

July 28, 2016

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

DECISION

BSEA # 1608291

BEFORE

**RAYMOND OLIVER
HEARING OFFICER**

**PARENT, PRO SE
MARY JOAN REEDY, ATTORNEY FOR WALPOLE PUBLIC SCHOOLS**

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

Bureau of Special Education Appeals

In re: Doug¹

BSEA #: 1608291

DECISION

This decision is rendered pursuant to M.G.L. Chapters 30A and 71B; 20 U.S.C. §1401 et seq.; 29 U.S.C. 794; and the regulations promulgated under these statutes.

A hearing in the above-entitled matter was held on July 6, 2016 at the Bureau of Special Education Appeals in Boston, Massachusetts.

Those in attendance for all or part of the proceeding were:

Linda McKelligan	Director of Special Services, Walpole Public Schools
Mary Vey	Special Education Coordinator, Walpole Public Schools
Pamela Peckinpaugh	School Psychologist, Walpole Public Schools
Jason Zeigler	Board Certified Behavior Analyst, Walpole Public Schools
Nancy Regan	Director of Student Services, Bi-County Collaborative
Mary Joan Reedy	Attorney for Walpole Public Schools
Father	
Danielle Lubin	Intern, BSEA
Carol Kusinitz	Court Reporter
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Walpole Public Schools' Exhibits labeled S-1 through S-15; and approximately 4½ hours of oral testimony.

STATEMENT/HISTORY OF THE CASE

Doug is an 8 year old special education student in third grade who resides with his family in Walpole, Massachusetts. Prior to moving to Walpole during the 2015 summer, Doug attended public school in Pawtucket, Rhode Island under an Individualized Education Program (IEP). This IEP covered the period June 2015 to June 2016, and called for Doug's placement in a substantially separate special education program (S-12). Parents met with Walpole Public Schools (WPS) in early September 2015 to determine Doug's special education placement in WPS (S-11). Based upon the services in his Pawtucket IEP (S-12) and his last evaluations performed by Pawtucket in the spring of 2013 (S-13), WPS proposed that Doug be placed in WPS' District Learning Program (DLP), a partial inclusion program located at the Fisher School in Walpole. Parents agreed to this placement and Doug began in the DLP in

¹ Doug is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in publicly available documents.

September 2015. On October 7, 2015 the TEAM convened and formally proposed an IEP which specified the partial inclusion DLP program which was accepted by Parents (S-10). In late October 2015, Doug's behavior began to deteriorate. He became dysregulated, wandering the classroom, and having difficulty following teacher directions. He began bolting from the DLP classroom and running around the building. His transitions had to be limited and 2 aides were assigned to him when he did transition. (Refer to testimony, Vey.) A functional behavioral assessment (FBA) was performed in November 2015 (S-8) and a behavior intervention plan (BIP) was written (S-5). (Refer to testimony, Zeigler.)

A TEAM meeting took place on December 4, 2015 and WPS discussed their concerns with Parents. WPS proposed moving up Doug's three year reevaluation, which Father accepted. Based upon the FBA and the data obtained (S-5, 8) WPS also proposed changing Doug's placement to a substantially separate placement. Because WPS does not have a substantially separate classroom with peers who would be appropriate for Doug, WPS proposed a new IEP (S-7) which called for an out-of-district placement. Father accepted the substantially separate IEP but rejected the out of district placement (S-7; testimony, Vey).

In January 2016 WPS performed updated evaluations of Doug. WPS performed an educational evaluation, a psychological evaluation, a speech-language evaluation, an occupational therapy evaluation, a physical therapy screening, and an updated FBA. (See S-3; refer also to testimony, Zeigler; Peckinpugh; Vey.) On February 4, 2016 the TEAM reconvened to consider the 2016 evaluations (S-3). Said evaluations (consonant with Pawtucket's 2013 evaluations at Exh.S-13) found Doug to present with autism, that his functional skills were delayed across all domains, and that he was eligible to receive special education. WPS' new IEP (S-2) again proposed an out of district placement which Father now totally rejected. Given Doug's significant dysregulation when frustrated or challenged in class or during transitions, since December 4, 2015, his transitions and classroom space have been limited and personnel necessary to manage his behaviors has been increased to 2 aides (testimony, Vey).

On April 8, 2016 the team met and WPS formally proposed that Doug's IEP be implemented in a substantially separate placement in the Bi-County Collaborative (BICO). Parents consented to have Doug's referral packet sent to BICO but did not consent to Doug's placement at BICO (S-1; testimony, Vey; Father).

On April 15, 2016 WPS filed for a hearing before the BSEA and a hearing was scheduled for May 6, 2016. Both Parent and WPS requested a postponement. During a pre-hearing conference call which took place on May 9, 2016, Parent requested a lengthy postponement due to family illness and the necessity for foreign travel. The Hearing Officer allowed Parent a two month postponement of the hearing, scheduling the hearing for July 6-7, 2016, but with the caveat that no further postponements would be allowed. The hearing took place on July 6, 2016 and concluded on that date.

ISSUE IN DISPUTE

Does WPS' proposed IEP appropriately address Doug's special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive educational environment (LRE)?

STATEMENT OF POSITIONS

WPS' position is that its proposed February 4, 2016 to February 4, 2017 IEP is appropriate to address Doug's special education needs so as to provide him with a FAPE in the LRE and that such IEP should be implemented in order to afford Doug the FAPE to which he is entitled. WPS also requests a determination that the BICO substantially separate programs (specified below) are appropriate settings in which to implement the proposed IEP.

Parent's position is that he will never allow Doug to attend the BICO program; that Doug's current program in WPS is inappropriate; and that he wants Doug to be placed in a regular education program in his home school in Walpole.

STATEMENT OF THE EVIDENCE

Student Profile

Pawtucket Public Schools' Psychologist, Dr. Steven Colucci, evaluated Doug in March 2013 and diagnosed him with an Axis I 299.00 Autistic Disorder. Dr. Colucci found Doug to be overwhelmed by a regular school classroom and an overall school setting. He strongly recommended a small, highly structured classroom setting with a low student to teacher ratio and direct instruction with clear visual supports. The Pawtucket speech and language evaluation found Doug, then 5 years 8 months old, to have severely delayed receptive and expressive language skills and decreased pragmatic skills. Doug demonstrated both receptive and expressive language skills in the 18-24 month range (1½ to 2 year old range) with some scatter skills up to the 3-4 year range. The Pawtucket occupational therapy evaluation found Doug to have deficits in the areas of visual perception, fine motor skills, and sensory integration, all of which impact his performance in the classroom. (See S-13 for complete 2013 Pawtucket evaluations.)

WPS evaluated Doug in late 2015/early 2016 when he was 8 years 5 months old. On the Kaufman Brief Intelligence Scale – 2d edition (KBIT-2) Doug's verbal standard score of 53 placed him below the 1st percentile, with his verbal raw score of 18 corresponding to an age equivalent below the 4 year old level. His non-verbal standard score fell at the 1st percentile with his non-verbal raw score of 13 corresponding to an age equivalent of 4 years 8 months. The KBIT-2 uses less language than most standardized intelligence measures. On the Test of Non-Verbal Intelligence – 4th edition (TONI-4) which does not rely on language, Doug scored at the 52nd percentile, falling within the average range. (Refer to testimony, Peckinpaugh; S-3.)

WPS' speech-language evaluation was performed in late January 2016. On the Peabody Picture Vocabulary Test – 4th edition (PPVT-4) which tests receptive language, Doug's percentile score was 0.5 (extremely below average). On the Expressive Vocabulary Test (EVT) Doug scored at the 4th percentile

(below average range). On the Clinical Evaluation of Language Fundamentals – 5th edition (CELF – 5) Doug’s percentile scores were 0.1 for subtests in linguistic concepts, word structure and sentence completion, while he was at the 2nd percentile in word classes and recalling sentences. All of these CELF-5 subtests place Doug in the well below average range in all areas of language functioning. In his occupational therapy evaluation Doug demonstrated average to below average scores in different subtests of visual perception on the Developmental Test of Visual Perception – 3rd edition (DTVP-3). Based upon scores from the Sensory Processing Measure (SPM) Doug demonstrated “definite dysfunction” in the areas of social participation, vision, hearing, and touch. Physical therapy screening was normal. (See S-3.)

The extensive updated FBA, performed in January 2016 found:

Both the indirect and direct assessment tools demonstrate that Doug’s most concerning interfering behaviors including bolting, noncompliance, and property destruction are most likely maintained by escape from work demands and non-preferred teacher directives as well as access to tangible items. Bolting is also possibly maintained by access to some sort of sensory stimulation and/or escape from over-stimulating environments or activities. Doug displays these behaviors most frequently when working in the large group setting, when transitioning between activities in the classroom or from a leisure break to work demands, transitioning in the hallway (especially from recess or lunch), and when engaged in a novel or difficult task demands. These behaviors are less likely to occur when Doug is engaging in leisure activities or preferred work activities with more intensive teacher support, when activities or work demands are very highly structured and fluid, and when the environment has fewer and/or distractions that may lead to overstimulation or excessive stereotyped behavior. (See S-3; testimony Zeigler; Peckinpough; Vey.)

WPS’ Proposed Program

WPS proposes that Doug’s IEP be implemented in a substantially separate program at the BICO Collaborative. WPS is a member of the BICO Collaborative.

The specific substantially separate classrooms being considered for Doug by BICO are both located within the Plainville Public Schools (Plainville) and are located approximately 8 miles (or a 12-15 minute drive) from Parents’ home in Walpole. One program is the therapeutic elementary alternative program located at the Jackson School. The other is the therapeutic upper elementary alternative program located at the Wood School. The Wood School is adjacent to the Jackson School. The student to staff ratio in both programs is a maximum of 2:1. The maximum number of students in each program is 8. The grade range in the elementary program is 1st-3rd grade. The grade range in the upper elementary program is 4th-6th grade. Both programs are highly structured programs in terms of predictability, positive behavioral support, and visual reinforcements.

While both programs are located with Plainville Public Schools, they are run by BICO, supervised by a BICO program director with all of the teachers, aides, speech-language therapists,

occupational therapists, counselors and BCBA's employed by BICO. Both the Jackson School teacher (Ms. Dubois) and the Wood School teacher (Ms. Bailey) are Master's degree level certified special education teachers.

When receiving Doug's referral packet from WPS in April 2016, BICO initially believed that the Jackson/elementary/grade 1-3 classroom would be the most appropriate placement for Doug because he would start in that class for several months and then transition with his peers to the Wood/upper elementary/grade 4-6 classroom in September 2016 for his 4th grade year. Given that the 2015-2016 school year (Doug's 3rd grade year) has now ended, BICO would now likely place Doug at the upper elementary classroom at the Wood School. However, Parents have not yet visited BICO or either program and BICO has not yet met Doug. Therefore, either program could be possible.

Based upon a review of WPS' proposed IEP for Doug and a review of all of WPS' updated evaluations, BICO has accepted Doug and would have an opening for him in either program in September 2016.

(Refer to testimony Nancy Reagan, Director of Student Services for BICO.)

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Doug is a student with special education needs as defined under state and federal statutes and regulations. The fundamental issue in dispute, as set forth under **ISSUE IN DISPUTE**, above, is whether WPS' proposed IEP appropriately addresses Doug's special education needs so as to provide him with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

Pursuant to the *Schaffer v. Weast*, 126 S.Ct 528 (2005) the United States Supreme Court has placed the burden of proof in special education administrative hearings upon the party seeking relief. Therefore, in the instant case, WPS bears the burden of proof in demonstrating that its proposed IEP for Doug is appropriate so as to provide him a FAPE in the LRE.

Based upon the testimony and exhibits introduced into evidence and a review of the applicable law, I conclude that WPS' proposed February 4, 2016 to February 4, 2017 IEP is appropriate to address Doug's special education needs so as to provide him a FAPE and does so in the LRE, consistent with Doug's special education needs. I further conclude that the BICO classrooms proposed by WPS would provide Doug a FAPE in the LRE.

My analysis follows.

The DLP in which Doug participated during the 2015-2016 school year provided him with his reading, writing, math and all related services/therapies in a special education DLP classroom which is attached to the regular education DLP classroom where Doug received the balance of his educational programming. Doug was mainstreamed with his DLP classmates for physical education, music, art, and lunch at the Fisher School. There were 21 students assigned to the DLP – 17 regular education students

and 4 special education students on IEPs. The DLP special education teacher is certified in moderate special needs, reading and literacy, and elementary education. The DLP regular education teacher is certified in both elementary education and special education. These two teachers have been working together in the DLP for three years. Mr. Zeigler is a licensed Applied Behavior Analyst; a Board Certified Behavior Analyst (BCBA); is certified in severe special needs; and has experience in private special education schools as well as public schools. The DLP speech-language pathologist is a licensed speech—language pathologist and has her Certificate of Clinical Competency (CCC) from the American Speech Language and Hearing Association (ASHA). The Occupational therapist is a licensed occupational therapist. All teachers and therapists have extensive experience. (Refer to testimony, Vey; Zeigler; S-14, 15).

DLP, a well-run program with well credentialed and highly experienced teachers and therapists, has not been sufficient to address Doug’s behavioral needs. As the school year progressed, Doug became increasingly overstimulated and dysregulated and displayed multiple inappropriate behaviors. Such behaviors included non-compliance with teacher directions, work refusal/escaping task demands, inability to transition, wandering/running around the classroom, throwing things, banging on windows and doors, hand flopping, body flopping, aggression and bolting out of the classroom into the Fisher School for up to several hours. Doug could be dysregulated for up to 1 – 2 hours per day. (Refer to testimony, Zeigler; Vey; S-5, 8).

The evidence clearly demonstrates that the DLP partial inclusion program which WPS originally proposed and Parents accepted, is simply inappropriate to address Doug’s complex special education needs. Mr Zeigler, a BCBA who has been extensively involved in designing a BIP and strategies to deal with Doug’s behaviors when he becomes overstimulated and dysregulated, performed two FBAs (S-3, 8). These FBAs comprehensively detail Doug’s dysregulated behaviors, as does Mr. Zeigler’s testimony. Doug’s behaviors have clearly negatively impacted up his ability to access his education or to make educational progress. (See also testimony, Vey.)

The evidence is overwhelming and essentially un rebutted that Doug requires the more controlled environment of a substantially separate special education program in order to receive a FAPE. Father testified that Doug never manifested the behaviors WPS has described when he was in Pawtucket. However, when he was in Pawtucket, Doug was in a substantially separate special education placement.

I conclude that Doug requires the highly structured, small group, low student to teacher ratio, and intensive direct teaching that a substantially separate special education program would provide. Unfortunately, WPS does not have such a program to address Doug’s special education needs in-district. Father objects to Doug going out of district. However, the very purpose of forming public school collaboratives was to allow school districts to join together and pool their resources to provide special education programs for students with low incident disabilities (such as Doug’s) that each school district would be unable to provide on its own, without the necessity of sending such students to private schools.

A small group, highly structured substantially separate program such as BICO would allow Doug’s potential in his non-verbal areas of strength to be tapped and appropriately channeled. The structured, small group environment would be less stimulating, reduce his dysregulation and the

frequency and intensity of his maladaptive behaviors, and allow him to access the curriculum and receive a FAPE.

I find that the two classroom offered by BICO would provide Doug with the substantially separate program which has worked for him in the past and which the evidence reflects he clearly requires now. I urge Father to visit BICO, observe the two classrooms, and allow the BICO staff to meet and informally assess and observe Doug to determine which classroom composition is most appropriate to address his current special education needs.

ORDER

1. WPS' proposed February 2016 – February 2017 IEP is appropriate to address Doug's special education needs so as to provide him a FAPE in the LRE.
2. Placement in one of the proposed BICO programs would be appropriate to implement WPS' proposed IEP for Doug.

By the Hearing Officer,

Dated: _____