

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

In re: Susana<sup>1</sup>

BSEA #1606551

**DECISION**

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

A hearing was held on March 4, 2016 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student's Mother	
Michele Clark	School Psychiatrist, Newburyport Public Schools
Christina Gentile	Director of Pupil Services, Newburyport Public Schools
Jeanna Guardino	Special Education Team Facilitator, Newburyport Public Schools
Tim Piskura	Co-Director, Futures Clinic/School
Michelle Thivierge	School Nurse, Newburyport High School
Nicole Twomey	Special Educator, Newburyport Public Schools
Paige Tobin, Esq.	Attorney for Newburyport Public Schools
Caitlin Leach, Esq.	Attorney for Newburyport Public Schools

The official record of the hearing consists of documents submitted by the Newburyport Public Schools and marked as Exhibits S-1 to S-26; a document submitted by the Parent on the date of the hearing and marked as Exhibit P-1; documents submitted by the Parent on March 9, 2016 and marked as Exhibits P-1 to P-9;<sup>2</sup> a flash drive containing pictures of Susana marked as Exhibit P-10; approximately one half day of recorded oral testimony and argument; and a one volume transcript produced by a court reporter. After her request to postpone the Expedited Hearing was denied, Parent appeared for the Hearing but left two hours later without testifying.<sup>3</sup> A CD of the proceedings was sent to her overnight and as agreed to by the parties the record was held open until March 9, 2016. Parent's exhibits and Newburyport's closing argument were received on March 9, 2016 and the record closed on that date.

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<sup>1</sup> "Susana" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

<sup>2</sup> Exhibit 1 submitted by Parent on the date of the hearing is part of Exhibit 1 submitted by Parent on March 9, 2016.

<sup>3</sup> Upon arrival at the Hearing Susana's mother initially stated that she had to leave at noon due to Susana's appointment for Magnetic Resonance Imaging (MRI). When that appointment was found to be scheduled for 8:30 PM by way a phone call from Parent to Susana's doctor in the presence of a Bureau of Special Education Appeals (BSEA) staff member, Parent stated for the first time that she had to leave early because she had to relieve Susana's babysitter.

## INTRODUCTION

Susana was enrolled in the Newburyport Public Schools (“Newburyport” or “District”) in January 2016. On her third day at Newburyport High School an incident occurred, after which Newburyport proposed an extended evaluation for Susana at an out-of-district placement. Parent disagrees with this proposal and refuses to consent to an extended evaluation; she has requested that Susana receive home tutoring.

On February 18, 2016, Newburyport filed a request for an Expedited Hearing on the grounds that seventeen-year-old Susana’s health or safety would be endangered by delay and that the special education services she is currently receiving are sufficiently inadequate that harm to Susana is likely.<sup>4</sup> Expedited status was granted and the Hearing was scheduled for March 4, 2016. A Conference Call took place on February 24, 2016. Parent filed a request for postponement<sup>5</sup> on February 29, 2016, in which she responded to Newburyport’s Hearing Request. Newburyport, the moving party, filed an Opposition to Postponement on March 1, 2016. Parent’s request was denied. On March 3, 2016, Parent renewed her request for postponement of the Hearing scheduled for the next day, stating that Susana had an appointment for Magnetic Resonance Imaging (MRI) scheduled for that date and that she had just found a parent advocate to assist her. In light of the absence of a Notice of Appearance from any advocate, the lack of documentation pertaining to an MRI that conflicted with the Hearing, and the continued opposition of Newburyport, filed on March 3, 2016, Parent’s request was denied.

The Hearing took place on March 4, 2016. Parent attended for two hours but left before presenting any witnesses on her behalf, after the undersigned Hearing Officer explained that the Hearing would continue in her absence.

For the reasons discussed below, I find that in these circumstances an extended evaluation of Susana at Futures is both necessary and appropriate, and I grant substitute consent for that evaluation. In addition, I find that Newburyport properly denied Parent’s request for home tutoring.

## ISSUES

1. Whether an extended evaluation of Susana is necessary to ensure that she is able to receive a free, appropriate public education;
2. If so, whether that extended evaluation may take place in the Newburyport Public Schools;

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<sup>4</sup> BSEA *Hearing Rule* II.C.1(b). Although the District’s initial Hearing Request sought an order requiring Parent to consent to an extended evaluation, Newburyport subsequently filed a Motion seeking substitute consent.

<sup>5</sup> On February 18, 2016, Newburyport Public Schools (“Newburyport”) filed a Motion to Shorten Time to Respond to its First Set of Interrogatories and First Request for Production of Documents, seeking due dates of February 26, 2016 for both. After the Conference Call that took place on February 24, 2016, the Motion was allowed in part and the due date for completion of discovery was set for February 29, 2016.

3. If not, whether Futures is an appropriate setting for the extended evaluation;
4. Whether Parent's refusal to consent to an extended evaluation will result in the denial of FAPE, in which case substituted consent is appropriate;
5. Whether Newburyport properly denied Parent's request that Susana receive home tutoring.

## FINDINGS OF FACT

1. Susana is seventeen years old. She resides in Newburyport, Massachusetts with her mother. (S-11)
2. Susana has a "complex medical history;" her medical diagnoses have included PDD-NOS; autism; intellectual disability; inflammatory ailments; serious ear infections; sinusitis; mild kidney disease; paranasal sinus disease; and gastrointestinal, vascular, and pulmonary disorders, some resulting in hospitalizations. (S-18; S-19; S-20; S-25; P-8) As reported by her mother, Susana's medical history also includes idiopathic angioedema, multiple allergies, meningitis, febrile seizures, respiratory failure, a ruptured tympanic membrane, and an elevated IgG4 count, among other issues. (S-15; S-18)
3. Susana's early history is difficult to ascertain and contains some inconsistencies. For example, Susana's mother reported to a neuropsychologist in 2015 that Susana's speech capabilities deteriorated after she was hospitalized with vasculitis and a urinary tract infection at the age of four (S-18), whereas medical records submitted by Parent indicate that several professionals who evaluated Susana when she was two years old found that she "hardly uses any words at all and does not respond very well." (P-4) Susana's immunologist described her medical care as "very fragmented." (S-19)
4. Susana's educational history includes moves between districts, delayed enrollment, frequent absences, and multiple periods during which she received schooling in the home, either with or without the resident district's approval. (S-19; S-21; S-23; S-25) During a neuropsychological evaluation in December 2014, Susana's mother reported that Susana had attended preschool in Brookline from age three to age five, though she was absent frequently due to illness; that she had subsequently received home-based school services for four years between 2000 and 2004; and that since that time she has been home schooled by her mother.<sup>6</sup> (S-19)
5. Multiple evaluations of Susana over time characterize her presentation as consistent with a diagnosis of PDD/autism. Evaluators state that Susana engages in self-injurious behaviors such as head banging, stereotypies (visual, motor, and vocal), and echolalia. (P-4, Allen 2000; P-9, Fayad 2008; S-25, Castro 2010; S-23, Vineland Teacher Rating Form 2013; S-19, Ensworth & Schwartz 2014; S-20, Braintree Rehabilitation Hospital

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<sup>6</sup> This report conflicts with evidence in the record, specifically S- 22, S-23, and S-24, to the effect that Susana was enrolled and attended schools in Park City, Utah for some time in 2012 and 2013.

Speech and Language 2015; S-18, Pennoyer 2015; S-12, Linehan 2015) Some of these behaviors, including head banging, the absence of eye contact, and lack of interest in other children, date back to 2000, when Susana was two years old. (P-4)

6. Several of Susana’s doctors wrote letters between 2003 and 2010 stating that due to Susana’s sensitivity to possible environmental triggers, it might be difficult for her to function in any setting that is not free of mold and chemicals, including school. (P-5, Englander 2003 and 2004, Herbert 2004, Nishiyama 2005,<sup>7</sup> Dubuske 2008,<sup>8</sup> Bonilla 2010) Many of these doctors linked Susana’s autistic presentation to her environment, stating that her symptoms were exacerbated by exposure to mold, chemicals, and other environmental factors. In 2002, however, one doctor noted that standard allergy tests did not support a diagnosis of allergy-related illness, whereas a diagnosis of autism was supported. (P-5) Another noted in 2008 that Susana’s tendency to hold her head, which her mother suspected was suggestive of headaches, might well be related to behavioral outbursts. (P-9)
7. Subsequent examinations and evaluations of Susana consistently note an urgent need for more intensive, year-round instruction to address severe behavioral, academic, cognitive and adaptive deficits as well as the need for ancillary services such as occupational, physical, and speech therapy and home-based services. (S-25, Castro 2010; S-21, Townes 2014; S-19, Ensworth & Schwartz 2014; S-18, Pennoyer 2015) In 2010, Dr. Rafael Castro recommended that Applied Behavioral Analysis (ABA) methodology be utilized with Susana (S-25), as did Drs. Ensworth and Schwartz in 2014. A rejected Individualized Education Program proposed by the Brookline Public Schools in 2009 included utilization of ABA methodologies in addition to a small, highly structured class with 1:1 support, a total communication approach, direct instruction of social, play, communication, and academic skills, support with respect to medical issues, and an oral motor program. (S-18)
8. Rather than enroll Susana in an intensive educational program as recommended, Susana’s mother has continually voiced disagreement with her autism diagnosis. For example, in or around April 2012, Susana’s mother informed the Park City, Utah Public Schools, where Susana was then enrolled and classified as autistic, that she would not bring Susana to school or agree to behavioral interventions. (S-23, S-24) During a neuropsychological evaluation in December 2014, Susana’s mother explained that she had terminated services through the Brookline Public Schools when Susana was “wrongly diagnosed as being on the autism spectrum by the school system,” which was “a misinterpretation due to her hearing impairment and significant medical problems that affected her social and emotional functioning.” (S-19) Similarly, Susana’s mother expressed to a speech therapist working with Susana that she disagreed with her approach

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<sup>7</sup> Dr. Nishimaya’s letter refers to allergies to many antibiotics, foods, molds, pollen, and common chemicals such as perfumes and carpets, as well as to a “significant history of hospitalizations for allergic reactions and multiple infections.” Dr. Nishiyama, who was Susana’s pediatrician at the time, submitted this letter in support of his Physician’s Statement for Temporary Home or Hospital Education. (P-5)

<sup>8</sup> Dr. Dubuske cited physicals and histories provided by Susana’s mother as the sources of his information regarding Susana’s symptoms and her need for home-based education. (P-5)

because she found it condescending. (S-18) Mother cites past medical issues, including tinnitus, clostridium difficile, colitis, meningitis, mastoiditis, sinus infections, ear infections, and seizures, as the cause of Susana's issues. In turn, she believes the mastoiditis and recurring ear infections led to hearing impairment, which caused verbal delays and communication difficulties. During Susana's 2014 neuropsychological evaluation, Susana's mother reported that when Susana was two and a half she was sent to a neurologist who ruled out PDD and did not believe she was on the autism spectrum. (S-19, S-20, S-21) Parent reports that Susana's current issues, including her lack of focus and habit of holding her hands over her ears, are related to allergies, episodes of swelling, and ear pain, and that her presentation varies in response to her physical/medical status. (S-18, S-21)

9. To the extent she accepts a PDD/autism diagnosis of her daughter, Susana's mother characterizes it as "medical autism" and links Susana's autistic presentation to the medical issues described above. (S-18; S-23) She expresses concern that Susana's medical emergencies present as typical autism behaviors and therefore can be misunderstood as autism. (S-15) Moreover, when Susana has engaged in self-injurious behaviors such as hitting herself on the forehead in school, her mother has attributed the behaviors to a disregard by the school of Susana's medical needs. (S-18; S-5)
  
10. Parent's view of Susana's presentation and the cause of her symptoms differs significantly from that of other professionals who have worked with Susana. Professionals working with or evaluating Susana report that her eye contact is fleeting or absent; they have observed her to engage in repetitive and stereotypical behaviors such as hitting or tapping her forehead with her hand and knuckle until her forehead is swollen, and biting and flapping her hands. During a two day evaluation in January 2015, Susana was observed to engage in these behaviors on the first day. On the second day of testing she had a large lump on her forehead that appeared raw and her hands were slightly swollen. (S-18) Susana's mother asserts that Susana's allergies lead to distress and swelling of her forehead and hands. (S-21) Her pediatrician and immunologist, on the other hand, report that although in the past Susana had a positive allergy test to cats, her recent allergy testing has been negative, any allergy issues she has are minor, and allergies are not the cause of the behaviors described (such as head banging).<sup>9</sup> (S-21) During a recent neuropsychological evaluation, Dr. Pennoyer suggested that these behaviors may be connected to Susana's limited communication skills and overstimulation when she is faced with tasks that place demand on performance. (S-18) In November 2015, Susana's mother reported to Susana's pediatrician, Dr. Kathleen Townes, that she had been to the Emergency Room at least ten times since their recent move to Newburyport for reported swelling episodes, ear pain, headaches, forehead swelling, and an "allergic seizure," which she attributed to the presence of mold in the new apartment. According to Dr. Townes, by the time Emergency Medical Services arrived in each instance these issues had resolved and ER documentation noted no issues with swelling other than Susana's known forehead prominence. Moreover Dr. Townes

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<sup>9</sup> This is consistent with Parent's Exhibit 4, a report from Children's Hospital from 2000, according to which skin testing performed at Susana's mother's request showed a positive reaction for cat but negatives for all other inhalant allergens tested including molds and dust mites as well as wheat, egg, milk, and apple.

observed that except for her mother's subjective reports, nothing in Susana's medical record documents any swelling. Susana's immunologist, Dr. Francisco Bonilla, reported to Dr. Townes that he does not believe Susana's presentation is consistent with angioedema. (S-11, S-21)

11. Parent's view of Susana's progress differs significantly from that of other professionals who have worked with and/or evaluated Susana. Susana's mother has consistently reported that Susana possesses skills that others are unable to replicate. For example, she reported during a neuropsychological examination that took place in December 2014 that Susana was an early reader and is now able to recite books from her toddler years. (S-19) She reported to Susana's pediatrician in September 2014 that Susana reads at grade level and has good comprehension. (S-21) She reported to neurologist Dr. Michael Robbins in July 2014 that Susana understands language, is good at math, and likes to read. (S-19), She reported to neuropsychologist Kathleen Pennoyer in January 2015 that Susana's decoding skills are well developed, she reads articles and books on her own, enjoys math, displays both number sense and the ability manage multiplication and fraction problems, and "currently behaves like a typical teenager." (S-18) Susana's mother believes that Susana would learn best in a large group setting with one classroom teacher and approximately thirty students. (Thivierge) In her report, Dr. Pennoyer referenced a letter from a pediatrician who had worked with Susana previously in which the pediatrician wrote that it would be difficult to get Susana's mother on board in dealing with her behaviors, as she "feels like [Susana] is a typically functioning 14 year old and treats her like one. I have not been able to get [Mother] to discuss [Susana]'s developmental delays and Autism." (S-18)
12. Professionals familiar with Susana report consistently that they believe that working with her mother at home is inadequate to ensure Susana's progress, and that she requires an intensive program instead. (S-21, Townes report (2014); S- 25, Castro report (2010))
13. It is difficult to gain an accurate picture of Susana's communication skills. In March 2015, Susana's expressive, receptive, and pragmatic language skills could not be assessed formally as she could not follow the directions required to produce accurate results. At that time, Susana presented with severely impaired receptive language, profoundly impaired expressive language, and related pragmatic deficits consistent with her previous diagnosis of autism. She demonstrated echolalia. (S-20) Although this report, written by a clinician at Braintree Rehabilitation Hospital's Outpatient Pediatric Speech and Language Therapy program after eight weeks of therapy (twice weekly) did not list hearing loss among Susana's current problems (S-20), a speech and language evaluation conducted seven months later, in October 2015, described Susana as presenting with moderate-severe receptive and severe expressive language deficits "secondary to hearing loss and likely other sensory deficits." (S-12)
14. Susana was unable to complete many items across multiple categories during neuropsychological testing in January 2015. On the WISC-IV, her Full Scale IQ fell in the Extremely Low range, with subtest scores all below the 1<sup>st</sup> percentile. (S-18)

15. Other professionals have had difficulty assessing Susana's cognitive and academic skills using formal measures or standardized formats. (S-15; S-19; S-25; Clark)
16. In March 2015, the Hamilton-Wenham Regional School District (HWRSD) conducted an eligibility determination. Susana was found eligible for special education on the basis of autism and intellectual and health disabilities. (S-16) The IEP developed by HWRSD for the period from March 19, 2015 to March 18, 2016 provided for extended school year, occupational therapy, speech/language, and academic/life skills. (S-15) The IEP does not specify a placement, though reportedly HWRSD proposed an out of district placement for Susana. (Gentile) The IEP was accepted in full and packets were sent to a number of programs including Cotting, Futures, O'Grady, and Children's Center for Communication. It does not appear that a mutually agreeable placement was ever located. (S-15; S-16; Gentile)
17. At no time since Susana's return to Massachusetts in 2014 has any professional opined that she is unable to attend school. In fact, her pediatrician has twice written letters stating that Susana is currently able to attend school. (S-7; S-14)
18. Susana's mother would like Susana to be assessed in her home and receive in-home services rather than attend school. (S-11)
19. On or about August 14, 2015 Susana's mother notified HWRSD that she was moving out of the district and did not intend to access proposed services. (S-9) Susana and her mother moved to Newburyport in September 2016. As of October, Susana's mother had not followed up with HWRSD to notify the district as to where she had moved, and the Director of Student Services notified her by letter that she would be filing a truancy report if she did not provide this information. (S-13) Susana did not attend school in HWRSD or Newburyport between August 2015 and January 2016.
20. As of December 2015, Susana was still not attending school. Susana's mother was advised at that time by a clinician in the Autism Language Program at Children's Hospital to contact Newburyport to initiate the special education process. (S-9)
21. Susana enrolled in the Newburyport Public Schools in January 2016. (Gentile)
22. On January 7, 2016 Susana's mother signed a consent form giving Newburyport permission to conduct academic achievement, speech and language, educational, and psychological assessments. (S-8)
23. On January 12, 2016 Dr. Townes submitted a Physician's Statement for Temporary Home or Hospital Education form (603 CMR 28.03(3)(c)) to Newburyport Public Schools. On the form she requested that Susana receive educational services at home "until/and-or IEP program and evals...District conducting evaluations (with month) (*sic*)." On a letter that accompanied the form, Dr. Townes stated that "[i]t is very important that [Susana] be evaluated for her educational needs," and "[t]here is no medical reason that she cannot participate in an educational program." (S-7)

24. On January 14, 2016, Newburyport informed Susana's mother by letter that it had rejected her request for home tutoring, as the documents submitted by Dr. Townes did not provide sufficient support for her request. (S-7)
25. On or about January 21, 2016 Newburyport special education Team coordinator Jeanna Guardino and Director of Pupil Services Christine Gentile met with Susana and her mother at Newburyport High School to give Newburyport personnel the opportunity to become familiar with Susana before she began school. At that time, Susana's mother expressed her opinion that ABA methodology was not appropriate for Susana. (Gentile)
26. On January 22, 2016, Susana and her mother met with Ms. Guardino and special education teacher Nicole Twomey to discuss Susana's return to school. (Twomey) Ms. Twomey, an experienced special education teacher licensed in moderate special needs who also has a Master's degree in special education, stated that she could not get a good sense of Susana's skill set and needs at the meeting because her mother focused on her medical needs, but she did notice that Susana was mostly nonverbal, did not make eye contact, and displayed some stereotypies. (S-26; Twomey) At this meeting, Susana's mother indicated that she did not believe test results were an accurate reflection of Susana's abilities, and that she was in fact reading at an eighth grade level. (Twomey)
27. Susana and her mother then met with school nurse Michelle Thivierge to discuss Susana's mother's medical concerns in relation to Susana's impending return to school. Ms. Thivierge is licensed by the Department of Elementary and Secondary Education as a school nurse, and she also has a Registered Nurse license. During this meeting Ms. Thivierge observed that Susana did not make eye contact and at one point began banging her head on the table repetitively. Susana's mother's main concerns were idiopathic angioedema and severe food allergies. Asked for medical records, she provided Ms. Thivierge with medical records that were at least five years old and reflected a past history of meningitis, mastoiditis and sinus surgery, but not angioedema or allergies. (Thivierge)
28. While at Newburyport High School on January 22, 2016, Susana's mother signed release forms to permit Newburyport to speak with Susana's pediatrician and allergist. Ms. Thivierge called Dr. Townes that day. Dr. Townes reported that there is no medical proof that Susana has angioedema or allergies. Dr. Bonilla's nurse confirmed this information. (Thivierge)
29. On January 25, 2016 Susana began attending school in Newburyport for three hours a day for the purpose of assessment. (S-5) Susana was placed in the Independence Development Center, a substantially separate program at Newburyport High School staffed by Ms. Twomey and two 1:1 aides. The seven students in the IDC prior to Susan's placement there have a range of intellectual and developmental disabilities. The program focuses on life skills, daily living skills, prevocational skills, and functional academics. ABA is not inherently part of the program, though Ms. Twomey has some training in it and a Board Certified Behavioral Analyst (BCBA) consults to the program on an as-

needed basis. (Gentile; Twomey) At the time Susana was placed in the IDC both Ms. Twomey and Ms. Gentile, who is a licensed special educator, believed the program could meet her needs. (S-26; Gentile)

30. On January 27, 2016 Susana was involved in an incident in which she assaulted two staff members, threw a chair across the room, banged her head on the floor, punched her head, and bit her hands. Both hands and her head were observed to be swollen afterward. The incident lasted between seven and ten minutes and required the assistance of at least four or five staff members to mitigate injuries and assist Susana in calming down. (S-5; Twomey; Thivierge) Susana's behavior during this incident was more severe than that of other students in the IDC. (Twomey)
31. Emergency medical technicians and Susana's mother were called to the school during the incident. Susana's mother reported to first responders that this was an allergic reaction, stating that Susana's head swells approximately three times a week at home from allergic reactions and that her hands swell for the same reason. She stated that this has led to at least ten calls to 911 since she moved to Newburyport, and that she is frustrated by the fact that doctors have not found it to be an allergic reaction. She disagreed with witness statements that Susana's swelling on this date was the result of self-injurious behaviors. (S-5; Thivierge) Susana was seen in the emergency room for acute head injury and angioedema, and follow-up with her pediatrician or an angioedema specialist was recommended. (P-1)
32. After this incident, Ms. Thivierge contacted Susana's allergist and pediatrician to discuss what had happened.<sup>10</sup> Both doctors confirmed the absence of severe allergies and angioedema. Dr. Townes noted that although self-injurious behavior appeared in Susana's history, her mother had not reported any instances of it in the two years she had been working with the family. Dr. Townes expressed concern about Susana's mother's inability to accept her diagnosis of autism, and the associated neglect of Susana's education. (Thivierge)
33. Susana's Team reconvened for an emergency meeting on February 1, 2016. Susana's mother discussed Susana's medical issues in detail and stated that the incident that occurred on January 27<sup>th</sup> was the result of an allergic reaction. The Team determined that Newburyport could not meet Susana's needs in-district and that it needed more information about her needs in order to determine the type of services and placement that would be appropriate for her. The Team proposed an extended evaluation to include a functional behavioral assessment, observations, and a health assessment, in addition to the psychological and academic assessments to which Susana's mother had consented previously. Susana's mother rejected this recommendation and indicated that she would not return Susana to school because she felt there were medical issues that needed to be addressed. (S-1; S-2; S-4; Gentile)

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<sup>10</sup> At this time, Susana's mother reported that Susana was no longer seeing Dr. Bonilla and signed a release to permit Ms. Thivierge to speak with Susana's new allergist, Dr. Conroy.

34. Subsequent to the emergency Team meeting, Newburyport referred Susana to the Futures School in Beverly for an extended evaluation. Ms. Gentile believes Futures would be able to provide a thorough analysis of the extent and function of Susana's self-injurious behaviors. Based on her observations and her review of Susana's records, Ms. Gentile does not believe that an evaluation in a home setting would be comprehensive, thorough, and appropriate. (Gentile)
35. On February 3, 2016, Susana was accepted by the Futures School. (S-3, Piskura) Futures is a state-approved Chapter 766 school that utilizes ABA methodologies to teach children who require intensive instruction. The program involves data-driven direct teaching and generalization of learned skills across multiple areas, including academics, vocational skills, speech and language, physical therapy, occupational therapy, communication skills, etc. Futures serves a range of students who need an intensive level of instruction, including children with autism, traumatic brain injury, and rare chromosomal disorders, and works with them on issues from decreasing self-injury and aggression to learning functional communication and the ability to stay on task as they acquire and retain skills. A full-time nurse is on staff at Futures and the program partners with sending school districts if a student requires a specific medical device such as an air purifier. (Piskura)
36. Timothy Piskura serves as Futures' clinical co-director. Mr. Piskura has a master's degree in applied behavioral analysis and has been licensed as a BCBA since 2007. He is currently working on his Ph.D in behavioral analysis. As part of his professional responsibilities, Mr. Piskura regularly conducts intakes for potential Futures students and their families. (Piskura)
37. To make an admission decision, Futures conducts an intake for forty to sixty minutes, considers an intake packet completed by the parent, and reviews any records sent by the referring school district. These records generally include a recent IEP, progress notes, and assessments conducted by the district as well as those conducted by outside evaluators. (Piskura)
38. Susana and her mother participated in a tour and intake at Futures with Mr. Piskura in or about March 2015, pursuant to a referral by HWRSD.<sup>11</sup> Futures declined to admit Susana at that time. Mr. Piskura testified that it is possible for a student to be rejected from Futures because the composition of the program (cohort of students in particular classrooms, staffing, and community opportunities, for example) is not a good fit at that particular time, then accepted at a later date. He testified that he believes Futures would be an appropriate place for an extended evaluation of Susana at this time, and that the program could keep a child with seizures and medical or behavioral issues that led to self-injurious behaviors safe. (Piskura)
39. Newburyport would consider out of district placements other than Futures as a setting for an extended evaluation of Susana, but to date no other placement has been proposed. (Gentile)

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<sup>11</sup> See paragraph 16, above.

40. Although Susan’s mother did not disclose to Newburyport that Susana had engaged in self-injurious behavior (S-5), the incident that occurred on January 27, 2016 was not an anomaly. According to her pediatrician and her immunologist, Susana continues to have episodes of “physical and emotional distress of unclear etiology” in which she “may cry or shout and appears very flushed. . . She may bite her hands and strike her head with her hands or strike the front or back of her head on the floor. The episodes may be brief (a minute) or may go on for hours.”(S-10) No specific treatments have worked to control these episodes, which appear in reports and evaluations of Susana throughout her life. (S-7; S-23; S-24; P-8; P-9)
41. Susana is capable of making progress when she is provided with appropriate services in an appropriate environment. Notes from Susana’s Brookline Public Schools’ educational Team written in 2011 indicate that during her transition to a highly individualized school-based program, presumably from home-based services, she “became more engaged, making eye contact, identifying the classroom as a safe place, beginning to make connections.” (S-18) After two months of speech and language therapy in March 2015, Susana was described as eager, interested in interaction, and capable of making progress in speech and language with targeted services, despite severe deficits. (S-20) In December 2015, a clinician in the Autism Language Program at Children’s Hospital described Susana as highly motivated by certain applications and able to benefit from adult modeling and phonemic cues. (S-9)
42. Due to discrepancies among reports from her mother and the medical and educational professionals who have worked with Susana, Newburyport Public Schools lacks sufficient information to develop an IEP for her. (Twomey)
43. Given the extent of Susana’s self-injurious behaviors and the incident that occurred on January 27, 2016 Newburyport Public Schools is not capable of keeping Susana safe in district at this time. (S-5; Gentile)

## DISCUSSION

### A. Free Appropriate Public Education, Evaluations & Substitute Consent

#### 1. *Legal Standards*

The Individuals with Disabilities Education Act (IDEA) was enacted “to ensure that all children with disabilities have available to them a free appropriate public education” (FAPE).<sup>12</sup> FAPE is delivered primarily through a child’s individualized education program (IEP).<sup>13</sup> An IEP

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<sup>12</sup> Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (d)(1)(A).

<sup>13</sup> *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012).

must be “reasonably calculated to confer a meaningful educational benefit”<sup>14</sup> and tailored to address each student’s unique needs that result from his or her disability.<sup>15</sup>

Under state and federal special education law, a school district has an obligation to provide the services that comprise FAPE in the “least restrictive environment.”<sup>16</sup> This means that to the maximum extent appropriate, a student must be educated with other students who do not have disabilities, and that “removal . . . from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services, cannot be achieved satisfactorily.”<sup>17</sup> “The goal, then, is to find the least restrictive educational environment that will accommodate the child’s legitimate needs.”<sup>18</sup>

Pursuant to the IDEA, before a child with a disability may begin receiving services, a “State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation.”<sup>19</sup> This evaluation serves multiple purposes; it enables a school district to determine eligibility, and it produces information that can be used by an eligible child’s Team in developing an IEP that meets her needs. Subject to the limitation that they not occur more frequently than once a year or less frequently than once every three years unless the parent and the local educational agency agree otherwise, subsequent evaluations must be conducted “if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or . . . if the child’s parents or teacher requests a reevaluation.”<sup>20</sup> Generally, parental consent is required for an evaluation to occur,<sup>21</sup> but limited exceptions exist. Courts have found that reevaluation is warranted, over parents’ objections, where a student has reportedly made significant progress toward one or more goals,<sup>22</sup> and when a student is out of school on homebound instruction for an extended period of time during which his medical condition changes.<sup>23</sup>

Massachusetts law further limits the availability of evaluations over parents’ objections to situations in which school district personnel believe an evaluation, other than an initial

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<sup>14</sup> *Sebastian M. v. King Philip Reg’l Sch. Dist.*, 685 F.3d 84, 84 (1st Cir. 2012).

<sup>15</sup> See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (FAPE must be “tailored to the unique needs of the handicapped child”).

<sup>16</sup> 20 U.S.C. § 1412(a)(5)(A); 34 CFR 300.114(a)(2)(i); M.G.L. c. 71 B, §§ 2, 3; 603 CMR 28.06(2)(c).

<sup>17</sup> 20 U.S.C. 1412(a)(5)(A).

<sup>18</sup> *C.G. ex rel. A.S. v. Five Town Comty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008).

<sup>19</sup> 20 U.S.C. § 1414(a)(1)(A).

<sup>20</sup> *Id.* at §1414(a)(2)(A).

<sup>21</sup> *Id.* at §1414(a)(D); 34 CFR 300.300(c)(1)(i).

<sup>22</sup> See *M.T.V v. Dekalb County Sch. Dist.*, 446 F.3d 1153, 1160 (11th Cir. 2006) (affirming Administrative Law Judge’s order requiring parents to consent to School District’s request to reevaluate student by an expert of its choice, or else forfeit services addressing his motor impairments pursuant to eligibility under “Other Health Impaired” category).

<sup>23</sup> See *Johnson ex rel. Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 557-58 (7th Cir. 1996) (affirming Hearing Officer’s order, under previous version of IDEA, that a three-year evaluation take place absent parental consent where a student’s “condition had changed since he last attended school”).

evaluation, is necessary for the district to provide FAPE.<sup>24</sup> In these circumstances, the district may proceed to the BSEA for a hearing:

If, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation or to placement in a special education program subsequent to the initial placement, or the parent revokes consent to such reevaluation or placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.<sup>25</sup>

Although the BSEA cannot force a Parent to consent to an evaluation, at hearing the district may seek substitute consent, and a Hearing Officer may grant that consent if she finds that failure to conduct the evaluation would likely result in the denial of FAPE to that student.<sup>26</sup>

The provision cited above does not refer explicitly to extended evaluations. Massachusetts law provides for an extended evaluation period of up to eight weeks in circumstances where a student's Team finds that the evaluation information it possesses is insufficient for it to develop an IEP.<sup>27</sup> BSEA Hearing Officers have read these two provisions together to grant substitute consent in the context of extended evaluations upon a finding that failure to conduct an extended evaluation would likely result in the denial of FAPE to a student.<sup>28</sup>

2. *Reevaluation of Susana is warranted, and Futures is the Least Restrictive Environment in which it can take place.*

Although the parties disagree as to the causes of her symptomology, there is no dispute that Susana is a student with special learning needs as defined by state and federal law.<sup>29</sup> At issue is whether an extended evaluation is necessary for Susana to receive an education "tailored to address [her] unique needs."<sup>30</sup> As the party seeking relief in this matter, the District bears the

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<sup>24</sup> See 603 CMR 28.07(1)(b).

<sup>25</sup> *Id.*

<sup>26</sup> See *In Re Duxbury Public Schools & Ishmael*, BSEA #072419 (Byrne 2007 (concluding that the "availability of a 'substitute consent' mechanism is subsumed in the broad grant of jurisdiction to the BSEA to hear any matter concerning the eligibility, evaluation, placement, IEP, provision of special education in accordance with state and federal law" (internal citation omitted), and allowing the district to conduct a comprehensive psychiatric evaluation absent parental consent of student whose mental health was primary disability affecting his education, and the District expressed concern about conflicting and missing information regarding his mental status and health).

<sup>27</sup> 603 CMR 28.05(2)(b).

<sup>28</sup> See *In Re "Mapletown" Public Schools*, BSEA #1406097 (Berman 2014) (granting substitute consent for in-district extended evaluation); *In Re Ken*, BSEA #1400255 (Oliver 2013) (granting substitute consent for district to send referral packets for out of district extended evaluation).

<sup>29</sup> 20 U.S.C. § 1400 *et seq.*; M.G.L. c. 71B.

<sup>30</sup> *Rowley*, 458 U.S. at 181.

burden of demonstrating that reevaluation is warranted, and that without reevaluation Susana would likely be denied FAPE.<sup>31</sup>

The evidence demonstrates that for many of her seventeen years, Susana has not attended school consistently. Although she has seen a number of medical professionals and evaluators during this time, it has been difficult for both doctors and educators to discern Susana's needs and her abilities. Susana's last accepted IEP, proposed by HWRSD, provided for significant services in a substantially separate setting, but no placement was identified and agreed to by her Team. When Susana enrolled in Newburyport, the District sought information beyond that provided in her records through a combination of formal and informal assessments, which they intended to conduct while she attended the IDC at Newburyport High School. Due to the incident that occurred on January 27, 2016, which involved self-injurious behavior so severe that at least four or five additional staff members had to be paged to the classroom and an ambulance had to be called, Newburyport special educators determined that they could not keep Susana safe while assessing her. As a result, her Team recommended an extended evaluation at Futures Clinic.

In order for Susan's Team to develop an IEP reasonably calculated to confer educational benefit, it must have an accurate picture of her needs and abilities. Given the inconsistencies in Susana's record between what her mother reports Susana knows and is able to do, and the cognitive and academic skills reported by evaluators; the severity of the incident that occurred at Newburyport High School and the disagreement about its antecedents between Susana's Parent and the educators who observed the incident; and the dearth of documentation regarding Susana's formal education, I conclude that the "educational or related services needs" of Susana warrant reevaluation.<sup>32</sup> Testimony elicited at the hearing and documentation regarding earlier evaluations of Susana suggest that an accurate picture of Susana is unlikely to emerge in the absence of an extended evaluation within a structured program, where Susana may be observed and data taken during her daily activities as she completes more formal measures. Without this information, Newburyport cannot provide Susana with FAPE. I conclude, therefore, that Newburyport has met its burden to establish both that an extended evaluation is necessary and appropriate for Susana, and that failure to conduct the extended evaluation would likely result in the denial of FAPE. I credit the testimony of Ms. Thivierge and Ms. Twomey, who witnessed the incident that took place in the IDC and were among those that tried to minimize the injuries to Susana that resulted from seven to ten minutes of banging her head on the floor, hitting her forehead with her knuckles, and biting her hands, that Newburyport could not keep Susana safe during this extended evaluation.

According to Timothy Piskura, clinical co-director of the Futures School, Futures would be able to keep Susana safe while collecting information about her across multiple domains. Futures is consistent with recommendations of clinicians who evaluated Susana as far back as 2010, in that it provides a structured setting utilizing ABA methodologies to teach children who require intensive instruction. Based on the evidence before me, I find that Susana cannot be evaluated in a less restrictive environment.

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<sup>31</sup> See *Schaeffer v. Weast*, 546 U.S. 49, 62 (2005).

<sup>32</sup> IDEA, 20 U.S.C. §1414(a)(2)(A)).

Furthermore, given the significant discrepancies between Parent's description of Susana and that of others who have worked with her, I find that a home assessment is likely to provide relevant information for the District to consider as it develops an IEP for Susana. Although Newburyport did not request consent for a home assessment, I hereby grant substitute consent for a home assessment as one component of Susana's extended evaluation.

## B. Home Tutoring

Massachusetts law provides for educational services in the home under certain limited circumstances:

Upon receipt of a physician's written order verifying that any student enrolled in a public school or placed by the public school in a private setting must remain at home . . . for medical reasons and for a period of not less than fourteen school days in any school year, the principal shall arrange for provision of educational services in the home.<sup>33</sup>

Newburyport has never received a letter from any of Susana's doctors stating that she must remain at home for medical reasons. In fact, the letter submitted by Susana's pediatrician to Newburyport in January 2016 emphasized the importance of timely evaluation of Susana's educational needs and stated explicitly that no medical reason existed that would preclude Susana from participating in an educational program. As such, Newburyport properly denied Susana's mother's request for home tutoring.

## CONCLUSION

There is no question that Susana is a young woman with a complex medical history and significant needs. For years, her mother has sought medical explanations for Susana's regression in language and for the swelling of her forehead and hands, to no avail. When Susana enrolled in the Newburyport Public Schools, the District determined that it needed more information about her in order to develop an IEP. Three days into the District's assessment, Susanna engaged in behavior that resulted in swelling of her forehead and hands; her mother believes these symptoms are the result of allergies, whereas Newburyport educators who witnessed the event were troubled by the severity of what they describe as self-injurious behaviors. Whatever its cause, it is clear that Newburyport needs more information about Susana in order to address her complex presentation, and it is equally clear that Newburyport cannot keep Susana safe while collecting this information on its own. Yet Susana's mother has withheld her consent for an extended evaluation at the Futures School without proposing an alternative program.

Although I am granting substitute consent for an extended evaluation of Susana at the Futures School, I cannot force her mother to bring Susana to Futures for this evaluation to occur. In light of Susana's mother's continuing refusal to consent to an extended evaluation and her

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<sup>33</sup> 603 CMR 28.08(3)(c).

expressed intention not to return her daughter to school, the District could have stopped there.<sup>34</sup> I commend Newburyport for pursuing this matter instead. It appears that in spite of her considerable challenges, Susana is capable of making progress if she is provided with appropriate services in a safe environment. It is my sincere hope that Susana's mother will allow Susana to undergo an extended evaluation, which could lead to information (medical and educational) that would permit Susana's mother, her doctors, and her educators to work together to support Susana's growth.

### **ORDER**

Newburyport may proceed, without Parent's consent, to obtain an extended evaluation of Susana at the Futures School. The extended evaluation shall incorporate a home assessment.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: March 14, 2016

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<sup>34</sup> See 34 CFR 300.300(c)(1)(ii)-(iii) ("If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures . . . [t]he public agency does not violate its obligation . . . if it declines to pursue the evaluation or reevaluation.")