPEALS

**Student v. Melmark New England & BSEA # 2508471**

**Bourne Public Schools**

**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.

**RELEVANT PROCEDURAL HISTORY**

Student’s grandparents and Guardians (P-4) (hereinafter, Guardians or Parents) requested an accelerated hearing on February 14, 2025 and the Hearing was scheduled for March 17, 2025. The Hearing proceeded via Zoom (by agreement of the parties) on March 17 and 18, 2025. On March 25, 2025 the Parties submitted their closing arguments and the record closed.

Those present for all or part of the hearing were:

Guardian 1

Guardian 2

Sylvia Worrell, MD Westborough Behavioral Healthcare Hospital

Kristin Donahue Director of Special Education and Student Services, Bourne Public Schools

Patricia Cosgrove Consultant, Bourne Public Schools

Rita Gardner President/CEO Melmark New England

Katherine Salvatore Executive Director, Melmark New England

Kimberly Duhanyan Senior Director of Residential Services, Melmark New England

Helena Maguire Vice President/COO Melmark New England

Laura Gillis Attorney, Parents

Colby Brunt Attorney, Bourne Public Schools

Joshua Krell Attorney, Melmark New England

Eric MacLeish Attorney, Melmark New England

Ellen Muir Court Reporter

Catherine Putney-Yaceshyn Hearing Officer

The official record of this hearing consists of: Parents’ exhibits marked P-1 through P-11; Bourne Public Schools’ exhibits marked B-1 through B-13; Melmark New England’s exhibits marked M-1 through M-28, M-30-M-38, and M-40-M-43; and approximately 7 hours of recorded oral testimony.

# ISSUE

1. Whether Student’s “stay put” placement is Melmark New England.

**SUMMARY OF THE EVIDENCE**

1. The student (hereafter, “Student”) is a 19-year-old student who has been placed residentially at Melmark New England (hereafter, Melmark) since on or around April 1, 2024. She has a complex profile including diagnoses of autism spectrum disorder, level 2; intellectual disability, mild; attention deficit hyperactivity disorder, combined type; reactive detachment disorder; fetal alcohol syndrome, by history; and specific learning disability in reading, writing, and mathematics. (P3, B-1)
2. Prior to Student’s placement at Melmark, she was placed at Easter Seals. When she was terminated from Easter Seals, Bourne hired Patricia Cosgrove, a consultant with experience in placing students with complex profiles, to assist in its search for a successor placement. Bourne sent 23 packets to potential placements and Student was accepted only at Melmark. (Donahue, Cosgrove.)
3. Rafael Castro, PhD and Priscilla G. Galera, Psy.D., conducted a neuropsychological and educational assessment of Student on October 27, 2023[[1]](#footnote-1). (P-5, B-8, M-25) They provided feedback from their evaluation on November 2, 2023 and issued their report on or around February 28, 2024. (Cosgrove) (P-5, P-8,M) Notably, on the Youth Self Report, Student endorsed thinking about suicide and engaging in self-injurious behavior, feeling worthless, and increased feelings of sadness. The report notes that at the time of the evaluation Student was on an inpatient psychiatric unit due to increased reports of suicidal ideation. In the PQ-16, Student endorsed items related to hearing unusual sounds; being confused if her experience was factual or imaginary; feeling that she is not in control of her thoughts, and seeing things that others do not. She stated that she draws “silly animals” that come to life in the form of 3D images and help her remain calm. She stated that she sometimes hears the animals talking to her. Sometimes they say “mean” things such as telling her to spit at her teacher or to burn the school down. Student stated that she is sometimes scared of the voices and she heard the voices during the evaluation. (P-5, B-8, M-25)

Student endorsed suicidal ideation and a history of self-injurious behavior and suicide attempts. She noted a history of headbanging and stated she had cut and burned herself and had previously tied something around her neck and tried to hang herself from a windowsill. She recounted preparation for suicide including collecting pieces of clothing and writing letters to staff and peers at her prior placement. She explained that during prior physical restraints she had bitten staff and tried to throw them to the ground. (P-5, B-8, M-25)

Dr. Castro noted that Student had recently had an increase in externalized behaviors, had threatened the safety of herself and others, and had engaged in self-injurious behaviors. He concluded that the combination of her intellectual and learning profile and her affective psychiatric presentation continued to require intensive supports within a specialized setting. He recommended that Student be placed in a specialized therapeutic program “to accommodate for the uniqueness and magnitude of her psychiatric presentation.” He noted she would require the guidance of clinical staff to develop plans to address her emotional needs as well as special educators familiar with the needs of adolescents with social emotional and cognitive challenges as their primary difficulty. Dr. Castro reported that Student required group psychotherapy to equip her with coping skills. He suggested that Student would benefit from dialectical behavioral therapy (DBT) to teach her tolerance skills and to mitigate self-injurious thoughts and suicidal ideation. He further recommended individual DBT. He noted that the “magnitude and persistence of Student’s markedly impulsive behavior and unstable mood have reached clinical significance which is contributing to all aspects of her neuropsychological functioning.” He recommended that a psychiatrist or psychopharmacological prescriber re-examine Student’s current medications as soon as possible. He further recommended interventions aimed at promoting safety and building social skills, specifically, instruction targeting social interaction and pragmatic skills from a speech language pathologist. He suggested that Student would benefit from a social skills group to practice social skills with same-age peers with similar profiles. (P-5, B-8m M-25)

1. Student was accepted to Melmark by letter dated January 8, 2024. She was provided with a start date of April 1, 2024. (M-2) Between receipt of the acceptance letter and Student’s starting at Melmark, Ms. Cosgrove spoke to Melmark staff regularly. She provided Melmark with all documentation that Bourne had pertaining to Student. On February 28, 2024, upon receipt of Dr. Castro’s evaluation, Ms. Cosgrove provided it to Elizabeth McRae, Melmark’s Administrator of Program Services. (Cosgrove)
2. On or around March 18, 2024 Bourne proposed an “Administrative IEP for the purpose of Change in Placement.” The N1 states that the IEP includes recommendations from Melmark based on its initial findings. It notes that Bourne had provided additional staffing for Student while she was at the Easter Seals residential program. Melmark was not recommending the same level of individualized staffing support and thus that service was removed from the IEP. Parents accepted the IEP and placement on March 19, 2024. (M-3)
3. Pursuant to Student’s placement, both Bourne and Melmark signed a document entitled “Monitoring & Placement Agreement for [Student]”. The document acknowledges that Melmark had been identified as an appropriate placement at the time the agreement was signed. The agreement included the following relevant section.

In carrying out their obligations under this Agreement and with respect to the Student, the School (Melmark) and the LEA (Bourne) shall comply with the applicable provisions of Chapter 71B of the Massachusetts General Laws, 603 CMR 18.00, 603 CMR 28.00, and 808 CMR 1.00 of the Code of Massachusetts Regulations issued thereunder, as well as any applicable policy statements and directives issued by the Department of Elementary and Secondary Education and the Operational Service Division. (M-5(f))

The agreement also contains the following provision.

In the case of an emergency, the Student may be discharged immediately provided that the LEA has been given notice and a reasonable opportunity to convene an emergency IEP team meeting. Depending upon the nature of the emergency, the School (Melmark) will consider a request from the LEA (Bourne) to delay termination of the Student for up to 14 days so that the LEA can convene the IEP meeting. Further, by mutual agreement between the School and the LEA, emergency termination can be further delayed for not more than an additional 14 days. In no event shall emergency termination be delayed beyond 28 days from the LEA’s receipt of emergency discharge notice. (M-5, 13(b))

The agreement was signed on or around March 24, 2024 (M-5)

1. Melmark is approved by the Massachusetts Department of Elementary and Secondary Education. (DESE) (Gardner) As part of the approval process, schools are required to sign a statement of Assurances. Among them is, “Legal Status. We assure the Department that we adhere to all applicable provisions of 603 CMR 18.00, 603 CMR 28.00, and 603 CMR 46.00.” (P-11)

Melmark serves students with autism spectrum disorders and intellectual disabilities in both day and residential settings. It does not serve students with primary psychiatric diagnoses. Some students demonstrate self-injurious and aggressive behaviors. (Gardner) Most of its clinical staff are made up of board certified behavior analysts as Melmark’s primary methodology for teaching and treatment is applied behavior analysis (ABA). They have one licensed psychologist who mostly works as part of their consulting staff. Melmark uses restraints when necessary and staff are trained in the nonviolent crisis prevention (CPI) curriculum. (Salvatore)

1. Student began attending Melmark on April 1, 2024. (M-15, Parent) During Student’s first weeks there, incidents occurred that Melmark staff deemed much more consistent with a psychiatric presentation than autism. Student made disturbing statements to staff about wanting to die and engaged in self-harm that staff described as pre-meditated and intentional. Student tried to use objects in her environment to hurt herself. (Salvatore, Duhanyan)
2. On May 7, 2024, Student was able to extract a metal spring from a toy she had gotten during an outing. She stuck the spring in her leg and had to go to the hospital to have it removed. Ms. Salvatore was concerned by the level of planning required for Student to remove the spring, hide it, and stick it in her leg when nobody was watching. (Salvatore, M-7, pg. 126) There was an emergency Team meeting on May 8, 2024 during which Melmark proposed providing Student with 1:1 staffing. (Parent) Bourne had agreed to provide the same prior to the meeting. (Donahue)
3. The Team convened on June 14, 2024 for an annual review meeting. The N1 indicates that Bourne is continuing to propose a residential out-of-district placement to address Student’s “academic, social skill, safety/behavioral, emotional regulation and life skills across setting [sic] to facilitate her acquisition of critical skill development to facilitate her safety to self and others while addressing academic and therapeutic needs.” The IEP included the 1:1 paraprofessional that had been added to address safety concerns. (B-1)

The IEP that resulted from this meeting was for the period from June 14, 2024 through June 13, 2024. It contains goals in the areas of behavior, adaptive behavior, communication, academic, daily living skills, personal responsibility, and vocational. The A grid provides for consultation with the speech and language therapist 1 x 30 minutes per week. The C grid proposes educational services provided by special education teacher/ABA counselors 5 x 6.5 hours per day; 1:1 ABA support by a special education teacher/ABA counselors/program coordinator 7 days per week x 24 hours per day; and residential services with a program coordinator/ABA counselors 7 days per week for all non-school hours. Parents accepted this IEP and placement in full on July 30, 2024. (B-1)

1. During the summer of 2024 Student had periods of time when she was successful. (Duhanyan) However, in August she began engaging in pica, the ingesting of inedible objects. On August 1, 2024 Student removed the metal end and eraser from a pencil and put her hand to her mouth, presumably ingesting the object. She was taken to the emergency room for assessment. (Salvatore, M-7, pg. 132) On September 11, 2024, a police officer came to Melmark and reported that a suicide hotline had received a notification from Melmark’s address from an alias Student sometimes used. A staff member informed the officer that Student had a history of making suicidal statements and described the protocols in place for Melmark to deal with such statements. The staff member then checked on Student and confirmed with another staff member that Student appeared to be having a good day and was not in distress. (Salvatore, M-7, pg. 134) On September 11, 2024, Student ingested the chain portion of a metal key chain. She was taken to the emergency room. (Salvatore, M-7, pg. 136) On September 18, 2024, Student punched holes in a wall and fractured her finger. (Salvatore, M-138) On October 14, 2024, Student took two pennies from the kitchen counter and put one in her mouth. She swallowed one penny and staff removed the other. Student went to the emergency and returned to Melmark that evening. (Salvatore, M-7, pg. 140) On October 22, 2024, Student took three coins from the office and put them in her mouth. Staff tried unsuccessfully to remove them. She spit out one coin and swallowed the other two. Staff called Student’s doctor’s office who advised that she could wait until the following day to seek treatment. She was brought to the hospital the next day and advised to monitor bowel movements to ensure the coins pass. (Salvatore, M-7, pg. 142) On November 15, 2024, Student sprained her ankle after kicking an item. (Salvatore, M-7, pg. 144)
2. By November and December there were instances when Student had hallucinations and delusions, during which she talked about “the mailman” and other people in her head telling her to engage in self-harm or injury to others. (Duhanyan) As part of Student’s CBT therapy she was encouraged to write in a journal. Initially she was using journaling in a functional way. Over time, Ms. Duhanyan became concerned by what Student was writing in her journal. (Duhanyan) Ms. Salvatore was made aware of the journal entries by one of Student’s classroom staff. She described the entries as frightening. She did not inform Parents or Bourne about the journal entries. (Salvatore)
3. Melmark staff regularly updated Student’s behavior support plans to address behaviors that they were observing. (Salvatore, M-12-M-14) Although Student’s IEP required 1:1 staffing, there were times that Student was being assisted by multiple staff by necessity. When she engaged in challenging behavior she could require at least two staff. When she required a protective hold, it might require more than two staff. She would sometimes require two staff to successfully transition from the residence to school. (Salvatore)
4. On December 30, 2024, after going to bed, Student told “staff A” that she had swallowed a screw. Student told Ms. Salvatore that she had found the screw and hidden it hoping it was sharp enough to cut herself with, but that it was not, so she swallowed it instead. Student was brought to the hospital where x-ray imaging showed she had consumed a 1.25 inch screw. Student informed hospital staff that she wanted to die, but Melmark staff verified “that this was typical of her current profile and she had 1:1 staffing.” Student was released back to Melmark the same morning. Student returned to the hospital on January 2, 2025 for follow-up imaging and was discharged with instructions to watch for “alarm symptoms” including fevers, chills, abdominal pain, bleeding, etc. which could indicate obstruction/perforation/mucosal injury. She was further directed to take MiraLax twice daily with vigorous hydration. (M-7, pg. 148, M-43)
5. In January 2025, while Ms. Salvatore was in Student’s residence, she observed Student bolt down the stairs ahead of a staff member. Another residential staff person was cooking dinner and using knives, which are usually locked up. Student “made an effort to get access to the knife.” Ms. Salvatore was able to get between Student and the knife and other staff were available to assist. (Salvatore) On January 13, Student tried to post, on the refrigerator in the residence, a list of staff and students that she wanted to kill. A staff member removed it. On January 27, 2025, during an episode of challenging behavior Student yelled that she was going to get a gun and shoot up the school, and that all staff deserve to be shot. Student does not have access to a gun on the Melmark campus. (Salvatore, M-7, pg. 154)
6. Melmark staff convened a meeting on or around February 1, 2025, during which they put together a Crisis Emergency Management Plan in response to their concern about Student’s escalating behavior. They were looking at ways to keep Student safe. The plan described Student’s recent behaviors; current supports provided by staff; and criteria to guide staff as to when an emergency 9-1-1 call should be made due to Student’s behavior. (M-19)
7. On the morning of February 7, 2025, senior staff were notified that Student was having a difficult time in the residence. Helena Maguire went to the residence to assist and Student was almost ready to leave when she arrived. Three staff members walked with Student from the residence to the school building, two standing shoulder to shoulder, and one behind. As they were crossing the street where cars and buses were driving, Student began to lunge forward and propel her body toward the oncoming buses. The three staff were able to physically move Student away from the buses to the sidewalk and accompany her into the foyer of the school. Once inside, Student dropped to the ground and aggressed toward staff. She banged her head on the floor and four people restrained her. It took approximately 30 minutes before Student could be successfully released. (Maguire, Duhanyan)

Ms. Duhanyan checked in with Student after the incident and she seemed to be doing better. Later on, Ms. Duhanyan was in a meeting with Ms. Salvatore and they heard a staff member call out and saw Student run by the office. Ms. Salvatore ran out into the hallway and observed Student had attempted to bolt from the building. Staff members were able to block her. She then aggressed on staff, including punching and biting, and was placed in a supine restraint. She was trying to bang her head on the floor. Staff brought a mat to place under her head. It took five people to restrain her in a protective supine hold. She cycled in and out of PNES episodes. Student was in a great deal of distress and was not getting better. She was continuing to try to injure herself even within the hold. Ms. Salvatore tried to speak to her and Student told her, “Mailman’s coming and he's bringing an AK-47, and we're going to shoot up the school”. Student was continuing to get worse. She was making threats and was hallucinating. She was clearly in crisis. She stated she did not feel safe. Ms. Duhanyan called 9-1-1. The EMTs mechanically restrained her when they arrived because she continued to try to harm herself. They took her to the hospital where she was sectioned. (Duhanyan, Salvatore, M-7, pg. 163)

1. Ms. Salvatore sent a letter to Parents and Ms. Donahue, dated February 11, 2025, providing written notice of the emergency termination of Student’s placement at Melmark, effective immediately. The letter indicated that Student’s behavior was “presenting a clear and present threat to the health and safety of herself and others despite Melmark’s best efforts to avoid having to terminate the placement.” It described the behaviors Student had engaged in over the past nine months, culminating in Melmark calling 9-1-1 to provide transport to the emergency room after Student made repeated attempts to harm herself and to elope from the building. The letter requested that Bourne convene an emergency Team meeting to discuss next steps. It further noted that Melmark believed Student required a comprehensive psychiatric evaluation, therapeutic care, and a medication evaluation, as Student was presenting with mental health symptoms that resulted in her unsafe actions. (M-23)
2. Melmark staff believed that Student presented a clear and present threat of harm to herself or others, because even with multiple staff supporting her, she was able to access ways to self-harm or aggress on others and staff was not able to manage her. (Gardner) Ms. Dunyanyan was concerned by the level of self-harm coupled with Student’s hallucinations and delusions and feared that Student would try to kill herself. (Dunhanyan) Ms. Salvatore believed Student was “incredibly determined to kill herself” because she was engaging in increasingly unsafe behaviors and that it was impossible for Melmark to keep Student safe. (Salvatore)
3. The Team convened for an emergency Team meeting on February 13, 2025. Ms. Donahue asked Melmark to consider additional staffing to keep Student safe. Melmark discussed their ability to make a “sterile environment” and Ms. Donahue inquired as to whether additional staff would help with that. Ms. Donahue requested that Melmark provide a two-week extension to Student’s termination date and Melmark did not agree[[2]](#footnote-2). (Donahue)
4. On February 21, 2025, there was a meeting with Bourne, Melmark staff, Parents, Pat Cosgrove, and Dr. Castro. Dr. Castro opined that although he thought highly of the program, Melmark was not an appropriate program for Student, based on his longstanding knowledge of her and reports of her current clinical profile. He stated she needed much more aggressive medication management than Melmark was able to provide and required a cohort of similar peers. (M-24, Donahue)
5. Dr. Syvia Worrell is a psychiatrist at Westborough Behavioral Healthcare Hospital. (Westborough) She prescribes medications for acute patients until they are stable. She met Student when she was admitted from Saints Hospital on February 13, 2025. Student was experiencing auditory hallucinations and commands to hurt herself and others. She initially had to be transferred to a different unit because she was physically aggressive toward a peer after taking offense at something he said. Her medications have been adjusted since she was admitted. She has been in locked units and has required medical restraints which cannot be used at Melmark. Dr. Worrell did not seem to be familiar with the term “sterile environment” but explained that within the units staff do not leave objects lying around, Student does not have access to forks and knives, and units are intensively staffed. (Worrell)

Student was transferred from Westborough to a hospital on February 26 due to a seizure but subsequently returned. She was discharged from Westborough on March 12 and transferred to a hospital for medical treatment after swallowing objects including an ice pack and a metal object which appeared to have come from a shelf on the unit. Dr. Worrell agreed that the ingestion of metal can potentially be life-threatening and that a screw could perforate the bowel. She opined that Student was not ready to be discharged from a psychiatric facility given the repeated ingestion of metal since leaving Westborough. (Worrell)

Student initially was staffed 1:1 at Westborough, but was later placed on five minute checks. She ingested the items while on five-minute checks. Dr. Worrell believes Student’s issues are both psychiatric and behavioral. She noted Student has PTSD and depression, but her maladaptive behaviors, such as self-injurious behaviors, are reactions to stress or to not getting her way. She also stated that Student has PNES, non-epileptic seizures, which are usually due to psychological stress or trauma. She noted there could be correlation between Student’s seizures and her behaviors. (Worrell)

Dr. Worrell opined that Student will be ready for discharge from Westborough when staff believes she is no longer a danger to herself and others and she is no longer experiencing command hallucinations. She stated it is not safe for Student to return to her Guardians’ home because it is not structured enough. When Student is discharged she should be staffed at a level of 2:1 in a highly structured environment. She noted that it would cause Student psychological harm if she did not have a placement to be discharged to when she is ready to leave the hospital setting. (Worrell)

1. After Student’s termination from Melmark, and due to the difficulty Bourne had encountered in securing Student’s previous placement at Easter Seals, Bourne again contracted with Patricia Cosgrove to assist with Student’s placement. Ms. Cosgrove explained that finding a placement for Student would likely be even more difficult this time. She noted Student’s complex profile; the fact that many residential programs do not accept students over eighteen years old; and the scarcity of residential programs in Massachusetts generally. Ms. Cosgrove sent Bourne and Parents a list of 14 placements that she had identified as being potentially appropriate. Parents consented to packets being sent to all of the suggested programs. (Cosgrove, Parent) As of the date of the instant Hearing, Student had not been accepted by any of the programs. She was rejected at five, and two had requested additional information which Ms. Cosgrove was in the process of providing. (Cosgrove, Donahue) Ms. Cosgrove also contacted DESE, which assists districts with placing complex students, but had not heard back. (Cosgrove) Parents have cooperated with Bourne in the placement process by providing consent to sending packets to all placements proposed. They will continue to cooperate in the process. (Parent, Donahue, Cosgrove) Parents agreed that they will provide Melmark with consent to speak to Westborough staff if Student returns to Melmark. (Parent)

**FINDINGS AND CONCLUSION:**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)[[3]](#footnote-3) and the state special education statute.[[4]](#footnote-4) As such, she is entitled to a free appropriate public education (FAPE). Neither her status nor her entitlement is in dispute. The Parties, however, disagree as to whether Student has the right to “stay put” in her current placement, Melmark.

 Legal Standards

1.Eligibility for Special Education

The right to a FAPE for all students with a disability is guaranteed by both federal and state law through the IDEA, M.G.L. c. 71B, and their corresponding regulations[[5]](#footnote-5). If a student is found eligible to receive special education, the Team must then develop an IEP setting forth the special education and related services that meet the special education needs of the student[[6]](#footnote-6). An IEP is a “a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated”[[7]](#footnote-7). The IDEA defines a “child with a disability” as a student having specifically identified disabilities “who, *by reason thereof, needs* special education and related services”. 20 USC 1401(3)(A) and (B)[[8]](#footnote-8) (emphasis added). “Special education” is defined as “specially designed instruction[[9]](#footnote-9), at no cost to the parents, to meet the unique needs of a child with a disability, … [inclusive of] speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards”[[10]](#footnote-10).

Similarly, Massachusetts defines a “school age child with a disability” as a child “… who, because of [specifically identified disabilities] … is unable to progress effectively in regular education and requires special education services, including … only a related service … [if they] are required to ensure access of the child with a disability to the general education curriculum[[11]](#footnote-11). The regulations define “eligible student” as “… a person aged three through 21 … who has been determined by a Team *to have a disability(ies), and as a consequence* is unable to progress effectively in the general education program without specially designed instruction or is unable to access the general curriculum without a related service”. 603 CMR 28.02(9) (emphasis added). To “[P]rogress effectively in the general education program*”*, means to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the student, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.[[12]](#footnote-12)

Thus, both federal and state law utilize a 2-pronged approach in determining a student’s eligibility for special education[[13]](#footnote-13). The first prong involves identifying whether the student has one or more of the disabilities enumerated in the law[[14]](#footnote-14). The second prong involves determining if, by reason of that disability, the child is unable to progress effectively in the general education program (i.e., make documented growth in the acquisition of knowledge and skills, including social/emotional development, with or without accommodations) without specially designed instruction or is unable to access the general curriculum without a related service[[15]](#footnote-15).

“[I]n determining eligibility, the school district must thoroughly evaluate and provide a narrative description of the student’s educational and developmental potential”[[16]](#footnote-16). In Massachusetts, the evaluation is to be conducted within 30 school days of receiving parental consent, by “appropriately credentialed and trained specialists” and adapted to the age of the student.[[17]](#footnote-17) Initial evaluation assessments must include, “an assessment in all areas related to the suspected disability” and an “educational assessment by a representative of the school district”[[18]](#footnote-18). Just as the appropriateness of an IEP is not to be viewed in hindsight, so too must a review of a Team’s eligibility determination be made by looking at the information available to the Team at the time of its determination

1. Burden of Persuasion

The burden of persuasion in an administrative hearing is placed upon the party seeking relief. *Schaffer v. Weast, 546 U.S. 49,* 126 S. Ct. 528, 534, 537 (2005) In this case, Parents/Guardians are the party seeking relief, and as such have the burden of persuading the Hearing Officer of its position by a preponderance of the evidence.

1. Stay-put

The “stay-put” provision of the IDEA requires that during the time that a parent and school district are engaged in an 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. § 1415(j); 34 CFR § 300.518; Honig v. Doe, 484 U.S. 305 (1988); Verhoven v. Brunswick School Committee, 207 F.3d 1, 10 (1st Cir. 1999). Similarly, Massachusetts special education regulations state, “in accordance with state and federal law, during the pendency of any dispute regarding placement or services, the eligible student shall remain in his or her than educational program and placement unless the parents and the school district agree otherwise.” 603 CMR 28.02(7). To determine a child’s “stay put” placement, courts look to the IEP that is “actually functioning at the time the dispute first arises.” Drinker v. Colonial School District, 73 F.3d 859, 867 (3rd Cir. 1996).

As a preliminary matter, Melmark argues that “stay-put” in the IDEA does not apply to private schools that contract with school districts to provide special educational services because it applies only to state and other public agencies. Melmark cites to 34 CFR §300.225(c) which states, “Even if a private school or facility implements a child’s IEP, responsibility for compliance with this part remains with the public agency and the [State Education Agency].” Melmark further cites to federal cases from other jurisdictions to support its contention. (See Koehler v. Juniata Cnty. Sch. Dist, 2008 WL 1787632 (M.D. Pa. Apr. 17, 2008); St. Johsbury Acad. v. D.H., 240 F.3d 163, 171 (3d Cir. 2001); A.G. v. Genesis Learning Ctrs. (In re P.G.), 2019 S. Dist. LEXIS 120014 (M.D. Tenn. 2019) It also references the opposing view presented in P.N. v. Greco, 282 F.Supp. 2d 221, 236 (D.N.J. 2003))

P.N. v. Greco involved Windsor, a private school approved by the New Jersey State Department of Education for the placement of disabled students by local school districts. When it obtained such approval Windsor executed an affidavit attesting that it would comply with IDEA, state statutes and regulations. Parents of a student at Windsor challenged his termination and the reviewing court held that as a private school accepting placements of students protected by the IDEA, Windsor is subject to IDEA regulations, and can therefore be held liable under the IDEA for its failure to comply with IDEA rules in connection with the termination of the student’s placement. The court reasoned that New Jersey regulations implementing the IDEA are expressly made applicable to private entities providing publicly funded educational programs and services to students with disabilities. This was in contrast to the *St. Johnsbury Academy* case in which Vermont regulations regarding due process hearings provided for actions only against public entities. (*Id*. at 238)

In Massachusetts, the provisions of 603 CMR 18.00, the regulations governing private special education schools, relate back to the general special education regulations found at 603 CMR 28.00, which regulations include the “stay put” provision. There is no exemption for publicly placed private school students. As noted by Hearing Officer Byrne in *In Re: Northampton Public Schools & Lolani, BSEA No. 04-0359 (Byrne, 2003)*, “There is no legislative language exempting publicly funded students placed in private special education facilities from application of the ‘stay put’ doctrine.” As further stated in *Lolani*, if the drafters of the regulations had “intended to strip private school students of a right accorded to public school students they would have said so.”

Additionally, as part of the DESE approval process, and within the Monitoring & Placement Agreement signed between Bourne and Melmark, Melmark agreed to comply with the applicable provisions of Chapter 71B and 603 CMR 18.00 and 603 CMR 28.00, which include the stay put provision at 603 CMR 28.02(7) (M-5, P-11) Based upon the foregoing, I am not persuaded by Melmark’s argument in this regard, and find that the IDEA, inclusive of the “stay put” provision, applies to private schools, including Melmark.

Melmark next argues that its emergency termination of Student was proper under DESE regulations.

603 CMR 18.05(7)(d) states “in case of an emergency termination, which shall be defined as circumstances in which the student presents a clear and present threat to the health and safety of him/herself or others, the school shall follow the procedures required under 603 CMR 28.09(12).”

As discussed below, I find that Student’s behavior on February 7, 2025 rose to the level of presenting a clear and present danger to herself and others. Such determination is limited to the events that transpired on said date. I am not persuaded that Student’s behaviors before that time rose to that level.

Although Student was clearly engaging in more concerning behavior during the time period between November 2024 and February 2025, it did not rise to the level where an emergency termination could be contemplated. I did not rely on the writings in Student’s journal which were included in the exhibits at M-8. As I was reviewing the entries, there were simply too many questions about the context and Student’s intention and state of mind while she wrote the entries that could not be answered without testimony from Student or somebody who had discussed the writings with her. Further, Although Ms. Salvatore testified that Student’s journal entries were frightening, she had not found the entries to be significant enough to warrant notification to Bourne or Parent. (Salvatore) I also did not rely upon the photograph of the contents of Student’s backpack. Without testimony from Student or somebody who had discussed the items in the backpack with Student it was impossible to determine student’s intentions with respect to the contents of the backpack. Further, Ms. Duhanyan noted her concern upon viewing the contents of the backpack but did not notify Bourne of the backpack and could not recall whether she spoke to Parents about it. (Duhanyan, M-42) I also did not make any findings with respect to Student’s impact on the peers at Melmark. Although Melmark testified that Student’s verbal aggression toward peers impacted their presentation, I did not find that it rose to the level of presenting a clear and present danger to them. I also found that the testimony regarding the presentation of some peers before and after Student left Melmark was too speculative to rely on.

However, as stated above, I do find that Student’s behavior on February 7, 2025 rose to the level of presenting a clear and present danger to herself and others. While the evidence was not persuasive that Student’s moving her body toward traffic that day was an act intended to harm herself,[[19]](#footnote-19) once she was returned to the school building she did in fact engage in self-harm (including banging her head on the floor) and harm to others,( i.e., attempting to hit staff) , thus meeting the clear and present danger to herself and others criterion. [[20]](#footnote-20)After staff intervention, Student was able to get up and return to the classroom, However, later that morning, she again bolted toward the door, was returned to the building and at that time, her behaviors were significant and intense. She was suffering from hallucinations and PNES seizures, with staff noting that she was in distress, did not feel safe, and was clearly in crisis. (Salvatore) This situation appropriately resulted in Melmark’s calling 9-1-1 to have Student transported to a hospital for psychiatric evaluation and treatment. Having found that Student’s behavior on February 7, 2025, rose to the level of presenting a clear and present danger to herself and others, I turn to the requirements of 603 CMR 28.09(12). When initiating an emergency termination, schools are required to follow the procedures in 603 CMR 28.09(12) which states in relevant part:

### Students shall be entitled to protections and standards in accordance with 603 CMR 18.00. In addition approved special education schools shall observe the following requirements:

(b) Emergency termination of enrollment. The special education school shall not terminate the enrollment of any student, *even in emergency circumstances* until the enrolling public school district is informed *and assumes responsibility for the student*. [emphasis supplied] At the request of the public school district, the special education school shall delay termination of the student for up to two calendar weeks to allow the public school district the opportunity to convene an emergency Team meeting or to conduct other appropriate planning discussions prior to the student's termination from the special education school program. With the mutual agreement of the approved special education school and the public school district, termination of enrollment may be delayed for longer than two calendar weeks.

The regulation does not define what is meant by “assumes responsibility for the student”. However, in order to avoid conflicting with the stay put provision of federal and state law, it must be inferred to mean that assuming responsibility connotes the ability to provide a placement. Here, Bourne has been duly informed of Student’s termination from Melmark, and has assumed responsibility for seeking a placement, however, there is simply no successor placement available to Student at present. If there was a viable option of placing Student in another residential school which could implement her accepted IEP, there would be no dispute in this matter. Until Bourne is able to identify a successor placement for Student, it will not have fully fulfilled the “assume responsibility” language of the Regulation. See In Re: Steve and Worcester Public Schools and Cent. Mass. Collab., BSEA #1808823, 24 MSER 162 (Reichbach, 2018)

In recent years, the BSEA has consistently found that in cases such as the case at bar, when termination from a residential placement results in Student not having any other placement in which to remain during the pendency of the dispute, the Student must remain in their last agreed upon placement. In *Framingham Public Schools and Student v. Guild for Human Services, Inc* *and the Department of Developmental Services*, BSEA #1808824 (Putney-Yaceshyn, 2018) the student inflicted significant injuries on a peer resulting in a severe concussion and the Guild was found to have followed the required emergency termination procedures. Nevertheless, Student was determined to have the right to stay put at the Guild. In that case, I found “under the unique circumstances of this case, where Student has no other placement available to him and is unable to safely return to his home, his “stay put” placement has to be the Guild. As a matter of public policy and if the IDEA’s stay put provisions are to have any meaning, the BSEA cannot issue a decision finding that Student does not have any placement in which to remain during the pendency of this matter.”

Similar to the student in the *Guild* case, Student in the current case is not able to return home and has not been accepted into any successor placement. Thus, her “stay put” placement can only be the IEP that is “actually functioning at the time the dispute first arises, in this case, the Melmark IEP for the period from June 14, 2024 through June 13, 2025. As noted in *In re: Student v. North Middlesex Regional School District and Dr. Franklin Perkins School*, BSEA #2400589 (Kantor Nir 2023), “At its most basic interpretation, stay-put is the last educational placement a student attended prior to a placement dispute, the placement delineated in “last implemented IEP”, regardless of whether the placement is no longer appropriate.” (*Id.*) Similarly, in the case of *Student v. Boston Public Schools and the Children’s Center for Communication Beverly School for the Deaf*, BSEA #2402627 (Berman 2023) where if not for the “stay put” provision, Student would have been left without an educational provision, the hearing officer found, “Such as scenario is not permissible under federal or state special education law.” *Id.*

Further, the argument embodied in testimony of Melmark staff that they were surprised by Student’s profile and behaviors when she began attending Melmark, and were unprepared to address them is not persuasive. Although Melmark indisputably did not have Dr. Castro’s evaluation when they sent Student’s acceptance letter in January 2024, it received the evaluation when Bourne received it in February 2024. Further, the administrative IEP, with a notice date of March 18, 2024, set out a summary of Student’s adaptive skills which included, “safety concerns (self harm, threatening to others, and wandering/eloping), and unusual behavior/thoughts.”(M-3, pg. 12) Student did not begin attending Melmark until April 1, 2024. Melmark did not raise any concerns to Bourne or Parents about Student’s profile when it received the evaluation and IEP. It did not seek to rescind its acceptance of Student. I was also not persuaded that Parents and/or Bourne withheld information from Melmark. The evidence shows that Parents and Bourne provided Melmark with all of the records that they had available to them, and have remained cooperative throughout the entire placement process.

All parties agree, and testimony presented at hearing confirms, that Student is currently not stable, would not be immediately discharged from the hospital, and will not be until she is deemed medically stable. Although the Melmark staff who testified presented as professional, knowledgeable, and compassionate, none of them had expertise in managing the clinical/psychiatric portion of Student’s profile. Based on this Melmark posits in its Proposed Findings of Facts and Conclusions of Law that the issue of Student’s stay put placement is not ripe. I am not persuaded by the ripeness argument. First, Ms. Donahue and Ms. Cosgrove credibly testified that it will be difficult to find a successor placement for Student and may take a long time. Further, when Student is ready to be discharged from the hospital, especially if a successor placement has not been identified, the Parties will immediately need a decision regarding Student’s stay-put placement. Dr. Worrell was unable to predict when Student will be ready for discharge. There remains a dispute between the Parties as to whether Student has the right to “stay put” at Melmark which requires resolution before Student is discharged from her current hospital stay.

 Melmark is not left without recourse if Student is released from the hospital prior to the identification of a successor placement and it continues to believe that it cannot appropriately and safely maintain Student’s placement. Although the BSEA does not have the authority to issue a Honig injunction[[21]](#footnote-21), Melmark can request the same in a court with pertinent jurisdiction if it deems such action necessary.

Based on the foregoing, I find that: Melmark is Student’s stay put placement.

**ORDER**

1. Student’s “stay put” placement is Melmark.
2. When Student is deemed stable and ready for discharge, if she does not have a successor placement, Bourne shall convene a meeting between Parents, Bourne, Melmark and relevant hospital staff to plan for Student’s return to Melmark. The meeting participants will determine what additional services/staff are necessary to ensure Student’s safe return to Melmark for the pendency of her stay-put placement there. Bourne shall be responsible for providing any necessary additional services/staff.

By the Hearing Officer,

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Catherine M. Putney-Yaceshyn

Dated: April 1, 2025

1. The following assessments were utilized: Achenbach System of Empirically Based Assessment (ASEBA; select forms); Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI(, select subtests); California Verbal Learning Test – Second Edition, Adult Version (CVLT-II); Delis-Kaplan Executive Function System (D-KEFS, select subtests\_; Kauffman Assessment Battery for Children – 2nd Edition (K-ABC-w, select subtests); Prodromal Questionnaire -16 (P-Q-16); Rey-Osterrieth Complex Figure Test(ROCFT); Suicide Risk Assessment; Wechsler Individual Achievement Test – 4th Edition (WIAT-IV (select subtests); Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV); Wide Range Assessment of Memory and Learning – 3rd Edition (WRAML -3; select subtests) Additionally, Guardians completed the Achenbach Child Behavior Checklist (BCCL), Student completed the Youth Self Report (YSR). (P-5, B-8) [↑](#footnote-ref-1)
2. There was conflicting testimony as to whether or not Melmark agreed to the two week extension. Melmark staff testified that it had agreed to the extension, but the parties could not agree as to when the two week extension began and left it to the lawyers to decide. (Gardner, Salvatore) [↑](#footnote-ref-2)
3. 20 USC 1400 *et seq*. [↑](#footnote-ref-3)
4. MGL c. 71B. [↑](#footnote-ref-4)
5. 20 USC 1400, *et seq*.; M.G.L. c. 71B; 34 CFR 300.000, *et seq*.; 603 CMR 28.00 *et seq*. [↑](#footnote-ref-5)
6. 603 CMR 28.02(11); 603 CMR 28.05(3). [↑](#footnote-ref-6)
7. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). [↑](#footnote-ref-7)
8. The identified disabilities in the IDEA include “other health impairments” and for students ages 3 through 9, “developmental delays defined by the state”. [↑](#footnote-ref-8)
9. “Specially designed instruction”, is defined as “adapting, as appropriate to the needs of an *eligible* child under this part, the content, methodology, or delivery of instruction— (i) To address the unique needs of the child *that result from the child’s disability; and* (ii) To ensure access of the child to the general curriculum ….” 34 CFR 300.39(a)(3) (emphasis added). [↑](#footnote-ref-9)
10. 20 USC 1401(29); 34 CFR 300.39(a). Massachusetts defines “special education” as “specially designed instruction to meet the unique needs of the eligible student or related services necessary to access the general curriculum and shall include the programs and services set forth in state and federal special education law.” 603 CMR 28.02(20). [↑](#footnote-ref-10)
11. M.G.L. c. 71B §1. Relevant to this proceeding, the disabilities recognized in the Massachusetts laws and regulations include developmental delay for children ages 3 through 9 (provided supra), and “other health impairment”, including health impairments “due to … [ADD] or [ADHD] …”. 603 CMR 28.02(7)(b) and (i). [↑](#footnote-ref-11)
12. 603 CMR 28.02(17). [↑](#footnote-ref-12)
13. *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 13-14 (1st Cir. 2007); *In Re: Lynnfield PS*, BSEA # 12-1425, 18 MSER 247 (Berman, 2012); *In Re: Agawam PS*, BSEA # 08-2564/08-4033, 14 MSER 53 (Byrne, 2008); *In Re: New Bedford PS*, BSEA # 01-3505, 7 MSER 261 (Crane, 2001); *In Re: Berlin-Boylston RSD*, BSEA # 00-1711, 6 MSER 247 (Byrne, 2000); *In Re: Canton PS*, BSEA # 00-2912, 6 MSER 239 (Erlichman, 2000);see *In Re: Stoughton PS*, BSEA # 99-0807, 5 MSER 1 (Oliver, 1999). [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. *Id.; see*M.G.L. c. 71B §1; 603 CMR 28.02(17). [↑](#footnote-ref-15)
16. 603 CMR 28.02(9); see34 CFR 300.8(a). [↑](#footnote-ref-16)
17. 603 CMR 28.05(2). [↑](#footnote-ref-17)
18. 603 CMR 28.05(2)(a). [↑](#footnote-ref-18)
19. This could have been bolting behavior that Student had engaged in previously, and staff were able to guide her away from the street and into the school building. [↑](#footnote-ref-19)
20. Staff members, who were trained in restraint, were able to get a mat to protect her head and restrain her to prevent further injury. [↑](#footnote-ref-20)
21. A *Honig* injunction, stemming from the *Honig v. Doe* Supreme Court case, is an extraordinary remedy that allows a school district to seek court intervention to address a student with a disability who poses an immediate threat, potentially bypassing the "stay-put" requirement of the IDEA. [↑](#footnote-ref-21)