

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

In Re: Sharon Public Schools (“SPS”)

BSEA#: 16-00749

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 October 30, 2015, in Sharon, MA before Ann F. Scannell, Hearing Officer. Those present for all or part of the Hearing were:

Zoe ¹	Student
Zoe’s Mother	
Charles Moore, M.D. (via telephone)	Psychiatrist
Janet Denzer	Special Education Administrator, SPS
Adam Pigeon	Teacher, SPS
Jeffrey Strunin	Teacher, SPS
Jacqueline Kaye	Guidance Counselor, SPS
Meghan Alson	School Psychologist, SPS
Karen Wise	School Social Worker, SPS
Susan Fisichella	Director of Special Education, SPS
Doris Ehrens	Attorney, SPS

The official record of the Hearing consists of documents submitted by the parent and marked as Exhibits P-1 through P-3, P-5 through P-11; documents submitted by the school district and marked as Exhibits S-1 through S-23; and, approximately one day of oral testimony. Closing oral arguments were heard following the oral testimony and the record closed on October 30, 2015.

INTRODUCTION

Zoe is a 16 year old girl who resides in Sharon. She is currently a junior at Sharon High School. Zoe has been diagnosed with Bipolar Disorder which affects her ability to access the curriculum.

¹ Zoe is a pseudonym used for confidentiality purposes in publicly available documents.

On August 13, 2015, Zoe's mother filed a Hearing Request with the Bureau of Special Education Appeals ("BSEA"). She alleges that Sharon High School cannot provide a free, appropriate, public education ("FAPE") to her daughter. She is seeking an outside placement at a therapeutic day school.

On August 13, 2015, the school district filed a response to the Hearing Request. It is the school district's position that the June 2015 to March 2016 individualized education program ("IEP") and the proposed October 2105 to October 2016 IEP provide Zoe with a FAPE in the least restrictive environment.

This matter was originally scheduled for Hearing on September 17, 2015, but on August 18, 2015, the school district filed a request for postponement. A conference call was held on September 2, 2015. The Hearing was rescheduled to October 27 and 30, 2015.

This matter was administratively reassigned from Hearing Officer Lindsay Byrne to Hearing Officer Ann Scannell. The parties met with Hearing Officer Scannell on October 27, 2015. The parties attempted to resolve the issues but were unsuccessful. The Hearing went forward as scheduled on October 30, 2015.

ISSUES

The issues to be decided in this matter are:

1. Whether the June 2015 to March 2016 IEP was reasonably calculated to provide Zoe with a FAPE in the least restrictive environment?
2. Whether the October 2015 to October 2016 was reasonably calculated to provide Zoe with a FAPE in the least restrictive environment?
3. If not, can the IEP be modified to meet this standard; and,
4. If not, is Zoe entitled to an out of district therapeutic day program in order to receive a FAPE in the least restrictive environment?

FACTS

Zoe is a 16 year old student who has been diagnosed with Bipolar Disorder. She is eligible for special education services due to her emotional disability which interferes with her ability to access the curriculum. Zoe is a friendly and outgoing young woman who has struggled with consistent school attendance due to hospitalizations. (Exhibits P-1, 2, 8 and 10 and S-5, 6 and 7 and testimony of Zoe's mother)

Zoe entered Sharon High School as a freshman. During her entire tenure at Sharon High School, Zoe has been serviced by an IEP. Her last accepted IEP was dated March 20, 2014 to March 19, 2015. Zoe was being educated in a full inclusion setting and receiving academic support and counseling with the school social worker. (Exhibit S-9)

A TEAM meeting was held on January 16, 2015 to discuss Zoe's progress. The TEAM reported that Zoe was using coping and social pragmatic skills appropriately. Zoe's mother reported that she felt that Sharon High School could meet her daughter's needs and was happy with the placement. (Exhibit S-8 and testimony of Denzer)

An annual review meeting was held on March 12, 2015. A new IEP was proposed. The IEP reflected that Zoe wanted to graduate with her class in 2017. Zoe has difficulty remaining in class because of stress and her difficulty sustaining focus, however, she was working towards remaining in her classes for longer periods of time. This proposed IEP contained social and emotional, study skills and organization and self advocacy goals. Zoe was to receive counseling once per week for 40 minutes and academic support five days per week for 55 minutes. In addition, several accommodations were proposed including check-ins, use of a word processor and graphic organizers, additional time for assessments, short breaks, clarification of directions and the ability to complete her assignments in the academic lab. Zoe was to be placed in a full inclusion classroom. Zoe's mother accepted this IEP on May 1, 2015. (Exhibit S-7 and testimony of Denzer)

Zoe was hospitalized at McLean Hospital on May 1, 2015. Her hospitalization was both residential and partial. She was discharged on June 12, 2015. Zoe reported that she was making ongoing progress. She was working on emotional regulation skills both at home and in school. Zoe also began an outpatient course of Dialectic Behavior Therapy ("DBT"). (Exhibits P-1 and 2 and testimony of Zoe's mother and Moore)

A TEAM meeting was held on May 29, 2015 to discuss Zoe's needs and planning for her return to school. Zoe's mother advised that Zoe had been accepted as a client by the Department of Mental Health ("DMH"). McLean Hospital staff recommended that Zoe transition to a therapeutic school setting. The TEAM advised that Zoe could be supported at an in district program for the fall of 2015. (Exhibit S-6 and testimony of Denzer)

A further TEAM meeting was held on June 24, 2015 and a new IEP was proposed calling for a partial inclusion program. Zoe was to receive a portion of her academic classes in the self contained small group setting of the Networks classroom. The Networks paraprofessional would provide assistance to Zoe in the inclusion classes. The proposed IEP included additional classroom support, additional time outside of the general education setting and additional accommodations. In addition to an increase in time for her counseling session, Zoe would see the adjustment counselor five days per week for 15 minutes. She would also receive additional academic support. On July 16, 2015, Zoe's mother rejected the proposed IEP. (Exhibit S-5 and testimony of Denzer)

The Networks program is separate classroom within Sharon High School with its own entrance from the outside. It is a supportive and therapeutic program staffed by school social worker, Karen Wise, an instructional assistant and two special education teachers who are present for one period per day. Ms. Wise has an extensive background in providing DBT and uses it with students in the Networks Program. Ms. Wise sees Zoe for individual counseling and group counseling. When feeling overwhelmed, Zoe can

leave class to come to the Networks classroom where she can receive her academic work as well as emotional support. (Testimony of Wise, Denzer and Pigeon)

On July 20, 2015, the school district proposed a school based evaluation and sent a consent form to Zoe's mother. Zoe's mother rejected the proposed evaluation. She requested that Zoe be placed in a therapeutic day school. On September 2, 2015, a second consent form was sent and Zoe's mother signed the consent form authorizing the evaluation. (Exhibit S-1,2 and 3 and testimony of Denzer)

In early October Zoe underwent a psychological evaluation with the school psychologist, Meghan Alson. Zoe's full scale IQ score fell in the average range. On the ratings scales completed by Zoe there were several at-risk and clinically significant scores in monitoring emotional responses, problem solving, shifting mindset or tasks, levels of anxiety, depression and stress in interpersonal relationships. Zoe's mother's rating scale responses were consistent with Zoe's responses. Although her teachers reported fewer problematic behaviors in their classroom, they did report Zoe's difficulty with shifting mindset, attention, anxiety and peer interactions. Zoe's counselor reported that Zoe was demonstrating improved self-control and the ability to manage her moods more effectively. (Exhibit S-14A and testimony of Alson)

Ms. Alson recommended that Zoe continue with individual counseling and group counseling. She should be allowed to leave class and access the Networks program when she struggles emotionally. Ms. Alson also recommended several academic accommodations, including time extensions, teacher check-ins and preferential seating. (Exhibit S-14A and testimony of Alson)

Teacher Adam Pigeon conducted an educational evaluation of Zoe. Her reading, writing and math skills were in the average to superior range. He opined that Zoe would benefit from additional time on assessments and using an outline for writing essays. (Exhibit S-14B and testimony of Pigeon)

A new IEP was proposed with effective dates of October 20, 2015 to October 19, 2016 pursuant to which Zoe would have ongoing access to the Networks counselor and access to other clinical support staff as needed. If Zoe required a higher level of support the IEP could be amended to provide for an additional four academic blocks per day within the small group setting of the Networks program. The TEAM also discussed options for Zoe to recover credit for one Math and Science class and completion of a Wellness course. These options include summer school or online learning classes. This proposed IEP was rejected. (Exhibit S-5 and testimony of Denzer)

DISCUSSION

It is not disputed that Zoe is an individual with a disability falling within the purview of the Individuals with Disabilities Act ("IDEA"), 20 USC 1400 *et seq.* and the Massachusetts special education statute, MGL c. 71B. The IDEA was enacted "to ensure that all chil-

dren with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”² FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”³

Zoe’s right to a FAPE is assured through the development and implementation of an individualized education program (“IEP”).⁴ 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.⁵ A student is not entitled to the maximum educational benefit possible.⁶ Similarly, the educational services need not be, “the only appropriate choice, or the choice of certain selected experts, or the child’s parents’ first choice, or even the best choice.”⁷ The IDEA further requires that special education and related services be designed to result in progress that is “effective.”⁸ Further, a student’s level of progress must be judged with respect to the educational potential of the child.⁹

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.”¹⁰ Massachusetts also requires that the special education services be designed to develop a student’s educational potential.¹¹

An IEP is a snapshot, therefore the IEP must take into account what was, and was not objectively reasonable when the snapshot was taken, that is, at the time the IEP was

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

³ 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

⁴ 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)

⁵ *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir.1993)

⁶ *Rowley*, 458 U.S. at 197

⁷ *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991)

⁸ 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”)

⁹ *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008)

¹⁰ 603 CMR 28.05(4)(b)

¹¹ MGL c.71B; 603 CMR 28.01(3)

promulgated.¹² The critical inquiry is whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.¹³

There is no dispute as to Zoe's eligibility for special education services. The only dispute in this matter is whether the June 2015 to March 2016 IEP and the October 2015 to October 2016 IEP proposed by Sharon offer Zoe a FAPE in the least restrictive environment. The parent, as the party seeking relief in the instant case, has the burden of persuasion.¹⁴ It is her burden to show that the IEPs proposed by Sharon will not allow Zoe to make effective progress; that is, that the IEPs were not reasonably calculated to provide Zoe with a FAPE in the least restrictive environment. Further, the parent must show that the October 2105 to October 2016 IEP cannot be modified to meet that standard.

As with eligibility, there is also no dispute as to Zoe's needs. Zoe's Bipolar Disorder can affect her to the point that she cannot access the curriculum and at times results in hospitalization. Sharon has proposed an IEP that will, in their opinion, address Zoe's deficits and provide her with a FAPE in the least restrictive environment. Zoe's mother believes that the proposed IEP is insufficient and will not provide Zoe with a FAPE, and that an out of district therapeutic day program is the appropriate placement for Zoe. After a careful review of the testimony and the documentary evidence, I find that the parent has not met her burden of proof.

June 2015 to March 2016 IEP

The TEAM met to discuss Zoe's needs and a plan for her return to school following her hospitalization. As a result of this TEAM meeting, a new IEP was proposed. At the time this IEP was proposed, the school had been working with Zoe for approximately two years and had information from her teachers, her school social worker, Ms. Wise, who had worked with Zoe almost daily; and information from her stay at McLean's Hospital. The proposed IEP provided services and accommodations in addition to those called for in her prior IEP, moving from a full inclusion to a partial inclusion program. Staff would meet following Zoe's absences to modify assignment lengths and due dates. The Networks staff and the academic lab staff would be provided with the missed assignments to allow Zoe to complete them within the Networks program or her academic lab. Zoe would receive academic support from a special education instructional aide ten times per cycle for 55 minutes and her counseling services and her academic time with a special education teacher would be increased. Zoe would have the ability to meet as needed with the Network's counselor, Ms. Wise, and would receive a portion of her academic classes in the self contained small group setting of the Network classroom.

¹² *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990)

¹³ *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993)

¹⁴ *Schaffer v. Weast*, 546 U.S. 49, 62 (2005)

I commend Sharon for conducting a timely TEAM meeting while Zoe was still hospitalized so that they could properly plan for her return to school. I also commend them for proposing a new IEP that appropriately addressed Zoe's stress and anxiety and recommending a reevaluation. Although this proposed IEP was rejected, I find that it was reasonably calculated to provide a FAPE to Zoe. This IEP reflected the changes in Zoe's mental status and addressed her changed needs by providing her with additional access to the Network's program and Ms. Wise. Zoe had established a wonderful rapport with Ms. Wise who has several years experience in using DBT therapy, the specific type of treatment recommended by McLean's Hospital. Zoe's mother rejected this IEP because she felt that Zoe should be placed in an out of placement therapeutic day school, however, there was no evidence presented by Zoe's mother to support Zoe's need for a therapeutic day school.

In July 2015, the TEAM recommended that Zoe undergo a school district reevaluation due to her hospitalization and changing needs. This proposed action was reasonable to ensure that the school district was providing a FAPE to Zoe. Ms. Denzer testified that the TEAM wanted to assess Zoe's needs following her hospitalization at McLean's Hospital. Zoe's mother rejected the TEAM's proposal at that time, but in September consented to the reevaluation. Based on the credible testimony of the Sharon staff and the documentary evidence produced by the school district, I find that the June 2015 to March 2016 IEP was reasonably calculated to provide Zoe with a FAPE in the least restrictive environment.

October 2105 to October 2016 IEP

Turning now to the October 2105 to October 2016, I find that this proposed IEP is reasonably calculated to provide Zoe with a FAPE in the least restrictive environment. No modifications to the IEP are required. This October IEP was proposed after the TEAM had an opportunity to reevaluate Zoe. Zoe's reevaluation revealed clinically significant scores in the areas of anxiety, depression, interpersonal relationships and self-esteem. The TEAM appropriately considered these results when proposing this new IEP.

The testimony from a few of Zoe's teachers revealed that Zoe was maintaining consistent attendance both to school and within her individual classes since she began her junior year in September. She has generally been able to remain in the classroom and access her learning without becoming emotionally overwhelmed or distracted or having to leave the classroom. On the few occasions when Zoe has needed to leave the classroom, it has been toward the end of the class. Both Mr. Pigeon, Zoe's special education teacher, and Mr. Strunin, Zoe's English teacher, provided credible testimony about Zoe's overall ability to sustain attention and participate in class. They testified that Zoe was exhibiting increased ability to address her feelings and apply strategies to reduce her anxiety. It was clear from their testimony that they had developed a close connection with Zoe and very much enjoyed having her in class.

The testimony from Ms. Wise was also significant. Ms. Wise testified that she has been working with Zoe since freshman year and sees her on a daily basis. Ms. Wise was

pleased to report that this year Zoe has been remarkably consistent with her class attendance and motivated to be present in class. In her counseling sessions, Ms Wise testified that Zoe is becoming an effective communicator and advocates for herself, regulating her emotions more effectively and returning to baseline more quickly when stressed.

Dr. Moore, Zoe's treating psychiatrist at McLean Hospital for approximately six weeks in May and June of 2015, testified about Zoe's disability. He testified that when Zoe entered McLean Hospital she was emotionally dysregulated with emotional swings, emotional lability and strong mood storms. She was treated with medication and therapy. Based on his experience, he opined that Zoe was suffering from a major mental illness. He diagnosed her with Bipolar Disorder I. He noted that Zoe would continue to experience serious cycles of manic and depressive moods but there was no way to predict the timing or intensity of these episodes. Dr. Moore testified that Zoe could experience stable moods for extended periods (ie. several months) and then suffer a Bipolar episode. He opined that Zoe would probably do better in a smaller classroom with staff that could manage her mood swings. He stated that Zoe could be challenged, but not to the point of causing destabilization. Dr. Moore was not intimately familiar with the Networks Program but did have past clients who had been in the program. He could not provide a professional opinion about its appropriateness for Zoe. He also did not render an opinion that Zoe needed to be placed in an out of district therapeutic day placement. Dr. Moore testified that DBT therapy is helpful, smaller classes would work best and that those working with Zoe should be able to address her mood swings.

The proposed IEP addresses Dr. Moore's concerns. Zoe is receiving DBT therapy from Ms. Wise, she has access to the Network's small group classroom, has daily academic support with Mr. Pigeon in the small group academic lab and has the ability to leave her classroom to see Ms. Wise if she becomes overwhelmed. Although Zoe's mother is seeking an out of district therapeutic day school, she has failed to meet her burden to show that placement in a therapeutic day school is necessary for Zoe to receive a FAPE in the least restrictive environment. Sharon staff testified that Zoe wants to remain at Sharon High School and graduate with her class. They testified that Zoe told them that it was her mother who was seeking the outside placement.

I was impressed with Sharon staff's commitment to Zoe. They obviously care about her, enjoy her and view her as a talented and creative young woman. I was similarly impressed with Zoe's mother who is a strong and loving advocate for her daughter. I would encourage the school district continue to monitor Zoe's emotional status and to work with Zoe and her mother to address any changes in Zoe's needs by providing additional services and supports if necessary.

ORDER

The March 2015 to March 2016 IEP was reasonably calculated to provide Zoe with a FAPE in the least restrictive environment. The October 2015 to October 2016 is reasonably calculated to provide Zoe with a FAPE in the least restrictive environment.

So Ordered by the Hearing Officer,

Ann F. Scannell

Dated: December 8, 2015