

**COMMONWEALTH OF MASSACHUSETTS  
Division of Administrative Law Appeals  
Bureau of Special Education Appeals**

**In Re: Lynn Public Schools**

**BSEA#: 14-06357**

**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 April 15, 2014 in Lynn, MA before Ann F. Scannell, Hearing Officer. Those present for all or part of the Hearing were:

Tom Petersen	School Psychologist, Lynn Public Schools
Dawn McGrath	TEAM Chairperson, Lynn Public Schools
Stephanie Gaeta	Behavioral Specialist, Lynn Public Schools
Miki DiVirgilio	Program Specialist, Lynn Public Schools
Shannon Crompton	2 <sup>nd</sup> Grade Special Education Teacher, Lynn Public Schools
Laurie Erhard	3 <sup>rd</sup> Grade Special Education Teacher, Lynn Public School
Cheryl Meninno	Director of Special Education, Lynn Public Schools
Jane Lavoie	Attorney, Lynn Public Schools

The official record of the Hearing consists of documents submitted by Lynn Public Schools ("Lynn") and marked as Exhibits S-1 through S-26 and approximately 4 hours of oral testimony. Oral closing arguments were heard on April 15, 2014. Lynn requested an order at that time to address the appropriateness of the proposed MCAS accommodations because the math MCAS test was scheduled to occur before the decision would be issued.<sup>1</sup> In addition, Lynn requested that the record remain open in order for Lynn to submit additional exhibits. Lynn submitted additional exhibits and the record remained open until June 13, 2014 to provide the parents a chance to object to these exhibits or submit exhibits. The parents neither objected to Lynn's exhibits nor submitted any exhibits and the record closed on June 13, 2014.

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<sup>1</sup> Lynn requested, at the close of the oral testimony on April 15, 2014, an order addressing the appropriateness of the MCAS accommodations outlined in the proposed IEP. By order dated April 28, 2014, I found that the MCAS accommodations provided Jay with a FAPE.

## INTRODUCTION

Jay<sup>2</sup> is an 8 year old boy who is in the 3<sup>rd</sup> grade at the Drewicz School in Lynn. Jay has been receiving special education services for several years. A three year reevaluation was conducted in the spring of 2013 to determine Jay's continued eligibility for special education services. The TEAM found Jay ineligible at that time. The TEAM reconvened in the fall of 2013, however, because Jay was having difficulty accessing the curriculum. They concluded that Jay was again eligible for special education services based on an emotional disability. An individualized education program ("IEP") was proposed at that time. Jay's parents have not responded to the proposed IEP.

On March 7, 2014, Lynn filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA"). It is Lynn's position that the November 4, 2013 to November 3, 2014 IEP, and subsequent updated IEP dated April 29, 2014, proposed by Lynn is reasonably calculated to provide Jay with a free, appropriate public education ("FAPE") in the least restrictive environment. Jay's parents did not file a response to the Hearing Request.

A conference call was attempted with the parties but the Hearing Officer was unable to reach either parent. The initial Hearing date scheduled for March 27, 2014 was postponed to give the parents an opportunity to discuss the matter. The Hearing was rescheduled for April 15, 2014 and the location of the Hearing was changed to Lynn in order to facilitate the parents' participation.

Prior to the start of the Hearing on April 15, 2014, the Hearing Officer attempted to contact the parents by phone but was unsuccessful. The Hearing proceeded at that time. The Hearing was subsequently suspended in order to receive additional documents and further testimony, if necessary. The parents were notified of the suspension and continuation of the Hearing. Lynn submitted additional documents and requested no further testimony. The parents were given an opportunity to object to Lynn's exhibits and/or submit exhibits. The parents did not respond and the record closed on June 13, 2014.

## ISSUES

The issues to be decided in this matter are:

1. Whether the November 4, 2013 to November 3, 2014 IEP is reasonably calculated to provide Jay with a FAPE in the least restrictive environment?
2. If not, can the IEP be modified to meet such standard?
3. Whether the updated IEP from April 29, 2014 to November 3, 2014 is reasonably calculated to provide Jay with a FAPE in the least restrictive environment
4. If not, can the IEP be modified to meet such standard?

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<sup>2</sup> Jay is a pseudonym used for confidentiality and classification purpose in publicly available documents.

## **FACTS**

Jay is a bright and capable young boy but often becomes frustrated in the classroom because he is a perfectionist. As a result, Jay exhibits outbursts of anger and frustration in the classroom. When presented with adult intervention he often becomes visibly upset and shuts down. Jay has difficulty with emotional regulation and qualifies for special education due to his emotional disability. (Exhibits S- 1, 7 and 9 and testimony of Crompton and Erhard)

During the second grade, Jay received occupational therapy and speech and language therapy pursuant to his IEP. His IEP also included an English language arts goal and a social/emotional goal. As of December 2012, it was noted that Jay was able to calm himself with the teacher's assistance and could use strategies such as asking for a break when he had anger outbursts. Jay's socialization skills had also improved. He was able to take turns with peers, work well in small and large groups, participate in class and interact appropriately with his friends. He had also made steady gains in his occupational therapy and speech and language therapy. (Exhibit S-10 and testimony of Crompton)

Jay's three year re-evaluation was completed in February and March of 2013. The staff had been attempting to obtain consent for Jay's three year reevaluation since the fall of 2012. The parents, however, had not responded until the winter of 2013. (Exhibits S-11, 12, 13, 14 and 15 and testimony of McGrath)

As part of Jay's three year reevaluation, Jay's classroom teacher, Shannon Crompton, conducted an educational assessment. Jay scored in the average range on oral language skills but demonstrated superior ability to apply academic skills. His performance was superior in written expression, high average in math and average in broad reading and math calculation. Ms. Crompton noted that Jay was an active participant in class, who struggled at times with blurting out answers. He was able to complete his work independently, participate well at lunch and recess and resolve conflicts in social situations. Ms. Crompton outlined accommodations that were helpful to Jay, including praise, check-ins, social stories and a structured schedule. (Exhibit S-16 and testimony of Crompton)

Thomas Peterson, Ph.D. conducted Jay's psychological evaluation. Dr. Peterson noted that Jay was highly intelligent but immature in his emotional self-management. He concluded that Jay's emotions "get enlivened and disruptive rather easily." (Exhibit S-16 and testimony of Peterson)

The results from Jay's speech and language reevaluation revealed that Jay no longer needed speech and language therapy. His occupational therapy results demonstrated similar gains and the TEAM subsequently concluded that Jay no longer needed occupational therapy services. (Exhibits S-16 and 17)

The reevaluation TEAM meeting was scheduled for May 7, 2013 but did not go forward on that date because the parents were not present. The meeting was rescheduled for June 11, 2013.

Neither parent appeared at the meeting so after leaving a voice mail message for Jay's mother, the meeting went forward on that date. The TEAM concluded that Jay was no longer eligible for special education services. Although the TEAM recommended that Jay transition to his neighborhood school, Jay remained in the integrated COACH program at the Drewicz School. (Exhibits S-13, 14, 15 and 17 and testimony of McGrath)

During the fall of 2013, the beginning of third grade, Jay's inappropriate behavior including growling, kicking furniture, banging his head and having angry tantrums escalated and became more frequent. These behaviors were occurring when Jay became frustrated with school work or upset with a peer situation. After a consent form was signed by his mother, Jay was referred to the school adjustment counselor. The counselor provided Jay with a reminder sheet with calming strategies and a journal and feelings worksheet to express his emotions when he becomes upset. (Exhibits S-1 and 18 and testimony of McGrath, Crompton and Erhard)

On October 24, 2013, after being advised by the staff that Jay's problematic behaviors were escalating, Jay's mother requested a TEAM meeting. Two days later she requested that Lynn conduct a Functional Behavior Assessment ("FBA") and initiate a Behavior Intervention Plan ("BIP") for Jay. A TEAM meeting was held on November 4, 2013. (Exhibits S-1, 2, 3, 4 and 7 and testimony by McGrath, Peterson, Gaeta and Erhard)

Prior to the TEAM meeting Dr. Peterson spoke with Jay's teachers, the school's behavior specialist and the COACH program specialist. Dr. Peterson authored a short report dated November 1, 2013. In his report, Dr. Peterson noted that Jay was having behavioral outbursts the likes of which had not been observed in more than a year. He opined that Jay's outbursts satisfy the criteria for a diagnosis of Intermittent Explosive Disorder, an emotional disability. Dr. Peterson noted that Jay's cognitive effectiveness eliminated the need for any academic goals but his ability to access the curriculum was presently impaired and necessitated specialized behavioral supports. (Exhibit S-7 and testimony of Peterson)

At the November 4, 2013 TEAM meeting, the TEAM found Jay eligible for special education services due to his emotional disability which interfered with his ability to access the curriculum. Jay's mother was present and expressed her concerns as well. (Exhibit S-7 and testimony of Erhard, McGrath, Gaeta and Peterson)

An IEP was developed at that time with effective dates of November 4, 2013 to November 3, 2014. The IEP called for several accommodations including a structured classroom setting, frequent breaks and reminders, additional processing time and visual supports. The proposed IEP also included test accommodations including specific MCAS accommodations such as frequent breaks, a separate test setting and a familiar test administrator. The IEP contained a behavior goal and a social skills goal. The service delivery grid included classroom consultation for behavior support, placement in the integrated class with special education staff and counseling with the school adjustment counselor. (Exhibit S-7 and testimony of McGrath, Gaeta and Erhard)

The behavioral specialist, Stephanie Gaeta, had not observed Jay's behaviors at the time of the TEAM meeting or before the new IEP was proposed. Jay's mother gave verbal permission to leave the FBA open until Ms. Gaeta could observe and analyze his behavior. The proposed IEP was subsequently sent to Jay's parents on three different occasions. They have neither accepted nor rejected the IEP. (Exhibit S-7 and testimony of McGrath)

Ms. Gaeta completed the FBA in March of 2014. Ms. Gaeta conducted six observations of Jay from October 30, 2013 to February 27, 2014. Jay's classroom teacher completed the Functional Assessment Screening Tool ("FAST") and the Motivation Assessment Scale ("MAS") but the parents did not return their completed FAST or MAS to the school. Ms. Gaeta observed Jay engaging in some escape behaviors, attention seeking behaviors and tangible behaviors such as tantruming, interrupting or disrupting others. She provided recommendations to address these behaviors including allowing Jay to request space, providing praise throughout the day, using a calm even tone when speaking to Jay, referring Jay to his calming strategies list on his desk and providing Jay with choices. (Exhibit S-22 and testimony of Gaeta)

Ms. Gaeta developed a Behavior Intervention Plan in April 2014 based on her FBA. The BIP targets Jay's tantruming behaviors by establishing a point system whereby Jay will earn points for the absence of identified target behaviors. (Exhibit S-24)

A TEAM meeting was held on April 29, 2014 to review the FBA results. The parents were invited but did not attend the meeting. As a result of the TEAM meeting, an updated IEP was proposed with effective dates of April 29, 2014 to November 3, 2014. There were no substantive changes to the IEP. The updated IEP included copies of the FBA and the BIP. (Exhibits S-23, 24, 25 and 26)

## DISCUSSION

It is not disputed that Jay is an individual with a disability falling within the purview of the federal Individuals with Disabilities Act ("IDEA"), 20 USC 1400 *et seq.* and the Massachusetts special education statute, MGL c. 71B. As such, he is entitled to a free, appropriate public education ("FAPE"). The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living."<sup>3</sup> FAPE must be provided in the least restrictive environment. Least restrictive environment means that, "to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature and severity of the disability is

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<sup>3</sup> 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School admin Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007)

such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>4</sup>

Jay’s right to a FAPE is assured through the development and implementation of an IEP.<sup>5</sup> An IEP must be custom-tailored to address a student’s “unique” educational needs in a way reasonably calculated to enable him to receive educational benefits.<sup>6</sup> A student is not entitled to the maximum educational benefit possible.<sup>7</sup>

Similarly, the educational services need not be, “the only choice, or the choice of certain selected experts, or the parents’ first choice, or even the best choice.”<sup>8</sup> The IDEA further requires that special education and related services be designed to result in progress that is “effective”.<sup>9</sup> Further, a student’s level of progress must be judged with respect to the educational potential of the child.<sup>10</sup>

Massachusetts special education regulations provide that specially designed instruction and related services described within the IEP must be sufficient to “enable the student to progress effectively in the content areas of the general curriculum.”<sup>11</sup> Massachusetts also requires that the special education services be designed to develop a student’s educational potential.<sup>12</sup>

An IEP is a snapshot, therefore the IEP must take into account what was, and was not reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.<sup>13</sup> The critical inquiry is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.<sup>14</sup>

The only dispute in this matter is whether the most recent proposed IEP offers Jay a FAPE in the least restrictive environment, and if not, whether it can be modified to provide a FAPE to Jay. The school district as the party seeking relief in this matter has the burden of persuasion.<sup>15</sup> It is the school district’s burden to show by a preponderance of the evidence that the November 4, 2013 to November 3, 2014 IEP, and the updated version dated April 29, 2014, will allow Jay to make effective progress; that is, that the IEP was reasonably calculated to provide

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<sup>4</sup> 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(1); 603 CMR 28.06(2)(c)

<sup>5</sup> 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305 (1988); *Bd. Of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

<sup>6</sup> *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993)

<sup>7</sup> *Rowley*, 458 U.S. at 197

<sup>8</sup> *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1<sup>st</sup> Cir. 1991)

<sup>9</sup> 20 USC 1400(d)(4); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F.Supp.2d 479 (D. Mass.2007)(the educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as “special needs”).

<sup>10</sup> *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1<sup>st</sup> Cir. 2008)

<sup>11</sup> 603 CMR 28.05(4)(b)

<sup>12</sup> MGL c. 71B; 603 CMR 28.01(3)

<sup>13</sup> *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990)

<sup>14</sup> *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1<sup>st</sup> Cir. 1993)

<sup>15</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005)

Jay with a FAPE in the least restrictive environment. After a careful review of the testimony and the documentary evidence, I find that the school district has met its burden to show that the proposed IEP and placement provide Jay with a FAPE in the least restrictive environment.

There is no dispute as to Jay's needs. Jay has an emotional disability that interferes with his ability to access the curriculum. Academically Jay is a bright, young boy who is able to meet or exceed academic requirements. He struggles, however, when he becomes frustrated in the classroom and his behaviors negatively impact his ability to succeed in school. The IEP proposed by Lynn addresses Jay's emotional needs through classroom accommodations and assistance of special education staff in his integrated classroom and counseling sessions with the school adjustment counselor.<sup>16</sup>

Specifically, Jay's IEP contains two emotional goals; one addresses Jay's acceptance of staff's intervention when he makes a mistake, becomes frustrated and shuts down. The second goal addresses Jay's difficulties with anger outbursts and self-control when he becomes frustrated. Additionally, classroom accommodations include frequent breaks, visual support, structure in class and a separate setting for testing with a familiar test administrator. It is proposed that Jay will also attend two counseling sessions per month to help him work on his anger issues and provide him with strategies to lessen his frustration in the classroom.

The staff credibly testified about the coping strategies that they use with Jay and the success they have seen as Jay has been able to utilize these strategies to help with his emotional dysregulation. These strategies are included in the proposed IEP. Jay's classroom teacher, Ms. Erhard, testified that she works closely with Ms. Gaeta, the behavioral specialist to implement these strategies in the classroom. The strategies include the use of a positive reinforcement system so Jay can earn points for computer time, frequently referring to the written list of strategies posted on his desk and reviewing these strategies with the teacher or aide each morning, praising him throughout the day for appropriate behavior, providing choices to give him a sense of control and opportunities for him to ask for breaks or retreat to a quiet corner. Ms. Erhard testified that these strategies have been helpful for Jay and have resulted in less frequent and less severe anger outbursts.

The staff consistently described Jay as bright, engaging and enthusiastic boy who is a perfectionist and struggles when he makes a mistake. The staff also consistently testified about their frustration with Jay's parents who have repeatedly failed to respond to efforts to assist Jay by neglecting to respond to several proposed IEPs, significantly delaying consent to reevaluate and inconsistently participating in Jay's daily home to school communication notebook. Additionally, the staff testified that Jay has significant stress at home which he tends to carry to school, an inordinate amount of household chores and little parental support with homework.

It was apparent that the staff cares deeply for Jay and is trying to develop his significant potential but has been stymied by the limited participation and engagement of Jay's parents.

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<sup>16</sup> MCAS testing accommodations are also proposed.

The staff has been working with an outdated IEP and clearly wants to implement the proposed IEP because they believe that this IEP would better address Jay's emotional disability and allow him to be consistently engaged in his work and more successful at school. The testimony was persuasive and undisputed that the special education services contained in the proposed IEP would allow Jay to make effective progress.

I agree with the Lynn staff and am persuaded by their credible and caring testimony that the proposed IEP, which now includes a written behavior plan, provides Jay with a FAPE in the least restrictive environment and will allow him to make effective progress consistent with his educational potential.<sup>17</sup> There was no evidence to the contrary. The parents neither submitted documents into testimony nor appeared at the Hearing with any witnesses. The undisputed evidence provided by the school was convincing that Lynn has met its burden of proof to demonstrate that the proposed IEP provides a FAPE to Jay in the least restrictive environment.

### **ORDER**

The IEP dated November 4, 2014 to November 3, 2014 which was subsequently updated to include the written BIP with effective dates of April 29, 2014 to November 3, 2014 provides Jay with a FAPE in the least restrictive environment.

So Ordered by the Hearing Officer,

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Ann F. Scannell  
Dated: June 25, 2014



